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Claimant

Respondent

Mr Y Olarinde

AND

Network Rail Infrastructure Limited

HELD AT: London Central

**ON: 30-31 January 2019
1, 4-5 February 2019**

BEFORE: Employment Judge Glennie
Members: Mr G Bishop
Ms S Maheswaran

Representation:

For Claimant: In person
For Respondent: Ms S Tharoo, of Counsel

REASONS

(Judgment sent to the parties on 15 February 2019)

1. By his claim to the Tribunal the Claimant, Mr Olarinde, made the following complaints: unfair dismissal; direct discrimination because of race, religion, age and sex; and trade union detriment and/or trade union related unfair dismissal. The Respondent, Network Rail Infrastructure Limited, resisted those complaints.

2. The Tribunal was unanimous in the reasons that follow.

The issues

3. The issues were identified by Employment Judge Hodgson at a Preliminary Hearing on 30 November 2018. EJ Hodgson refused Mr Olarinde's application to amend the claim and recorded the issues in the following terms (with different numbering):

3.1 There are two allegations of direct discrimination, namely:

3.1.1 Instigating in around June 2017 and carrying on with disciplinary proceedings. It is the Claimant's case that there were not proper grounds for taking disciplinary proceedings.

3.1.2 Dismissing the Claimant.

- 3.2 The Claimant relies on the protected characteristics of age (being younger), religion (Christianity), race (the Claimant describes himself as Black British), and sex. It was accepted that a claim of sex discrimination had not originally been raised. Following discussion, the Respondent agreed to allow the addition of the protected characteristic of sex in relation to the two allegations only.
- 3.3 The Claimant also alleges that allegation one amounted to a detriment contrary to section 146(1) Trade Union and Labour Relations (Consolidation) Act 1992, and allegation two, his dismissal, was contrary to section 152(1)(c) of the 1992 Act. It is his case that it was his refusal to become part of a trade union which caused the treatment.
- 3.4 He places reliance on a specific email which was sent on 2 November 2015 by Mr Richard Allen. It is his case that it was as a result of this action that the trade union related detriment occurred.

The evidence and findings of fact

4. The Tribunal heard evidence from the following witnesses:
 - 5.1 The Claimant, Mr Olarinde.
 - 5.2 Mr Richard Allen, a Senior Assets Engineer and Mr Olarinde's line manager.
 - 5.3 Ms Linda Penfold, at the time a Senior Asset Engineer.
 - 5.4 Ms Claire Kavanagh, a Project Manager.
 - 5.5 Mr Philip Bye, a High Voltage Coordinator.
 - 5.6 Mr Martin Bastiani, at the time a Programme Manager, who conducted the investigation into the allegations against Mr Olarinde.
 - 5.7 Mr Ian Simpson, a Programme Manager, who conducted the disciplinary hearing and decided to dismiss Mr Olarinde.
 - 5.8 Mr Stephen Martin, a Senior Route Asset Manager, who heard Mr Olarinde's appeal against Mr Simpson's decision.
5. There was an agreed bundle of documents, and page numbers in these reasons refer to that bundle. Mr Olarinde also produced a separate small bundle of documents.
6. As recorded at the Preliminary Hearing, Mr Olarinde identifies himself as Black British. At the time of the events with which we are concerned he was

around 35 years of age, being born on 17 November 1982. He is a Christian, specifically a Protestant.

7. Mr Olarinde joined the Respondent on 16 July 2015. His role was that of an Asset Engineer. One early event which is relevant to the trade union detriment complaint was a conversation, maybe two conversations, followed by an email, all involving him and Mr Allen. The email, at page 103, was dated 29 October 2015 and read as follows:

“As discussed, I suggest that you might wish to discuss the merits of union membership with our local rep..... I suggest you drop him a line and take it from there. I must emphasise that any decision you take is yours and yours alone and no one in the team (least of all me) will pressurise you one way or another. I personally believe it is worthwhile to join but that is only a personal opinion. I am happy to discuss with you if you wish or you may wish to discuss with Linda [Ms Penfold] who is also a member.”

8. The evidence from Mr Allen was that he had one conversation with Mr Olarinde on the subject, (Mr Olarinde was not too sure whether it was one or two conversations), in which he suggested that Mr Olarinde should consider joining the union and he explained what he believed the benefits of doing so would be. Mr Allen gave the further explanation for the timing of his email that he knew that Mr Olarinde would be attending an induction process, having joined from a different organisation where there was no recognised union, and the induction process would include a talk on behalf of the union explaining the possible benefits of membership. Mr Olarinde had initially said that he did not wish to join, but Mr Allen followed up his earlier conversation after the induction process had taken place in case he had taken a different view.

9. The Tribunal found that this was where the matter ended and that Mr Allen took the point no further after his email. We found that that there was no reason to conclude that Mr Allen or anyone else, held an adverse view of Mr Olarinde because he had not joined the union. We accepted Mr Allen’s evidence that he would not even know whether Mr Olarinde had joined or not, as the membership lists were not generally made available, and he had no further conversation with him about the subject.

10. The Tribunal found that this particular aspect played no part at all in the decisions to investigate, which we will describe in due course, or ultimately to dismiss Mr Olarinde. We so found because:

11.1 Mr Allen did not raise the matter again after October 2015. The first investigation began in June 2017.

11.2 Mr Allen’s email was expressed in moderate terms and did not in any way suggest that he would hold the matter against Mr Olarinde.

11.3 As stated above, we have accepted that Mr Allen did not know whether Mr Olarinde had joined or not.

11.4 There was nothing to suggest that Mr Simpson or Mr Martin knew whether or not Mr Olarinde was a member of the union, or were in any way influenced by that matter.

