Case Number: 3306687/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr O Oladepo	v	E.on Energy Solutions Ltd

Heard at: Amersham and Watford

On: 27, 28, 30 and 31 July and 3 August and (in private) 5 and 20 August 2020

Before: Employment Judge Hyams

Members: Mr M Bhatti MBE
Mr D Sagar

Appearances:

For the claimant: In person
For the respondent: Ms Amy Smith, of counsel

RESERVED JUDGMENT

1. The claimant's claims of discrimination because of his race, contrary to sections 13 and 39 of the Equality Act 2010 do not succeed and are therefore dismissed.

2. The claimant's claim of harassment within the meaning of sections 26 and 39 of the EqA 2010 on the part of Mr Steven Baptiste is dismissed on its withdrawal by the claimant.

3. The claimant's other claims of such harassment are not well-founded and are therefore dismissed.

REASONS

The claim

1 In these proceedings, the claimant claims that he was discriminated against because of his race, contrary to sections 13 and 39 of the Equality Act 2010 ("EqA 2010"), and that he was harassed contrary to sections 26 and 39 of that Act, the protected characteristic for the purposes of the latter claim being race.

2 The claim form was presented on 24 April 2018. The early conciliation period commenced on 19 March 2018 when ACAS received notification of it, and it ended on 19 April 2018. The claimant was at the time of the making of the claim, and remained at the time of the hearing before us, an employee of the respondent.

The procedure which we followed and the evidence which we heard

3 The hearing which we conducted was listed to start on Monday 27 July 2020 at 10.00am. It had originally been listed to be heard in Cambridge, but for reasons related to the availability of hearing rooms in the circumstances of the national response to the Covid-19 pandemic, it was transferred at the last minute to Amersham. However, four witnesses of the respondent were unable to attend the hearing for reasons related to the pandemic. The respondent had as a result applied for the postponement of the hearing. The claimant had vigorously opposed that application, and on Thursday 23 July 2020, the respondent's application for a postponement was refused by Employment Judge R Lewis.

4 The respondent had as an alternative proposed the participation by video of its witnesses who could not attend in person, and we were expecting that that would occur: so that we expected the hearing to be in the main in person but in part by video.

5 We asked the parties to come into the hearing room at 10.00am on Monday 27 July 2020, and shortly after that, they did so. We did not have any copies of the parties' witnesses statements, and we did not know what the position was as far as those statements were concerned. We were fortunate to have physical copies of the (1049-page) hearing bundle, and we had been given (via a forwarded email to the tribunal, from the respondent's solicitors, which had given a link to the pdf file on the solicitors' website) a link to a pdf file consisting of (1) the pages of the bundle, and (2) its index in Word format.

6 The claimant attended without a copy of the hearing bundle and had, he said, not been given access to the bundle in pdf format. When we, via Employment Judge Hyams ("the judge"), asked about the content of the bundle, we were told that it contained all of the documents which the respondent had disclosed together with those of the claimant, including some documents (at pages 91-97) which were print-outs of pages from a website with the address "glassdoor.co.uk" with a series of unattributed comments by persons who said that they had worked for the respondent. For example, on page 94, someone had written that they had "worked at E.ON full-time" and that the "Pros" were "very health and safety conscious and offer a good pension", and the "Cons" were "no loyalty some discrimination at local level management". The judge explained to the claimant during the morning of 27 July 2020 that those comments were of no evidential value to us, since we had no idea who had made them, we would not be hearing from the makers of the comments, the respondent could not test the accuracy of the comments, and there

was no testable evidential basis for the comments. The judge made it clear to the claimant that he therefore could not rely on them.

7 The claimant, we were told, had not prepared a witness statement for himself. Rather, he had provided to the respondent (probably on Friday 24 July 2020, but precisely when was irrelevant in the circumstance that the respondent was not objecting to its late provision) a witness statement for his wife.

8 We explained to the claimant that he should have provided to the respondent in advance of the hearing a witness statement stating his evidence, so that the respondent could prepare its cross-examination of him in advance of the hearing. Case management orders had been made by Employment Judge Johnson on 26 September 2019, and we return to them below. We referred the claimant to the terms of the case management order made by Employment Judge Johnson relating to the provision of witness statements, and while the order did not in terms refer to the claimant himself giving evidence as a witness, it would have been obvious to an experienced litigant that the order required the claimant himself to make a witness statement and furnish it to the respondent in advance of the hearing.

9 The respondent, however, through Ms Smith (for whose courteous assistance in this and other respects we were grateful), did not object to the fact that the claimant had not prepared a witness statement for himself. Ms Smith very helpfully said that she and the claimant had got reasonably close to agreeing a list of issues which included a list of the factual issues, i.e. the factual matters that were in dispute.

