



EMPLOYMENT TRIBUNALS

Claimant: MR R RAWAL

Respondent: ROYAL MAIL GROUP LIMITED

Heard at: Watford

On: 15,16,17,18 October 2019 and
9 January 2020 in chambers

Before: Employment Judge Skehan
Mrs G Bhatt
Mr D Bean

Appearances

For the claimant: Mr Otchie, Counsel

For the respondent: Mr Hartley, Solicitor

RESERVED JUDGMENT

1. The principle reason for the claimant's dismissal was his trade union activities. The claimant's dismissal was unfair contrary to section 152 (2) of the Trade Union and Labour Relations (Consolidation) Act 1992 and Part X of the Employment Rights Act 1996; and
2. The claimant's claim for unlawful race discrimination contrary to the Equality Act 2010 is unsuccessful and dismissed.

REASONS

Preliminary Issue

1. At the commencement of the hearing the respondent made an application to exclude covert recordings and transcripts of private discussions between the respondent's management during adjournments within the respondent's internal disciplinary meetings where the claimant had left the room. This application was made on the basis of: (1) public policy, and (2) lateness of the disclosure. On the issue of public policy, we were referred to the two authorities of *Amwell View School Governors v Dogherty* [2007] IRLR 199 and *Punjab National Bank v Gosain* UKEAT/0303/14/SM. We considered this matter carefully and concluded that the circumstances of this case were more akin to

Punjab National Bank and could be distinguished from those in Dogherty. The difference between the current case and the Dogherty case is that the comments which are alleged to have been recorded, if said, fall well outside the area of legitimate consideration of the matters which fell to be considered by the decision-maker within the disciplinary process. For example, it is alleged to have been said during a break in the disciplinary hearing that the decision maker had a conversation with an unnamed third-party who ordered the decision-maker to dismiss the claimant. Unexplained comments were made relating to a threat of violence to the decision maker, and comments relating to trade union activities and the claimant's relationship with his line manager as set out below.

2. We are considering a claim that involved allegations of less favourable treatment on the grounds of race and automatically unfair dismissal on the grounds of trade union activities, alongside 'ordinary' unfair dismissal. The circumstances here are materially different from the circumstances in Dogherty. These alleged comments are not the sort of comments which fall within the 'ground rules' principle set out in Dogherty because they did not constitute the type of private deliberations which the parties would understand would take place in relation to the specific matters at issue at the disciplinary hearings. To the extent that we are wrong about that, given the nature of what is alleged to have been said, we can see no public policy reasons why these particular comments, even though made in private, should be protected and should provide an exception to the general rule that relevant evidence is admissible. In relation to delay: the respondent submitted that it was made aware of the existence of this transcript at 10:28pm on Saturday evening, and the email was only read by the respondent's representative on Monday morning. The claimant's representative stated that the claimant had made reference to the existence of these recordings and the content of the recording within his witness statement as exchanged between the parties on 31/05/2018 and therefore the respondent was on notice of the existence of the recordings since this time. The transcripts were not in existence previously due to a lack of funds on the claimant's part. The transcripts were disclosed as soon as they were available. The tribunal noted that this is not a case where the claimant has attempted to ambush the respondent, and the lateness of the disclosure is not accepted as a reason to exclude the evidence. The tribunal concluded that the transcripts of the discussions should be accepted as evidence.

The Claims

3. By claim form presented on 14/02/2018 the claimant claimed unfair dismissal, automatic unfair dismissal on the grounds of trade union membership and direct race discrimination. The respondent submitted its notice of appearance on 23/03/2018 and all claims were defended. On 03/12/2018 the parties with the assistance of EJ Smail set out the issues to be considered. We revisited

and agreed these issues with the parties at the commencement of the hearing and also revisited them during the course of the hearing. The issues were:

- 3.1. What was the reason the principal reason for dismissal? Was this trade union membership and activities in which case the dismissal was automatically unfair. Was the reason for dismissal misconduct? If misconduct, a) were there reasonable grounds for the belief of misconduct, b) had been a reasonable investigation, c) was a fair procedure followed, d) was the dismissal within the range of reasonable responses?
- 3.2. The claimant is of Indian ethnic origin. The claimant claims direct discrimination on the grounds of his ethnic origin. The less favourable treatment was the dismissal. In the following cases a white comparator who had urinated in public was not dismissed: Paul Claridge, Michael Maynard, Nick Williams, Adam Hicks and John Shayler

The Law

4. Both parties were represented. The statutory framework for the claims consisted of section 152 (2) of Trade Union and Labour Relations (Consolidation) Act 1992 that provides For purposes of Part X of the Employment Rights Act 1996 (the ERA) 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 had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time. The 'ordinary' unfair dismissal claim arises under section 98 of the ERA. In a claim of unfair dismissal, it is for the respondent to show a genuinely held reason for the dismissal and that it is a reason which is characterised by section 98(1) and (2) of the ERA as a potentially fair reason. Conduct is a potentially fair reason for dismissal. If the respondent shows such a reason, then the next question where the burden of proof is neutral, is whether the respondent acted reasonably or unreasonably in all the circumstances in treating the reason for dismissal as a sufficient reason for dismissing the claimant, the question having been resolved in accordance with the equity and substantive merits of the case. It is not for the Employment Tribunal to decide whether the respondent employer got it right or wrong. This is not a further stage in an appeal. In a case where the respondent shows the reason for the dismissal was conduct, it is appropriate to have regard to the criteria described in the well-known case of Burchell v BHS [1978] IRLR 379. The factors to be taken into account are firstly whether the respondent had reasonable grounds for its finding that the claimant was guilty of the alleged conduct; secondly whether the respondent carried out such an investigation as was reasonable in the circumstances; thirdly whether the respondent adopted a fair procedure in relation to the dismissal and finally whether the sanction of dismissal was a sanction which was appropriate, proportionate and, in a word, fair. In relation to each of these factors, it is important to remember at all times that the test to be applied is the test of reasonable response.

5. Section 13 of the Equality Act 2010 sets out the definition of direct discrimination. 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. Section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. The burden of proof provisions in the Equality Act 2010 is set out in section 136(2) and (3) and states: "(2) If there are facts from which the court [or tribunal] 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."

The Facts

6. We heard evidence from the claimant, Mr Khalifah, Mr Warner, Mr Hicks, Mr Williams and Mr Kennedy on behalf of the claimant. We heard evidence from Ms Dunkley, Mr Maddy and Mr Brown on behalf of the respondent. All witnesses gave evidence under oath or affirmation and all were cross-examined. We were provided with witness statements from Mr Shah and Mr Yirenyi, who did not attend tribunal. We explained to the parties that less weight could be given to those statements as the witnesses were not present at the hearing to face cross-examination.
7. As is not unusual in these cases, the parties have referred to in evidence of a wider range of issues that we deal with in our findings. Where we fail to deal with any issue raised by the party or deal with it in the detail of which we heard, it is not an oversight or an omission but a reflection of the relevance of that particular piece of evidence. We made findings on the balance of probability, taking into account the witness evidence in considering it alongside the available documentary evidence.
8. The claimant was employed by the respondent for over 17 years since 02/05/2000 as a delivery/collection driver/postman. Prior to the incident giving rise to his dismissal he had a clean disciplinary record. The claimant enjoyed his job.
9. The claimant says within his witness statement that during his employment he was a trade union representative, being an assistant area Health & Safety workplace representative. His duties required checking the welfare and well-being of employees and assisting them in dealing with all their issues including Health & Safety issues and employment issues. The claimant said that he had to attend meetings with the respondent's managers to discuss safety issues in various offices around the Hertfordshire area. He was trained in undertaking risk assessments of workplace areas in the respondent's work environment premises. He also attended workplace accidents/incidents and scenes following an accident to take pictures and identify potential hazards to ensure that the required information was accurately recorded in the accident book. This

would sometimes involve assessing whether the Health & Safety rules and regulations had been followed or adhered to by the respondent and/or their employees. The claimant says that he is a qualified trade union (learning) representative, which requires him to organise learning and training of the employees/members of the union. This also requires the claimant to be involved in education of the employees of the respondent and ensure that the employees received training they need. The claimant was a first aider with the respondent. This required him to travel round the respondent offices in the area to replenish first-aid boxes and check that the first aid signs were placed in correct areas and to ensure that current first aiders had all of the required and updated qualifications. The claimant assessed fire escape routes to ensure that they were compliant with the regulations. The claimant says that he attended several courses relating to his roles over the last 10 years of his employment prior to his dismissal. The claimant said that he was involved on behalf of the trade union in the planning of drivers' collection routes and the testing of the routes to prove the respondent's efficiency in respect of delivering service to the public and his trade union activities brought him into conflict with his direct line manager Simon Maddy. The claimant told us that Mr Maddy did not like him questioning the respondent's practices within the respondent.