11. Ultimately seven allegations were investigated by Mr Bastiani and became the subject of the disciplinary proceedings. The procedural history is somewhat complicated in that there was an earlier investigation by a Mr Mill and what was intended to be a disciplinary hearing conducted by a Mr Subramaniam, relating to some of the matters investigated by Mr Bastiani. These earlier proceedings did not reach a conclusion and were superseded by Mr Bastiani's investigation and the subsequent disciplinary proceedings. The Tribunal has made findings about the substance of the allegations because it was the Claimant's case that they were false, and that those who made them (substantially, Mr Allen and Ms Penfold) did so for discriminatory reasons.

12. The subject matter of the first of the seven allegations (one which was not investigated by Mr Mill) was a meeting on 9 May 2017, involving among others Mr Olarinde and a Project Engineer, Mr Cooper. On that date Mr Cooper sent an email at page 230 to various recipients complaining about what he described as Mr Olarinde's intransigence, and saying that Mr Olarinde had taken the view that the clarification that Mr Cooper was seeking did not require his input. Mr Cooper continued:

"I found [Mr Olarinde's] manner and approach to all assembled to be rude and condescending, questioning my incorporated Engineer qualification, not worthy and believing that a Chartered Engineer would be better suited to interpreting his instructions. He did not recognise [RL] as a colleague and asked why he was at the meeting. He was critical of the whole Project Management organisation failing to do their jobs. He believed his job was completed and that his major concern was now about managing funds".

13. Further to this, on 22 June 2017 Mr Olarinde sent an email at page 299 to a Programme Manager, Mr South, on the subject of this particular meeting and this particular project. This email included the following:

"With all the information and financial resources provided this project should have been delivered ages ago, I would not like to believe the project delivery is being stonewalled by unnecessary technical queries, politicking, unprofessionalism and absolute incompetency but it appears to be the case. I would recommend for it to be escalated to the next level of management, I have no further comment to make on the matter
Quite disappointed though."

14. Mr Bastiani's investigation of this allegation involved the following. His notes of the interview with Mr Olarinde at pages 491-492 recorded that Mr Olarinde said that he did not say the things that were alleged. He was asked about whether he had questioned Mr Cooper's competence and he replied that he could not remember what was said and then added, "I asked him if he

was a chartered engineer, his response was strange". Mr Bastiani asked why Mr Olarinde had asked about this, and Mr Olarinde said that he did not think that they had the technical competency or technical partner to deliver a design and complete at that stage. He said of Mr Cooper, "He admitted he was not chartered and he asked me the same. I said no but I do have an MSC in electronic engineering."

15. Mr Bastiani then referred to the 22 June email and, referring again to Mr Cooper, Mr Olarinde said "He is only an incorporate engineer. His body language showed that he was not happy. He was irritated." He went on to say that the atmosphere at the meeting was offensive, the behaviours of the attendees were inappropriate and finally on this point said, "I don't know what the abuse is. I make no apologies. I have every right to ask. It is my job to ask". It was clear that Mr Olarinde was expressing the view that he done nothing wrong at this particular meeting, and that he was within his rights to ask Mr Cooper what he did.

16. Mr Allen was interviewed on this point at page 504. He said that he had a high opinion of Mr Cooper's competence based on many years of experience and his time working with him, and that he had never previously heard anyone question his competence.

17. On this particular allegation the Tribunal finds, as a matter of probability that it was the case that Mr Olarinde questioned Mr Cooper's competence and qualifications. The reference to "absolute incompetency" in Mr Olarinde's email to Mr South suggests that it was likely that he had used similar language at the meeting. The Tribunal found that this was a heated meeting, but that the approach that what Mr Olarinde took was inflammatory. We found that he did overstep the appropriate boundaries at the meeting and in what he wrote in his email to Mr South.

18. Allegation number two investigated by Mr Bastiani was that Mr Olarinde was absent from the office on 19 May 2017 after 13:30 without prior notice or permission from his line manager Mr Allen. The background to this allegation is that on 17 May 2017 a Regional Asset Manager Mr Elsey and/or Mr Allen had asked Mr Olarinde to attend a meeting with them to discuss the concerns that had been raised by Mr Cooper. Mr Olarinde left the building and did not attend the meeting that had been arranged.

19. The meeting was rearranged for 18 May, this time to be attended by Mr Elsey and Ms Penfold in addition to Mr Olarinde. There is a note of that meeting at page 234. That note refers to the concerns raised by Mr Cooper and then states: "his absence on 17.5.17 was raised and he was reminded that he should not absent himself during working hours without agreement of his line manager or other relevant manager". The note continued that Mr Olarinde was advised that, in view of the previous incidences of non-acceptable behaviours, formal action would be considered. The note was followed by a letter of 25 May 2017 at page 242 which made substantially the same points.

20. Mr Olarinde was inclined to dispute that this aspect had been mentioned at the meeting on 18 May. The Tribunal finds that it was raised, not only because it appears in the note of the meeting and appears in the letter that followed it, but also because it was natural that it would be raised. This was the day after Mr Olarinde had failed to attend the original date for this meeting and it would be surprising if Mr Elsey and Ms Penfold had not raised the question of why he had not attended the previous day. Furthermore, when asked about this aspect by Mr Bastiani, Mr Olarinde did not say that he had not been told on 18 May that he should not leave the office without prior notification or agreement from his manager. We find it likely that, if that had been the case, he would have said so when being interviewed.

21. What then followed on 19 May 2017 was that Mr Olarinde left the office at 1:30 or 2pm without informing anyone that he was proposing to do so, and left his work mobile phone on his desk. Ms Penfold asked Mr Olarinde about that on 26 May and wrote an email of the same date at page 243, in which she said that, when she raised the matter with Mr Olarinde, he refused to answer and stated that it was a private matter.

