EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr I Thompson	**v**	**Openreach Limited**

Heard at: London Central **On**: 30 September – 3 October 2019

Before: Employment Judge E Burns
Mr D Kendall
Mr I Mcloughlin

Representation

For the Claimant: In person

For the Respondents: Mr S Way (counsel)

WRITTEN REASONS

Claims and issues

1. By a claim form submitted on 18 March 2019, following a period of early conciliation from 6 March to 15 March 2019, the claimant brought claims of unfair dismissal, direct race discrimination and for "other payments".

2. The issues were established during two case management preliminary hearings held on 23 July and 24 September 2019 and were as follows:

Unfair Dismissal

1. What was the principal reason for the claimant's dismissal? The respondent says it was the claimant's conduct which is a potentially fair reason under s. 98(2) Employment Rights Act 1996 (ERA). It must prove that it had a genuine belief in the misconduct and that this was the reason for the dismissal.
2. Did the respondent hold that belief in the claimant's misconduct on reasonable grounds? The claimant challenges the fairness of the dismissal for the following reasons:
    a. The respondent did not take into account that safety issues were not his responsibility; he was not working at that site but waiting for another engineer to return and was only holding a tool at the request of his manager;

b. Another engineer (Sean Bennett) was never questioned or disciplined and therefore the claimant was treated inconsistently;

c. There was insufficient investigation;

d. He was not given copies of any statements other than a statement from a senior manager (Lewis Daniels) who then changed his statement after the appeal hearing;

e. After the appeal, further investigations were flawed because no further statements were taken (other than from Lewis Daniels).

3. Was (1) the procedure and (2) the decision to dismiss within the reasonable range of reasonable responses of a reasonable employer?

4. If the claimant succeeds, what remedy is the claimant entitled to? (The claimant is no longer seeking reinstatement)

5. Should any compensation be adjusted on the following basis?

   a. Did the claimant contribute to his own dismissal by culpable conduct? This requires the respondent to prove on the balance of probabilities that the claimant actually committed the misconduct alleged.

   b. Does the respondent prove that if it had adopted a fair procedure the claimant would have been dismissed in any event? And/or to what extent and when?

   c. Has the claimant taken all reasonable steps to mitigate his loss?

   d. Has either side failed to any extent to comply with the ACAS Code?

Direct Race Discrimination

6. The respondent accepts that the claimant's race (he is black) is a protected characteristic.

7. The factual allegations of direct race discrimination are:

1) the alleged actions of Mr Alizada set out in the claimant's email of 29th of July 2019 which states (in his own words):

   a) "The first time I became aware that I was singled out was on the 2/3/2018 when Mr Alizada accused me of always running to the union when there is a safety problem. He has never questioned anyone else's motives, other than Rob White, who is also black, to my knowledge.

   b) On the 16 April 2018 I had a meeting with Mr Alizada. He began questioning me about bringing in his mother's medical records or hospital records. I got upset and walked out and drove to my task for the day.

      [The claimant describes nearly having an accident while driving following this meeting and visiting his doctor who diagnosed that his blood pressure was high (214) and told him that he wasn't that far from having a stroke. The claimant states he was signed off work for four weeks which had never happened to him in all the years he had worked there.]

c) When I returned to work on 15/5/2018 I informed Mr Alizada what had happened on that day and he wasn't even concerned about the incident or about my mother.

d) May 2018 - Mr Alizada came out to see S Bennett and myself at Fulham. It was around 14:00 to 15:30 Mr Alizada handed me a letter in an unsealed envelope. It was the results of my discipline hearing. I then asked Mr Alizada if I could have a transfer to another group. The claimant alleges Again no response. J Newman had had asked for a transfer and got one.

e) May 2018 - I approached Mr Alizada at Hammersmith Glendale Road that I wanted to discuss welfare arrangements for his mother who had a severe stroke in 2005 and in 2016 her husband, my father died. Managers before Mr Alizada came to my group and knew about my situation and were very understanding even Mr Alizada assistant manager knew and was understanding. I approached Mr Alizada at Harlesden Exchange and asked him again and he will have a meeting. S Bennett gets time to look after his uncle so there wasn't a problem there.

f) Mr Alizada on the 27/6/2018 between 08:00 and 09:30 he rang me and started shouting down the phone why I wasn't on a course. I tried explaining that I was on a course the following Wednesday at Brentwood but I will check and get back to him. He then turned around and told me told me that he has been told that I don't attend courses. I have only known Mr Alizada for the best part of 4 to 5 months, so how he came to that conclusion is beyond me. When he found out that he was wring he didn't even apologise and the only other person to call Mr Alizada out as been racist is V Barrett a team brief at that point.

g) 18 September 2018 I had a fact-finding meeting with Mr Alizada and near the end of the meeting I asked Mr Alizada has he ever been trained on diversity he refuse to answer me I have been trained and so has most of my managers.

h) The worst thing Mr Alizada has done was on 1/10/2018. He came to my home and put a note through my door explaining my duty of care. My son picked up the note and read it. My partner and I hadn't told any of the children that I was suspended from work. When I rang Mr Alizada later that day when I got in I asked him why didn't he put it in an envelope, he claimed that he did so I was telling my son off for opening the letter but my wife reminded me that he has never done that before. We looked everywhere there was no envelope. Mr Alizada was lying."

2) The claimant's dismissal.

All of the allegations of direct race discrimination are denied by the respondent on the grounds that they either did not happen or if they did happen, they did not constitute less favourable treatment than any real or hypothetical comparator because of race.

Time Limits

8. The respondent accepts that the claim of unfair dismissal is in time.

9. The respondent argues that any allegations of direct race discrimination arising before 9 December 2018 are outside the primary time limit for bringing a claim found in section 123 Equality Act 2010.

10. The respondent argues that this is not a claim where it would be just and equitable to extend time.

Other Claims

11. Has the respondent made an unlawful deduction and/or breached the claimant's contract of employment by failing to reimburse him £62.00 in respect of diesel fuel?

    Over the course of the hearing the respondent accepted liability for this claim.

The Hearing

3. For the claimant, the tribunal received written witness statements and heard oral evidence from the claimant himself as well as four additional witnesses who appeared for the Claimant. They were:

    - Anthony Hester, who had been employed by the respondent previously, but was dismissed in 2015
    - Orlando Phillips, who had also been employed by the respondent previously, but had been dismissed
    - Neville Thompson, the claimant's brother who is a current employee of the respondent
    - Ian Lemin, the Claimant's trade union representative who accompanied the claimant to his disciplinary and appeal hearings

4. None of Mr Hester, Mr Phillips and Mr Thompson were able to give first-hand witness evidence in relation to the issues under consideration. We noted Mr Thompson's observations about the deterioration of his brother's health and state of mind during 2018 and 2019.