10. There was considerable confusion and disagreement between the parties in respect of the claimant's precise trade union involvement from February 2017. As the tribunal hearing progressed, both parties produced further documentary evidence relating to the claimant's trade union involvement. It was accepted by the respondent that the claimant was up until his dismissal, the CWU 'branch editor'. This was a role that concentrated on the communication of union information, education and training to members. It was also accepted by the respondent that the claimant was deputy area Safety rep for the Northern Home Counties CWU branch until around 22/02/2017. The respondent says that at some point following this date, but before the commencement of the disciplinary issues in question, an election was held in respect of this post and Mr Trevor Flowers was elected as the deputy area safety rep for the area. The claimant conceded that Mr Flowers was elected as the deputy area safety rep for the area was told us that he believed that he remained a workplace local Health & Safety rep within Watford up to the point of his dismissal. In support of this contention he relied upon:

10.1. An email from Stephen Collins to Rick Jewell (CWU branch chair) dated 20 July 2017 stating: '... I overheard a heated debate between [the claimant] and his line manager Simon Maddy yesterday and was asked by Simon if [the claimant] was an elected H & S rep. I stated that no he wasn't the only position he holds is Branch Editor but he said he was and that we had to ring you or Tom to confirm this.....' The email response from Mr Jewell to Mr Stephen Collins of 20/07/2017 states, '[the claimant] is elected deputy workplace safety rep for Watford MPU'

- 10.2. Email correspondence between the claimant and Mr Maddy dated July 2017 relating to leave for union meetings.
- 10.3. Email correspondence between Mr Dewar and Mr Maddy relating to the claimant's attendance at union meetings in July 2017.
11. The evidence we heard in relation to whether or not the claimant was a Health & Safety representative at the time of the disciplinary process was confused. We heard evidence from Mr Lee Warner, who is a CWU representative and has worked for the respondent for over 30 years. Mr Warner told us that he believed that the claimant was the branch editor for the CWU and there was a debate as to whether or not he was a CWU Safety rep. Rick Jewell, the acting branch secretary has said that he was. Others have said that he was not.
12. We were referred to long email correspondence between Mr Kennedy and Mr Jewell dated 21/07/2017 at 1739. This email questions why other reps would not want the claimant within a CWU position and suggests that the claimant's race may be a factor. It states '.....it is about time that the CWU recognised out and out racism in Watford MP[The claimant] has been victimised, verbally abused and discriminated against and it needs to stop and stop now....' We conclude on the balance of probability that there was considerable change occurring within the various areas of the CWU, considerable infighting within the CWU and the claimant was, for reasons that fall outside the issues with which we are concerned, unpopular with some of his CWU colleagues. We conclude on the balance of probability that the claimant was an elected Health & Safety representative of the CWU before February 2017 but not following that time. He retained an interest, a formal position of 'Branch Editor' and had a general interest and involvement in CWU Health & Safety matters.
13. The claimant's main duty was a delivery/collection driver and post man for the respondent. He was required to drive to and from postboxes to post offices and also to undertake customer firms/company collections. He had undertaken this role and duties for over 17 years.
14. The disciplinary allegations raised by the respondent arise from a customer complaint received by the respondent and logged on the respondent's internal 'CLEO'. This complaint was created on 13/08/2017, relating to an event that occurred on 10/07/2017. The description reads
'improper behaviour – Postman urinating in a layby member of the public has dashcam video can't make out the registration on the van. Pulled into layby. We were really disgusted [by] his actions. He had Morrisons shop in 200m where have toilets so he could have gone there if urgent. Also the Royal Mail delivery center is only half a mile from where he was.'
15. The complaint contains a youtube link, set to be a link to the dash cam video. There was some confusion during the course of the tribunal hearing as to how

the respondent obtained the video as the claimant subsequently noted that the link provided did not work. The video was introduced as evidence to the tribunal and viewed by the employment tribunal. The video is approximately one minute long and consists of dash cam footage showing a dual carriageway. The complainant's car appears to be driving at normal speed on a dual carriageway. A Royal Mail van can be seen pulled up in a layby at the side of the dual carriageway. As the car is approaching, a person can be seen standing beside the van, in the shadow of the van. The commentary to the video shows that the car occupants clearly believe the person to be urinating. The car passes the van quickly. It is not possible to identify the individual from the video as only the person's back can be seen. There is an audio commentary to the video, where voices can be heard commenting that the behaviour is disgusting. The claimant was suspended from work on 14/08/2017. The claimant remained suspended until the termination of his employment.

16. The respondent has a practice of not dating its correspondence with employees as a matter of course. Therefore, there was an element of guesswork involved during the hearing in identifying the date of some correspondence.
17. The claimant was invited to a fact-finding meeting to be held on 18/08/2017 by Mr Maddy, the claimant's line manager. The claimant told us that it was normal for any complaint to be dealt with by his line manager. The initial fact-finding meeting took place on 18/08/2017. In attendance was the claimant, Mr Maddy, Mr Paul Grace being a CWU representative and Mr Lewis Marshall as notetaker. There was a dispute between the parties in relation to what was said at this meeting. The respondent produced an initial set of notes following the meeting and sent them to the claimant on 19/08/2017. The claimant reviewed the notes, amended them and returned amended notes to the respondent by email dated 22/08/2017. Both sets of notes were contained within the bundle. The claimant's amended notes retract a recorded admission said to be made by the claimant during the initial meeting. The claimant says that when he was initially shown the video in the factfinding meeting, it was not clear in the video whether the person shown was him or even whether the person in the video was urinating. The claimant recalls discussions as to whether or not the person in the video with him whether or not the person was urinating or being sick. The claimant said that on further viewing the video he admitted that it could have been him in the video but as the incident occurred 6 weeks before and on a layby that the claimant drives past 10 times a day he felt that he could not be certain at that time whether it was him urinating in the layby in the video. This was because they were probably about 5 to 10 other Asian drivers/collection drivers at that time in Watford. The claimant says that he did not accuse Mr Maddy or the notetaker of falsifying notes. He received the notes and was asked to comment upon them. He reviewed the notes and amended them in line with his own notes and recollection of what was said and sent them back to Mr Maddy. The claimant strenuously denied that he had made any allegation

against Mr Maddy of rewriting up the handwritten notes or fabricating them. The claimant said that the notes he was provided with by the respondent did not in his view record what was said in the meeting accurately or reflect what he said and he amended them.

18. Following receipt of the amended initial fact-finding meeting notes, Mr Maddy wrote to the claimant stating ‘ after looking at the copies returned there are discrepancies between what was said in the interview and the amendments you have put on your returned notes. Therefore, I would like to arrange a meeting to go over the amendments on the notes you returned. This meeting was scheduled for 25/08/2017. During this meeting the claimant was accompanied by Mr Lee Warner, union rep. Ms Lordan was in attendance as a notetaker. The claimant contends that Mr Maddy had already decided that he would be dismissed and his fact-finding exercise was simply trying to find ways reasons to justify that dismissal. Mr Maddy was not asking the claimant questions in order to ascertain the facts and was not seeking evidence of mitigating factors. Mr Maddy was only interested in aggravating factors. Initially, the claimant was not sure that the person in the video was definitely him.

19. Mr Maddy wrote to the claimant by an undated letter stating,

‘following our fact-finding meeting on 18/08/2017 and [25/08/2017] concerning unacceptable external behaviour/urinating in a public place. Please note this case has now been referred to Vicky Dunkley for consideration of any further action. I consider the potential penalty to be outside my level of authority.’

20. The claimant had previously dealt with Ms Dunkley personally for approximately 3 years. They have been involved in Health & Safety meetings and collections together for 10 years. The claimant had no previous complaints relating to Ms Dunkley and they worked at different sites.

21. Mr Maddy told us that he was previously an OPG, for 10 years and thereafter a manager for 15 years. He did not see eye to eye with the claimant but had always remained professional. There was a lot of politics going on within the workplace. There have been arguments about Health & Safety matters, constructive conversations about Health & Safety matters and disagreements. Mr Maddy told us that the union and the manager sometimes don't see eye to eye. He thought it best for the second line manager to deal with the matter and he informed the claimant of his decision. Mr Maddy told this was the first time that he heard of someone urinating in public. He could not recall hearing about any previous incident or issue. Mr Maddy said that the case of JJ Collins mentioned by the claimant was different as Mr Collin's had used his girlfriend's flat to use the facilities. Mr Maddy said that he did not know about Mr Maynard's case.

22. Ms Dunkley wrote to the claimant on 31/08/2017 confirming receipt of his case and notifying the claimant of a delay due to her annual leave. Mr Maddy did not explain how his correspondence with the complainant following 31/08/2017 came about. He says that the complainant had his email address. Mr Maddy contacted the complainant (date unknown) to ask him to give him a statement about the initial incident. He did not keep any correspondence other than that disclosed within the bundle. Mr Maddy told us that he received this email from the complainant on 13/09/2017 at 20:38. It states:

Hi Simon,

On 10th of July at 19:01, I was driving towards Morrisons.

On our way to the shop, we have seen a Royal Mail post man urinating on the side of the road.

We were completely shocked and we could not believe our eyes. It was really upsetting seeing someone doing that on the street, especially someone from a big, famous and professional company as Royal Mail. That's a very busy street where even children can see him. As I mentioned before, he could have used Morrisons toilets which are just around 300 m down the road or Royal Mail delivery depot which is half mile away.

We can confirm we are still distressed by this disturbing behaviour and we really hope you will do something about it. I still can't believe that we have seen that. Royal Mail employees should know that they are the face of the company and that their action can affect the reputation of the company. I don't want the post man to be sacked but he should definitely have some serious talk about what happened that day and to make sure it won't happen again, not just with him but with any other postman.

