# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr R Kumar**

**Respondents:** **Network Rail Infrastructure Ltd**

Heard at: London South

On: 29, 30 and 31 January 2019
In chambers 7 and 8 March 2019

Before: Employment Judge Freer
Members: Mr H Smith
Ms Y Batchelor

Representation:
Claimant: Ms V Webb, Counsel
Respondent: Ms K Balmer, Counsel

## RESERVED JUDGMENT

**It is the unanimous judgment of the Tribunal that the Claimant's claims are unsuccessful.**

## REASONS

1. By a claim presented to the Tribunal on 30 October 2017 the Claimant claims unfair dismissal, race discrimination and wrongful dismissal.

2. The Respondent resists the claims.

3. The Claimant gave evidence on his own behalf and the Respondent gave evidence through Mr Sam Long, Local Operations Manager; Mr Daniel Pender, Operations Manager; and Mr Brian Lynch, Incident Officer.

4. The Tribunal was presented with an agreed bundle of documents comprising 380 pages.

5. The parties agreed a list of issues that was produced at a Preliminary Hearing on 01 May 2018.

## A summary of the relevant law

*Unfair dismissal*

6. The legal provisions relating to unfair dismissal are contained in Part X of the Employment Rights Act 1996.

7. Section 98 provides that, where dismissal is not controversial, the Respondent must show that the reason for dismissal is one of a number of permissible reasons. The Respondent in this case contends that the reason for dismissal is related to the Claimant's conduct.

8. The Employment Tribunal will consider whether or not the dismissal was fair in all the circumstances in accordance with the provisions in section 98(4):

> "The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case"

9. The standard of fairness is achieved by applying the range of reasonable responses test. This test applies to procedural as well substantive aspects of the decision to dismiss. A Tribunal must adopt an objective standard and must not substitute its own view for that of the employer. (**Iceland Frozen Foods –v- Jones** [1982] IRLR 439, EAT as confirmed in **Post Office –v- Foley** [2000] IRLR 234, CA; and **Sainsbury's Supermarkets Ltd –v- Hitt** [2003] IRLR 23, CA).

10. It is established law that the guidelines contained in **British Home Stores Ltd –v- Burchell** [1980] ICR 303 apply to conduct dismissals, such as in the instant case. An employer must (i) establish the fact of its belief in the employee's misconduct, that the employer did believe it. There must also (ii) be reasonable grounds to sustain that belief, (iii) after a reasonable investigation. A conclusion reached by the employer on a balance of probabilities is enough. Point (i) goes to the employer's reason for dismissal (where the burden of proof is on the Respondent) and points (ii) and (iii) go to the general test of fairness at section 98(4) (where there is a neutral burden of proof).

11. It is also established law that the **Burchell** guidelines are not necessarily determinative of the issues posed by section 98(4) and also that the guidelines can be supplemented by the additional criteria that dismissal as a sanction must also be within the range of reasonable responses (also a neutral burden of proof) (see **Boys and Girls Welfare Society –v- McDonald** [1997] ICR 693, EAT).

12. The Court of Appeal in **Taylor –v- OCS Group Ltd** [2006] IRLR 613 emphasised that tribunals should consider procedural issues together with the

reason for the dismissal. The two impact upon each other. The tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason as a sufficient reason to dismiss.

13. This decision was echoed in **A –v- B** [2003] IRLR 405, EAT and the Court of Appeal in **Salford Royal NHS Foundation Trust –v- Roldan** [2010] ICR 1457 with regard to assessing reasonableness of the process and the decision to dismiss with the seriousness of the alleged conduct: "the relevant circumstances include the gravity of the charge and their potential effect upon the employee. So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of that case, the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite".

14. In **Burdett -v- Aviva Employment Services Ltd** [2014] UKEAT/0439/13 the EAT, confirming Supreme Court authority, held:

"What is meant by "*gross misconduct*" – has been considered in a number of cases. Most recently, the Supreme Court *Chhabra v West London Mental Health NHS Trust* [2014] ICR 194 reiterated that it should be conduct which would involve a repudiatory breach of contract (that is, conduct undermining the trust and confidence which is inherent in the particular contract of employment such that the employer should no longer be required to retain the employee in his employment. . . In *Chhabra*, it was found that the conduct would need to be so serious as to potentially make any further relationship and trust between the employer and employee impossible. . . The characterisation of an act as "gross misconduct" is thus not simply a matter of choice for the employer. Without falling into the substitution mindset . . . it will be for the Employment Tribunal to assess whether the conduct in question was such as to be capable of amounting to gross misconduct".

*Direct discrimination*

15. Section 13 of the Equality Act 2010 provides:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

16. On comparison between the Claimant and the case of the appropriate comparator, real or hypothetical, there must be no material difference between the circumstances relating to each case (section 23).

17. A Tribunal may not make findings of direct discrimination save in respect of matters found in the originating application. A Tribunal should not extend the range of complaints of its own motion (**Chapman –v- Simon** [1994] IRLR 124, CA, per Peter Gibson LJ at para 42).