22. It then happened that Mr Allen declined to sign Mr Olarinde's time card for 19 May. That led to an email from the payroll department at page 246 on 5 June asking for clarification of Mr Olarinde's whereabouts on the afternoon of Friday 19 May. Mr Olarinde replied on 8 June at pages 245-246. He said that he was required to go and deal with a reported fraud in relation to his bank account, and so he went to his bank branch to deal with that. He then included a paragraph which spoke in general terms about being able to use his home office for work and also being out and about visiting sites. He said that this meant, in effect, that it was not the case that if he was not in the office he was not working.

23. Mr Olarinde concluded this email, which was addressed additionally to Mr Allen and Ms Penfold, with the words "Sir, on Friday 19 May 2017 where were you?" The Tribunal found that this was directed to Mr Allen, who had been on leave on that day. One of the points that emerged in the course of the hearing is that Mr Olarinde seemed to take the view that, because Mr Allen was not present in the office on that occasion, he was not really entitled to ask about what Mr Olarinde was doing on that day. We find that it was inflammatory language to include the question "where were you?" in these particular circumstances.

24. Mr Olarinde was interviewed by Mr Bastiani on this point at page 494. He agreed that he had not asked for permission to be away from the office. When asked, "do you accept that you must inform your line manager", he replied "sometimes". There was then a discussion about the meeting of 18 May and the 25 May letter. Mr Olarinde said that he had not seen, or might not have seen, the letter of 25 May, but as we have observed, he did not say that the conversation had not taken place on 18 May.

25. Mr Olarinde was asked why he left his phone on the desk, to which he made a reply about his working hours, saying that his contract provided for 35

hours per week. There was then discussion about the working hours that were expected or required. Mr Bastiani said there was no suggestion that the Claimant had not worked his hours, but that the allegation was that he did not have permission to be away from the office. Ms Penfold was interviewed on the point at page 463, and she said that what had happened was that Mr Olarinde had simply disappeared without saying that he was going to be working from home or elsewhere. She said that it was only considerably later that she found out that there was a banking issue, and that had she been told this at the time, there would have been no issue about it. Ms Penfold said that "it all seemed so petty".

26. Mr Allen was also interviewed on the point, although he added nothing of significance to what Ms Penfold had said. The Tribunal concluded that, in any event, it is inherent in the work relationship that it is reasonable for an employer to say that they need to know where the employee is during the working day. This is the more so where there is a potential safety aspect, in that someone in Mr Olarinde's position might be out working on site, and where it is necessary for the whereabouts of employees to be known at any given time. Furthermore, we find that Mr Olarinde had been told on 18 May that he should not absent himself without advance notice or permission, and that this is what he did on 19 May.

27. Allegation number three concerned a meeting on 7 June 2017 where it was said that Mr Olarinde had behaved abusively towards Ms Penfold in refusing to undertake a task allocated to him. Ms Penfold was interviewed about that on page 464. She said that what happened here was that she asked for a prioritised list of assets and the risks to them, and that Mr Olarinde refused to do this and then blanked her. This was referring to a list of the various assets that were to be used in connection with a particular project in order of the significance of the consequences if they were to fail.

28. When asked about this, Mr Olarinde said, at page 496, that he did not know what Ms Penfold meant by prioritise. He said that she did not have an understanding of the project and then said that he deemed the task done. Mr Bastiani asked whether Ms Penfold had asked for a list of priorities, to which Mr Olarinde said: "I completed the job." Mr Bastiani repeated the question and said: "if you were asked, why did you not comply?" Mr Olarinde replied that his response was documented in an email, this being at page 285. He then said: "refer to GRIP" (being the procedures in place) and "it was not my job."

29. The email concerned was dated 16 June 2017 and is at page 285, addressed to Ms Penfold and copied to two other individuals. In this Mr Olarinde said that a list of prioritised assets had been completed months back. He attached a document and said that he could expect the project team to re-prioritise. He then wrote this: "I appreciate you're just coming into the project and how the project has developed over time may not be clear, please see my previous email for the sponsor review meeting notes. It would be a good idea to read and study the previous meeting notes before making decisions going forward".

30. The Tribunal found the tone of this email to be impolite towards Ms Penfold. In cross-examination Mr Olarinde put to Ms Penfold that indeed she did not understand the complexities of the project, and he commented that “the best thing you could have done that day is listen to myself”. He also said that in his view Ms Penfold was interfering in the conduct of the project. The Tribunal’s finding is that Mr Olarinde was asked to create a prioritised list as described, and that he asserted that the information was already available and that it was not his job to put this list together. In other words, he did indeed refuse to carry out what he had been asked to do.

31. The Tribunal found that this was a reasonable request coming from Mr Olarinde’s line manager’s manager. Whether, in terms of the wording of allegation three, that can be regarded as abusive, is in the Tribunal’s view open to question. We find, however, that what happened was that Mr Olarinde refused to carry out this instruction. He did so in front of other people, and Ms Penfold interpreted this as undermining her authority. The email that he sent then aggravated the situation further.

32. On 23 June 2017 Ms Penfold sent an email to Mr Olarinde (at page 297) informing him that an investigation was to be carried out into his absence on 19 May, his behaviour on 7 June, and an email he had sent on 22 June regarding a particular project. Mr Mill carried out the investigation. Mr Olarinde declined to meet Mr Mill, who subsequently met Ms Penfold and Mr Allen and produced an investigation report dated 13 September 2017. On 6 November 2017 Mr Olarinde was invited to attend a disciplinary hearing to be conducted by Mr Subramaniam on 16 November.

33. The Tribunal considered allegations four, five and six together as they all concern the events of 13 November 2017 (and so between the date of the invitation to the disciplinary hearing and the intended hearing). These events were the subject of interviews with Ms Penfold predominantly at page 465, Mr Olarinde mainly at page 499, Mr Allen at page 506 and Mr Bye at pages 524-525.