23. We were referred to further emails from the complainant to Mr Maddy dated 17/09/2017 at 19:21. This has the subject 'personal data protection breach ' and states

Hi

I forgot to mention that this is the third time for someone to ring the bell 10 times on a Sunday on that address. Judging by the message that he left for sure he has previously been at that address and obviously he is trying to harass me and to intimidate me. It looks like is someone from Royal Mail as he has all my details and you should make sure that this doesn't happen again. This is causing me a lot of distress, I feel threatened and I don't feel safe anymore. I am already suffering from severe anxiety and doing CBT and this is making it worse. I'm also contacting ICO tomorrow to discuss data protection breaches. Can you please tell me your formal complaint procedure as I want to file a formal complaint. I look forward to hearing from you

kind regards

24. Within the bundle there is the heading of an email with the same subject line 'personal data protection breach' dated 17/09/2019 timed 17:42. The contents of this email has not been reproduced. The employment tribunal enquired as to the whereabouts of any other email correspondence between Mr Maddy and the complainant. By way of explanation Mr Maddy informed the employment tribunal that he had mistakenly failed to redact the complainant's personal details including his address from the complaint form provided to the claimant. Thereafter the second or 'harassment' complaint, relating to a visit to the complainant's address was made. The complainant was angry that his details had been released. Mr Maddy concentrated on apologising to the complainant and preventing him from making any complaint to the ICO or the police in respect of data breaches. Mr Maddy said that he did not retain any other exchanges of emails he had with the complainant. The respondent's representative told the tribunal that the respondent had checked its systems for further emails, but none were available. Ms Dunkley, said during the course of her evidence that where an individual user had deleted emails these were thereafter permanently deleted from the system after a set period of time.

25. Mr Maddy told us that he did not investigate the allegation of harassment. He overlooked it as there was a lot going on at the time. Mr Maddy prepared a statement relating to the harassment complaint. During the course of hearing Mr Maddy told us that the date on the statement is incorrect it should read 17/09/2017 rather than 17/08/2017. This statement states:

On Sunday [17/09/2017] I received an email from [redacted] complaining that the Royal Mail employee that he complained about had repeatedly visited his premises and had asked him to change his statement he also asked how the Royal Mail employee got his address.

The next morning, I called [redacted] regarding his email and he was very upset and worried, he stated that the Royal Mail employee had called round to his premises repeatedly buzzing on the intercom. After about the 11th buzz he looked out of his window (he lives on the top floor of a three-storey block of flats) to see who it was and the Royal Mail employee that he complained about was at the entrance to the flats. The employee started to shout up to him asking him to change his statement, Mr [redacted] told me that he felt threatened and intimidated and asked how he got his address, he carried on stating that he does not want the Royal Mail employee coming round to his premises again and if he does he will call the police. He told me that he suffers from anxiety and what has happened had really stressed him out.

I told Mr [redacted] that I would get somebody from the union to contact the Royal Mail employee and tell him that he must stop visiting him. I apologised to Mr [redacted] and I told him that if he had any more problems that he should contact me straight away

26. Mr Maddy denies that the claimant's race had played any part in his treatment. Mr Maddy's right-hand man was of Asian origin and would not have been promoted to this position had Mr Maddy had any issue with his race. Mr Maddy did not believe the allegations that Mr Kennedy had made relating to general problems of racism within the business.

27. Ms Dunkley invited the claimant to a formal conduct meeting by an undated letter. The meeting scheduled to take place on 27/09/2017. The letter inter-alia stated:

Following your fact-finding meetings with Simon Maddy on 18/08/2018 and 25/08/2018 concerning urinating in a public place/unacceptable external behaviour. You are now being invited to a formal conduct meeting to discuss the alleged incident of urinating on the side of the road on 10/07/2018 at 19:01 in the layby at Ascot Road just after the roundabout with the Premier Inn near to Morrisons at Watford. Please attend a formal conduct meeting to consider the conduct notifications listed below:

urinating in a public place

.....

you should be aware that:

I will take into consideration your conduct record which is currently clear

this formal notification(s) is being considered as misconduct. If the conduct notification is upheld, one outcome could be your dismissal with notice.

28. The conduct hearing was held on 27/09/2017. The matter was handled by Ms Dunkley and Mr Pearce was in attendance as a notetaker. The claimant was accompanied by Mr Warner as his union representative. At the beginning of the meeting Ms Dunkley set out the allegation is contained within the correspondence referred to above. Ms Dunkley asked the claimant whether it was him in the video. The claimant responded that it was so long ago he did not know/could not remember if it was him. He says that if it was him, he was being sick. Ms Dunkley says that it does not appear that the claimant is being sick. It appears as if the claimant is urinating. Later in the interview the claimant said that he is not saying that he did not urinate as he cannot remember.

29. There is a discussion about the notes taken at the previous fact-finding meetings conducted by Mr Maddy. Ms Dunkley says that the reason for this interview was to go through the previous notes. Why the claimant changed his mind. The discussion returned to the CCTV. Ms Dunkley said the man in the video looks very similar to the claimant and asked the claimant if it is him. The claimant responded in the positive but says that he could not remember if he

was urinating he could not remember that far back and he had been off ill. The claimant said that had he needed to go he would have pulled in at Morrisons. The claimant reiterated that he had been driving a long time for the Royal Mail and as a Health & Safety rep he would have stopped the vehicle and been sick. The claimant noted that the complaint took 40 days to come through and 2 months to get to that interview.

30. Ms Dunkley told the claimant that she also wished to discuss a further complaint. She said that the person who made the complaint had been intimidated as someone went to the complainant's house – he was furious someone had his address and was intimidating him. Ms Dunkley referred to Simon Maddy's statement set out above. This had not been provided to the claimant previously and a break was provided for the claimant to consider it. The hearing resumed and the claimant was asked whether he or anyone else had been round to the complainant's address. The claimant explained that he runs 3 football teams on a Sunday and denied that he had visited the complainant's address. Ms Dunkley notes 'just checking the facts..... As part of the investigation I wanted to cover this off I'm happy that we've covered this off..... This is a fact finding extending part of this case.'

31. It can be seen from the notes that at this point, while the claimant had been shown the short video, he had not been provided with a copy of the video. Ms Dunkley told the tribunal, and it is accepted on the balance of probabilities, that she provided the video on a stick to the claimant on 27/09/2017 following his meeting. The claimant and Mr Warner told Ms Dunkley of a strained/poor relationship between the claimant and Mr Maddy. The claimant had worked with Mr Maddy for 6 years. Mr Warner states that the claimant raises issues as the union rep, Mr Maddy thought he knew more than the claimant did not want to comply with the claimant's requests. Mr Warner said that Mr Maddy was out to get the claimant. The claimant noted that while it was said that the complainant posted the video on YouTube, no one could find it. The incident was on a memory stick.

32. Ms Dunkley had a meeting with Mr Marshall (who acted as notetaker during the initial fact-finding meeting) on 03/10/2017. Mr Marshall was asked what happened when [Mr Maddy] asked whether [the claimant] was the person in the video. Mr Marshall responded that [Mr Maddy] showed [the claimant and his union representative] the video and asked [the claimant] if this was him, initially he said he wasn't sure that it was him, this was when they took a break. When they return to the interview, he said that it was him urinating by the side of the road, [the claimant] answered the questions as [Mr Maddy] asked them, never challenged back at any point that it was not him urinating and gave mitigation as to why he had to urinate in layby. He said it was a quiet lay by and he could not wait. Mr Marshall said that it is a fabrication [on the claimant's part] where

he says in his notes that he didn't urinate and said he would have gone to the toilet elsewhere.

33. Mr Maddy was invited to a meeting with Ms Dunkley on 03/10/2017. Mr Maddy denied making any amendments to the notes of the meeting. He says that the complaint was made by CLEO and then by email. No information is provided or requested relating to any other contact Mr Maddy may have had with the complainant. Ms Dunkley also interviewed Mr Grace, the claimant's union representative, on 06/10/2018. The notes record Mr Grace as saying 'yes after watching the video, we took a break and I said that it was clearly him in the video and to go through the mitigation, I feel the notes are a true reflection I wouldn't change them much. Mr Grace was not shown the claimant's amended notes.
34. On 10/10/2017 the claimant wrote to the respondent raising issues in relation to confidentiality and also confirming that others who have been subject to alleged urinating in public have been treated differently to him. The claimant provided the following names: Martin Wragg, Mark Holberry, Riz Shah, James fish, Paul Claridge, Mohamed Hanif, Michael Maynard, Nick Williams, Adam Hicks, Kandi and Simon Rackley
35. By letter dated 17/10/2017 Ms Dunkley wrote to the claimant forwarding details of new evidence. A meeting was scheduled for Monday, 23/10/2017 and rearranged for Thursday, 26/10/2017. This meeting is said to discuss the discrepancy within the original fact-finding notes. During the course of the meeting the claimant questions why Mr Grace was not shown both sets of notes when asked to comment. Ms Dunkley said that he was not shown the notes for confidentiality reasons.
36. The claimant complains that during the initial fact-finding Mr Maddy had assumed that he was guilty. Ms Dunkley confirms that she will consider both conscious and unconscious bias on Mr Maddy's part. Mr Warner questions whether the customer's harassment complaint, that he was approached by someone, was investigated by Mr Maddy. Ms Dunkley said that she was not, 'bringing this up as a charge'. She commented, 'I do understand your concerns around this'. It was noted that Ms Dunkley had not added this matter as a separate allegation in writing to the disciplinary charge.
37. Ms Dunkley said that she did not consider the claimant's colleagues cases as they were confidential and had no bearing on the claimant's matter. The claimant offered to give a written and verbal apologies to the customer and sought to produce statements from Mr Aidan Wicks and Nick Williams about previous alleged cases. Ms Dunkley refused to accept the statements on the basis that they were not part of the claimant's case and confidential to the

individuals. During this hearing the claimant explained to Ms Dunkley that he gets his words 'stuck'.

38. Ms Dunkley asked the claimant, 'did you urinate?' The claimant responded, 'I passed the spot four times a day in the round and this happened 5 weeks before I was called then I can't say for sure. Mr Warner said that the respondent should take the claimant 17 years of service the fact his record as clear of conduct issues and the length of time this case is taken to get to this stage into account. The claimant offered to apologise, he said he was drinking too much water. His doctor had advised him to drink less. He was filling up 2 litre bottle every trip. He was on the last run setting off at 17:30 and not finishing up until 19:30. The claimant highlighted that the layby in question was on a dual carriageway and had a 7 foot hedge running along it.