18. The burden of proof reversal provisions in the Equality Act 2010 are contained in section 136:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

19. Guidance is provided in the case of **Igen Ltd –v- Wong** [2005] IRLR, CA. In essence, the Claimant must, on a balance of probabilities, show facts from which a Tribunal could conclude, in the absence of an explanation by the Respondent, that the Respondent has committed an act of unlawful discrimination. The Tribunal when considering this matter will raise proper inferences from its primary findings of fact. The Tribunal can take into account evidence from the Respondent on the primary findings of fact at this stage (see **Laing –v- Manchester City Council** [2006] IRLR 748, EAT and **Madarassy –v- Nomura International plc** [2007] IRLR 246, CA). If the Claimant does establish a *prima facie* case, then the burden of proof moves to the Respondent and the Respondent must prove on a balance of probabilities that the Claimant's treatment was in 'no sense whatsoever' on racial grounds.

20. The term 'no sense whatsoever' is equated to 'an influence that is more than trivial' (see **Nagarajan –v- London Regional Transport** [1999] IRLR 573, HL; and **Igen Ltd –v- Wong**, as above).

21. The Court of Appeal in **Madarassy** above, held that the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status (e.g. sex or race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

22. Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating on why the Claimant was treated as they were, and postponing the less-favourable treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? (*per* Lord Nicholls in **Shamoon –v- Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285, HL).

23. The Supreme Court in **Hewage –v- Grampian Health Board** [2012] UKSC has confirmed:

> "The points made by the Court of Appeal about the effect of the statute in these two cases [Igen and Madarassy] could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352, para 39, it is important not to make too much of the role of the

> burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

Wrongful dismissal

24. The issues to be determined by the Tribunal are based in common law: whether or not the Claimant committed a repudiatory breach of contract, which was accepted by the Respondent and entitled it to dismiss the Claimant without payment of notice pay.

25. A repudiatory breach of contract is a deliberate flouting of the essential contractual conditions (see **Laws -v- London Chronicle (Indicator Newspapers) Ltd** [1959] 1 WLR 698): Gross misconduct must be a deliberate and wilful contradiction of the contractual terms (see **Sandwell & West Birmingham Hospitals NHS Trust -v- Westwood** UKEAT/0032/09).

26. Conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in its employment (see **Briscoe -v- Lubrizol Ltd (No 2)** [2002] IRLR 607 approving **Neary -v- Dean of Westminster** [1999] IRLR 288).

27. In more recent times there has been the decision of the Court of Appeal in **Adesoken -v- Sainsbury's Supermarkets Ltd** [2017] IRLR 346 which cited with approval the decision in **Neary** (above). The nature of the employer's business and the position of the employee are clearly relevant circumstances to the assessment.

28. The Tribunal has also taken fully into account the additional authorities cited by the parties in submissions.

## Findings of fact and associated conclusions

29. The Claimant commenced employment with the Respondent on 25 January 1982. The Claimant was initially employed as a Leading Railman and was promoted through various roles including Guard, Shunter, Signaller, Shift Manager, Signal Manager, Local Operations Manager and Temporary Operations Manager.

30. This case arises out of an event that occurred on 22 December 2016. On that date the Claimant was working the night shift as a Signaller at the Victoria Area Signalling Centre ("ASC") with responsibility for a specific section of the track.

31. There were other Signallers working at the time with responsibility for the other track sections.

32. There were two Shift Signalling Managers ("SSM") working on the shift at that time, Ms Nadia Ouertani (SSM for the Kent side of the track) and Mr Graham Morgan (SSM for the Sussex side of the track). Ms Lucy Phipps was the On-call Manager in Charge of the Area Signalling Centre, although she was not on site at that time.

33. The incident involved the Claimant granting 'signal protection' for his own panel of track (Panel 1) and also for two other panel sections (Panel 7 and 8) to a Person In Charge Of Possession ("PICOP"). Signal protection would allow the PICOP and his team to access areas of rail track for work purposes. The Claimant did not check with the members of staff responsible for Panels 7 and 8 that it was safe to grant signal protection to the PICOP in advance of giving that authority, thereby endangering the safety of the PICOP and his staff. There was a train in Panel 7.

34. This set of events led to disciplinary action to be taken against the Claimant and his ultimate dismissal.

35. Addressing the Claimant's unfair dismissal claim first, the Tribunal will consider the **BHS v Burchell** guidelines in turn.

36. With regard to whether or not the Respondent held a genuine belief in the Claimant's conduct, the Tribunal does not understand this matter to be in dispute, but in any event, given the surrounding circumstances the Tribunal concludes that the Respondent did hold a genuine belief in the Claimant's conduct. Given the concessions that the Claimant made during the internal proceedings, particularly during the disciplinary hearing, it is self-evident that the general conduct alleged was accepted by the Claimant and there is no contention that somehow it was a sham by the Respondent.

37. With regard to whether or not there had been a reasonable process adopted by the Respondent, the Tribunal concludes that the general framework of the disciplinary process fell within the range of reasonable responses.

38. An initial investigation into the incident began immediately in the early hours of 22 December 2017. The Claimant was interviewed by both SSM's, taken off the panel for the rest of the evening and required to undertake an urgent medical screening and drug and alcohol test. Ms Phipps was called into the ASC and statements were taken from the Claimant, Mr Stewart Garnham (signaller responsible for Panel 8); and Mr Paul Johnson (signaller responsible for Panel 7). Ms Phipps wrote her own account of events (although that account is undated).