10 In fact, the respondent had not given the claimant the respondent's witness statements until after being informed that the respondent's application for a postponement of the hearing had been rejected. The claimant said to us at the start of the hearing on 27 July 2020 that he had not received the respondent's witness statements before he was given them in hard copy form by the respondent when, during the first part of the hearing, we asked whether he had received those statements, but it subsequently became clear, and he acknowledged, that he had received those statements by email on Friday 24 July 2020. Ms Smith told us that her instructing solicitor had sought to exchange witness statements with the claimant on Thursday 23 July 2020, after being informed that the respondent's application for a postponement had been rejected, but that he had not responded to the solicitor's attempts to contact him until Friday 24 July 2020.

11 The claimant agreed that he would give evidence by proving the factual things that were stated in the agreed list of issues once it was agreed, and that it would state the factual things about which the parties were not agreed. He agreed that he would otherwise give evidence by being cross-examined. The judge asked for the witness statements to be sent to the tribunal for forwarding on to the judge so that we could read those witness statements and could see the extent of the evidence which would require consideration. The judge also explained what was required

by way of cross-examination of the respondent's witnesses and we agreed after we had seen the witness statements and after we had discussed the matter with the parties that we would resume the hearing at 14:00 on the next day, when the claimant would start to give evidence. The parties then withdrew and we continued to read the hearing bundle and read the witness statements.

12 The witness statements put before us during the morning of 27 July 2020 were the claimant's wife's witness statement and, for the respondent, the witness statements for the following persons:

12.1 Ms Amanda Usher, who at the material time (in all cases below, we refer only to the role of a witness as it was at the material time) was a Field Team Leader in the Northamptonshire area;

12.2 Mr Brandon Lycett, who was a Smart Meter Technician who had recently been seconded to the respondent's training team as a Technical Trainer;

12.3 Mr Stephen Baptiste, who was a Dual Fuel Technician;

12.4 Mr Ian Starmer, who was employed as a Field Team Leader;

12.5 Mr Mark Lawrence-Gray, who was employed as a Field Services Manager;

12.6 Mr David Wilson, who was also employed by the respondent as a Field Services Manager; and

12.7 Ms Sally Jones (who had subsequently become Mrs Sally Woodward), who was employed as a Customer Service Manager.

13 Unsurprisingly, the claimant's wife's evidence was almost wholly hearsay. To the extent that it was capable of being relevant to liability as hearsay evidence, i.e. in that it might have contained evidence of the claimant saying something to his wife shortly after an event about which he now complained in these proceedings, it was likely to be of very little value, since the claimant himself was present to give evidence.

14 Towards the end of that day, however, the claimant made an application by email for the postponement of the hearing until October of this year, 2020. We declined to consider it without hearing from the respondent, and directed that the hearing resumed at 10:00 on the following day instead of 14:00, so that we could consider the application by hearing from the parties in person.

15 We then resumed the hearing at 10:00 on 28 July 2020. The respondent had by then responded to the claimant's application for an adjournment, with an email in which the application to postpone the hearing was vigorously opposed. We asked the claimant why, precisely, he was saying that his application for a postponement

should be granted, and he said that it was because he wanted to seek the assistance of his trade union. He said that he had done so originally, when he made his claim to the tribunal, and that the union had declined to provide legal assistance to him. The claimant said that he had gone back to the union subsequently, and the union had said to him that he should send the union the hearing bundle and the respondent's witness statements, after which it, the union, would reconsider its decision not to support his case.

16 Of course, the claimant had not had the hearing bundle and the witness statements until very recently. However, he had known that he had not had those things when, on 21 July 2020, he had, in a detailed letter, opposed the respondent's application to postpone the hearing. In no place in that letter did he say that he had not received the bundle or the respondent's witness statements and that he wanted them so that he could seek the assistance of his trade union.

17 The claimant accepted that he had had the respondent's disclosed documents since February 2020. Ms Smith said that the hearing bundle was no more than all of the relevant documents in chronological order (the respondent's disclosed documents not having been in strict chronological order). She also said that the respondent's witness statements contained nothing, or at least very little, that was new in that they did not add (or at least add materially) to what the claimant already knew from the respondent's response to his claims and what had been said to him during the course of his employment with the respondent.

18 Ms Smith on behalf of the respondent added orally to the email from her instructing solicitor opposing the application for a postponement of the hearing, emphasising that the respondent's witnesses were very anxious about the allegations that had been made against them and that it was stressful for them to have the hearing postponed now that they were prepared to give evidence to us, i.e. in the 6-day period from 27 July to 3 August 2020 inclusive.

19 Having heard from both parties on the claimant's application to postpone the hearing, we discussed the matter carefully and concluded that we should refuse the claimant's application for an adjournment. That was because we concluded that it was in the interests of justice for the hearing to go ahead. That was for the following reasons.

19.1 The stress of an undetermined allegation of unlawful discrimination would continue to be felt by the respondent's witnesses if the case were postponed.

19.2 The claimant had had the respondent's documents since February 2020 and must (or at least should) have known what he intended to put in cross-examination to the respondent's witnesses, including by reference to those documents, since at least that time. Thus he could have stated his case to his union in detail at any stage since then.

19.3 In any event, as we could see (having read the respondent's witness statements), the respondent's witness statements were neither voluminous nor obviously controversial. In some respects they recounted the terms of documents on which the respondent relied, and to that extent they would not need to be the subject of cross-examination.