39. We note the following excerpt from the transcript of the meeting on Thursday, 26/10/2017, where the claimant and his representative was absent from the room,:

Mr Webb: I'm deliberately making my notes as illegible as possible.

A call is taken by Mr Webb from a gentleman identified during the hearing as Mr Mick Barry

Mr Webb: I don't know how long this is going to take cause he's rabbiting on like 1 million miles an hour this bloke

Mr B: just sack him

Mr Webb: are you listening to this Vic? Because the team managers telling you just sack him

Ms Dunkley: laughed

Mr B: just sack him. I can't be bothered with it. It's boring, all this stuff. Just tell him, look, he done it. We know he done it. Just sack him. Do the honourable thing and go.... That's what you need to do

Mr B: when Alan Piston and whispered 'He's a tosser, he'll try and hit you", then we just sack him because (unclear)... It's an old trick yeah..... Just say "you're a tosser and you ain't fucking (unclear) you paedo or something..... And then sack him and say I didn't say a word to him I just asked him how he was feeling and he hit me for no reason.

.....

Mr Webb: to be fair, right, he probably has got a good grievance case.... grounds for a good grievance case against Simon

Ms Dunkley: it's not going to make a difference to....

Mr Webb: Unfortunately for him, he's already going to be sacked before he can bring the grievance case, yeah? Now, he can still bring the grievance case as a sacked employee but he's not going to get very far.....

Ms Dunkley: When I bring him in for the, eh, decision, do you mind being here? As long as, I won't do it on a Tuesday. It's just that, em, if he's got a very large knife in his bag or something (unclear) (laughed) which...

Mr Webb: I don't think he's that sort. I think he's quite agitated.....

Ms Dunkley: Simon is being perfectly honest about it in his statement. He's not denied that everything is all hunky-dory. I mean, if Simon had turned round and said you know what, we have a perfect working relationship..... so the fact that he said you know, sometimes he's a bit up and down, he runs a bit hot and cold, em, he's always wanted - you can hear it - he wants to get involved in collections. He's not even a CWU rep any more.. Well he is, but is not on the collections. He shouldn't be involved.

Mr Webb: but this is not under a chapter, A section 14

Ms Dunkley: no, he's just... He's only interested in.... Don't get me wrong he's probably a bane in Simon's life

Mr Webb: he's a - he's probably an awkward (unclear)

Ms Dunkley: he is very, I'm sure of it

Mr Webb: he's somebody that he.... He probably thinks, God you're an annoying twat, yeah? right? It's a difficult one because you just.... you're going to have to write fucking chapter and verse to basically just put, to cross the T, to.....

Ms Dunkley: when I said to him I've shut it... I have tried to shut him down a couple of times by saying... When he tried to give me those things, "I don't want them"... Because they're not relevant to my case. There are only relevant to somebody else's.

.....

Ms Dunkley:That's what I said. (Unclear) one way of getting it across to (unclear). If they were prepared to let him go back and work in that unit, 1 because I couldn't let him go out in the (unclear)..... And have the risk of him doing it again..... Because at the moment he's provided no good mitigation as to why he was doing it in the first place and 2 you could imagine him going back in and all the questions and answers... And what are you saying about, em Simon and about how he dealt with this kind of thing and everything else? You couldn't have him working in the same office. I mean I didn't put it in chapter and verse but that's what it.....

Mr Webb: the fact of the matter is, did he do it? Yes. Is it gross misconduct?

Ms Dunkley: yes

Mr Webb: if it's gross misconduct then.....

.....

Mr Webb: singing- whatcha gonna do, Diddley do do do what you think he's going tell him while he's out having a fag or whatever they're doing?

Ms Dunkley: well I don't know. To be honest?

Mr Webb: does he still give him some sort of hope, like, actually you're going to end up with, like, 2 years serious and you're back at work? Have you told him what the likely outcome is going to be that he'll get?

Ms Dunkley: I think he knows. It tells you in the letter that there's always a chance of it being (unclear) that's what it is.....

40. The claimant told the tribunal that he decided to record the meetings with the respondent because of the issues raised about the notes of the very first meeting where he did not consider that the respondent had accurately recorded what he had said.
41. Ms Dunkley said under cross examination that she did not consider the allegation of harassment of the complainant made against the claimant to be false or made up. This was potentially a criminal offence. She told us however that the claimant was charged with urinating in public only. She was not passed the allegation relating to harassment as a disciplinary offence.
42. During course of cross examination Ms Dunkley was asked about her conversation with Mr Webb and Mr Barry set out within the transcript:
- 42.1. Ms Dunkley told us that Mr Barry was senior to her within the organisation. Although he said 'just sack him' during the conversation Ms Dunkley took this as jest and paid no attention to it.
- 42.2. Ms Dunkley denied that she had clearly made up her mind to dismiss the claimant by the time of the adjournment. Ms Dunkley said that her decision was made following the hearing prior to the production of the dismissal correspondence.
- 42.3. Ms Dunkley denied that the reference to a knife or other references made were made with reference to the claimant's race or that any of the comments related to trade union activities.
43. By letter dated 02/11/2017 Ms Dunkley informed the claimant that she had reached her decision and the claimant was invited to a meeting scheduled for 07/11/2017. By undated letter Ms Dunkley confirmed the claimant's dismissal without notice. The charge is stated to be 'urinating in a public place'. Ms Dunkley encloses a report giving details of how the decision was made. This conduct decision includes inter alia:
- 43.1. Ms Dunkley said that she has taken into account the mitigation about the claimant's retraction of the statement that he was not urinating because he felt he would be treated unfairly and there was a conspiracy. Ms Dunkley took into account the claimant's worries in relation to his health as to possible cancer, diabetes prostate and thyroid and that he was having tests which subsequently came back clear and that he was depressed and that

because of the hot weather he was drinking a lot of water. Ms Dunkley concluded that the claimant did not offer any real mitigation of why he could not make it back to the office or to the nearby supermarket.

43.2. Ms Dunkley noted that the claimant had admitted urinating on the side of the road in a public place. She notes this could have been concluded earlier had the claimant not changed his statement and concludes that she had lost faith in the claimant.

43.3. In summary Ms Dunkley said that while she did consider a lesser penalty, she felt the seriousness of the charge of urinating in public and the breakdown in trust especially around the contradictions in his interviews and false claims that Simon had changed the notes brings his honesty into question and is there below the expected standard from Royal Mail employees.

43.4. Ms Dunkley produced a table showing evidence for and evidence against the disciplinary outcome. The last entry in this table reads, under the evidence 'for' column, 'alleged threatening behaviour towards complainant' and under the evidence against column, 'was football coaching at the time of the alleged threatening behaviour.'

43.5. Within the conduct decision document Ms Dunkley notes, 'the entire case could have been concluded earlier if the claimant had not changed his statement from the first fact-finding interview and thereby delaying the outcome of the case, he had also implied that his line manager had falsified the notes in the first fact-finding meeting, when it was him that falsified the returning notes to make out what was discussed was a fabrication to get him to trouble, he made the claim in bad faith and therefore I have lost faith in himI feel the seriousness of the charge of urinating in a public place and the breakdown in trust especially around the contradictions in his interviews and false claims that Simon was the one to change the notes brings his honesty into question for which he has fallen below the standard of Royal Mail employees.'

44. Ms Dunkley told us during the course of cross examination that she did not consider any comparators raised by the claimant as she did not believe that these had any bearing on her decision. In her opinion, under no circumstances was acceptable for any employee to urinate in public and she would expect all those who were found to have urinated in public to have been disciplined in a similar way to the claimant and dismissed. Ms Dunkley told us that the harassment allegation played no part in her decision to dismiss the claimant.

45. The claimant appealed against the decision to summarily terminate his employment and his appeal was dealt with by Mr Brown. An appeal hearing was held on 22/11/2017. The claimant was accompanied by Mr Jennings as a union representative. The notes of the hearing are contained within the bundle. Mr Brown deals with the appeal as a rehearing of the case. Mr Jennings says that they are appealing against the severity of the award.