39. On 19 January 2017 Ms Phipps produced a preliminary report and investigation form which was agreed by Mr Neil Verrinder, Operations Manager acting as the Designated Competent Person. (See pages 131C to H). That report sets out a description of the event, the behavioural cause and actions, and states under 'Action for individual directly involved': "Potential discipline if found guilty of using a mobile phone on panel and attempting to cover up an operational incident".

40. As a consequence Mr Verrinder spoke with Human Resources and Mr Long was appointed to carry out a disciplinary investigation. Mr Long was instructed to investigate the Claimant's use of a mobile phone to contact the PICOP at the time of the incident and a failure to report an operating incident in line with the Respondent's rulebook regulations. Mr Long was not told to investigate the circumstances of granting signal protection to the PICOP as that was to be the subject of a separate safety investigation by the Respondent. That investigation produced a Level 2 Safety Investigation Report which was completed on 06 June 2017 (page 275A of the bundle) and therefore Mr Long did not see this when completing his own disciplinary report.

41. Mr Long interviewed the PICOP, Mr Adams, by telephone and held investigatory meetings with the Claimant, Mr Garnham, and Mr Johnson. Mr Long also interviewed Mr Morgan as part of a separate disciplinary investigation into Mr Morgan's involvement with the incident. Mr Long also carried out an investigatory interview with Ms Ouertani, which was delayed due to her absence from work on long-term sick leave. Mr Long also collated a copy of the recorded voice communications during the relevant period, although that did not capture any discussions between the Claimant and the PICOP as the Claimant used his mobile phone at the time.

42. The Claimant was invited to his investigatory interview by letter dated 23 January 2017 (see page 131A of the bundle) in which the Claimant was informed of the allegations, that they could constitute misconduct, may lead to formal action being taken against the Claimant and which may include dismissal. The Claimant was notified of the opportunity to produce any documents upon which he wished to rely and was given the right to be accompanied.

43. Mr Long produced a written investigation report. That report sets out an overview of events, information surrounding the allegations, points of contention, an explanation for the delay in producing the report, the conclusion that the case should proceed to formal action and the reasons for that decision. The appendices to the report contain all the investigation material save for the interview with Mr Morgan, which was part of a separate investigation.

44. As a consequence, the matter advanced to a disciplinary hearing. The Claimant was invited to a disciplinary hearing by letter dated 13 June 2017 which informed the Claimant that Mr Pender was to conduct the disciplinary hearing, the nature of the allegations, the investigatory material, informed the Claimant of his right to ask relevant witnesses to attend at the hearing and to provide any relevant documentation, informed the Claimant of his right to be accompanied, provided the Claimant with a copy of the Respondent’s disciplinary procedure, and notified the Claimant of the potential consequences of the hearing.

45. The Claimant attended at the disciplinary hearing on 28 June 2017. The Claimant was represented by his trade union representative, notes were taken and produced of the hearing which were signed by the Claimant's trade union representative.

46. The outcome of the meeting was provided to the Claimant in a letter dated 29 June 2017 confirming summary dismissal for gross misconduct and providing the Claimant with the right of appeal (page 170 of the bundle).

47. The Claimant did appeal against that decision by a letter dated 04 July 2017 and which sets out seven bullet-point grounds of appeal. The Claimant was invited to a disciplinary appeal hearing. The Claimant was informed that Mr Lynch would be undertaking the appeal, notified of the right to be accompanied, given the opportunity to provide any additional new documentation and notified that Mr Lynch was not proposing to rely upon any further documentation or witnesses in addition to those considered that the disciplinary hearing.

48. The appeal hearing took place on 28 July 2017 and the Claimant was represented by his trade union. Notes were taken of that hearing. The Claimant was provided with the outcome by letter dated 04 August 2017 upholding the original decision to dismiss (page 186 of the bundle).

49. The Claimant in his submissions raised a number of specific grounds challenging the reasonableness of the disciplinary process and is contained in paragraph 9 a to i of the written submissions as expanded upon in oral submissions by Ms Webb of Counsel.

50. Addressing those points in turn:

51. *'No interview with Lucy Phipps. Statement not signed or dated and does not cover mobile phone and non-report issue'*: The statement of Ms Phipps was available both to the Respondent and to the Claimant. The statement at pages 112 and 113 of the bundle is not dated, but it was clearly completed before the investigation report by Mr Long on 18 April 2017. The statement is not in the same format as the other investigatory interviews undertaken by Mr Long, but the Tribunal concludes that it is not unreasonable for the Respondent to rely upon the statement as produced. The Claimant was given an express opportunity to call to the disciplinary hearing any relevant witnesses who he believed would be able to provide evidence relating to the allegations made against him. Therefore the Claimant could have called Ms Phipps to give evidence at the disciplinary hearing, but chose not to do so. The Tribunal also concludes that the statement of Ms Phipps was a reasonable account of the incident and surrounding circumstances.

52. *'Timeline muddled as to when the Claimant was first informed of the irregularity and by whom'*: Mr Long produced his own timeline as part of his investigation report which is at pages 114 to 116 of the bundle. The Tribunal has assessed all the evidence considered by Mr Long during his investigation

and recognises that the consideration of timings was not a precise science given the circumstances.