19.4 If this hearing were postponed then that might affect the administration of justice in that it might affect other users of the tribunal system by requiring some other case to be postponed.

19.5 As the judge said to the claimant on 28 July 2020, we the tribunal have something of an inquisitorial role and would in any event need to ask searching questions of the witnesses, including the respondent's witnesses. In any event, there was of course no guarantee that the claimant's trade union would agree to support his case when it saw the hearing bundle and the respondent's witness statements.

20 We ensured that the respondent sent the claimant that morning a link to the hearing bundle in digital form so that he had that as well as the hard copy of the bundle. He had already had the respondent's witness statements in digital form since before the preceding weekend, as we note in paragraph 10 above.

21 We concluded that we should start the hearing as soon as possible, so that the claimant could be cross-examined during the rest of the day, after which we would adjourn the hearing until 2pm on Thursday 30 July 2020, so that the claimant could finish preparing his cross-examinations of the respondent's witnesses. Once he had been cross-examined, he would know what cross-examination involved, which should help him to prepare his cross-examination questions for the respondent's witnesses. It would also enable him to put together a witness statement stating any further evidence that he needed to give in order to provide an evidential foundation for any questions he might ask of the respondent's witnesses in his cross-examination of them.

22 We announced our decision on the adjournment application at about 11:00 on Tuesday 28 July 2020, and said that we would start the hearing at 11:30. In fact, we then found that the screen and video facilities in the hearing room which we were in at Amersham were not (as far as we could ascertain at the time) able to use the necessary CVP software to enable the witnesses to give evidence via CVP. We therefore, because the judge had with him 2 laptops, both of which could be used as a CVP vehicle or portal, arranged for the claimant's evidence to be given with one laptop in front of him, and the other being used by the judge, so that the respondent's witnesses who were not present physically could follow the proceedings.

23 We then resumed the hearing and the claimant started giving evidence at 12 noon. By then the list of issues had been agreed. Certain of the factual issues stated in it were evidently not in contention (with the document stating the issues in

something of a roundabout fashion), but in so far as any factual matter stated in the list was in contention, the claimant's oral evidence in chief was treated by us with his agreement as being to the effect that the facts were as he claimed in that list. However, as a result of a discussion with the judge which occurred after the claimant had started to give evidence under oath, the claimant said that he was not now alleging one of the factual matters that was stated in that list. We return below to that list when we state (in paragraph 29 below) what we understood the issues to be by the end of the hearing.

24 The claimant was cross-examined for the rest of the day, and at the end of it we were able to ascertain that there was a hearing room at Watford in which the facilities would enable the respondent's witnesses who were not physically present to give evidence via CVP and be seen by all persons present at the physical hearing room on a large screen.

25 We therefore resumed the hearing at 2pm on Thursday 30 July 2020, at Watford. While there were some technical difficulties (in that it was necessary if the remote participants were to be able to hear what was said for there to be only one microphone switched on in the hearing room at any one time), the witnesses were able to follow the hearing and give evidence by CVP.

26 The claimant attended with several witness statements stating some further evidence (but also what amounted to a number of submissions) and some other documents, and we read those statements and documents before the claimant gave some further oral evidence. We then heard from Mr Baptiste, who gave evidence in person. We sat until after 17:00, and adjourned to 11:00 on the following day because one of us had a prior, unavoidable, commitment that meant that he was not able to attend until then.

27 On 31 July 2020, we heard oral evidence via CVP from Mr Lycett and Mr Starmer, and from Ms Usher in person. We again sat until after 17:00.

28 On 3 August 2020, we heard oral evidence from Mr Lawrence-Gray (who was referred to in the investigation report which he himself wrote, at pages 637-641, to which we return below, as "Mr Gray", and to whom we refer below accordingly) and Mrs Woodward, and oral evidence via CVP from Mr Wilson. The parties exchanged, and we read, written submissions, and we then heard oral submissions, finishing the day's hearing at 17:45.

The issues

29 At the time of the making of the claim, the claimant (who is of black African ethnic origin) was a trainee Smart Meter Installer. The hearing had been the subject of a case management hearing conducted by Employment Judge Johnson on 26 September 2019. The record of that hearing contained a statement of the issues.

However, by the time of the hearing before us, the issues had been refined somewhat. We refer above to the dropping by the claimant of one factual allegation. During the course of his oral evidence, when he was being cross-examined by reference to the statement of issues, the claimant dropped a further set of allegations. Reading the list in a sensible and purposive way, and bearing in mind that the claimant's claims were made after he had been suspended on full pay (i.e. the pay that he was receiving at the time of his suspension) "pending an investigation into allegations of unsafe working practices" (that being stated in an undated letter which was given to the claimant by Mr Starmer on 15 August 2017, of which there was a copy at page 507, i.e. page 507 of the hearing bundle), the issues as they stood before the claimant started giving evidence and before he stated that he was abandoning any element of his claim, were these.