5. The tribunal received a further written witness statement from Sean Bennett, a current employee of the respondent. Although Mr Bennett attended the first day of the hearing, he did not attend on the second day to give oral evidence. It was accepted by both parties that his absence was voluntary. The claimant did not apply for a witness order for Mr Bennett. We have not relied on Mr Bennett's witness statement.

6. For the respondent, the tribunal received written witness statements and heard oral evidence from three witnesses who were:

    - Akbar Alizada, Operations Manager for London North West (Earls Court) region
    - Ross Young, Senior Engineering Area manager for the London Central area
    - Timothy McDonagh, Senior Engineering Area Manager for London

    There was an agreed trial bundle of 455 pages. We read the evidence in the bundle to which we were referred. We admitted into evidence some additional documents from both parties with the agreement of the other. This included the transcript of the claimant's disciplinary hearing held on 26 October 2018 which had only just been served on the claimant (pages

250A – 250M). We note that the claimant was provided with the actual audio recording of the hearing shortly after the disciplinary hearing.

7. We refer to the page numbers of key documents that we relied upon when reaching our decision below.

8. The respondent provided a written closing submission which the respondent's counsel expanded upon orally. The claimant delivered his closing submissions orally.

9. We explained the reasons for various case management decisions carefully as we went along, including our commitment to ensuring that the claimant was not legally disadvantaged because he was a litigant in person. We regularly visited the issues and explained the law when discussing the relevance of the evidence.

10. Part way during the hearing, the claimant requested that his brother be allowed to take over the presentation of his case. This was after his brother had given evidence as a witness. We decided that this was not appropriate in the circumstances, but ensured that the claimant was given additional time to prepare his cross-examination questions and his closing submissions to enable him to consult with his brother.

Findings of Fact

11. Our findings of fact and the inferences we have drawn from our primary findings are set out below. Where we have had to reach a conclusion in relation to disputed facts, we have made our findings on the balance of probabilities.

Background

12. The respondent provides the UK's digital network. It is a large national employer with 75,000 employers with a significant HR resource.

13. The claimant was employed by the respondent as a Fibre Jointing Engineer. The claimant's role required him to attend various sites to make repairs to the digital network. This included undertaking works at customer sites, public highways and telephone exchanges.

14. The claimant's employment began on 22 March 2001. His last day of employment was 10 December 2018. The Claimant was summarily dismissed for conduct said to amount to gross misconduct following a disciplinary hearing held on 26 October 2018.

15. At the time of his dismissal, the claimant was line managed by Mr Alizada. Mr Alizada only joined the respondent company in January 2018 and took over the line management of the claimant sometime in February 2018. The claimant was one of 13 engineers who were managed by Mr Alizada.

16. The claimant alleges that Mr Alizada "singled him out" and bullied him from quite early on in their employment relationship and that such treatment constituted direct race discrimination, culminating in the claimant's dismissal.

28 March 2018

17. The claimant says that the first time Mr Alizada "singled him out" was on 28 March 2018, when Mr Alizada accused the claimant of always running to the union when there was a safety problem. The claimant says Mr Alizada did not question the motives of other team members, with the exception of a black colleague.

18. The claimant did not provide any further detail about the context in which he alleges this comment was made.

19. Mr Alizada told that us that he conducted a one-to-one meeting with the claimant on 28 March 2018. He explained that he met all members of his team at around this time to agree objectives with them. These were a mixture of general objectives that were the same for all team members and specific areas for each member of staff to focus on which he documented in writing. We were provided with a copy of document prepared following the discussion with the claimant which is clearly dated 28 March 2018 corroborating that a meeting took place on this date (174 – 179).

20. Our finding is that Mr Alizada did not make the alleged comment. Mr Alizada explained that he had not worked with the claimant for very long and would not have been in a position to give any view on the claimant's relationship with the union. We find this to be a plausible explanation.

21. We believe that the claimant may have misunderstood an aspect of the discussion at the one to one meeting, which did indeed touch upon safety as well as a number of other issues.

16 April 2018 – request for mother's sickness records

22. The claimant alleges that on the 16 April 2018 he had a meeting with Mr Alizada at which Mr Alizada began questioning him about bringing in his mother's medical records or hospital records. The claimant's evidence is that he got upset and walked out of the meeting. He went on to say that he was so distressed as as a result of the meeting, that he nearly had an accident when driving to his next job. This led to him visiting his GP who signed him off for four weeks.

23. According to the respondent's records (150), the claimant was absent from work due to sickness from 9 April to 15 May 2018, meaning that the alleged request for his mother medical records cannot have been made on 16 April 2018.

24. On 3 April 2018, an incident had occurred which led to the claimant being issued with a written warning under the respondent's disciplinary

procedure. Two allegations were considered during the subsequent disciplinary process. The first concerned an allegation that the claimant had failed to inform Mr Alizada of his whereabouts on the morning of 3 April 2018 and was therefore "AWOL". The second concerned the fact that the claimant was found working at a customer site wearing ordinary clothes, rather than his corporate uniform and personal protective equipment (PPE).

25. The claimant admitted the second allegation, but denied that he had been AWOL. He said that on the morning of 3 April 2018, he had had to urgently attend to his mother who had been rushed to hospital. The claimant said that he had tried to contact Mr Alizada to let him know about this, but that he was unable to get through to him by telephone. The subsequent investigations revealed that the call logs of both the claimant and Mr Alizada showed no record of any attempted call.

26. Mr Alizada was responsible for investigating the incident and prepared a Misconduct Investigation Report. He held an initial fact-finding meeting with the claimant on 6 April 2018, a note of which is contained in the report. The note confirms that when Mr Alizada asked the claimant questions about what happened at the hospital, the claimant refused to answer and walked out of the meeting (184).

27. The investigation was not progressed while the claimant was absent on sick leave. Mr Alizada resumed the fact-finding investigation into the events of 3 April 2018 on 5 June 2018. The note of the resumed meeting (195) records that Mr Alizada again asked the claimant if he was able to provide proof of his mother's health at the meeting. Further corroborating evidence that this question was asked is seen in the document setting out the outcome of the disciplinary process which records the claimant objecting to this request (213).

28. We find that Mr Alizada asked the claimant about his mother's admission to hospital on 3 April 2018 and for proof of his mother's health on 5 June 2018. We find that the reason why he asked for this information was because he considered it to be relevant to the investigation he was conducting.

29. Following the conclusion of the investigation, Mr Alizada recommended that the case be passed to an appropriate manager for consideration under the respondent's disciplinary process under misconduct. The final report was dated 11 June 2018. The disciplinary hearing was held on 16 July 2018. It was conducted by Jamie Goate, one of the respondent's managers. The written warning was issued on 19 July 2018 and a copy of it was provided in the bundle (209). We note that the claimant did not appeal against the warning.