46. By letter dated 02/01/2018 Mr Brown confirmed that the claimant's appeal was unsuccessful. His letter attaches his appeal decision document. It notes the conduct notification as 'urinating in a public place'. Within the deliberations section Mr Brown says that the video footage shows the claimant standing towards the rear of his van by the layby, a couple of feet away from its towards the hedgerow. In the appeal hearing Mr Jennings stated that if the claimant had stepped a couple of feet to his right he would not have been observed. Mr Jennings said this reflected the urgency the claimant was experiencing at that time. Mr Brown said that the claimant was in clear view of the traffic while urinating and while Mr Jennings makes a potential point it must also be seen as an indicator of the lack of care taken by the claimant, that the situation may have been very different had he made an effort to take 2 steps. While the customer cannot see the claimant urinating it is clear that the customer had no doubts that the claimant was urinating.
47. During the appeal Mr Jennings comments on the customer harassment complaint. It is stated that the statement by Mr Maddy in respect of a telephone conversation with the complainant had not been disclosed prior to his interview with Ms Dunkley. Mr Brown considers that it is not a fundamental piece of evidence in this case as the claimant's role in approaching the customer is not the subject of a notification. In any event, the claimant had now seen the statement as part of the appeal process and had the opportunity to comment about it. Mr Brown asked the claimant if he visited the complainant at his home address. The claimant replied that he did not.
48. Mr Brown considered comparators suggested by the claimant He states: the detail provided shows that the customer saw a colleague go into some bushes and assumed that he was doing this in order to go to the toilet. It is clear that this case is not the same as [the claimant's]. Mr Brown also distinguished the case of Mr JJ Collins. Mr Brown noted the other names provided by the claimant and looked on the Royal mail's personnel systems for individuals and any conduct records that might be associated with them. He could find no trace of 2 individuals named and there was no trace of disciplinary actions in relation to the other 2 names. Mr Brown notes that in January/February 2017, a pocket guide of the standards were sent to the home address of all Royal Mail employees. Prior to this the similar posting took place in November 2013. The guide of business standards' as referred to above is clear that all colleagues must present a credible image to the public and that behaviour which damages Royal mail's reputation is unacceptable. Mr Brown concludes, 'I have given careful consideration to the options available to the claimant on the day in question and it is clear that options other than urinating near his van, in a layby, in view of passing traffic were available. I conclude that he did not make sufficient attempts to avail himself of these. I have given careful consideration to the penalty in this case or penalties within the conduct agreement available

to me. I do not accept that the claimant had no choice to urinate where he did and the reaction of the customer clearly demonstrated the inappropriate nature of his act. Given this, I consider the original penalty appropriate. During cross examination Mr Brown told us that a key difference between the claimant's case and other cases of his colleagues was that the claimant did not make any attempt to hide. In previous cases the complainant had assumed that the individuals were urinating whereas the claimant could be seen.

49. The claimant told us when initially confronted with the video it was not apparent that the individual was him and there was a considerable delay in bringing it to his attention. He felt that Mr Maddy was out to get him and was searching for evidence to support his dismissal. The claimant told us during cross examination that he had some initial discussions with Mr Grace and they could not be sure that the person in the video was the claimant. The video was approximately 45 seconds and there were a lot of Asian drivers in Watford. In normal circumstances if the claimant needed to urinate he would go to the Morrisons supermarket. The claimant initially was not sure about the person in the video was him but agreed after several meetings that it was him. The claimant was on his final collection duties collecting mail. He had collected mail from 8 pillar boxes and then drove to the respondent's office at Hemel Hempstead to unload the mail that he had collected. After unloading the post, he started driving back to the respondent's offices at Watford from Hemel Hempstead. After having driven for about 25 minutes and while on a dual carriageway the claimant urgently felt the need to urinate. He started feeling the urine coming out and began to panic. His legs were wobbling. He knew there was no way he could get to a nearby facility in time or the respondent's offices. To avoid urinating on himself and/or in the respondent's van, the claimant had to quickly find somewhere discreet on the dual carriageway to urinate. The claimant said that if he had not stopped then he would have made a mess in the work van. He pulled over at the dual carriageway at a layby which had no public footpath. The claimant felt the layby was discreet. He stopped the van in the layby and parked behind a green duster sweeper vehicle that had already been parked there. He then quickly exited the van and went behind his van and hid himself as close to the van and bushes as possible. He tried to tuck himself in. He did not believe that he could be seen from the motorway. He was leaking and embarrassed. The claimant urinated and it took about 30 seconds. There was nobody in the vicinity the claimant did not believe that anybody could see him. The claimant says that he was in a desperate state and could not have driven to the nearby Morrisons supermarket, that he estimated would take 10 minutes, or to the respondent's offices to use the toilet. Prior to the incident he had noticed issues with his bladder which caused a sudden urge to urinate and he was concerned about possible health problems such as diabetes, prostate problems or cancer. His mother had passed away with diabetes. Medical records were produced in the bundle showing various

medical tests performed. The claimant has since had a clean bill of health. This was causing him stress and anxiety at the time.

50. We were referred to the Royal Mail Group's conduct policy. Within the guiding principles of the conduct policy it is noted inter alia that:

50.1. the business will make employees aware of the expected standards of conduct and behaviour

50.2. employees should make every effort to meet the business standards of conduct and behaviour

50.3. resolving conduct issues informally and with support and guidance will be considered when appropriate to encourage employees to improve behaviour

50.4. conduct and behaviour should be managed by providing constructive feedback. All conversations will be consistent with the general requirement that we all treat each other with dignity and respect. At every stage in the procedure the employee will be advised of the full nature of the allegation and the action that might be taken against them and will be given the opportunity to state their case before any decision is made.

50.5. The employee will be made fully aware of the evidence. Copies of all documents will be provided in a timely manner in line with the procedure.

50.6. No conduct action will be taken against the employee until the case has been fully investigated.

50.7. No employee will be dismissed for a first breach of conduct, except in the case of gross misconduct, when the penalty will normally be dismissal without notice or payment in lieu of notice

50.8. notification of action in line with the conduct policy will only be made when sufficient facts of the case of been determined.

.....

50.9. When progressing a case and completely new information regarding a different incident comes to light, then a further conduct notification will be made to the employee including the specific details.

50.10. Under the heading fact-finding it is stated, inter-alia, that...if the manager conducts the fact-finding feels there is a case to answer, they must decide whether, if the allegation is proven, the penalty appropriate would be likely to be within or outside their authority. If they feel a major penalty is a possible outcome, they must at that stage patten to another manager, normally the 2nd line manager.

50.11. Under the heading of gross misconduct, it is stated that it is not possible to construct a definitive list of what constitutes gross misconduct and in any event all cases will be dealt with on their merits. However the following examples show some types of behaviour which in certain circumstances could be judged to be gross misconduct: theft, violence, abusive behaviour to customers or colleagues, criminal acts against Royal Mail group or its employees, intentional delay of mail, deliberate disregard of Health & Safety and security procedures and instructions, unauthorised

entry to computer records, a serious or persistent breach of the continuous disclosure and communications policy or the sharedealing policy.

51. During the course of the hearing we were referred by the respondent to documentation within the bundle relating to two other cases considered by the respondent to be comparable to the claimant's circumstances. In summary we note the case of:

51.1. Mr R from July 2010. The disciplinary allegation made against Mr R was that he had urinated near to the front door while delivering to the customer there. The customer reported Mr R. It is noted in the documentation provided by the respondent that the comparators put forward by Mr R 'did not involve urinating on a customer's premises. In the case of Mr [redacted] across the road into a field and gone behind a tree on some waste ground. It is also noted [at page 99] 'had [Mr R] been remorseful of his actions then I think it reasonable that Mr R would not have urinated more than once alongside the customer's front door Mr R continue to put forward that his breach on 21/07/2010 was an isolated one, despite the customer's evidence to the contrary.' Within the summary section [page 99] it is noted whilst in exceptional circumstances it might be accepted that delivery staff may be caught short and have to urinate in a public place, it cannot be accepted that it is appropriate to do so on a customer's property alongside their front door.

51.2. Mr PH from June 2011. In this case it is said '.... When you entered [the customer's property] you have already decided that you were going to use the customer's premises to urinate, when you could have walked 20 m to where you knew there were toilet facilities for your delivery was situated. And therefore of the belief that on that day you showed a total disrespect for the customer and the customer's premiseshaving spoken to the customer I am of the opinion that when she knocked on the window and asked you to stop, you willfully made the decision to just carry on what you were doing. By the comments you made when challenge[d] showed a total lack of respect to the customer I would have expected an experienced post-person faced in that situation to offer an apology to the customer.

52. We heard from Mr Adam Hicks who has been employed as a postman for 17 years by the respondent. Mr Hicks told us that postman urinate in public all the time. This happens regularly. The situation as such, due to the nature of their job and the lack of facilities that there are instances where postman who are desperately bursting to go to the toilet, we have no option but to urinate while on duty. Mr Hicks recalled an incident in 2016 where his work partner had been spotted disappearing into a bush and private land to use it as a toilet. A customer complained. Mr Hicks was questioned and discussed the incident with his supervisor. Mr Hicks provided this evidence by way of a statement to the respondent during the course of the claimant's disciplinary process. Mr Hicks said that he could not understand why the claimant would be dismissed

for this disciplinary allegation when white postman have been caught urinating or have received complaints from the same offence and continue to work with the respondent. During the course of his oral evidence Mr Hicks added that as a postman it was sometimes not possible to do the job that you had to do in the time provided to do it without urinating in public. All routes were supposed to have designated toilet facilities however this does not happen in practice or facilities may not be open. Post men and women on occasion have to go where they have to go. Postmen hear of this issue arising all the time and the answer is to hide better or choose a better place.

53. Mr Warner attended 4 of the meetings held with the claimant during the disciplinary process. He has acted in the union rep in hundreds of disciplinary meetings. Generally, he said the respondent applies the corrective approach are set out within their policies rather than a punitive approach. He raised issues in respect of Mr Maddy's conduct. In particular he considered that Mr Maddy failed to adhere to the respondent's own guiding principle for a manager to look for evidence of mitigation. Mr Maddy had recalled that the claimant said initially 'your was trickling down his leg 'did not record this in the initial minutes. This was in Mr Warner's opinion an obvious mitigating factor. Mr Warner questioned Mr Maddy's decision to pass this matter to Ms Dunkley. Further the disciplinary process appeared to ignore completely the claimant's evidence in respect of comparators. Mr Warner considered that there was evidence provided to the respondent during the investigation that urinating in public is not unusual within the respondent's workforce. The claimant was subject to suspension and dismissal without notice that was not the normal approach of the respondent. The respondent had failed to take the claimant's suspected health issues into account. At the very least Ms Dunkley should have conducted further investigation in relation to the mitigating factors. Mr Warner said that the claimant is the only person in all his years working with the respondent of whom he is aware of who has been dismissed for urinating in public. This is normally dealt with at the lowest level of the conduct code.
54. Mr Warner explained that there is a separate appeal policy for union reps in that there is an independent national appeals panel. This process was not afforded to the claimant. Mr Warner said he was not involved within the appeal.
55. Although not present in tribunal to face cross-examination we note Mr Shah statement. Mr Shah who has been employed as a postman by the respondent for approximately 15 years and is of Asian origin. Mr Shah noted that the claimant has previously assisted him as a union rep. He says it was not unusual for postman while on duty to urinate. Mr Shah said that many postmen had received complaints and noted Mr Maynard who urinated in somebody's garden/alley while on duty. Mr Maynard was white and not dismissed from his job. He considered it unsurprising that the claimant was dismissed as black and Asian employees are frequently treated differently from their white counterparts

and suffer racism from the management and other employees. He was told by one of his colleagues that the management were after the claimant for a long time.