34. There was a safety meeting arranged for the morning of 13 November. There was some debate in the hearing over whether attendance at the safety meetings was mandatory or not. Mr Olarinde said that it was not, although he had in fact always attended safety meetings up until that point. Ms Penfold’s account to Mr Bastiani was that she approached Mr Olarinde in order to tell him where the meeting would be taking place, and that he was working with earphones and did not respond when she spoke to him. She walked up to him and waved in his direction. Her account was that she waved her hand with a small gesture, about 18 inches away from Mr Olarinde, and that she did not wave in his face. She said that she did this in order to attract his attention.

35. Mr Olarinde’s account, at page 497 was that he was wearing headphones, but could nonetheless hear Ms Penfold. He said that she waved her hand within an inch of his face. He demonstrated this to Mr Bastiani and said that he was shocked and was not happy with this, and that Ms Penfold

then walked away. He said this was evidence of something going on, by which he meant bullying and remarks behind his back.

36. Mr Allen, at pages 505-507 said that the meeting was mandated, but he did not see what had gone on earlier. Mr Bye at pages 524-525 said that he witnessed the event when Mr Olarinde was wearing his ear phones. He said that Mr Olarinde did not respond when Ms Penfold announced which room the safety meeting was to be held in, and that she then waved her hand at him to attract his attention. He described it as a “usual gesture” and said that it was “just normal” and that at the time Ms Penfold was close to Mr Olarinde, but not closer than 3 feet.

37. The meeting then took place and Mr Olarinde did not attend. Following this, there was a further encounter between Ms Penfold and Mr Olarinde. Ms Penfold’s account of this to Mr Bastiani was that she returned to her desk about an hour and a half after the safety meeting had finished. Mr Olarinde was sitting at a desk some way from her, but soon got up and approached her. Ms Penfold said that he stood over her and began to shout at her. She said: “he went for me verbally, he said that I had no right to approach him in such a manner and that my actions were rude and dangerous”. Ms Penfold said that she stood up, as Mr Olarinde was standing over her, but did not get too close. She said that he was aggressively loud and was so angry, and that later that she felt upset and intimidated and that she “lost it” with her manager. In her oral evidence to the Tribunal Ms Penfold explained that this meant that she was crying because she was so upset about what had happened.

38. In his account to Mr Bastiani, Mr Olarinde said that he told Ms Penfold that he had found her gesture earlier in the day offensive. He said: “I told her not to do it again, I then walked away and she followed. She was defensive, it could not carry on, perhaps she doesn’t understand appropriate behaviour, it was not appropriate.” He denied acting aggressively and said in his evidence to the Tribunal that he had approached Ms Penfold gently in order to explain how he felt about what had happened that morning. Mr Bastiani asked Mr Olarinde whether he raised his voice in any way to which he replied: “No, I told her she was wrong and I was not happy, she was aggressive.” He denied standing over Ms Penfold and again said that he was not aggressive.

39. Mr Bye was not present at this time in the afternoon. Mr Allen, however, was, and he said that he could not recall the words that were used but he became aware of Mr Olarinde shouting at Ms Penfold. He said it was very loud and that he saw Mr Olarinde standing over Ms Penfold and that he was stunned and shocked. He then said this: “I did not know what to do. I feared he would become violent and because of this and completely against my instincts I did not intervene. I felt if I did matters would escalate to violence very quickly, however that does not take away from the fact the behaviour was completely unacceptable”. He said that Mr Olarinde stormed off and that Ms Penfold was very shocked and upset.

40. To the extent that it is necessary to make a finding about these events, the Tribunal finds that it is the case that in the morning Ms Penfold made a

gesture of some sort to Mr Olarinde. Mr Olarinde did not go to the safety meeting that followed. The Tribunal considered that this was not necessarily misconduct because Ms Penfold said that people did miss these meetings from time to time for various reasons, and that if they did so they could make up their attendance on some other occasion. Ms Penfold did not approach Mr Olarinde to say that he should have been there or to ask him why he had not attended.

41. So far as the events of the afternoon are concerned, clearly there is a dispute about precisely what happened. The Tribunal considered that each individual was recalling matters from their own perspective. Broadly, however, the Tribunal preferred the account given by Ms Penfold and Mr Allen as being closer to what actually happened. We found Ms Penfold's evidence that she was very upset credible, as was Mr Allen's account of feeling shocked by what happened, and of feeling something like guilt about his failure to intervene.

42. There was a later email from a Mr McCauley who had witnessed some of what went on and in which he set out what he had heard. He did not give a great deal of detail, and what he said sat somewhere between the accounts given by Mr Olarinde and Ms Penfold.

43. Ultimately, the Tribunal found that it was not credible that Mr Olarinde approached Ms Penfold gently on this occasion, and that essentially it was Mr Olarinde, and not Ms Penfold, who was aggressive. We say this in the light of the following, which was the subject of allegation number six, concerning the sending of an email to Ms Penfold. This email is at pages 406-407, and was sent at 17:07 on 13 November, addressed to Ms Penfold but copied to Mr Butcher, Mr Allen and Mr Bye. In this Mr Olarinde wrote the following:

"Good afternoon Ms Penfold, further to my verbal warning, please accept this as my formal, last and final warning do not swiping your hands across my face – ever again, it is dangerous and unwarranted. I find this too aggressive and invasion of my private space.

There was no reason(s) that warranted you swiping your hand across my face and in front of my computer. If you want to update the team on where the meeting room is you could have done this via outlook calendar and minute their absence on register.

If you ask for someone's attention verbally and he or she is not giving it to you, the mature and best thing to do is to walk away.

Please keep safe.

Thank you

Regards".