Direct discrimination because of race

29.1 Did Mr Lycett destroy any documents during that investigation into "allegations of unsafe working practices" by the claimant? If so, was that done to any extent because of the claimant's race?

29.2 It being accepted that Mr Lycett changed the date on one of those documents (the one at pages 650-651), did he change that date to any extent because of the claimant's race?

29.3 Was the claimant suspended to any extent because of his race?

29.4 Was the decision to take disciplinary action against the claimant in respect of the alleged unsafe working practices to any extent made because of his race?

29.5 Was the claimant not permitted to have a union representative at the meeting of 15 August 2017 at which he (the claimant) was suspended to any extent because of his race?

29.6 Was the decision that the investigation into the "allegations of unsafe working practices" by the claimant was commenced by Mr Munir Bhaiji but was then restarted by Mr Gray made to any extent because of the claimant's race?

29.7 Was the giving to the claimant on 20 December 2017 by Mr Wilson of a first written warning done to any extent because of the claimant's race?

29.8 Did the failure by the respondent to permit the claimant during his suspension to commence training to become a smart gas meter installer occur to any extent because of the claimant's race?

In all of these regards, the claimant relied on a hypothetical comparator and/or on the manner in which the respondent responded to the allegation of the claimant that Mr Robin Canham had committed breaches of safety requirements.

Harassment

29.9 Did Mr Baptiste say to the claimant when the claimant was his mentee and before the claimant was suspended:

29.9.1 "You are given a cosmetic employment just to show [E.ON is an] inclusive company. You will be frustrated out soon."

29.9.2 "I hate Africans, they sold our forefathers to America and from there, we became Caribbeans."

29.9.3 "Your job confirmation depends on my feedback."

29.9.4 "I wish you were white."

29.10 Did Ms Usher say to the claimant: "I will put your portfolio work in the dustbin"? (It was the claimant's case that she did so on 14 August 2017 in the presence of Mr Starmer.)

29.11 If the answer to either of the questions asked in paragraphs 29.9 and paragraph 29.10 above is "yes", was that to any extent unwanted conduct related to the claimant's race?

29.12 Was the conducting of an audit of the claimant's company van on 30 August 2017 to see whether it had suffered any physical damage unwanted conduct related to the claimant's race?

29.13 If the answer to either of the questions asked in paragraphs 29.11 and 29.12 above is "yes", did the conduct in question have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

29.14 If not, did that conduct have the effect (taking into account the clamant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have the effect) of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

30 Immediately after starting to give oral evidence, the claimant said that he was no longer contending that Mr Lycett had destroyed any documents in the course of the investigation which followed the claimant's suspension. Thus, the issues stated in paragraph 29.1 above no longer required determination.

31 During the course of his cross-examination by Ms Smith, the claimant said that he no longer contended that the things that he alleged were said by Mr Baptiste as set out in paragraph 29.9 above were said to any extent because of (or related to) his (the claimant's) race. Thus, the issues stated in paragraph 29.9 and the relevant one of the two issues stated in paragraph 29.11 above no longer required determination. The claimant in fact said in terms (and careful questions were asked of him by the judge about this) that he withdrew that part of his claim.

Our findings of fact

The relevant events in chronological order

32 The claimant started to work for the respondent on 5 June 2017 as a trainee Meter Technician. He had not previously done any work on installing electricity or gas meters.

33 In paragraphs 7 and 8 of the respondent's revised Grounds of Resistance (at pages 178-179), this was said:

> "7. When the Claimant commenced his period of training with the Respondent, he was enrolled on a training programme along with other new joiners. All new joiners in this position are expected to complete the same training. The Claimant undertook several written and practical tests, and was observed by trainers and other qualified members of the team.
>
> 8. The training programme involves a mixture of 'artificial' setting training, at a training academy, and 'in the field' training, at customers' houses. The entire training programme is expected to last 38 weeks. After 11 weeks, the individual is assessed for his Meter Operation Code of Practice Agreement (MOCOPA) certificate and, if they pass, they can then work on Single Phase Electric Meters until they start their gas training in week 21. In week 32, the individual then sits their ACS Exam where they then spend a further 6 weeks with a mentor until their Gas Safe Card arrives. At the end of their training, they are either confirmed in post, given additional training or their engagement could be terminated. The aim of the training is to provide trainees with the opportunity to learn the skills required for their role within a safe learning environment."

34 While the content of those paragraphs was not specifically put to the claimant in cross-examination and it was not the subject of specific oral evidence on behalf of the respondent, all of the evidence that we heard (including about the document at pages 307-316, which was described in the bundle index as "Training Timeline" and related to the claimant; it was the subject of some, albeit limited, oral evidence) and saw (including the email at pages 551-552 to which we refer in paragraph 42 below) was consistent with the content of those paragraphs, and we accepted them as stating the factual background to the claimant's training period

accurately. For the avoidance of doubt, at no stage did the claimant contest the accuracy of those paragraphs.