56. We were provided with a witness statement from Mr Yirenkyi, who do not attend tribunal and did not face cross-examination. Mr Yirenkyi was a colleague of the claimant's and was dismissed by the respondent on 21/07/2017. He describes the claimant as a helpful trade union representative. He states that he is aware of postmen who were caught short while on duty and reported to management for urination public. He was not aware of any postman who had been dismissed for this offence other than the claimant. He believed the claimant's race and/or his trade union membership played a part in the claimant's dismissal.
57. We heard from Mr Nicholas Williams who has been a postman employed by the respondent for approximately 7 years. Mr Williams faced a similar situation in 2016 when he was caught short on duty and reported by a customer. The complaint was dealt with by his manager within a meeting. He discussed the matter with his manager and was told not to do it again. The meeting ended and no disciplinary issue was raised and the matter never mentioned again. Mr Williams said that he provided a statement to the claimant during the claimant's disciplinary process. Mr Williams says that he had heard of other postmen urinating in public on duty, some get spotted but most don't. This happens regularly and Mr Williams is not aware of any other postmen being dismissed for the offence. Mr Williams said that there should be a list of places on a route such as pubs and shops where the postman can use the facilities. However sometimes they are not open and sometimes a person is just caught short and not near enough to anywhere to be able to use the facilities. Mr Williams said that in his opinion there was not a post person alive, man or woman, who had been doing the job for a length of time who had not been caught short without access to facilities and had to urinate in public.
58. We heard from Mr Robert Kennedy has worked for the respondent for approximately 19 years and is the area Health & Safety representative of the CWU. Mr Kennedy said Mr Maddy was extremely excited and took great pleasure in explaining that the claimant had been suspended from his employment following a member of public reporting the claimant for urinating in a layby. Mr Kennedy as the Health & Safety representative noted that there was nothing documented on any collection route folder stating where an employee/delivery collection driver should go to the toilet in the event of them urgently needing to go to the toilet any collection route. This was a clear failing by the respondent in their duty to the employee. Mr Kennedy said that the claimant was very much disliked by Royal Mail management and also by the local CWU reps along with the area delivery rep. This was because of the claimant's role in planning new collection routes collating information regarding the routes, the hazards, the parking and the whole collection rate being

individually assessed for a fit for purpose collection route. Mr Kennedy considers the claimant to be his sub area Health & Safety rep and describes warring factions within the union.

59. Mr Kennedy said that over the last 3 years the most people dismissed from the respondent were black or Asian people of foreign descent including East Europeans. Mr Kennedy is aware of at least 4 individual claims of race discrimination against the respondent. Mr Kennedy considered that the respondent had used the opportunity of the customer complaint to dismiss the claimant. He noted that a Mr Paul Claridge, a white colleague had been reported as urinating while on delivery but no action was taken against him. Mr Kennedy also noted Mr Maynard's example. Mr Kennedy said he was aware of other white postman being caught and reported for urinating but none had been sacked by the respondent.

60. We heard from Mr Abdulraheem Khalifah who has worked for the respondent for approximately 20 years. He is a walking postman. He told the tribunal that it was common knowledge at Watford that several postmen are employees of the respondent had been caught short while on duty and have urinated in public. None of these postmen have been dismissed by the respondent. He told the tribunal that he was not surprised that the claimant was dismissed as he is aware of different treatment for black and Asian employees compared with their white colleagues. Mr Khalifah told that he was aware of other situations where a postman had urinated in a customer's garden. This matter was discussed with the man in question and the postman was told 'don't be so stupid and don't get caught up'. It was a case of a slapped wrist.

61. In relation to the transcript the claimant told us that he believed:

61.1. the reference 'just sack him', was said because he is a CWU rep, he wanted to teach employees, take part in union training courses that required him to be away from his position, he was a trained union learning rep and the first aider and wanted to make the respondent better.

61.2. The claimant said he thought the reference to the knife was because there were lots of Asian people working at Watford. The claimant had never done anything that would make the respondent consider that he was potentially violent. Royal Mail had an issue with Asian people. Royal Mail set different standards for Asian people and some don't have a chance.

62. The employment tribunal was told that a different disciplinary appeal process applies to trade union representatives in that they are referred to an independent appeal panel. The claimant was not treated as a trade union representative and was afforded the 'ordinary' respondent appeal process.

63. At the outset of the hearing the tribunal was not informed as to Mr Barry's identity. The claimant was recalled at the end of the hearing to address issues relating to his trade union membership and documents that have been disclosed during the course of the hearing. During this time the claimant also confirmed that he had previously never heard of Mr Michael Barry. They had had no previous interaction.

Deliberations

64. The first issue to be addressed by the tribunal is what was the reason for the claimant's dismissal? It is trite to say that the 'reason' for a dismissal is a set of facts known to the employer or a set of beliefs held by him which causes him to dismiss (*Abernethy v Mott Hay and Anderson [1974] IRLR 213*). The task of a tribunal hearing a case is to determine the employer's reason by examining the factors operating on the mind of the decision-maker.

65. Who made the decision to dismiss the claimant?. The claimant alleged that Ms Dunkley was given an order to dismiss by Mr Barry. We were told that Mr Barry was senior to Ms Dunkley. We were also told by the claimant that he had no prior knowledge or dealings or prior animosity with Mr Barry. We note Mr Barry urging Ms Dunkley repeatedly to 'just sack' the claimant. The language used by all parties in the absence of the claimant is obviously and agreed by all parties to be inappropriate. We have examined the transcript very carefully and also had the opportunity to listen to the recording. Mr Barry appears to be waiting for the notetaker, Mr Webb, as the meeting with the claimant has taken longer than envisaged. Mr Barry had a reasonable expectation of the conversation being a private conversation. There was no discussion or comment by either Ms Dunkley or Mr Webb following the telephone conversation with Mr Barry to suggest that either party considered Mr Barry's comments to be a direct instruction. On the balance of probability, when considering the transcript and recording alongside the remainder of the evidence in the round, we conclude that Mr Barry's comments were more likely than not to be said in jest. They were not an instruction to Ms Dunkley to dismiss the claimant, nor were they taken as such. We conclude that the decision to dismiss the claimant was a decision taken by Ms Dunkley alone. Mr Barry played no part in it.

66. In considering the entirety of the evidence we conclude that there is more than one reason for the claimant's dismissal. Ms Dunkley's reasons for terminating the claimant's employment were:

66.1. The claimant's conduct of urinating in a public place gave rise to the disciplinary proceedings. This conduct allegation was expanded to include an allegation of 'loss of faith /dishonesty /breakdown in trust' arising from issues relating to the notes of the first meeting. While Ms Dunkley denied that the allegation of harassment of the complainant was taken into account in reaching her decision, it is included within the conduct decision as evidence supporting the claimant's dismissal with the claimant's 'alibi' of 'was football coaching at the time of the alleged threatening behaviour', noted under evidence against the claimant's dismissal. We conclude that the allegations relating to the claimant's conduct, encompassing all of

these matters, formed a reason for the claimant's dismissal.

66.2. Mr Maddy told us that he did not see 'eye to eye' with the claimant and they disagreed in relation to Health & Safety and political matters. We consider these matters to relate to the claimant's trade union activities. There were issues between the claimant and Mr Maddy that did not relate to his union activities including the grievances raised by the claimant and frustrations caused by a desire on the claimant's part to undertake a greater trade union role, but we consider these issues to be lesser causes of friction. We have also considered the implication of the fact that the claimant was not at the time of the dismissal a Health & Safety trade union rep. We do not consider this to be relevant. The predominate cause of the poor relationship relates to matters that arose when the claimant was a Health and Safety rep. Thereafter the claimant remained closely involved within the union as branch editor. Considering the entirety of the evidence we conclude that the poor relationship was caused by the claimant having taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time. We heard no submissions to suggest that 'an appropriate time' was in issue between the parties. Ms Dunkley was aware of this poor relationship, acknowledging that the claimant was probably 'a bane' in Mr Maddy's life. In weighing the evidence provided within the transcript, we have taken into account that it records a conversation that Ms Dunkley considered to be private and parts of the conversation are muffled and unclear. However, we consider that it gives the tribunal an insight into the matters considered relevant by Ms Dunkley at the time, and have viewed it as such alongside the remainder of the evidence. We conclude that the poor relationship between the claimant and Mr Maddy was at the forefront of Ms Dunkley's mind when considering this appropriate sanction within the disciplinary matter. Ms Dunkley's comments in discussing the disciplinary allegations are prefixed with the assumption that it is not possible for the claimant to return to work within his unit. We refer in particular to the below comment [tribunal emphasis added]:

If they were prepared to let him go back and work in that unit, 1 because I couldn't let him go out in the (unclear)..... And have the risk of him doing it again..... Because at the moment he provided no good mitigation as to why he was doing it in the first place and 2 you could imagine him going back in and all the questions and answers... And what are you saying about, em Simon and about how he dealt with this kind of thing and everything else? You couldn't have him working in the same office. I mean I didn't put it in chapter and verse but that's what it.....