15 May 2018

30. The claimant alleges that when he returned to work from his sickness absence on 15 May 2018, he informed Mr Alizada about his near miss.

The claimant alleges that Mr Alizada was not concerned about the incident or about the claimant's mother.

31. Mr Alizada's told us that he conducted a return to work interview with the claimant on or around 15 May 2018. He says that he encouraged the claimant to take time to ease himself back into work. He says that he suggested the claimant spend the first day or two reading briefings, emails and safety processes and doing some e-learning modules. He said he tried to be as supportive towards the claimant as possible.

32. Mr Alizada did not address whether he had commented specifically upon the claimant's potential accident or enquired about the claimant's mother on the occasion of the return to work interview. Our finding is that he did not do either of these things. Having asked the claimant questions about his mother's health at the fact-finding interview on 3 April 2018 and received a negative reaction, we think it most likely that Mr Alizada did not want to proactively engage in a conversation about an issue which was clearly sensitive for the claimant.

May – Fulham Incident

33. The claimant alleges that Mr Alizada visited him and Sean Bennett at Fulham on an unspecified date in May 2018. He says that it was around 14:00 to 15:30 and Mr Alizada handed him a letter in an unsealed envelope. The claimant said it was the results of his discipline hearing.

34. The claimant alleges that he then asked Mr Alizada if he could have a transfer to another group, but Mr Alizada ignored this request.

35. Mr Alizada said he could not recollect the claimant asking for a transfer. No contemporaneous documentation exists of the discussion.

36. Our finding is that this incident cannot have taken place in May 2018 as stated by the claimant. The outcome of the disciplinary process concerning the events of 3 April 2018 was not available until 19 July 2018 when it was emailed by the disciplining officer to Mr Alizada (215).

37. Mr Alizada told us that he handed the claimant the outcome of the disciplinary hearing in July 2018. Our finding, on the balance of probabilities is that something was said by the claimant on this occasion. Having been given a written warning, we consider it is likely that the claimant expressed dissatisfaction, which included saying something about wanting a transfer. However, it was unlikely that he made a clear enough request for Mr Alizada to be able to appreciate its nature.

38. The claimant did not take any action to follow up any request for a transfer such as putting it in writing.

May – Hammersmith Glendale Road / Harlesden Exchange

39. The claimant alleges that in May 2018, on an unspecified date, that he approached Mr Alizada at Hammersmith Glendale Road saying that he wanted to discuss welfare arrangements for his mother who had a severe stroke in 2005. The claimant told us that his father died in 2016 with the result that he and his brothers have to provide care for his mother. One of his brothers is the main carer, but all of the brothers have to assist.

40. The claimant said that he also approached Mr Alizada at Harlesden Exchange and asked him about this again. This was also on an unspecified date in May 2018.

41. The claimant says that another employer, Sean Bennett, who is white, gets time to look off to after his uncle.

42. Mr Alizada's evidence was that he had no recollection of any specific request being made by the claimant in May, or at any other time, at Hammersmith Glendale Road or Harlesden Exchange locations.

43. Mr Alizada confirmed that it was correct that Mr Bennett, an engineer at that time in the same team and at the same grade as the claimant, was able to take time off to look after his uncle. This was under an arrangement called a Carers Passport operated by the respondent. Mr Alizada explained that the arrangement was put in place before he (Mr Alizada) had joined the company and he had not personally been involved with setting it up.

44. Mr Alizada's evidence was that the claimant had indicated to him that he may need some flexibility in relation to his working hours because of his mother' health condition. Mr Alizada told us he believed this conversation took place in July 2018 when he handed the claimant the outcome of his disciplinary. Mr Alizada said that he confirmed to the claimant that he could look into this for him, subject to the claimant providing either a doctor's letter or medical information in relation to his mum's condition. Mr Alizada's evidence was that the claimant did not raise the matter again after this discussion.

45. We find that it is likely, on the balance of probabilities, that the claimant approached Mr Alizada at Hammersmith Glendale Road and/or at the Harlesden Exchange and said that he wanted to discuss welfare arrangements for his mother. We believe Mr Alizada does not remember the discussions, however, because the requests were made in such an informal manner. Mr Alizada does remember the discussion from July as it was directly relevant to the disciplinary warning he was handing the claimant. We accept Mr Alizada's evidence that the discussion between him and the claimant about a possible Carer's passport was not followed up by the claimant.

27 June 2018

46. The claimant alleges that Mr Alizada contacted him by telephone on 27 June 2018 between 08:00 and 09:30 and started shouting at him that he

should have been on a course. The claimant's evidence is that Mr Alizada said that he had been told that the claimant did not attend courses.

47. The claimant further alleges when it transpired that the claimant was correct and should not have been on the course that day, Mr Alizada did not apologise.

48. Mr Alizada's evidence was that he did contact the claimant to query his whereabouts as he believed the claimant was supposed to be on a course. Mr Alizada denies shouting at the claimant during the telephone conversation. He accepts that he did not apologise to the claimant once he established that the claimant was correct.

49. We find that Mr Alizada did not shout at the claimant or say anything to him about being told that the claimant did not attend training courses. We accept the explanation given by Mr Alizada that he had not worked with the claimant long enough to form a view as to whether or not he had a record of not attending training courses. We think the most likely explanation for why the claimant thought Mr Alizada was shouting is that Mr Alizada was annoyed at the time of making the telephone call. This was perceived by the claimant and has become embellished in his mind over time due to the subsequent events.

18 September – Diversity question

50. The claimant alleges that on 18 September 2018 near the end of a fact-finding meeting with Mr Alizada he asked Mr Alizada whether he had received training on diversity and Mr Alizada refused to reply.

51. The respondent does not dispute that this exchange took place as outlined by the claimant. There is a clear contemporaneous record of the meeting showing that Mr Alizada was asked but did not answer this question. (221). Mr Alizada explained in his evidence to the tribunal that he did not think it was necessary for him to answer the question as he was the investigator at the meeting and his answer was not relevant to the investigation he was conducting.

1 October - Letter

52. The claimant's final allegation concerns the hand delivery of a letter addressed to him by Mr Alizada on 1 October 2018. The claimant alleges that the letter delivered to his home address was not sealed in an envelope and was therefore read by his son, who learned from it that his father had been suspended from work. The claimant alleges that this was a calculated act by Mr Alizada.

53. The claimant was suspended on 18 September 2018. Mr Alizada admits hand delivering a letter to the claimant on 1 October 2018. The letter requests that the claimant contact Mr Alizada as during his suspension he was required to keep in regular contact with the respondent (246).

54. Mr Alizada explained to us that he had indeed hand delivered the letter, rather than posted it. This was because HR were chasing him to make contact with the claimant during his suspension. He therefore decided to travel from his office to the claimant's home, a journey of only 15 minutes, to hand deliver the letter rather than post it, which would have delayed its delivery by at least one if not two days. We find this to be a plausible explanation.