53. The Tribunal concludes that Mr Long's estimate of when the Claimant knew of the irregularity is reasonably accurate of around 00.40 hours. The Claimant himself stated it was within a relatively short period of the events occurring and stated at the time he was "in a bit of a blur". Mr Garnham gave some estimates of time, but they are clearly only estimates.

54. Mr Long's timeline suggest that Ms Ouertani knew of the incident at 01.20, as set out in her statement. The statement of Mr Morgan confirms that he was not sure, but considered it to be around "one-ish". Mr Long had not seen the Level 2 report and the timeline that is contained in it, but accepted in evidence that in hindsight he might have checked the timings a little closer.

55. The Tribunal concludes on balance that there was a minimum period of around 20 minutes without the Claimant notifying the SSM and it could have been as much as 40 minutes. Given that all the personnel are in the same room and within very close proximity of each other Tribunal concludes that not much turns on that difference.

56. *'No formal interview of Richard Adams - lack of proper scrutiny of timelines'*: Mr Long undertook a telephone interview with Mr Adams and a note of that conversation is at page 131 of the bundle. The Tribunal concludes that note was produced after a reasonable investigatory conversation with Mr Adams and it does not make the investigation unreasonable simply because it is not in the same format as the other investigatory interviews, such as with Mr Johnson and Mr Garnham. Furthermore, the notes of the conversation with Mr Adams set out his rough timings, set out his view that he was contacted by "a lady signalling manager at the ASC", had not spoken to the Claimant at that time and that: "Mr Adams told the shift manager that he hadn't spoken to anyone and that he had no idea there was a train in section".

57. *'A failure to ask for the Claimant's mobile phone or Ms Ouertani's mobile phone'*: The Tribunal concludes that the issue of whether the Claimant spoke to Mr Adams before or after Ms Ouertani, or at all, may have been determined definitively by checking mobile phone records. However, the Claimant was not dismissed for when, or if, he contacted Mr Adams. Mr Long had an overall picture of the evidence from a number of individuals. The issue of when, or if, the Claimant contacted Mr Adams may perhaps have gone in some way to the credibility of evidence before Mr Long, however an investigation is not a process of perfection, the test is whether or not it falls within the general test of reasonableness under section 98(4). Mr Long had the evidence of Mr Adams that Ms Ouertani spoke to him first. At the time Ms Ouertani spoke to Mr Adams he had no idea there was a train within his section. Mr Adams had only spoken to the Claimant when he later realised that he had three or four missed calls from another mobile phone number on his personal mobile phone. It is only when he rang the number back that he spoke to the Claimant. The Tribunal concludes that in the circumstances it was reasonable for Mr Long to rely on the account Mr Adams.

58. *'Evidence of concentrator call out to PICOP unanswered - not in timeline and not analysed by Mr Long - details supportive the Claimant's account - yet the Respondent did not accepted the Claimant tried to call PICOP before speaking to Ms Ouertani - superficial and unfair investigation'*: There is no record of the Claimant's call to the PICOP in the timeline created by Mr Long, however the Claimant does mention it in the investigatory notes at page 135 and also raises it in the disciplinary hearing as evidenced at page 167. Therefore that matter was squarely before Mr Pender when he made his decision to dismiss.

59. *'There are no notes of the conversation between the Claimant, Ms Ouertani and Mr Morgan - grossly unfair a) for Ms Ouertani to jump to a conclusion that the Claimant is lying, b) set up a conversation with the Claimant to try and see if he was admit it, c) doesn't appear to have been put to the Claimant the he had been lying, d) not to have taken notes – Ms Ouertani's interview is three months later after period of sick leave'*: There are no notes of that initial meeting between the Claimant, Ms Ouertani and Mr Morgan, but the Tribunal concludes that it is not of any material significance and does not make any disciplinary decisions with regard to the Claimant unreasonable. The Claimant accepted all of the main charges during the disciplinary hearing. Ms Ouertani's evidence is only particularly relevant to whether the Claimant spoke to Mr Adams first and whether she first spoke with the Claimant at around 1:20am. While the failure to make a note of that meeting is not best practice and is something for which Ms Ouertani received some criticism from the Respondent, it ceased to be a relevant point at the time of the disciplinary hearing when the Claimant accepted without any particular resistance the disciplinary allegations put to him and the seriousness of the potential consequences. Accordingly, the conversation between the Claimant, Ms Ouertani and Mr Morgan had reduced weight and significance.

60. *'Furthermore Ms Ouertani's version of events is clearly contradicted by Mr Morgan but Mr Long ignores that in his investigation report and adopted Ms Ouertani's version of events - not even-handed'*: Mr Long did adopt Ms Ouertani's version of events, but as with the above issue, this has materially reduced weight and significance on the basis that the Claimant had a full opportunity for this matter to be reviewed at the disciplinary and appeal hearings. Furthermore, Ms Ouertani's account of who first spoke to Mr Adams is supported by Mr Adams' own evidence. Accordingly, it is not unreasonable on balance for Mr Long to prefer Ms Ouertani 's version of events on the basis that one element of it at least had material corroborative support.