In considering the entirety of the evidence, we conclude on the balance of probability that Mr Maddy's poor relationship with the claimant was a reason for the termination of the claimant's employment. The principal reason for that poor relationship was the claimant's trade union activities. We conclude that the claimant's trade union activities was a reason for the claimant's dismissal.

67. Having identified more than one reason for the claimant's dismissal, we must now identify what we consider to be the predominant or principle reason for the claimant's dismissal. We have considered that this point very carefully. It is obvious that the claimant's

conduct started the disciplinary process that eventually led to the claimant's dismissal. The disciplinary process would not have occurred but for the claimant's conduct. However in light of the entirety of the evidence provided to the tribunal we conclude that the set of beliefs held by Ms Dunkley which caused her to dismiss the claimant related predominately to his poor relationship with Mr Maddy and therefore to the claimant's trade union activities. We conclude that the predominant reason for the claimant's dismissal was his union activities. The claimant's conduct in this matter, encompassing all of the conduct matters identified above, was a subsidiary reason for his dismissal. The claimant's dismissal was unfair contrary to section 152 (2) of Trade Union and Labour Relations (Consolidation) Act 1992 and Part X of the ERA. It follows that the claimant was unfairly dismissed contrary to the provisions of section 98 of the ERA.

68. If we are wrong, and misconduct was the predominant reason for the claimant's dismissal, we continue to determine the 'ordinary' unfair dismissal claim. The respondent is a very large organisation with substantial administrative resources. The respondent has an established internal disciplinary procedure. If the main reason for the claimant's dismissal was misconduct, we first consider whether there were reasonable grounds for the belief of misconduct and alongside this question, whether there had been a reasonable investigation.
69. The claimant had by the dismissal stage accepted that he was shown in the video and had urinated in public. The main evidence in relation to this allegation was the video recording provided by the complainant, together with the respondent's vehicle log. Ms Dunkley's handling of both the fact-finding stage alongside the disciplinary is a breach of the respondent's own policy as the disciplinary process had begun prior to the completion of the investigatory stage. However, when viewed as a whole, we consider this a relatively minor breach. There is little investigation that can be usefully added to the allegation of misconduct being 'urinating in public'.
70. The expanded aspects of the conduct allegations relating to 'loss of faith /dishonesty /breakdown in trust' and 'harassment' are more problematic. Ms Dunkley conducted some investigation in relation to the claimant's amended notes following the first fact-finding meeting between the claimant and Mr Maddy. Ms Dunkley spoke to Mr Maddy, Mr Marshall and Mr Grace in relation to the change of notes. When speaking to Mr Grace, Ms Dunkley omits to show him the claimant's revised notes on the grounds of 'confidentiality'. It is not possible for Mr Grace to comment meaningfully in relation to the claimant's amendments without sight of those amendments. Ms Dunkley phrases the issues relating to the notes of this initial meeting as an allegation that the claimant made a false claim that Mr Maddy had changed the notes. It can be seen from the documentation explaining the dismissal that Ms Dunkley implies this allegation on the claimant's part, leading Ms Dunkley to question the claimant's honesty. The claimant did not make any allegation that Mr Maddy had 'changed the notes'. We conclude that the investigation in relation to this aspect of the conduct is absent.
71. The documentation generated into the 'harassment of complainant' allegation consists of an email from the complainant together with the witness statement provided by Mr Maddy. Ms Dunkley told us that this allegation was not taken into account in reaching her decision. The employment tribunal has found that this did play a part in the reason

for the claimant's dismissal. The only investigation undertaken by Ms Dunkley was to raise the matter with the claimant, note his alibi and confirm that it did not form part of the disciplinary charge. We find it odd that Ms Dunkley, having seen the video evidence did not question Mr Maddy's statement in any way. Considering the seriousness of the allegation, we consider it odd that Ms Dunkley did not consider further investigation appropriate.

72. When taken as a whole, we consider the investigation in relation to conduct allegations to fall outside a that of a reasonable employer.

73. We now consider whether a fair procedure was followed. This matter was referred to Ms Dunkley by Mr Maddy, prior to the completion of a fact finding stage as the potential disciplinary sanction was outside Mr Maddy's authority. The conduct allegation expanded without any proper fact finding stage/ investigation as set out above into those expanded parts. The claimant was not expressly informed of the expanded allegations. These are serious procedural flaws and breach the respondent's own policy.

74. The tribunal was concerned in relation to Mr Maddy's unexplained part in the process, in particular:

74.1.1. Mr Maddy 'passed this matter up' to Ms Dunkley on or around 31/08/2017. The statement of 17/09/2017 and the email correspondence with the complainant shows that Mr Maddy continued to be involved with the complainant following his decision to pass this matter to Ms Dunkley. We are not provided with any reason why Mr Maddy continued to be involved in any way with this matter once handing it to Ms Dunkley. The email statement from the complainant supporting the video evidence is sent to Mr Maddy is dated 13/09/2017. It starts 'Hi Simon'.....' There had obviously been some communication between Mr Maddy and this complainant, an unknown member of the public, previously that has not been disclosed to the tribunal. This not queried by Ms Dunkley or explained by the respondent. The tribunal was not given any explanation as to how the complainant had Mr Maddy's name/ email address or the reason for any direct contact between Mr Maddy and the complainant. We find it odd that Mr Maddy would delete email correspondence between him and the complainant.

74.1.2. We note the email from the complainant to Mr Maddy dated 17/09/2017. This initial email refers to 'someone 'and 'it looks like someone from Royal Mail, as they have all my details'. When examining the subsequent statement provided by Mr Maddy it records the complainant as saying 'he looked out of his window (he lives on the top floor of a three-storey block of flats) to see who it was and the Royal Mail employee that he complained about was at the entrance to the flats'. This part of the statement appears, by reference to the email to be obviously incorrect. It is also obviously false by reference to the video. The video shows the claimant's back for seconds while passing him on a dual carriageway and it is most unlikely that the complainant could have identified the claimant by sight.

74.1.3. Mr Maddy told us that he considered the harassment allegation to be

a much more serious potential allegation against the claimant than the allegation of urination in public. Other than completing his internal statement following his discussions with the complainant, no further investigation was undertaken.

75. We have considered whether the claimant should have been subject to the respondent's policy as applicable to union representatives. The claimant was represented by his union throughout the process and no issue was raised in respect of the correct process. Taking the entirety of the circumstances into account, we conclude that the decision to treat the claimant under the 'ordinary' appeal process for employees as opposed to the union rep process is not a flaw within the respondent's process, capable of contributing to an unfair dismissal finding.
76. When reviewing the procedure as followed by the respondent as a whole, we have taken into account its size and administrative resources. We conclude that the procedure followed by the respondent falls outside the band of reasonable responses of a reasonable employer. While we consider the flaws identified within both the respondent's investigation and procedure to be such as to render the dismissal unfair contrary to the provisions of the legislation, if we are wrong, we continue to address the final question within the unfair dismissal claim, being whether the dismissal fell within the range of reasonable responses from a reasonable employer.
77. The claimant's conduct in urinating in a public place is an antisocial act. There appears to the tribunal to be an obvious question of circumstances surrounding this antisocial act which may turn the allegation to one of serious or gross misconduct or alternatively provide mitigation to the extent that the 'misconduct' element is mitigated or even removed entirely. In our opinion, an allegation of 'misconduct' must involve some blameworthy conduct and 'gross misconduct' must involve serious blameworthy conduct on the part of the claimant. The two cases highlighted above by the respondent of Mr R and Mr PH were postmen who urinated on customers properties appear to be examples of obvious blameworthy conduct on the part of the individuals.
78. We have heard convincing evidence from postmen as set out above that there are occasions when individuals, who routinely work away from toilet facilities, are caught short, for whatever reason. It may happen once over a long career. The claimant has shown on the balance of probabilities that a significant number of his colleagues who were not office-based have at one point or another within long careers have been caught short and urinated in a public place. On the balance of probability this is not an uncommon matter that the respondent must deal with. It appears from the entirety of the evidence that the absence of evidence of disciplinary procedures arising out of these incidents suggests that the issue may often be considered at the less serious end of the misconduct scale generating no documentation.
79. During the course of the hearing the respondent sought to draw a distinction between those working on foot and those driving. While a driving employee may be able to cover greater distance more quickly, their basic predicament is similar to an employee on foot should they be caught short. We cannot see any material difference in these circumstance as all are away from facilities when those facilities are needed.
80. We find it odd that both Mr Maddy and Ms Dunkley state within their evidence that they

were entirely unaware of any previous incident of any Royal Mail employee urinating in a public place. Ms Dunkley excluded any consideration of similar offences from her decision-making process. We consider it more likely than not that both Mr Maddy and Ms Dunkley, within their long careers with the respondent are aware, that access to toilet facilities are on occasion an issue along with urination in public. The respondent's potential issues with employees working away from toilet facilities has been addressed to the extent that routes are expected to have designated toilet facilities. In the claimant's case the toilet facilities were the depots at each end of his route. In practice, the claimant was aware of further facilities at the Morrisons supermarket. The claimant estimated the facilities at Morrisons to be approximately 10 minutes, including parking time, from the layby.