55. Mr Alizada says that the letter was in a sealed envelope. The claimant was not able to give direct first-hand evidence of seeing whether or not the letter was in an envelope at the time of delivery. We prefer the direct first-hand evidence of Mr Alizada on this point.

Dismissal

13 September 2018

56. On 13 September 2018, the claimant and his colleague, Mr Bennett, were assigned to a job at an 02 shop on Notting Hill Gate High Street. The allocation of jobs was dealt with by a specific allocation team, rather than their line manager Mr Alizada.

57. The claimant told us that Mr Bennett was the "primary" for this particular job and he was the "assist". He said that he was always the "assist" when working with Mr Bennett, notwithstanding that they were both at the same grade. We explored the concept of having a primary and an assist during the course of the hearing. The respondent's managers told us that they did not recognise it. They told us that jobs are allocated to a minimum of 2 engineers who have equal and joint responsibility for each job.

58. We find that the concept of identifying the "primary" and the "assist" was in use by the engineers themselves and was part of their custom and practice or in other words, the etiquette between them on the job. We accept the claimant's evidence that Mr Bennett was the primary and that he was the assist on the job on 13 September 2018. We find that this was not an official matter, however, and was not formally recognised by the respondent.

59. The claimant met Mr Bennett at one of the respondent's sites, the Bayswater Exchange. The claimant left his van there and drove with Mr Bennett to the job site. The claimant admits that he was wearing his own clothes and was not wearing his corporate clothing or PPE having left them and all his equipment, including his gas detection unit (GDU) in his van in the Bayswater Exchange.

60. While the claimant and Mr Bennett were at the site, Mr Alizada and his line manager, Lewis Daniels, visited the site for the purpose of conducting a safety check. The check was part of a series of regular checks that Mr Alizada was required to undertake. He had notified his team by email dated 3 September 2018 (229) that he would be undertaking such checks.

61. Mr Alizada and Mr Daniels arrived at the site at between 8.20 am and 8:30 in the morning. This was 45 or so minutes after the claimant and Mr Bennett had arrived at the site.

62. The claimant accepts that they found him sitting in a cordoned off area on the pavement about 15-20 metres from the O2 shop. Within the cordoned off area two footway box lids had been moved from the pavement to enable access to a node carrying ethernet fibres. The node had been raised out of the ground and the cover from it removed. The tribunal were provided with photographs of the site as it was discovered (227-228), although the claimant had moved by the time the photograph was taken. The claimant does not dispute the accuracy of the photograph.

63. The photograph clearly shows that the guarding around the site was not complete, but had significant gaps in it. It also shows that a third footway box lid was still in place. There is no GDU in the photograph. Similarly, the photograph does not show a piece of equipment called a cover roller that should be used to safely remove footway box lids. The respondent assumed, on the basis that the equipment was not present at the site, that the footway boxes had been removed without a gas test having been undertaken and without using a cover roller in breach of the respondent's safety procedures.

64. There are two key areas of factual disagreement between the parties involving the site. These are:

- what was the claimant doing when Mr Alizada and Mr Daniels arrived, i.e. was he working in the unsafe site; and

- whether the claimant set up the site as it was found.

65. In his oral evidence before the tribunal, the claimant told us that he was not carrying out any repair work at the site when his managers arrived, but says that he was simply undertaking observations. His trade union representative had made the same argument at the appeal hearing held in April 2019 (297). This is different to what the claimant said at the disciplinary hearing held on 26 October 2019. At that hearing, which by consent was recorded, he gave an account that is set out on page 250B.

66. In that accounts he specifically states:

"*so as I got back erm, the node lid [was] off and Sean was going through the fibres and err we found what appeared to be the bundle, we weren't sure so, but it didn't have a [missing word] so he went off and I went down and sat on the lid to try and unpick the bundle and by that time [Mr Alizada] came up.*."

67. We prefer this account because it is was given only 5 weeks after the event and is therefore more reliable. We do not believe that the claimant was being deliberately dishonest in the subsequent accounts he gave us

or at the appeal, just that his recollection of events has been adversely affected by the passage of time.

68. We understand the claimant's account on page 250B as confirming that he was trying to unpick the bundle of fibres on the node when Mr Alizada and Mr Daniels arrived at the site. Our factual finding, therefore, is that he was undertaking work on the site.

69. With regard to the question of whether the claimant set up the site in an unsafe manner, his evidence has consistently been that he was not responsible for it and that Mr Bennett set up the site. The claimant's evidence is that Mr Bennett set up the guards and removed the footway covers while the claimant was talking to a traffic warden. He then joined Mr Bennett in the site and ultimately took over when Mr Bennett went into the customer's premises.

70. This version of events is recorded on page 250B as the version of events the claimant gave at the disciplinary hearing. The claimant reiterated this at the appeal hearing (297) and in his evidence before the tribunal.

71. We have not made a finding whether this account is true or not as in our view, it is not necessary for us to do so in order to consider the claim.

72. The finding we do make is that this account was given by the claimant at the disciplinary hearing and it is a plausible one, bearing in mind the time that the claimant and Mr Bennett arrived at the site, the time that they were likely to be able to get access to the customer's shop was likely to open and the time that Mr Alizada and Mr Daniels arrived on the site.

73. Specifically, the claimant said the following at the disciplinary hearing:

"*we proceed to go the customer and the customer was obviously shut. Sean was ringing the customer and the customer, well Sean came back to me and told me that we won't be able to get in there until 10 o'clock. I suggested to him that basically we could have a look at the [nodes] while we're here. He said yeah yea. So he got his [missing word] out of the van, gave them to me, we brought them to the [missing word] erm and as I was going back Sean was bringing his [missing word] and that but as he was going down there there was a traffic warden about to give him a ticket, and I went up to the traffic warden to tell him you know that where we were working and you know what I mean, we were not going to be that long and everything and I was talking to the traffic warden and he said no, he was going to give him a ticket, it doesn't matter because he was parked illegally so as I got back erm the lid and everything was already up and node was up so*"…(250B)

74. The claimant's subsequent evidence was that on his arrival, Mr Alizada did not immediately identify the safety issues at the site, but assisted the claimant to work there by handing him a fibre pick. The claimant says that Mr Alizada helped him to clean the fibre pick by purchasing a cotton wool bud. We do not find this to be at all credible and believe that the claimant

has misremembered this. This is not the account he gave at the original disciplinary hearing.

75. Mr Alizada says he would not have been carrying a fibre pick as he had not tools on him. He says he did purchase a cotton bud for the claimant but this was later after the site had been made safe (321).

76. Our finding is that Mr Alizada immediately stopped the claimant from doing any further work. He did not immediately require the claimant to remedy the safety defects present, but instead instructed him to get his corporate clothing, PPE and equipment.