61. *'Mr Long says Mr Morgan was spoken to as part of a separate investigation but clearly had relevant details and it was unfair not to have considered them and include them in investigation report'*: The Tribunal concludes that the only matter raised in Mr Morgan's account that may particularly be of any material relevance to whether or not the investigation was outside the range of reasonable responses is the issue of timing. However, Mr Morgan's account was part of a separate Level 2 investigation and therefore it was not

deliberately left out of the equation by Mr Long. Also, Ms Ouertani did the investigation of timing, not Mr Morgan. Furthermore, the Claimant could have called Mr Morgan as a witness at the disciplinary and appeal hearings.

62. It should be noted that at these hearings the Claimant was represented by his trade union and that the Claimant himself had also been a trade union representative. Accordingly, the Tribunal concludes that the Claimant was reasonably aware of the process and his capability to introduce any evidence he considered may support his position. It should also be noted in that respect, how little resistance the Claimant made with regard to the disciplinary allegations put to him by Mr Pender in the disciplinary hearing. In that meeting when the Claimant was asked if there was anything else he would like to be taken into consideration, the Claimant does not raise any of the procedural points that he now relies upon as part of his case.

63. *'The disciplinary hearing was superficial and did not remedy the deficiencies'*: The disciplinary hearing lasted for two hours. The notes are obviously an abridged version of events. Also, the Tribunal finds of the Claimant has not disputed to any extent the concessions he made at the disciplinary hearing and in fact repeated those concessions in his evidence to the Tribunal.

64. The hearing notes state: "Checked that the employee is satisfied with arrangements for hearing (received read and understood all the necessary documents) - All satisfied with the arrangements for the hearing [Mr Pender] went through all the documents from the investigation no additional documents were provided".

65. The Claimant accepted that he was aware of the Respondent's Mobile Telephone Policy, that he failed to report an operating incident in line with the Rulebook, that he was aware that he should have reported the ‘safety of the line’ incident, and that he was aware that the allegation is considered gross misconduct due to the serious health and safety concerns.

66. When the Claimant was asked if there were any mitigating circumstances, he raised an issue over his health, but only in relation to health difficulties that occurred after the incident in question. As stated above, the Claimant did not raise any complaint regarding either the process or conclusions of the investigatory process.

67. Once the Claimant had made those concessions and offered nothing by way of relevant mitigation, the Tribunal accepts Mr Pender's evidence that there was not any more enquiry that should reasonably have been made by him during the disciplinary hearing.

68. As part of the race discrimination case, which the Tribunal will address below, the Claimant argues that Mr Pender was not an appropriate person to consider the disciplinary issue. However, the Tribunal finds as fact that the Claimant had a full opportunity to raise any concerns that he had with Mr Pender prior to the disciplinary hearing and also at the outset of the

disciplinary hearing itself. No impediment was raised either by the Claimant or his trade union representative.

69. The Claimant raised the issue during the appeal hearing and the matter was expressly considered by Mr Lynch, who reasonably concluded that the allegation was not made out.

70. During the appeal hearing the Claimant stated that he raised the matter during the disciplinary hearing, but the Tribunal records that the notetaker of the disciplinary hearing was not Mr Pender but a separate individual and the notes of the meeting were signed as being accurate by the Claimant's trade union representative. Also, the Claimant's oral evidence to the Tribunal was that he had not raised the matter in the disciplinary hearing because he only had a short amount of time with his trade union representative before the hearing commenced.

71. When the process and all the procedural matters raised by the Claimant are considered as a whole, the Tribunal concludes that the disciplinary process was objectively reasonable.

72. With regard to whether or not the Respondent held a reasonable belief in the Claimant's conduct, the Tribunal concludes that upon a finding that the disciplinary procedure was fair, it follows that the Respondent held a reasonable belief in the Claimant's conduct, particularly given the concessions made by him at the disciplinary hearing.

73. As stated above, the main allegations were accepted by the Claimant without resistance and no material points relating to the incident itself were argued in mitigation by the Claimant at the disciplinary hearing.

74. The Tribunal concludes that the Respondent through Mr Pender and Mr Lynch did hold a reasonable belief in the Claimant's conduct.

75. Having considered genuine belief, reasonable investigation and reasonable belief in the Claimant's conduct, the Tribunal is strongly of the conclusion that in fact this case is simply an issue of whether or not dismissal was a fair sanction in the circumstances.

76. Mr Pender considered that the circumstances fell under gross misconduct within the Respondent's Disciplinary Policy and Procedure and in particular the example of gross misconduct of "a serious infringement of health and safety rules".

77. Mr Pender accepted that context was important and formed part of the investigation. Mr Pender set out his rationale for having a belief in the Claimant's conduct and the serious nature of it at paragraphs 33 to 35 of his witness statement with regard to the mobile phone allegation, and paragraphs 36 to 38 with regard to reporting the incident. Mr Pender also took into consideration the Claimant's mitigation as set out in paragraph 39 of his witness statement.

78. At the disciplinary hearing the main points put to the Claimant were admitted. For example there were the following exchanges: "Why did you use a mobile phone to contact the PICOP?" Response: "I tried initially on DIAS phone which was engaged. I kept pressing redial as wanted to stop people going out on track. Sheer panic at the time. Was concerned about contacting the PICOP and mobile phone was best way to contact them". The Claimant was asked "Are you aware of Network Rail's mobile telephone policy?" to which the Claimant confirmed that he was aware. The Claimant accepted that he failed to report an operating incident in line with the Rulebook and when he was asked why he did not report a 'safety of the line' incident the Claimant responded: "At the time from what I remember is to stop people going on the track. This was my only priority was to stop people getting hurt". The Claimant was asked if he was aware that he should have reported the 'safety of the line' incident the Claimant confirmed that he was. The Claimant was asked: "Are you clearly aware this allegation is considered gross misconduct due to serious health and safety concern?", to which the Claimant responded: "I am aware".