35 The claimant's first stage of training was described by Mr Lycett in his witness statement. Mr Lycett had by then worked as a Smart Meter Technician for over 8 years. Mr Lycett's evidence was challenged by the claimant in a number of ways, but in all respects we found Mr Lycett's evidence to have been given by him as an honest witness, doing his best to tell the truth, and we accepted paragraphs 1-21 of his witness statement without hesitation (except that the page reference in paragraph 7 to the "training schedule" was wrong). The implications of that acceptance as far as the facts are concerned, including where there was a conflict of evidence between the claimant and Mr Lycett, are stated by us below.

36 The claimant's line manager from the time that he started as a trainee Meter Technician was Mr Starmer. Mr Starmer was employed by the respondent at that time (and at the time of the hearing before us) as a Field Team Leader. As with Mr Lycett, we found that Mr Starmer was an honest witness, doing his best to tell the truth. We did not understand the claimant to take issue with the content of paragraphs 1-7 of Mr Starmer's witness statement, but in any event, we accepted them, i.e. that they were accurate.

37 During the summer of 2017, Ms Usher was also employed as a Field Team Leader. The area in which the team that she managed operated adjoined that of Mr Starmer's team. We found Ms Usher also to have been an honest witness, doing her best to tell us the truth. We accepted paragraphs 1-9 of her witness statement.

38 Accordingly, we accepted that

38.1 Mr Lycett was a seconded Technical Trainer in the respondent's training academy from 26 June 2017 onwards.

38.2 By 26 June 2017, the claimant had spent a week being inducted, a week in the training academy, and a week with his mentor, who was Mr Baptiste. Mr Baptiste was managed by Ms Usher, and Mr Baptiste, rather than a member of Mr Starmer's team, was the claimant's mentor because Mr Starmer did not have sufficient mentors in his team, i.e. persons who were regarded by the respondent as appropriate to act as mentors for trainees in the position of the claimant.

39 Mr Lycett's witness statement contained the following paragraph (number 13), which the claimant contested by asserting that it was simply not true.

> "After a few days of one to one training, on 28 June 2017, I asked the Claimant if he was confident enough to fit the electric meter with me during a mock MOCOPA audit to be done on 30 June 2017. The mock MOCOPA audit is a test where we run through the full process of a meter exchange and assess

the Trainee Technician against the requirements and expectations set by MOCOPA when carrying out such a task. The mock MOCOPA audit is therefore terminology that we at E.ON use, it is not an industry standard or MOCOPA specific term. From a training perspective it refers to an informal formative assessment that is used to ascertain the level of the learner's understanding, but we feel this is more wordy than required when for a learner."

40 Mr Lycett's witness statement went on to describe the mock MOCOPA audit that the claimant had (said Mr Lycett) taken as a test on 30 June 2017. In paragraphs 16-19, Mr Lycett said this:

> "16. The Claimant agreed to undertake the mock MOCOPA audit and so, prior to the mock audit, we spent a few days focussing on what he needed to know in terms of testing, tools and PPE [i.e. personal protective equipment].
>
> 17. I said that I would only stop the Claimant or intervene in the mock audit meter exchange if I needed to due to it being dangerous, as they would in the PTO [i.e. permit to operate].
>
> 18. During the mock audit I felt that the Claimant was ignoring safety procedures we had taught him. For example, he approached an exposed 230 volt wire with no gloves on, and that would have had the potential to cause a fatal electric shock. It was therefore essential that I stepped in to stop him. Despite that, the Claimant then tried to approach the same wire without gloves again. During my time training the Claimant he would regularly say that he knew what he was doing, but then immediately do it incorrectly.
>
> 19. That was one of 24 errors that the Claimant had made in his mock audit, as set out in my email dated 14 August 2017 (pages 646 and 647). I would not have expected that level of errors from any Trainee at that stage in their training, or at all."

41 During his oral evidence, Mr Lycett said that if the claimant had made any of those 24 errors during a real MOCOPA test, then he would have failed that test.

42 The email at pages 646-647 (to which we return below) enclosed with it, according to Mr Lycett, the document at pages 650-651 which had originally been dated 29 June 2017 by hand, but was corrected to 30 June. It was the claimant's case that the document was a false one, in that no mock MOCOPA audit had been taken by him, the claimant. We come to a conclusion on the question whether or not the document was in some way false in paragraph 59 below. At this point we note that the email was sent some time after the audit was said by Mr Lycett to have been taken by the claimant. However, Mr Lycett had sent to Mr Starmer the email dated 14 July 2017 at pages 551-552 after a conversation which both of them said had

occurred by telephone on that day (and which we accepted had occurred). In the email at pages 551-552, Mr Lycett wrote this:

> " Hi Ian, Following our earlier conversation I'd like to confirm the following details.
>
> Myself and the other Technical Trainers are very concerned about one of the students on the Single Phase Electrical course, Ola Depo. Ola is struggling with all aspects of installing an electric meter safely and to the standards required this far into the course .
>
> I met Ola during his second week in the Academy, so after a week's induction at Kingswinford, a week at Tipton academy and a week in the field with a mentor.
>
> It became apparent almost immediately that he had little to no idea of what was expected or how to even hold a screwdriver and would require constant 1 on 1 supervision to keep him safe when working at a live cutout (I was only able to do as I was sharing the class with Matt Furze, had this not been the case im [sic] not sure what I would have done). Ola doesn't listen or doesn't understand what is being said to him but I would stop him from doing something unsafe, explain to him what it was and how he should be doing it and he would agree and say he understands, repeating back to me so I know he has taken it in but then immediately continues to do the unsafe action.
>
> The following day, after a complete day with 1 on 1 coaching, I asked him to show me what he had learned by fitting a credit meter and I would only be stopping him if he did something unsafe, I had to stop him 29 times during the course of a single rate credit meter install. He works so untidily he has already punctured his first pair of 10KV gloves by not following instructions and I had to stop him and make him tidy up his area as he was treading on his tools and test equipment.
>
> After another week in the field he returned this week with little or no improvement. I have had to stop him a number of times again today from working in a live MSDB without the proper PPE. I have also been approached by several other students who were very upset with his body odour and also his way of working in a team environment. Comments such as, 'he doesn't listen', 'he thinks he knows how to do it and insists on doing it his way when the rest of us know its not correct, costing us a lot of valuable workshop time to correct the mistakes', 'he is rude and bossy', 'he talks down to us'. I have spoken to the students who raised these concerns and asked them to please be as patient as they can but their frustration is clearly becoming an issue. You mentioned his mentor had expressed similar concerns to you which only confirms to me that's its not just in the learning environment of the Academy that he acts this way.

> It would be interesting to speak to the recruitment team to check how his practical assessment went. He could not hold a screw driver or tighten a screw up properly by his second week at the academy so is the selection process robust enough? Could it be that he did not interview and someone technically competent stood in for him? (and by extension, are the new starters identity confirmed stringently enough that this could not happen?)
>
> My concern is that if he is not watched extremely closely whilst in a customer's home, he or a customer could be seriously hurt and it is my recommendation that he is referred back to the business for reassessment. It is only by chance that during the training he has not been injured or injured someone else."

43 Mr Starmer had (it was clear from page 569, which Mr Starmer told us in oral evidence, which we accepted, he had sent) forwarded that email to a number of colleagues on 16 July 2017 after speaking to the respondent's Employee Relations ("ER") department, who had "said that this sounds like an attitude problem rather than capability", although as Mr Starmer recorded (and he told us), he thought that the evidence pointed "to a combination of both". The recipient colleagues included Mr James Jackson, who was at the time the head of the respondent's training academy and who was also, we heard from Mrs Woodward, at that time championing diversity within the respondent's business. Mrs Woodward said that Mr Jackson had given training to managers of the respondent's business at all levels, including board level, on inclusion and diversity.

44 Mr Jackson had, it appears, written the email at pages 554-555, in which he thanked Mr Starmer for his email at pages 551-552 and said this:

> "Thank you for your prompt action/update here and I believe the question regarding identity is a valid one. In the last few weeks I have held multiple discussions regarding this candidate with both Matthew and Brandon from my team and I would echo all of the concerns raised. Please allow me to add that following your meeting and or the discussions around how we move forward; it would be my suggestion that should we decide to proceed in offering Olalekan Oladepo a position in the field as a SMART Meter Technician, then as a minimum he would need to sit the entire training program again from trying to ensure safety/support perspective. This is not a decision I can enforce however a strong recommendation and a decision I am happy to support."

45 Even though that email was not the subject of any direct oral evidence, we concluded that it was sent by Mr Jackson to Mr Starmer (and the other recipients named in the email).

46 Mr Starmer's evidence, which the claimant accepted, was also that he had, as a result of (1) his (Mr Starmer's) conversation with Mr Lycett and (2) the email of 14 July 2017 at pages 551-552 the vast majority of which we have set out in paragraph 42 above, spoken to the claimant on 17 July 2017. The claimant

accepted that he had admitted during that conversation to having "had a few clashes with some of the other Trainees" as Mr Starmer wrote in paragraph 16 of his witness statement, and that he (the claimant) had "denied being rude or bossy". By implication, we note that the claimant accepted that he had been told that Mr Lycett had described the claimant's colleagues as having said that the claimant had been rude and bossy. Mr Starmer's evidence (which the claimant did not challenge in cross-examination, despite the judge making sure that he, the claimant, knew that if he did not challenge what was said by Mr Starmer in this regard then he would be regarded as having accepted its accuracy) in paragraph 16 of his witness statement was also that the claimant had "specifically said [that Mr Lycett] had taught him [i.e. the claimant] a lot and that he felt [Mr Baptiste] was a good mentor".