77. This led to the Claimant walking from Notting Hill Gate back to the Bayswater Exchange where he changed and picked up his GDU. He took between 30 and 45 minutes to do this. Our finding is that when he returned, Mr Alizada required him to undertake a gas check using his own GDU. Our finding is supported by the GDU log 238 which shows that the claimant's GDU was used between 9:52 am and 10:06 am (238)

78. Mr Alizada's evidence was that throughout the time that he was present at the pavement worksite he did not see Sean Bennett. Mr Daniels did not attend the tribunal to give evidence, but he provided an account of the events of that morning to Mr Alizada during the investigation stage (235) and to Mr McDonagh on 10 April 2018 (318).

79. The account on page 235 does not deal with Mr Bennett's whereabouts at all. The account on page 318 confirms that Mr Daniels joined Mr Bennett in the customers premises. Given that Mr Bennett and the claimant arrived on site at 7.30 am there was sufficient time between then and Mr Daniels' arrival at 8.30 am for Mr Bennett to have set the site up, as claimed by the claimant, and then to have gone into the customer's premises.

18 September 2018

80. Mr Alizada invited the claimant to a fact finding meeting which was held on 18 September 2018. There is a clear record of what was said at that meeting (219 – 222).

81. The claimant was not offered the right to be accompanied to the meeting, but this is not a requirement under the respondent's policy and is not a legal right.

82. At the investigation meeting, the claimant admitted not wearing his corporate clothing and PPE and apologised for this. He did not say that he had not set up the site, but instead gave a series of "no comment" responses to Mr Alizada's questions about how the site came to be set up.

83. The claimant was suspended later that same day by Mr Alizada. A copy of the letter confirming his suspension was included in the bundle (239 – 241).

84. Mr Alizada prepared a Misconduct Investigation Report (216 – 238) in which he detailed his view of the incident and attached relevant evidence. This included the photographs referred to above, a copy of an email he had sent to his team dated 3 June reminding them to wear corporate clothing, the Claimant's certificates re training, a short account of the event prepared by Mr Daniels, and a GDU log for claimant's GDU device. In the report Mr Alizada categorised the claimant's behaviour as gross misconduct (223). He told us that he took advice from HR in connection with this.

Disciplinary Hearing – 26 October

85. The claimant was invited to attend a disciplinary hearing which was conducted by Mr Young. It was held on 26 October 2019. The letter inviting him to the disciplinary hearing clearly set out the allegations that he was facing, the possible consequences of a finding that he was guilty of gross misconduct, namely summary dismissal and that he had a right to be accompanied (247 – 250). The claimant attended the hearing with a trade union official, Mr Lemin.

86. The hearing was, with consent, recorded and we were provided with a transcript. The claimant admitted not wearing his corporate clothing or PPE, but said that he could not be held responsible for the unsafe worksite as he had not set it up. As noted above, the critical passage is at p250B of the bundle. The claimant asserted that Sean Bennett was was the primary on the job and he was the assist.

Outcome

87. Following the disciplinary hearing, Mr Young spoke to Mr Alizada and Mr Lewis in an attempt to obtain a witness statement from Mr Bennett. He did not speak to Mr Bennett directly. Mr Alizada told us that initially Mr Bennett said he would give a statement, but after two weeks of chasing him none was forthcoming, and Mr Bennett said he didn't want to get involved.

88. Mr Young wrote to the claimant on 5 December 2018 with the outcome of the disciplinary hearing (257 – 262). His conclusion was that the claimant should be summarily dismissed. The rationale for his decision is at page 261-262 of the bundle.

89. Mr Young decided that the claimant was guilty of misconduct because he was found working in an unsafe site without wearing PPE. He found the site to be unsafe because there was inadequate guarding and only 2 of the 3 footway box lids had been removed. Mr Young assumed that the site had been set up without a gas test having been undertaken and without a cover roller having been used.

90. Mr Young told us he reached his conclusion without making a finding as to who set the site up. His written explanation, however, says:

"*I do not accept your mitigation that you did not set up the work area as you did not provide this explanation during the fact find."* (262)

91. Mr Young explained to us that the reason he felt dismissal was the appropriate sanction was because the claimant had been given an earlier written warning (in July 2018 for the incident on 3 April 2018) for breach of safety standards. He said that he formed the view that there would be no point in giving the claimant a lesser sanction because he had shown that he had not learned from the earlier warning. His written outcome states:

"*As this is the second time that issues have been raised regarding poor safety practices, I conclude that there are no other improvement actions that would result in a change of behaviour, therefore my decision is dismissal*." (262)

92. Mr Young confirmed to us that he did not take the claimant's length of service, previous good safety record (until April 2018) or recent stress related illness into account when reaching his decision that dismissal was the appropriate sanction. Mr Young did acknowledge in his written outcome that the claimant had told him at the disciplinary hearing that he was experiencing a high level of stress due to his mother's medical condition and susceptibility to falling due to having water on the spine. He stated:

"*I appreciate that this is a really tough time for you and your family and that you have to be mindful of the need to leave at short notice to see to your mum. This said, it should not prohibit your ability to work in a safe working manner."* (261)

Appeal

93. It is not in dispute that there was a significant delay between the date the claimant submitted his letter of appeal, namely 10 December 2017 and the date of the appeal hearing which was not held until 2 April 2018. We accept the respondent's explanation that this was due to an administrative error. The appeal was conducted by Mr McDonagh. The appeal hearing was recorded, by consent, and the bundle contains a transcript (287 – 316).

94. We find that the way the appeal was conducted was very fair. The claimant, accompanied by his union representative, was able to make a number of arguments which were considered by Mr McDonagh. We have only made findings in respects of the arguments that are relevant for the purpose of the claim.

95. Following the hearing, Mr McDonagh met with Mr Alizada and Mr Daniels to take further statements from them. Copies of the interviews he conducted are found in the bundle (318 – 321).

96. Mr McDonagh also telephoned Mr Bennett and very briefly asked him some questions. Mr McDonagh made notes of that call (322-323). The call

lasted only a couple of minutes and he did not give Mr Bennett an opportunity to review the notes of the discussion for accuracy. Essentially Mr Bennett told him the following:

"*I took the guards out of the van and leaned them against the bench next to the JF10 and went into the customer premises. When I came out [Mr Alizada] and [Mr Daniels] and [the claimant] were around the box.*

"I don't know [who set the site up]. It wasn't me. I was in the customer. I went back into the customer premises with [Mr Daniels]."

He added that he did not want to give a statement because he "*didn't want to get dragged into it*." (322)

97. Mr McDonagh did not investigate the conflicting evidence provided by Mr Daniels, Mr Alizada and Mr Bennett with regard to their precise locations at the site that morning. For example, he did not test Mr Alizada's assertion that he had not seen Mr Bennett because he was in the customer's premises the whole time, despite Mr Bennett giving a different account.