44. There were two further versions of this email. At page 408 there was a version which omitted the words "please keep safe" and which Mr Olarinde sent to four other recipients. Then at page 412 there was a printed version which corrected the grammar in the first line so as to read: "do not swipe your hand" and which again omitted the words "please keep safe". This was signed by Mr Olarinde and left at least on Ms Penfold's and Mr Allen's desks.

45. The Tribunal found that this email was threatening in its tone and that Ms Penfold was entitled to feel threatened. Mr Olarinde's explanation for what he wrote was that he feared that Ms Penfold was risking some form of violent reaction from individuals if she waved in their face in the way that he said that she had done. That, the Tribunal finds, illustrates how the words "please keep safe" could be interpreted as containing some form of implied threat. The Tribunal also finds that it is significant that Mr Olarinde deleted those words in the later versions of the email. Although he said that he was not aware of how it was the words had "gone missing", and that the sense of the email was the same whether they were there or not, the Tribunal found it more likely that he realised that those words could be read as making some sort of implied threat, and decided that future copies of the email should not contain them.

46. Referring back to what the Tribunal has found about who was or was not aggressive on the afternoon of 13 November, this email helps us to find that the aggression was on the Claimant's part. It is clear that he was very angry about what had happened in the morning, and indeed it was evident from his cross-examination of Ms Penfold and his evidence to the Tribunal that he remains angry about it. We find it unlikely that he would have approached Ms Penfold on the day in the calm and gentle manner that he maintains that he did.

47. The final allegation, number seven, was originally one of being absent from the office without prior permission between 10:30 am on 16 November 2017 and 4:30pm on 17 November. It was accepted that the Claimant had booked annual leave for 17 November, which is his birthday, and so the allegation was concerned with 16 November. Put simply, it is the case that Mr Olarinde left the office unannounced at 10:30 on 16 November. It was intended that he would be attending the disciplinary meeting to be conducted by Mr Subramaniam. He sent a letter to Mr Subramaniam saying that he would not be attending, but it is uncontroversial that he had not informed or sought permission from Mr Allen. As we have found, Mr Olarinde had been told that, whatever his view of the matter, he should not leave the office during normal working hours without at least explaining where he was going.

48. On 17 November 2017 the Acting Director of Route Safety and Asset Management suspended Mr Olarinde from work. He sent a letter confirming this on 20 November 2017, at pages 430-431, in which he referred to an investigation into Mr Olarinde's refusal to attend the meeting on 13 November; his behaviour towards Ms Penfold on the same day; his email to Ms Penfold of 13 November; and his absence on 16 and 17 November.

49. Mr Subramaniam produced a report on 28 November 2017, in which he recommended a further investigation of events that had occurred after those with which he had been concerned. This in turn led to Mr Bastiani's investigation. The latter investigation was concerned with the seven allegations described above: the earliest of these concerned the meeting with Mr Cooper on 9 May 2017. Mr Bastiani interviewed Mr Olarinde, Ms Penfold, Mr Allen, Mr Bye and another colleague Ms Kavanagh.

50. When interviewed by Mr Bastiani, Ms Kavanagh referred to some matters which were not directly relevant to the allegations being investigated, but which were subsequently relied on by Mr Olarinde in the present hearing. Ms Kavanagh told Mr Bastiani that Mr Olarinde had given religious books (she described one of them as “an African Bible”) to some younger female colleagues, who had complained about this. Ms Kavanagh also suggested (as did Ms Penfold, when interviewed) that Mr Olarinde might have a problem with female colleagues or female managers.

51. On 13 March 2018 Mr Bastiani produced an investigation report at pages 527-539.

52. Mr Simpson was asked to conduct the disciplinary hearing. He had not had much previous interaction with Mr Olarinde, although he had worked with his team on occasions.

53. Mr Simpson was supplied with all the documents to date, including the investigation reports by Mr Mill and Mr Bastiani. On 27 March 2018 Mr Simpson sent a letter to Mr Olarinde at pages 546-8 requiring him to attend a hearing on 5 April: the date was subsequently changed to 16 April 2018. The hearing was attended by Mr Olarinde, Mr Simpson and a note taker, the notes being at pages 579-590. Mr Olarinde relied on notes he had made about the various events in his day-book.

54. Mr Simpson gave his evidence about the hearing by reference to the seven allegations which have already been described. The Tribunal noted the following points from his evidence:

54.1 Allegation 1. As confirmed by the meeting notes, Mr Olarinde said that he did not believe that Mr Cooper should have felt insulted by what he said. In cross-examination Mr Simpson said that he had not been aware at the time that this allegation had been added after Mr Olarinde was suspended. Mr Simpson concluded that this incident demonstrated rude and offensive behaviour and a level of insubordination.

54.2 Allegation 2. Mr Olarinde said that he seemed to him that Ms Penfold thought he was lying when he gave his explanation for being absent. Mr Simpson said that he took on board Mr Olarinde’s need to go to his bank, but that his behaviour when asked about his absence had escalated the matter.

54.3 Allegation 3. Mr Olarinde disputed being offensive or insubordinate to Ms Penfold, and said that he found it hard to get her to read some meeting notes. When cross-examined on this aspect, Mr Simpson accepted that there might have been other relevant evidence that Mr Bastiani could have obtained about what occurred on this occasion. He concluded that there had been serious insubordination on

Mr Olarinde's part and that his behaviour seemed to be a deliberate attempt to undermine Ms Penfold.

54.4 Allegation 4. Mr Olarinde agreed that he had not attended the safety meeting. Mr Simpson said that there was some mitigation in that Mr Olarinde was concerned about, and was preparing for, a disciplinary meeting, and that he concluded that this amounted to "mild insubordination but nothing more".