81. During the course of submissions, the claimant's representative phrased the allegation as 'the conduct of urinating in a place that was obvious to the public'. We consider this to be a different allegation from that made against the claimant as it appears to be concerned with the claimant's ability to hide and urinate in a public place without being seen. We heard submissions on the allegation that the claimant's conduct in urinating in public brought the respondent into disrepute, justifying the dismissal. Ms Dunkley's evidence does not expressly refer to this as a concern there is no express mention of it within the contemporaneous dismissal documentation. The customer reaction to the claimant's conduct is one of disgust but expressly says, in the complainant's view, that the claimant's conduct does not warrant his dismissal. The subsequent complaint relating to harassment appears much more serious and the complainant wishes to make a formal complaint and threatens to contact the police. The second complaint has a far higher potential to bring the respondent into disrepute, yet it is effectively ignored by Mr Maddy, Ms Dunkley and Mr Brown. We conclude that 'bringing the respondent into disrepute' was not a material factor within Ms Dunkley's decision to dismiss.
82. We considered the allegation of loss of faith /dishonesty /breakdown in trust within Ms Dunkley flawed by the deficiencies in the investigation. The inclusion of a 'dishonesty' aspect is a serious allegation. The false allegation alleged to have been made by the claimant was not made by the claimant. This matter arose from the notes of the first hearing. When initially confronted with the video evidence, the claimant considered that it was possible that the employee recorded may not be him, he repeated that position throughout. The claimant speaks quickly and has a slight speech impediment and tendency to stammer. The respondent makes reference at a later date to the claimant 'rabbiting on like 1 million miles an hour'. We consider it very likely that the claimant said more than is recorded within the notes of the first fact-finding meeting. Ms Dunkley's attitude to accuracy of notes in general also appears questionable. Mr Webb told Ms Dunkley that he was making his notes 'as illegible as possible' during a subsequent disciplinary hearing. We find it odd that Ms Dunkley does not question this approach in any way. When viewed in the round, while there appears to be some backtracking on the claimant's part, the characterization of his actions in amending the notes as he did as amounting to an allegation of loss of faith /dishonesty /breakdown in trust appears unsupported by evidence. The inclusion, in any form, of the allegation relating to harassment of the complainant without any investigation on the respondent's part is

obviously prejudicial to the claimant.

83. In viewing the entirety of the conduct allegations made against the claimant we also consider the impact of the claimant's poor working relationship with his manager Mr Maddy. The possibility of bias either conscious or unconscious by Mr Maddy had been raised expressly within the disciplinary proceedings on behalf of the claimant. Ms Dunkley is fully aware of this fractious relationship, yet Mr Maddy continued to be involved in the disciplinary matter following 'handing it up' to Ms Dunkley. Mr Maddy provides questionable evidence of 'harassment' on the part of the claimant in the absence of any reasonable investigation. Ms Dunkley does not question his actions in any way, but appears to preface her decision-making with the assumption that it is not possible for the claimant to return to work for his original team. We find the poor relationship between Mr Maddy and the claimant, regardless of the reason for the fractious relationship, resulted in a situation where Ms Dunkley was unwilling to consider the possibility of a sanction lesser than dismissal. We note that the transcript indicates Ms Dunkley's mindset at the time. When the meeting reconvenes, Ms Dunkley deals with mitigation points raised by the claimant. We conclude on the balance of probability that no real consideration was given by Ms Dunkley to the claimant's potential mitigating circumstances, including his previous good record, potential medical concerns and lack of any similar issue during his long career.
84. When considering the entirety of the evidence relating to Ms Dunkley's decision to dismiss the claimant, we conclude that the inclusion of the expanded conduct allegations relating to 'loss of faith /dishonesty /breakdown in trust' and 'harassment' along side the impact that the claimant's poor relationship with Mr Maddy results in Ms Dunkley's decision to dismiss falling outside the band of reasonable responses of a reasonable employer. The claimant was unfairly dismissed.
85. We have considered the appeal process carried out by Mr Brown. In considering the entirety of the circumstances and in light of the flaws identified within every stage of the disciplinary process we do not consider that the appeal is capable of remedying this unfair dismissal scenario.
86. We now turn to look at the allegation of direct race discrimination contrary to section 13 of the Equality Act 2010. When considering direct race discrimination, we must look at the issue of a correct comparator. there must be no material difference between the circumstances" of the claimant and the comparator (section 23(1) Equality Act 2010), or in other words. the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class. In the circumstances we conclude that the material circumstances of any comparator in the circumstances must be that the comparator was accused of the disciplinary offence of urination in public. We heard insufficient evidence in relation to Mr Paul Claridge's circumstances to allow us to conclude that he was accused of a similar disciplinary allegation. Mr Hicks was not accused of any disciplinary offence. We heard no evidence in relation to Mr Shayler. Mr Collins', raised as a possible comparator during the course of the hearing, had circumstances different to those of the claimant and he was not accused of urination in public. We therefore conclude that Mr Claridge, Mr Hicks Mr

Shayler and Mr Collins are not appropriate comparators to the claimant.

87. We have carefully considered the allegations faced by Mr Williams and Mr Maynard. The respondent sought to distinguish Mr Williams' situation as the member of the public saw Mr Williams disappearing and assumed (correctly) that he was urinating. In the claimant's case he was seen/filmed facing away from the complainant who assumed (correctly) that he was urinating. We consider the difference in circumstances between Mr Williams and the claimant to be so slight that it can properly be considered immaterial. Should we be looking at the disciplinary offence alone we consider that Mr Williams would be an appropriate comparator. We have less information in respect of Mr Maynard. He was not subject to any formal or informal disciplinary sanction. However we conclude on the balance of probability that he was also accused of the disciplinary offence of urinating in public and, should we be looking at that disciplinary offence alone, we consider that Mr Maynard also would also be an appropriate comparator.
88. We also note the two comparators raised by the respondent during the course of the hearing are set out above, Mr R and Mr PH. In both of these cases there were what can be described as 'aggravating features' in relation to where the employees chose to urinate and their interaction members of the public. These 'aggravating features' were not present in the claimant's case. We do not consider either of these examples to be comparators on the basis of the disciplinary allegation alone.
89. We have found that the main reason for the claimant's dismissal was his relationship with his direct line manager Mr Maddy. We have found various reasons for this poor relationship as set out above. We have not seen any evidence that would allow us to conclude that the poor relationship between the claimant and Mr Maddy was tainted by any aspect related to the claimant's ethnic origin or race. We conclude that the relationship was strained for reasons unconnected to the claimant's protected characteristic. We consider that a fair examination of the circumstances of the claimant would include as a material circumstance: a poor relationship with his direct line manager to the extent that he was considered a 'bane in his side' that made Ms Dunkley consider dismissal to be the only potential outcome. We conclude that neither Mr Williams nor Mr Maynard are appropriate comparators for the claimant as they were not in the same position as the claimant in all material respects. We conclude that the correct comparator in this case is an hypothetical comparator who is guilty of the conduct offence of urination in public and whose relationship with their direct line manager is perceived as having effectively broken down by the decision maker.
90. We have carefully considered the comments made by Ms Dunkley during the break in proceedings as recorded within the transcript and alleged by the claimant to be discriminatory:
- 90.1. Ms Dunkley makes reference to the possibility that the claimant might have a large knife. There is no reason for her to make such a comment and it was submitted that this comment betrays a conscious or unconscious bias and in particular the stereotype of Asian men carrying knives. Ms Dunkley denied the allegation. She told us that she considered knife crime not to be associated with any particular minority. We consider the comments to be unwarranted, unprofessional and unkind. We note that Mr Webb's immediate response is specific to the claimant, stating 'he's not the type', rather than any generalised slur on an ethnic minority. After careful

consideration we conclude that this comment on Ms Dunkley's part does not have conscious or unconscious discriminatory undertones.

- 90.2. We also considered whether Mr Barry's suggestion that the claimant be called a paedophile was a comment that was consciously or unconsciously connected to the claimant's race and or ethnic origin. We conclude looking at the entirety of the transcript that Mr Barry was describing 'a trick' being the use of a deliberately offensive comment to incite a violent response on the part of the individual. The reference to 'paedophile' being an offensive comment appears unconnected to race or ethnic origin when viewed in the whole. We do not consider that adverse inferences of discriminatory behaviour in relation to race discrimination may be fairly drawn from the above comments.
91. We note the burden of proof in discrimination claims. This is effectively a two stage approach: Stage 1: can the claimant show a prima facie case? If no, the claim fails. If yes, the burden shifts to the respondent. Stage 2: is the respondent's explanation sufficient to show that it did not discriminate? In these circumstances, we consider that the claimant has not shown a prima facie case. We have found the principal reason for the claimant's dismissal to be trade union activities and the claimant's poor relationship with his line manager. We have examined the reasons behind this poor relationship and do not find that the claimant's race or ethnic origin tainted/ played a part or formed a reason for that poor relationship. We have considered Ms Dunkley's actions and conclude that this poor relationship played a major part in her decision to dismiss the claimant, however we have seen nothing that would suggest that the claimant's race played any part within or tainted her decision to dismiss. Even if we give the claimant the benefit of the doubt and move to the second stage of the test, we consider that our findings of fact in relation to the predominant reason for the claimant's dismissal, show on the balance of probability, a non-discriminatory reason for the conduct as set out above.

92. In summary, we have found:

- 92.1. The principle reason for the claimant's dismissal was his trade union activities. The claimant's dismissal was unfair contrary to section 152 (2) of the Trade Union and Labour Relations (Consolidation) Act 1992 and Part X of the ERA; and

92.2. The claimant's claim for unlawful race discrimination contrary to the Equality Act 2010 is unsuccessful and dismissed.

Employment Judge Skehan

Date: 24/02/2020

ORDER SENT TO THE PARTIES ON
24/02/2020

.....
FOR THE TRIBUNAL OFFICE