98. Mr McDonagh confirmed the outcome of the appeal to the claimant by a letter dated 15 May 2019. His decision was to uphold the dismissal and his rationale is set out in full in his outcome letter (326 – 328).

99. In his letter Mr McDonagh states that:

"*I have spoken with Sean Bennett who stated he did not set up the site on the day, he left the guards next to the external work site and went to the customer. There was no other Openreach engineer on site when [Mr Alizada] and [Mr Daniels] arrived on site, you should still not have entered any worksite if it has not been made safe for either yourself or the general public.*

[Mr Young] and [Mr Bennett] confirmed that Mr Bennett would not provide a witness statement at the time of the investigation. Mr Bennett stated he did not want to get involved. Mr Young made the decision in the absence of a witness statement from Mr Bennett as per the investigation process. I am satisfied that it was correct for Mr Young to concluded that it was your responsibility to make the worksite safe and therefore you have failed to comply with the correct safety procedures / working practice." (326)

100. In relation to the claimant's argument that the decision to dismiss was too harsh, he states:

"*On review of the evidence and my further investigations following the appeal meeting, I conclude that this was a gross misconduct charge and no valid mitigating (sic) has been provided for me not to uphold the original decision*." (328)

101. Mr McDonagh told us that, in his mind, it did not matter that the claimant did not set up the worksite. For him it was sufficient that the claimant had

begun working at an unsafe site without wearing his PPE. Mr McDonagh also told us that he assumed that there had been no GDU test undertaken at the site because he could not see a GDU device in the photographs. Similarly, he assumed a cover roller had not been used to lift the two footway covers because one could not be seen in the photographs.

102. Mr McDonagh told us that, in his view, the site was very dangerous. He explained that gas testing is required to be undertaken to test for a range of gases before footway covers are removed to avoid releasing any gas present when they are removed. He said that all present footways covers should be removed, because if only two are removed this could cause pockets of gas to become trapped. The cover roller is used to prevent the possibility of sparks when the footway covers move across the pavement.

103. We find that Mr McDonagh exaggerated the dangerousness of the site somewhat when giving his evidence. We accept that removing footway covers without having first undertaken a gas test and without using a cover roller are potentially very dangerous. We are less convinced that a site with the gaps in the guard fences found at the site on 13 September 2018 or where only 2 out of the three footway covers have been removed is as dangerous as we were invited to find. We reach this conclusion because Mr Daniels and Mr Alizada were content to leave the site as it was while they waited for the claimant to walk back to the Bayswater Exchange to obtain his tools and PPE. We cannot accept that this would have been appropriate if the site was as dangerous as Mr McDonagh claimed.

Law

Direct Race Discrimination

104. Under section 13(1) of the Equality Act 2010 read with section 9(1)(a), direct discrimination takes place where a person treats an employee less favourably than that person treats or would treat others because of colour. Under section 23(1), where a comparison is made, there must be no material difference between the circumstances relating to each case.

105. According to section 39(2) of the Equality Act 2010 an employer must not discriminate one of its employees by (c) dismissing him or (d) by subjecting him to any other detriment.

106. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the ‘reason why’ the claimant was treated as he was.

107. Section 136 of the Equality Act 2010 provides for a shifting burden of proof in discrimination cases such that if the claimant can show facts from which a tribunal could decide, in the absence of any other explanation, that a

person has committed an act of discrimination, the tribunal must hold that discrimination occurred, unless that person can show that he or she did not contravene the provision.

108. Guidance on the burden of proof under the legislation preceding the Equality Act 2010 have been set out by the Court of Appeal in *Igen Ltd v Wong* [2005] ICR 931, *Laing v Manchester City Council* [2006] ICR 1519 and *Madarassy v Nomura International plc* [2007] IRLR 246. The recent decision of the Court of Appeal in *Efobi v Royal Mail Group Ltd* [2019] ICR 750 confirms the guidance in these cases applies under the Equality Act 2010.

109. The Court of Appeal in *Madarassy*, states:

'*The bare facts of a difference in status and a difference in treatment 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*.' (56)

110. It will be appropriate on occasion, for the tribunal to take into account the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (*Laing v Manchester City Council and others* [2006] IRLR 748; *Madarassy v Nomura International plc* [2007] IRLR 246, CA.) It may also be appropriate for the tribunal to go straight to the second stage, where for example the respondent assert that it has a non-discriminatory explanation for the alleged discrimination. A claimant is not prejudiced by such an approach sine it effectively assumes in his favour that the burden at the first stage has been discharged (*Efobi v Royal Mail Group Ltd* [2019] ICR 750, para 13).

Time limit – direct race discrimination

111. The relevant time-limit is at section 123 Equality Act 2010. According to section 123(1)(a), the tribunal has jurisdiction if the claim is presented within three months of the act to which the complaint relates. By subsection 123(3)(a), conduct extending over a period is to be treated as done at the end of the period.

112. If the claim is presented outside the primary limitation period, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable as provided for in section 123(1)(b).

113. The normal time limit needs to be adjusted to take into account the early conciliation process and the extensions provided for in section 140B Equality Act.

Unfair Dismissal

114. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g. conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

115. Under section 98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.'

116. Tribunals have been given guidance by the EAT in *British Home Stores v Burchell* [1978] IRLR 379; [1980] ICR 303, EAT which is relevant to the application of section 98(4) in conduct cases. There are three stages:

    (a) Did the respondent genuinely believe the claimant was guilty of the alleged misconduct?

    (b) Did it hold that belief on reasonable grounds?

    (c) Did it carry out a proper and adequate investigation?

117. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondent, the second and third stages of *Burchell* are neutral as to burden of proof and the onus is not on the respondent (*Boys and Girls Welfare Society v McDonald* [1996] IRLR 129, [1997] ICR 693).

118. We have reminded ourselves that our proper focus should be on the claimant's conduct in totality and its impact on the sustainability of the employment relationship, rather than an examination of the different individual allegations of misconduct involved (*Ham v the Governing Body of Bearwood Humanities College* [UKEAT/0397/13/MC]

119. We have also reminded ourselves that the question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for us to substitute our own decision.

120. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (*Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23, CA)

121. When considering the question of the employer's reasonableness, we must take into account the disciplinary process as a whole, including the appeal stage. (*Taylor v OCS Group Limited* [2006] EWCA Civ 702)

122. We were warned against relying too heavily on the label of "gross misconduct" We have heeded this warning. Ultimately the question is whether the employer had a reasonable belief that the employee committed such serious misconduct that dismissal was justified. We accept that the usual approach under section 98(4), which requires an examination of all the circumstances, must be followed. The use of the label gross misconduct in this case, together with the fact of summary dismissal, are simply factors to be considered along with all the other circumstances

123. In reaching our decision, we must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.

124. We note that of particular relevance to this case, the ACAS Code of Practice states:

> "19. *Where misconduct is confirmed, or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning.*
>
> *20. If an employee's first misconduct or unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning. This might occur where the employee's actions have had, or are liable to have, a serious or harmful impact on the organisation.*
>
> *……*
>
> *23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence. But a fair disciplinary process should always be followed, before dismissing for gross misconduct.*
>
> *24. Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct. These may vary according to the nature of the organisation and what it does, but might include things such as theft or fraud, physical violence, gross negligence or serious insubordination."*

125. This means that usually, in cases of misconduct, an employer is expected to give the employee a first written warning followed by a final written warning before moving to dismissal. However, an employer can "jump" stages where the misconduct is serious enough to justify this and can move straight to dismissal where the misconduct is serious enough to justify this for a first offence. We note that the respondent's disciplinary procedure reflects this (68).

Polkey/Contributory Conduct Deductions

126. Section 122(2) of the Employment Rights Act provides that where a tribunal considers any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent, the tribunal shall reduce it by that amount accordingly.

Section 123(1) Employment Rights Act allows a tribunal to reduce a claimant's compensatory award by such amount as the tribunal thinks is just and equitable in all the circumstances. In accordance with the decision in the case of Polkey v AE Dayton Services Ltd 1988 ICR 142, it may be just and equitable to reduce the amount of the compensatory award where we consider the respondent has shown that the claimant would have been dismissed in any event. We are required to speculate as to the percentage chance of this occurring and/or when it might have taken place.

127. Section 123(6) Employment Rights Act provides that where a tribunal finds that a dismissal was to any extent caused or contributed to by any action of the claimant, the tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

Analysis and Conclusions

128. We now apply the law to the facts we have found to determine the issues.

Allegations of Direct Race Discrimination (excluding dismissal)

129. Our factual finding on the claimant's first allegation of direct race discrimination was that it did not take place. We do not therefore need to consider it further and the claim fails.

130. We found that Mr Alizada did ask the claimant to provide proof of his mother's illness on two separate occasions. The request for proof was made in the context of a disciplinary investigation in which the claimant had said that the reason for him appearing to be AWOL was due to his mother's ill health. There was therefore a reasonable basis for Mr Alizada to make the request.

131. The claimant did not present any evidence to the tribunal from which we could concluded that this constituted less favourable treatment of him because of his race. We conclude that Mr Alizada would have made the

same request of a white employee in the same circumstances and therefore the claimant's claim for direct discrimination in relation to this matter fails.

132. Having found that Mr Alizada did not comment specifically upon the claimant's potential accident or enquire about the claimant's mother on the occasion of the return to work interview, we have considered whether this was because of the claimant's race.

133. The claimant has presented no evidence that points to his race being a factor in Mr Alizada's behaviour. There is no evidence to suggest that Mr Alizada would treated a white employee differently and made such enquiries in the same circumstances. Our conclusion is that Mr Alizada took the steps that he felt were necessary to support the claimant on his return to work which did not include making these enquiries. We believe that he would have done the same if the claimant had been white and therefore the claimant's claim for direct discrimination in relation to this matter fails.

134. We have found that the claimant made some informal requests of Mr Alizada regarding a possible transfer and in relation to meeting to discuss a carer's passport. Our finding was that the requests were so informal that any failure to act on them was natural.

135. We have not been presented with any evidence that, had the claimant been white, Mr Alizada would have taken a different approach. We have considered whether Mr Bennett, a white employee, was an appropriate comparator for this claim, based on the fact that he had a carers passport.

136. We note that Mr Alizada was not responsible for putting the carer's passport in place. There was no evidence before the tribunal that suggested that Mr Bennett did not have to make a formal application for the carer's passport and was therefore treated more favourably than the claimant. There was also no evidence before us that the claimant would not have been granted a carer's passport if he had made an application in the correct way. The claimant's claim for direct discrimination in relation to this matter also fails.

137. We found that Mr Alizada did not shout at the claimant during the telephone call on 27 June 2018 and did not say that he had been told that the claimant did not attend courses. The claimant's claim for direct discrimination in relation to these matter fails.

138. We found that Mr Alizada did fail to apologise to the claimant after the call on 27 June 2018. We conclude this was discourteous, but does not amount to evidence of less favourable treatment of the claimant because of his race. The claimant's claim for direct discrimination in relation to this matter therefore fails.

139. Mr Alizada admits that he did not answer the claimant about whether or not he had had diversity training when the claimant asked him this on 18 September 2018. As far as the panel is concerned, we do not understand why Mr Alizada did not answer such a straightforward question. However, we do not consider that his failure to answer, in the context of the question being asked in an investigation meeting he was conducting, can constitute direct discrimination. We are satisfied that the respondent has provided a non-discriminatory explanation for the refusal to answer this question and therefore the claimant's claim for direct discrimination in relation to this matter fails.

140. Finally, our finding was, that although Mr Alizada sent the letter to the claimant mentioning he had been suspended by hand, the letter was in a sealed envelope. Mr Alizada has explained why he chose to hand deliver the letter, which was to ensure that it reached the claimant as quickly as possible as HR were chasing him to do this. There was no evidence before the tribunal that his decision to hand deliver the letter would have been any different if the claimant was white. The claimant's claim for direct discrimination in relation to this matter therefore also fails.

Unfair dismissal

141. The first issue we have considered was whether the respondents have shown the reason why the claimant was dismissed. We find that they have. The claimant was dismissed for misconduct.

142. The misconduct in this case was made up of a combination of:

(a) The claimant was found working on an unsafe site where:

- there had been no GDU test undertaken
- cover roller had been used to lift the footway cover lids
- the guarding was inadequate as it had gaps in it
- only 2 out of 3 footway coverlids had been removed

(b) At the time, the clamant was not wearing his corporate clothing and was not wearing his PPE

143. We have considered whether it was fair for the respondent to treat this misconduct, in its totality rather than in its separate elements, as a reason for dismissal in all the circumstance of the case. In judging this we have considered it through the prism of the band of reasonable responses.

144. In order to consider this, we have gone through the three stages in the case of *BHS v Burchell*.

Stage 1: Did the respondent genuinely believe the claimant was guilty of this misconduct?

145. We conclude that it did.

Stage 2: Did the respondent hold that belief on reasonable grounds?

146. Our conclusion is that the respondent's belief was not held on reasonable grounds in its entirety.

147. We consider it was reasonable for the respondent to believe that the claimant was working on an unsafe site where there was inadequate guarding, only two footway covers had been removed and that he was not wearing his corporate clothing and PPE. All of this was either conceded by the claimant or was found to be the case.

148. It was not however reasonable for the respondent to hold the belief that there had been no GDU test undertaken or that a cover roller had not been used. These matters had not been fully and thoroughly investigated. The respondent assumed that because neither a GDU nor a cover roller were found at the site that they had not been used. We do not consider that this was a reasonable assumption that a reasonable employer would have made.