54.5 Allegation 5. Mr Olarinde denied being aggressive towards Ms Penfold, while saying that he agreed that he went to speak to her about the earlier "hand waving" incident, and that he thought that what she did was wrong. Again, in cross-examination Mr Simpson accepted that there could have been other relevant evidence that could have been obtained about this incident. He concluded that he had no doubt that Mr Olarinde had acted in an intimidating, aggressive, threatening, abusive and insulting manner towards Ms Penfold.

54.6 Allegation 6. Mr Simpson recorded that there was no doubt that Mr Olarinde had sent the emails concerned. He concluded that the emails were intended to be intimidating and hostile, and that this impression was reinforced by Mr Olarinde having sent copies to others, or left copies where they could be seen by others.

54.7 Allegation 7. Mr Simpson said that, while there was mitigation in that Mr Olarinde had been feeling unwell because of a stress-related condition, this was a further example of insubordination in that he had left work without informing the disciplinary hearing manager or his line manager.

55. Mr Simpson further stated in his oral evidence that, while he was aware of the suggestion in the witness interviews that Mr Olarinde had a difficulty with female colleagues, he ignored this as it was not what he was concerned with. In his witness statement, he said that Mr Olarinde had been insubordinate on a number of occasions and that, taken together, these amounted to serious insubordination, which was one of the examples of gross misconduct in the Respondent's disciplinary procedure. Mr Simpson stated that there was no evidence of any remorse or recognition of having acted in unacceptable ways: had there been, he would have given serious consideration to a sanction falling short of dismissal. In the event, he decided that Mr Olarinde should be dismissed, and provided this outcome in a letter dated 16 April 2018 at page 603.

56. Mr Olarinde put it to Mr Simpson that not challenging the witness statements was an act of discrimination against him. Mr Simpson replied that he would have taken exactly the same approach, whatever the protected characteristics of the person concerned.

57. The Tribunal accepted Mr Simpson's evidence about the reason why he decided to dismiss Mr Olarinde. He gave a detailed account, supported by

the meeting notes, of what was said about each allegation, and a reasoned account of why he decided as he did. Given the number and nature of the findings that Mr Simpson made on the allegations, and the lack of remorse or acknowledgement by Mr Olarinde, the Tribunal found it unsurprising that the decision was that he should be dismissed.

58. Mr Martin was appointed to hear the appeal that Mr Olarinde raised against Mr Simpson's decision. He had had no previous dealings with Mr Olarinde. He too was provided with all of the documents up to date.

59. The appeal hearing took place on 25 May 2018, attended by Mr Martin, Mr Olarinde and a note taker, the notes being at pages 631-646. Mr Martin's evidence was that Mr Olarinde maintained that much of the evidence against him was false and/or hearsay, and that his own evidence, as supported by his day-book notes, should have been preferred.

60. In cross-examination Mr Martin denied being biased against Mr Olarinde, and said that he did not feel that his age, race, religion or sex were in any way relevant.

61. Mr Martin gave his decision upholding the dismissal in a letter dated 5 June 2018 at page 649. He set out his rationale for that decision in a document at pages 647-8. This included the observation that signed written statements qualified as evidence under the Respondent's disciplinary procedure. Mr Martin wrote that, although Mr Olarinde maintained that the statements were false, he could not provide any material to support this. He stated that he had concluded that all seven incidents occurred, and continued:

"My view is each of the incidents would be regarded as misconduct and whilst Network Rail did not handle the situation well for some of them – it is the number of incidents that results in gross misconduct."

62. In his witness statement Mr Martin said that, in his view, the first five incidents amounted to misconduct and the fifth and sixth to gross misconduct. He did not see any reason to believe that the suspension had been pre-meditated or that Mr Simpson's decision was pre-determined. He too commented that he might have taken a different view of the appropriate sanction of Mr Olarinde had shown some remorse or had been able to see the events from a different perspective.

63. The Tribunal accepted Mr Martin's evidence as to why he reached the decision he did. The material before him was essentially the same as that before Mr Simpson, including Mr Olarinde's stance on the matters concerned. Just as the Tribunal found it understandable that Mr Simpson decided to dismiss Mr Olarinde, we found it understandable that Mr Martin decided to dismiss his appeal.

The applicable law and conclusions

64. The Tribunal first considered the complaints of detriment and automatic unfair dismissal under the 1992 Act. Sections 146 and 152 of the 1992 Act include the following provisions:

146 (1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of –

(c) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of trade unions.

152 (1) For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee-

(c) was not a member of any trade union, or of a particular trade union, or of one of a number of particular trade unions, or had refused, or had proposed to refuse, to become or remain a member.

65. The Tribunal has already explained its finding that the question about Mr Olarinde joining the union played no part in the decisions to investigate matters, or to dismiss him. For liability under section 146(1) to arise, there would have to be a finding that the sole or main purpose of the investigation was to compel Mr Olarinde to become a union member. For liability to arise under section 152(1), there would have to be a finding that the reason, or principal reason for his dismissal was his refusal to join the union. Neither of these findings is possible in the light of the conclusions that the Tribunal has reached on the evidence on this aspect. The Tribunal has accepted the evidence of Mr Martin and Mr Simpson as to the reasons why they decided, respectively, that he should be dismissed and that the decision to dismiss him should be upheld.

66. Further to the reasons already given on this aspect, the Tribunal found (as will be explained below) that it was reasonable for the Respondent to decide to investigate the various matters, and that the decision to dismiss Mr Olarinde was a reasonable decision. This was not a case where the facts led the Tribunal to suspect that there might be some other reason for these decisions beyond those relied on by the Respondent.

67. Turning to the complaints of direct discrimination, s.13(1) of the Equality Act provides that:

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.

68. In the present case, it is perhaps worth emphasising that this involves two elements: one is less favourable treatment, and the other is that the treatment should be because of a protected characteristic. It is not enough to

point to some link or suggestion about a protected characteristic: there must be causation of particular less favourable treatment.