79. Mr Pender consider that the Claimant's reasoning on why he had used his mobile phone was not plausible. He considered that: "The use of a mobile phone in order to use the redial option was just not justifiable and I was not convinced by this response".

80. The Claimant confirmed he was aware of the Mobile Telephone Policy and there was evidence before Mr Pender that the Claimant had been briefed on it.

81. It was reasonable for Mr Pender to conclude that the Claimant was an experienced member of staff and was fully aware the requirements not to use a mobile phone. It was also reasonable for Mr Pender to conclude that the 'concentrator' phone (the desk phone), which was positioned next to where the Claimant worked, was intended to be used by the Signallers and would record operational calls with the purpose of capturing these in the event of any incident or irregularity. It has a redial function. The use of the Claimant's mobile phone prevented the Respondent from examining the content of his discussion with the PICOP, which Mr Pender concluded: "was a perfect example of why this is prohibited".

82. The Tribunal concludes that it was within the range of reasonable responses for Mr Pender not to put the issue of plausibility directly to the Claimant at the disciplinary hearing. Mr Pender investigated the circumstances and asked the Claimant for his explanation. It is objectively reasonable for Mr Pender then to balance and take a decision based upon that material and evidence.

83. The Tribunal accepts Mr Pender's evidence that the Claimant had an ample opportunity to put his case at the disciplinary hearing, in particular when he was asked if there are any mitigating circumstances he wanted to raise with the disciplinary hearing, or any additional evidence that he wanted the disciplinary hearing to consider.

84. It was not in dispute that the Claimant had been trained in respect of incident reporting. That training had involved scenario training with role-play and simulation.

85. Mr Pender formed the view that the Claimant took no action for an unreasonable length of time. Mr Pender confirmed in oral evidence that he considered the Claimant to be a top-grade Signaller and that no root action had been taken and the Claimant was fully aware of the critical safety response required. Although aware of the Claimant's argument that he froze at the time, Mr Pender did not consider that explained the whole period of time in respect of which the matter was not reported.

86. Mr Pender took into account the Disciplinary Penalties Manager Guidelines with regard to deciding the appropriate action to take. Two of those matters were put to Mr Pender in cross-examination. The first regarding whether or not he had considered what penalties had been imposed in similar cases in the past and the second of whether or not he had considered how the employee responded to the allegation, for example did the employee admit the offence and apologise or try to denial conceal it?

87. With regard to past penalties, during an adjournment in the disciplinary hearing Mr Pender discussed the entire matter with HR for a period of around 30 minutes as confirmed at page 261 of the bundle. Mr Pender's evidence was that once the circumstances and his view on sanction had been discussed with HR, he considered that HR had an opportunity to raise with him whether or not the penalty in the circumstances was inappropriate and he relied upon HR to advise. While the Tribunal might take the view that Mr Pender could have expressly asked that question of HR at the time, it was not objectively unreasonable for him to take the view that once the circumstances of the offence and his decision had been conveyed to HR that HR would advise him if it was thought that the sanction was outside decisions made in similar cases.

88. With regard to how the Claimant had responded to the situation, Mr Pender considered that although there had been no concealment, the Claimant's evidence with regard to his mobile phone use did not make sense and had not, in his view, been open and transparent. The Tribunal is satisfied that Mr Pender did make that consideration and that his conclusion was within the range of reasonable responses. Mr Pender took into account the fact that the Claimant was an experienced employee with long service and also considered that no mitigating circumstances were raised with regard to events on the day of the incident. There was some mitigation relating to health put forward by the Claimant, but when Mr Pender asked the Claimant if that affected him on the night the Claimant confirmed that it had not. The mitigation on health related to the period after the event.

89. Mr Pender had also previously sent an email to Mr Long, at page 161 of the bundle, seeking clarification over why the Claimant had been the subject of disciplinary action and not the other two Signallers who had responsibility for

Panels 7 and 8. The Tribunal concludes that this enquiry together with the long discussion with HR at the time of the disciplinary hearing demonstrates that Mr Pender did not simply jump to a conclusion of gross misconduct and summary dismissal. Mr Pender clearly gave the matter some thought and discussed it in detail with HR.

90. Mr Pender was of the view that the Claimant had broken service rules which could have resulted in people being killed. In the circumstances the Tribunal concludes that it was within the range of reasonable responses for Mr Pender to consider that the circumstances amounted to gross misconduct and once that decision had reasonably been reached, then dismissal was also within the range of available options. The Claimant's conduct was capable of amounting to gross misconduct.

91. Mr Pender considered alternative sanctions, but in the circumstances concluded that summary dismissal was appropriate. The Tribunal concludes that dismissal was a reasonable option available to Mr Pender given the information before him and the Claimant's input to the disciplinary hearing.