47 Mr Starmer had then gone on a period of annual leave, and during that period Ms Usher had looked after his team. When Mr Starmer returned from annual leave, Ms Usher told him about what had happened when she had gone to see Mr Baptiste and the claimant carrying out an installation on 3 August 2017. What had happened at that installation was of critical importance. Before stating our findings of fact about it, however, we record here that in an email to among others Mr Jackson and Ms Usher which Mr Starmer sent on 9 August 2017 (pages 566-567), Mr Starmer described what Ms Usher had told him on that day, which was, as he wrote in the email, his first day back from holiday. Ms Usher had, however, an hour before Mr Starmer sent that email, sent an email (pages 559-560) to the same recipients, in which she (Ms Usher) described what had happened on 3 August 2017 and on the following day. Her email on page 559 contained these two paragraphs describing what had occurred on 3 August 2017:

> "I have done a Go See assisted by OE [i.e an initiative of the respondent which it called "Operational Excellence"] on Olalekan and his Mentor. (In Ian's absence due to holiday and at the request of the Mentor). Olalekan was assessed and fell well short of the required safety standard to be in the field. Olalekan appears to blame everyone else over any of his deficiencies. It is only a matter of time before Olalekan injures himself or someone else.
>
> ...
>
> Olalekan when told to stop by myself or his Mentor carried on with unsafe behaviour and did not appear to have any understanding of what he was doing and why. Even I had to raise my voice to stop him. This was observed by my OE Navigator [i.e. Ms Keiley Freeman] who also expressed concerns at his abilities in week 5 of his in field training."

48 The claimant's oral evidence was firmly to the effect that Ms Usher had not told the truth about what had happened on 3 August 2017. He complained also about what she had done on the next day, which was to ask him to go with a senior technician by the name of Simon Overy, who had assessed his (the claimant's) work on the installation of a meter on that day. Ms Usher told us (and we accepted

her evidence in this regard) that she had a few minutes after leaving the claimant and Mr Baptiste on 3 August 2017 called Mr Overy and asked him to accompany the claimant on the following day. Mr Overy did so, and his report of the installation of the claimant that he oversaw was at pages 697-702. That report was written on a form headed "Smart Metering Duel Fuel Apprenticeship – SM3 – Single Phase Meter On Job Assessment Form".

49 Something that became apparent during the course of the hearing before us, which was borne out by what was recorded on page 524, which was a note of the interview of the claimant by Mr Bhaiji on 30 August 2017, was that 4 August 2017 was a Friday, and on the following working day, which was Monday 7 August 2017, Ms Usher told the claimant not to come to work that day and, it appears, not to attend work again until he was told to do so.

50 There was in the bundle before us a chronology of the events which it appeared (and we were told by Ms Smith on instructions) had been written by Mr Starmer and Ms Usher. It was at pages 542-549, and Mr Gray referred to it in paragraph 6 of his witness statement as having been given to him by Rajashree Nayar of the respondent's ER department in October 2017. The chronology contained the following entries for the period 3-15 August 2017:

Date	**Time 24hr**	**Action**	**Summary Comments**
03/08/17		Amanda Usher Go see, accompanied by operational excellence. Covering for Ian Starmer holiday	Amanda spent day in field visiting several technician, several technician made aware on unrelated phone calls AM that Amanda was out and about, Steven aware that Amanda could be coming out. Amanda and Keiley arrived at NN3 8QU at about 14:00 Steven arrived a few minutes later and Olalekan arrived approximately 15 mins after that. Amanda explained to Olalekan that she was there to observe Steven, Go see was abandoned as Amanda observed multiple safety issues from Olalekan, Amanda had to step in to stop Olalekan when pulling live tail repetitively, he was stopped, had the reason explained to him, confirmed that he understood and proceeded to go straight back to the same unsafe action. The most concerning issue was his repetitive refusal to stop when instructed, Amanda Usher instructed Steven to

			take over the job at16:06 due to time constraints and Safety as Amanda had to leave site, Amanda made arrangements to see Steven first thing the next morning to discuss issues observed. Amanda arranged for Tech Specialist, Simon Overy, to take Olalekan out for a job on Friday morning (04/08/17) to assess him and provide feedback. Amanda phoned Andy Mullis to report what had been observed.
03/08/17	17:00 Approx	Amanda Received a phone call from Olalekan	Amanda received a phone call from Olalekan and said that he had concerns that Steven left work early today and that he regularly does this. Olalekan also stated that he did a good job and that Steve distracted him and he felt he was working safely and to the standards he had been trained to.
04/08/17	09:00	Amanda meets Steven for discussion with operational excellence	Steven expressed multiple concerns about Olalekans abilities and refusal to stop when asked to when not working safely and accurately. Steven also commented that he had taken over multiple jobs due to Olalekan not listening. Amanda challenged Steven as to if this had been recorded on the portfolio paperwork. Steven confirmed that it has not been. It was explained to Steven that the paperwork is not just a tick box exercise and needed to be a true reflection of what had occurred. Steven stated that he did not feel that he could mentor Olalekan any further. Amanda informed Andy Mullis.