69. The burden of proof is set out in s.136 in the following terms:

(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.

70. The Court of Appeal gave guidance on the application of this test in the cases of **Igen v Wong [2005] IRLR 258** and **Madarassy v Nomura [2007] IRLR 246**. Essentially the Court identified a two stage process. The first stage of this is for the Tribunal to consider whether (in the absence of an explanation from the Respondent) the facts are such that it could properly find that discrimination had occurred. In **Madarassy** the Court of Appeal emphasised that this must be a conclusion that the Tribunal could properly reach. It would not be sufficient for there to be simply a difference in treatment and a difference in protected characteristic, there would have to be something more (which might not in itself be very significant) which could enable the Tribunal properly to conclude that discrimination had occurred. If that first stage is satisfied, then the burden passes to the Respondent to prove that it did not discriminate against the Claimant.

71. The Tribunal then considered what the “something more” might be in respect of each of the allegations of discrimination. In relation to age discrimination, Mr Olarinde pointed to Ms Kavanagh’s statement to Mr Bastiani that “younger” female colleagues had complained about books that he had given them. Mr Olarinde focussed on the fact that they were described as “younger”, saying that this indicated discrimination against him because of his age. (The Tribunal noted that this argument was inconsistent with the way in which the issue had been identified at the PH, where Mr Olarinde identified himself as being “younger”). The Tribunal found that, in any event, this was not a basis on which it could properly find any such discrimination. It is simply a description that Ms Kavanagh gave of those who had complained about this particular point. The fact that she referred to them as “younger” would not be a proper basis on which the Tribunal could find that anyone had discriminated against Mr Olarinde because of his age.

72. The other point that Mr Olarinde made in this connection was to say that he believed that his treatment would have been different if he had been of the same age group as Ms Penfold and Mr Allen.

73. The Tribunal observed that we do not in fact have any evidence of what age group either Ms Penfold or Mr Allen might belong to, as compared to Mr Olarinde. But in any event, this is purely an assertion by Mr Olarinde. There is no evidence to suggest that age was a factor that influenced their actions, or any of the decisions made to investigate the allegations against Mr

Olarinde, or to dismiss him, or to uphold the dismissal on appeal. The facts were not such that the Tribunal could properly find that there had been less favourable treatment because of age.

74. In relation to discrimination because of sex, again Mr Olarinde referred to Ms Kavanagh's statement about younger female colleagues, this time emphasising that they were described as female. Again, the Tribunal found that this was no more than a description of those who had made this particular complaint. The fact that Ms Kavanagh had identified the individuals concerned as female was not something that could properly form the basis for a finding that anyone involved had discriminated against Mr Olarinde because he was male.

75. As stated above, it is also the case that Ms Penfold and Ms Kavanagh suggested in their interviews that it might be that Mr Olarinde had some problem with women colleagues or in particular female managers. The Tribunal found that this showed no more than these individuals saying what they thought, and that this was not a basis on which it could properly find that Mr Olarinde had been less favourably treated by virtue of being male, as compared to a female, in the same circumstances.

76. So far as discrimination because of religion or belief is concerned, Mr Olarinde pointed again to the complaint about giving colleagues books that were described as "religious". He said that, although he had given books to colleagues, these were not of a religious nature. The Tribunal found no reason to doubt what Mr Olarinde said on that particular point. Assuming that Ms Kavanagh and Ms Penfold were wrong about the nature of the books (whether because the original recipients had got this wrong, or otherwise) the Tribunal found that this was not something that could properly form a basis for a finding that Mr Olarinde was treated less favourably because of his religion. The decision to investigate the seven allegations against him had already been taken and acted upon by the time that this point came to light, and there was no reason to believe that it influenced the outcome of the disciplinary process in any way.

77. The Tribunal then turned to the complaint of discrimination because of race. Here Mr Olarinde made two points. The first of them was that, as was accepted, Mr Bastiani had made some reference to his previous career in the armed forces. There was a dispute about whether he said this at the beginning of the interviews or afterwards, but nothing turns on that. The Tribunal was unable to discern any connection between an observation that Mr Bastiani had a military background and any question of race.

78. The second point was that, in the course of interviewing Ms Penfold, Mr Bastiani asked whether it might be a possible explanation for communication problems with Mr Olarinde that English was his second language. Mr Bastiani's evidence, which was supported by the context in which this was said, was that he was considering whether there might be some explanation in terms of misunderstandings that had arisen. On the face of the matter, Mr Bastiani was wondering whether there was available mitigation in this respect.

79. Beyond that, the Tribunal has asked itself whether this might indicate an unconscious bias of some sort against the Claimant. Mr Bastiani recognised that this might be a question, because he accepted that it was something he would not have raised if the name of the person concerned had been one that would not have suggested to him that they might not have English as their first language.

80. Ultimately, we found that this did not cause us to find that the first stage of the **Madarassy** test had been satisfied. We accepted Mr Bastiani's evidence that what he was thinking about was possible mitigation and that, although he would not have asked that question had Mr Olarinde had a different name, none the less it is not something that would betray a negative attitude towards him on the basis of his race. In particular, we did not see any evidence of a biased approach in the investigation that followed.

81. The Tribunal has therefore found against Mr Olarinde on each of the complaints of discrimination, on the basis in each case of the first stage of the **Madarassy** test. We also considered whether, viewing all these matters in the round as opposed to allegation by allegation, we would take a different view (it sometimes being the case that an overall view can reveal matters of concern that are not necessarily seen on an item by item consideration). We did not find that looking at the matter overall led us to any different conclusion.