92. The Tribunal considers that it was reasonable for Mr Pender to take a view that there was a distinction between the judgement call of allowing the PICOP out on the track, which was part of the Level 2 enquiry and the Claimant's response to that circumstance through the delay in reporting the incident and the prohibited use of the mobile phone that formed the disciplinary charges.

93. With regard to the appeal hearing and the decision by Mr Lynch, the issue of disparity of treatment was raised with him in cross-examination with reference to three individuals: 'H', 'A' and 'W'.

94. The Tribunal has received no evidence with regard to H and heard unchallenged evidence that the HR facility of the Respondent does not store case details from the time that disciplinary took place.

95. With regard to A, Mr Lynch could remember that individual because he was the Hiring Manager. The evidence from Mr Lynch, accepted by the Tribunal, was the matter involved financial irregularities relating to budgeting.

96. The issue of W was a matter raised by the Claimant at the appeal hearing and the Tribunal was taken to pages 305, 312, 320, 329 and 338 of the bundle, which are the main documents relating to W. The most pertinent document being the disciplinary outcome letter at page 338 which sets out the allegations, findings of fact and decision. Although it was found that W had committed gross misconduct, he was demoted rather than dismissed.

97. Mr Lynch had no involvement with W's case. However Mr Lynch's evidence in cross-examination, accepted by the Tribunal, was that he considered it to be a materially different case. The Claimant's account of events at did not add up in Mr Lynch's view and he did not believe the Claimant's evidence. There was no mobile phone use in W's case. In addition, W's case occurred in 2011 and in early 2016 there had been a serious rail incident in Germany where a crash

resulting in multiple fatalities had been caused due to mobile phone use, which the Respondent says sent shockwaves through the industry and resulted in the Respondent re-emphasising and taking more seriously the issue of non-mobile phone use. Mr Lynch was of the view that the Claimant's mobile phone use did not make sense. He considered that there was a range of different actions that the Claimant could have taken, which included simply speaking/shouting to the nearby SSM on duty.

98. On the evidence the Tribunal concludes that W's case is not sufficiently comparable for the Claimant to argue successfully a disparity in treatment and which places the dismissal outside the range of reasonable responses.

99. With regard to the issue of the Claimant not being suspended from work and continuing in post for a period of six months pending the disciplinary issue, Mr Lynch was of the view that in hindsight the Claimant perhaps should have been removed from safety critical duties while the investigation and subsequent proceedings were ongoing, but took the view that this should not detract from what had actually happened.

100. Mr Lynch set that out in his witness statement and also made the point during the appeal hearing at page 183, which is also consistent with the discussion between HR and Mr Verrinder on 18 January 2017 where the HR guidance note states: "As this is a potential safety issue Raj should have stood down from safety critical duties pending the outcome of this alleged incident" and the next step was to confirm whether the Claimant had been stood down from safety critical duties. On 27 January 2017 in a conversation between HR and Mr Long he informs HR that the Claimant was initially stood down from safety critical duties pending the medical screen but once this came back negative he had not been suspended from safety critical duties moving forward with the rationale being that the incident is not an immediate safety risk.

101. The Tribunal concludes that although the Claimant was not stood down from safety critical duties pending the disciplinary process it was not outside the range of reasonable responses for Mr Lynch or Mr Pender to address the disciplinary matter on its merits being aware that the Claimant had not been suspended. Mr Pender and Mr Lynch were not involved in the decision not to suspend the Claimant and the Tribunal concludes that it was reasonable for both of them to address a disciplinary matter on the evidence put before them at the hearings. The Claimant did not raise the lack of suspension point at the disciplinary hearing. He did raise it at the appeal hearing and it was taken into account by Mr Lynch.

102. Mr Lynch came to the view that the Claimant had used his mobile phone to contact the PICOP primarily because he wanted to cover up what had happened and considered this was a significant honesty/integrity concern. Although that was not expressly part of the allegation made against the Claimant, the Tribunal concludes that it was open to Mr Lynch to reach that conclusion once he had reviewed the evidence and Claimant's representations and explanations relating to the mobile phone use. That

conclusion was made as a direct consequence of considering the express allegation put to the Claimant.

103. With regard to sanction, Mr Lynch considered a range of matters and concluded that the Claimant's length of service did not necessarily count in his favour because he expected him to be more familiar with policy and protocol.

104. Mr Lynch considered alternative sanctions the concluded that the matter was serious and did not believe the Claimant's series of events. Mr Lynch's evidence was that if it was simply the mistake of allowing the PICOP possession of the track by itself that it would have been a different matter, but in Mr Lynch's conclusion there was more to it than that and the matter was serious.

105. As with Mr Pender, Mr Lynch spent a good deal of time considering his conclusion after a conversation with two members of HR. The Tribunal accepts Mr Lynch's evidence with regard to there being a lack of notes relating to those conversations and that this situation which arises from the process adopted by the Respondent whereby it is the HR advisers who have responsibility for entering notes of any conversations on the computerised case report system, rather than the member of staff dealing with the issue. As a result there is some scope for those notes to be incomplete and/or inaccurate.

106. The Tribunal concludes that it was within the range of reasonable responses for the Respondent to consider the Claimant's actions amounted to gross misconduct and dismissal was a reasonable option available. Accordingly, the unfair dismissal claim is unsuccessful.