Stage 3: Did the respondent carry out a reasonable investigation? We find that they did not.

149. We consider that there were a number of significant flaws in the respondent's investigation.

150. The first flaw was the fact that it was carried out by Mr Alizada. We accept that he was the claimant's line manager and therefore the person who would normally undertake an investigation of this nature under the respondent's policy. In this case, however he was a witness to the events that took place on 13 September 2018. He had already formed a view as to what had occurred on the morning of 13 September 2018 by virtue of being there.

151. In particular, Mr Alizada, having been present, had formed a view of Mr Bennett's involvement in the incident, as he assumed that he had not set the site up and believed that he had been in the O2 shop at all times that he then did not investigate.

152. In our view that the natural principles of justice, required that a neutral manager to be appointed in order to conduct an unbiased, Burchell complaint investigation and that a reasonable employer would have recognised this.

153. The second flaw was the failure to interview Mr Bennett. It is our view that a reasonable employer would have interviewed him straight away, even without any request from the claimant. There were two engineers assigned to the job and the starting point should have been to speak to both of them. In addition, in this case the claimant was asserting that Mr Bennett was the primary on the job and that Mr Bennett set up the site.

154. We have considered whether these flaws were remedied later in the disciplinary process and find that they were not.

155. Mr Ross's involvement as an independent disciplinary manager did not remedy the involvement of Mr Alizada. Mr Alizada was responsible for categorising the claimant's conduct as gross misconduct which established a baseline for the rest of the disciplinary process and influenced Mr Young and Mr McDonagh's findings.

156. Mr Bennett was not interviewed by Mr Young. It was entirely unsatisfactory that he simply asked Mr Alizada to do this, rather than take the time and trouble to do it himself.

157. Although Mr Bennett was interviewed by Mr McDonagh, this was in a very unsatisfactory manner many months after the incident.

158. Another reason why the investigation was flawed was because it was not sufficiently thorough. There were other things that, in our view, would have been done by a reasonable employer undertaking a thorough impartial investigation. The respondent could have checked the GDU log for Sean Bennett and spoken to the customer to establish what time Mr Bennett had access to the customer's premises. Mr McDonagh established, but did not investigate the contradictions in the evidence provided by Mr Alizda, Mr Daniels and Mr Bennett.

159. We have been told that the failure to interview Mr Bennett is not relevant, because the respondent made its decision to dismiss the claimant based on the fact that they found him working at the unsafe site and not because he set the site up. We have given a great deal of consideration to this argument.

160. We do not consider it was not reasonable for Mr Young to conclude that he did not need to explore whether it was possible that Mr Bennett had set up the site simply because the claimant did not provide this explanation during the fact finding interview.

161. Our view is that a reasonable employer would have taken a different view of the claimant's misconduct had it known that the claimant was not responsible for setting up the worksite. We think it likely that it would have categorised his misconduct as less serious if it had been able to establish that there were shared failings by the claimant and Mr Bennett. However, because of the failure to be able to properly investigate the relevant facts, the respondent was not able to make a fully informed decision.

162. We find that that the investigative flaws of themselves were sufficient to render the dismissal was unfair. They were so significant that they clearly fell outside the range of responses of a reasonable employer and tainted the fairness of the decision overall such that it was procedurally and substantively unfair.

163. In addition, and or in the alternative, we have considered whether dismissal was the appropriate sanction in any event. In our view it was not. The claimant was a long serving employee with an excellent record of safety prior to April 2018. Although he had been given one recent warning for failing to wear his PPE, there were some extenuating circumstances on that occasion. In our view, taking into account our findings with regard to the dangerousness of the unsafe site, no reasonable employer would have reached the conclusion that the circumstances of 13 September 2018 justified dismissal rather than a final written warning. We think a reasonable employer would have given the claimant another chance, including providing him with additional training.

Was the dismissal discriminatory on the grounds of race

164. Having found that the respondent behaved unreasonably in relation to some aspects of the claimant' dismissal, rendering the dismissal unfair, we have considered whether the dismissal constitutes less favourable treatment of him when compared to a white employee in the same circumstances because of the claimant's race. Our conclusion is that it does not.

165. We have not been presented with sufficient evidence that the way in which the respondent approached the claimant's disciplinary process was discriminatory on the grounds of his race. In reaching this conclusion we have been mindful of the obvious difference in treatment between the claimant and Mr Bennett. The claimant, a black man, was investigated, disciplined and dismissed, while Mr Bennett a white man was not.

166. Although our conclusion is that the respondent behaved unreasonably when it decided not to interview Mr Bennett, we do not think this was because of his race. Our finding was that it was because Mr Bennett was not present at the site when Mr Alizada and Mr Daniels arrived and so had was not caught working in an unsafe site. Mr Bennett's material circumstances were not the same as those of the claimant and therefore he cannot be used as an actual comparator.

167. No evidence has been presented to us that the respondent would have treated a white employee in the same situation as the claimant preferably. We therefore conclude that the claimant has not made out a *prima facie* case that his dismissal was an unlawful act of discrimination.

168. We therefore reject the claim that the claimant's dismissal constituted direct race discrimination.

Additional Conclusions

Polkey

169. We have, as we are required to do so, speculated as to whether had the respondent undertaken a proper investigation including interviewing Mr Bennett formally and speaking to the customer, this would have changed

matters. We speculate that additional information would have come to light which cast doubt on the assumptions the respondent made about the setting up of the the worksite and the claimant's role in setting it up.

170. In addition, we have concluded that a reasonable employer would have considered the claimant's length of service, his previous excellent safety record and recent stress related illness when making a decision about the appropriate disciplinary penalty.

171. We conclude that had the respondent had the additional information from the investigation and taken into account all of the mitigating matters set out above, it would have concluded that dismissal was not a fair sanction and would have given the claimant a final written warning instead. We further speculate that the claimant would have heeded the final written warning and changed his behaviour. He would not therefore have been dismissed in the 12 months following the warning.

172. We therefore conclude that no reduction should be made to the claimant 's compensatory award as a result of applying the *Polkey* principle.

Contributory Conduct

173. We make a finding that the claimant's conduct contributed to his unfair dismissal. He has admitted to working in an unsafe site which clearly had inadequate guarding where only 2 out of 3 footway box lids had been removed wearing his ordinary clothes and no PPE. This is clear blameworthy conduct that contributed to his dismissal, albeit it that we have not concluded that it justified his dismissal in the circumstances.

174. Our conclusion is that a deduction, to reflect this blameworthy conduct, should be made to the claimant's basic and compensatory award, in both cases, of 60%.

Employment Judge E Burns
10 December 2019

Sent to the parties on:

23/12/2019

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For the Tribunals Office