82. It is also the case that, in respect of each complaint of discrimination, the Tribunal has found that the claim fails at the first element of the two-stage test. If we are wrong about that on any point, the findings we have made would lead us to conclude that the Respondent has discharged the burden of proving that it did not in any way discriminate against Mr Olarinde. We have made findings of fact about the incidents themselves which mean that Ms Penfold and Mr Allen had reason to make the allegations that they did about Mr Olarinde's conduct. The evidence that Mr Bastiani collected gave him reason to continue with the investigation and report in the way that he did; and we have accepted that Mr Simpson and Mr Martin made the decisions that they did for the reasons that they have given.

83. The Tribunal then turned to the complaint of unfair dismissal under section 98 of the Employment Rights Act 1996, which provides as follows:

- (1) *In determining.....whether the dismissal of an employee is fair or unfair it is for the employer to show –*
 - (a) *The reason (or, if more than one, the principal reason) for the dismissal, and*
 - (b) *That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
- (2) *A reason falls within this subsection if it –*

(b) *Relates to the conduct of the employee.*

(3)

(4) *Where the employer has fulfilled the requirements of subsection (1), 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.*

84. The burden is on the Respondent to establish the reason for the dismissal. If that reason is proved, this being one related to conduct, the Tribunal has to consider the test in **BHS v Burchall [1978] IRLR 379**, which involves asking whether the Respondent had a genuine belief based on reasonable grounds that the Claimant had committed the conduct concerned, whether there was a reasonable investigation, including any procedural aspects, and finally whether dismissal was within the range of reasonable responses.

85. We reminded ourselves that the test throughout is that of reasonableness. It is not for the Tribunal to decide whether we would or would not have dismissed an employee in the particular circumstances; we have to ask whether the Respondent has acted in a way that no reasonable employer, acting reasonably, could have done.

86. The Tribunal was satisfied on the evidence of Mr Simpson and Mr Martin that the reason that the Respondent relies on was the genuine reason for the decision to dismiss. It is a reason related to conduct.

87. The Tribunal found that both had a genuine belief, based on reasonable grounds, that Mr Olarinde had committed the conduct that was in the evidence gathered by Mr Bastiani, and on which we have commented at some length.

88. Was there a reasonable investigation, and were there any procedural failings? One point that Mr Olarinde made was that he said that Mr Bastiani could and should have investigated further in relation to what happened at the meetings on 9 May and 7 June, saying that there would have been other witnesses available and that he could have enquired further in order to obtain their accounts of what had taken place.

89. Mr Bastiani accepted that he could have asked about other witnesses, but effectively said that he had to make a judgment as to whether the evidence that he had gathered was sufficient. We reminded ourselves here that the requirement is that of a reasonable investigation, not an exhaustive one and we find that the investigation that was undertaken on those points

was reasonable. Mr Bastiani interviewed the main actors in these events, and the evidence that he obtained was sufficient for Mr Simpson to reach a view about what had occurred.

90. The same is true of the point about whether there should have been further investigation of the events of 13 November, in particular allegation five, and whether or not other witnesses, for example Mr McCauley might have thrown further light on what took place. Again we reminded ourselves that the test is whether the investigation that was conducted went outside the range of reasonable investigations that could have been undertaken, and that the test is not one of there being an exhaustive or a perfect investigation. We find that it was within the range of reasonable investigations for Mr Bastiani and subsequently Mr Simpson to consider that there was sufficient evidence in order to reach a conclusion about what had happened.

91. There are three particular points that the Tribunals has considered about the individual allegations. The first is that, in relation to allegation one, we found that it might be said that the particular point about the meeting on 9 May had been closed, in the sense it had been taken up with Mr Olarinde and he had, after a while, delivered an apology to Mr Cooper. The Respondent's case was that this had become live again because Mr Cooper had made a further complaint about Mr Olarinde's approach to the project. It seemed to the Tribunal that rather than causing that to be a reason to bring back to life the original complaint, it might have been better to have referred to the later alleged repetition of the same sort of conduct with the original complaint being in the background.

92. The second point referred to allegation three and whether or not what happened at the meeting on 7 June when Mr Olarinde refused to produce the prioritised list could really be regarded as abusive behaviour towards Ms Penfold. There was no allegation of abusive words. The Tribunal considered that it might be said that blanking Ms Penfold, in other words not speaking to her, was abusive, although that seemed to stretch the term somewhat.

93. The third point related to allegation number four and is a point that the Tribunal has already mentioned. Mr Simpson in his witness statement said that he thought that missing the safety meeting amounted to minor misconduct. The Tribunal has wondered whether it was misconduct at all, for the reasons that we have given.

94. We considered whether these points, taken together, mean that the investigation fell outside of the reasonable range. We find that it did not. These are examples, perhaps, of the sort of situation where the Tribunal might say, no doubt with the benefit of hindsight, that we might have conducted things differently in that particular way. That is very different from saying that the investigation and the process that was carried out was an unreasonable one.

95. We then asked whether dismissal was within the range of reasonable responses. Here Mr Simpson, upheld by Mr Martin, considered the totality of

the behaviour that he found that Mr Olarinde had committed. Looking at the totality of that, the Tribunal finds that dismissal was within the range of reasonable responses. On the findings made by Mr Simpson there had been serious insubordination, and behaviour that Ms Penfold had justifiably found to be threatening towards her, particularly in the emails that of 13 November. Given those matters, dismissal was within the range of reasonable responses.

96. Finally, if the Tribunal is wrong about any of the procedural aspects that we have identified such that the dismissal should be regarded as unfair, we consider that inevitably the Claimant would nonetheless have been dismissed fairly on the basis of the remaining allegations. It follows that, if there were to be a finding of unfair dismissal, that that would be subject to a 100% deduction in respect of the principal in **Polkey**.

97. So, for these reasons, the Tribunal's judgment is that all of the complaints should be dismissed.

Employment Judge Glennie

Dated: 3 January 2020

Judgment and Reasons sent to the parties on:

3 January 2020

For the Tribunal Office