107. With regard to the race discrimination claim, the Claimant describes himself being of Indian national or ethnic origin. The Claimant's argument is that because of an alleged comment made by Mr Pender in 2009 this is evidence from which an inference of direct race discrimination can be made in relation to Mr Pender's decision to dismiss the Claimant.

108. The Claimant relies upon two comparators of ‘W’ and ‘M’, both white British. The Claimant argues that in similar or not materially different circumstances those two individuals were not dismissed from employment.

109. However, the Claimant's argument in this respect is fatally flawed in that both Mr Pender and Mr Lynch, the decision-makers in the Claimant's case, had no involvement in the cases of W and M. Therefore this cannot raise an inference of discrimination in relation to those two individuals.

110. Also, it must be noted that the Claimant is not arguing that Mr Lynch acted in any race discriminatory manner, only Mr Pender.

111. Further, with regard to the alleged comment made by Mr Pender in 2009, whist the Tribunal fully accepts the Claimant’s reasons for why he may not have wished to complain about the incident at the time, at the stage of the

disciplinary hearing Claimant had a full opportunity to raise the matter himself and/or by his trade union representative both before the hearing when he is told that Mr Pender is to be the adjudicator and also the commencement of the hearing itself when the Claimant is given an opportunity to make any comments regarding the hearing, but failed to raise any concern or complaint. This is even more surprising when placed in the context of the fact that the Claimant thought that he had inadequate time to prepare for the disciplinary hearing due to issues with his trade union (not related to the Respondent) and therefore raising arguments of concern over Mr Pender may also have given the Claimant the additional time that he felt he needed. However, no concerns were raised.

112. The Claimant alleges in his Grounds of Complaint that in 2009 he was approached by Mr Pender and asked "What's it like to be the first Asian Signaller on Network Rail? You don't see many of you lot do you?"

113. In his witness statement the Claimant refers to a single incident and claims Mr Pender said "What's it like to be the first Asian manager on network rail?". In the appeal hearing it is recorded that the Claimant states: "We used to go for drinks after work and he used to say "What's it like being the first Asian covering a manager's job"". Accordingly, there are some differences between the accounts of the allegation made being single or multiple occasions, different job titles used and different types of enquiry which may impact on whether or not there was in fact any detriment.

114. Mr Pender was not involved in any of the decisions to place the matter within a formal disciplinary process and his decision was upheld after a genuine re-evaluation by Mr Lynch.

115. Accordingly, the Tribunal concludes on the evidence before it that the Claimant has not discharged his burden of proof and proved facts from which the Tribunal could conclude that his dismissal by Mr Pender was an act of less favourable treatment because of race. The reason why Mr Pender dismissed the Claimant was because he considered that the Claimant, largely after significant concessions made by the Claimant during the disciplinary hearing, had committed an act of gross misconduct worthy of dismissal.

116. With regard the claim of wrongful dismissal, the Tribunal concludes on the evidence produced to it at the hearing that there is a distinction to be made between the Claimant making a poor judgement call with regard to allowing track possession to the PICOP without sufficient clearance from the other signal operators and his conduct once the realisation of that error had occurred to him.

117. Much like the Respondent's approach to separating those matters out between the Level 2 investigation and the disciplinary process, the Tribunal knows that everyone makes mistakes and the Claimant has been employed for a long period of time and therefore it is more likely at some stage a mistake may be made.

118. However, the Tribunal reaches the same conclusion as the Respondent that the Claimant's reasons for the use of his mobile phone did not make any logical sense in the circumstances. The phone he should have used was next to Claimant's desk. That phone should be used so conversations can be recorded for important health and safety purposes. That is evident from the Respondent's policies and procedures. The Claimant was fully aware of that.

119. The Tribunal concludes that the Claimant's argument that he considered it was quicker to retrieve his mobile phone from his bag and then call the PICOP on redial on that phone rather than the desk phone is not credible. Not least because it is contrary to training and Policy, the PICOP would not recognise the Claimant's mobile phone number on his own phone when the call was received and the Tribunal received evidence that the desk phone has a redial function.

120. Given the context and the serious of the circumstances, the Tribunal concludes that the action of the Claimant amounts to a fundamental breach of contract and was a deliberate contradiction of the Claimant's contractual terms.

121. Also, the Tribunal concludes that given the serious nature of the event, with potentially members of staff working on the track while a train was in section and potentially other trains that could be entering the section, the circumstances required immediate attention by the Claimant. He was in surroundings whereby colleague Signallers and SSM were within easy reach and delayed informing the SSM of the situation for a significant length of time given the circumstances. The need to inform the SSM is precisely so decision making can be taken away from the individual involved and made by a more senior member of staff, who would have the knowledge and clarity of mind to deal with safety critical issues.

122. In the circumstances the Tribunal concludes this also amounts to a fundamental breach of contract by the Claimant. It was a deliberate contradiction of the Claimant's contractual terms and also amounts to negligence. Is not in dispute that the Claimant had been employed for a good length of time at various levels of employment. He is a senior Signaller and has been trained to address these types of circumstances and failed to do so in contravention of the Respondent's policy.

123. The Claimant committed a repudiatory breach of contract that entitled the Respondent to dismiss him and therefore the wrongful dismissal claim is unsuccessful.

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Employment Judge Freer
Date: 07 June 2019