04/08/17	15:00	Amanda meets with Simon Overy for feedback.	Feedback from Simon confirms safety and ability concerns including a lack of understanding of test not live, incorrect use of PPE, replacing fuse after test not live and attempting to tag up live. Olalekan had to be stopped from pulling live tails again. Simon stated that he had serious concerns over unsafe working and a lack of ability. The job also took over 4 hours to complete. Amanda informed Andy Mullis.
07/08/17		Amanda Phoned Olalekan	Amanda phoned Olalekan and discussed issues observed, he explained that he was behind with his paperwork so was instructed to spend the next 2 days getting up to date on paperwork and informed that Ian Starmer would be back in on Tuesday.
07/08/17		Amanda Phoned Jan Greenhalgh	Ian Greenhalgh was contacted in Ian Starmers absence to provide some clarity to previous concerns about Olalekan raised by the training team to Ian Starmer as Brendon was on holiday and Amanda was aware that Ian G had been contacted in relation to these concerns, It was discussed that we really needed Ian Starmers input but as it was a safety issue I asked for the email chain to be sent to myself and it was agreed that the potential of resetting training back to the start could be explored, this had been discussed with Andy Mullis. Ian G sent an email requesting this to James Jackson. This was then taken up by senior management

07/08/17		Amanda phoned ER	Amanda phoned ER to discuss what the correct action would be and to keep them informed as a case had been previously opened by Ian Starmer. When asked what we should do with Olalekan whist [sic] decisions were being made. Amanda was instructed to wait until a decision had been made about resetting training but it was an option to suspend whilst issues were being sorted and investigated.
09/08/17		Amanda informed Ian Starmer of the issues that had occurred in his absence.	Catch up and hand over call with Ian as is standard on return to work after leave.
09/08/17		Amanda and Ian asked on email from Michelle Downing for input into the email chain regarding concerns over Olalekan	Amanda Usher responded to request with email on 09/08/2017 at 11:29 Ian Starmer responded to request 09/08/2017 at 12:51 Matter was left in the hands of senior management to return with next steps.
10/08/17 to 13/08/17		Ian Starmer awaiting instruction on next steps	
14/08/17		Ian Starmer meets with Olalekan Oladepo	Meeting with Olalekan to discuss the issues meets with that had been highlight, portfolio taken in for review (concerns noticed over lack of during photo). Olalekan refused to accept there were any issues with his work. Olalekan stated that the training centre and his mentor had not taught him the full test not live procedure, he had never seen a time switch at the training centre and they had trained him on 3 phase meters on an MSDB board.

			Olalekan also stated that his mentor regularly leaves him to work unattended on electric installations whilst he fitted the gas meter and that his mentor was at fault for allowing him to tag up live and also for not wearing his visor at the cut out. He also stated that that when Amanda Usher made a site visit she was on his back for about 10 minutes (she was on site for approximately 2 hours with Keiley Freeman from operational excellence). He stated that Amanda Usher should not have stopped him carrying out what she considered to be an unsafe practice as he knew what he was doing. Ian explained to Olalekan that I would be keeping his portfolio for inspection and review. Andy Mullis informed verbally.
14/08/17	10:00	Ian Starmer Spoke with ER	Ian Starmer contacted ER to discuss points raised by Olalekan, ER advised that Ian should suspend Olalekan on safety grounds and that the case should be looked into by an independent investigator who was experienced in this and had the time, himself and Amanda should not conduct the investigation, all both should be required to do was supply witness statements. The hearing should be held ASAP and as far as the suspension is concerned Olalekan should be told verbally and confirmed in writing with the template letter from HR on line. HR also advised that it need high lighting to Olalekan that all points would be considered and that there was no assumption of guilt. Andy Mullis informed verbally.
14/08/17		Ian Starmer phoned Olalekan to arrange the	Meeting was arranged with Olalekan

		meeting the next morning	
15/08/17	AM	Ian Starmer and Amanda Usher meeting with Olalekan. Hanger Room, Bedford	Meeting was to do [sic] through points raised the previous day to ensure that Olalekan understood the safety issues that had been observed, to go through the portfolio at which point the lack of during photo on all jobs (during photos in portfolio were all after photos with Olalekan standing next to installation). Concerns over Stevens admissions that the paperwork was not a true reflection and was not showing safety incidence that had occurred led to Amanda Usher contacting Chris Snow who confirmed that the portfolio would be rejected. Olalekan was informed of this at length. Olalekan then stated that Steven had not taken during photos as he had been left doing the jobs unattended. He also stated that he had not had one on one training at the training centre and then alleged that Steven had made racist remarks towards him. Ian asked Olalekan if these remarks had been made by Steven before their meeting on the 17th July to which Olalekan responded yes. Ian asked why he had not mentioned this then and had said Steven was a great mentor at the time, the response to this was that it was because he was a new starter and he didn't want to make any trouble. Amanda Usher then said we need to stop this now as these are serious allegations that will need to be investigated fully and that it would be inappropriate for Ian or Amanda to do this. Ian Starmer informed Olalekan that after consulting with ER he would be suspended on full pay whilst the unsafe working practices and his subsequent allegations against Steven and the training were investigated and that all points would be considered and that there was no assumption of guilt. Ian

			handed an immediate suspension letter with his name on it, the reason for suspension and Ian reiterated several times the paragraph on the suspension letter that states 'I would like to emphasise that your suspension is not a disciplinary penalty and does not imply that you are guilty of any misconduct'. We verbally informed Andy Mullis.

51 We return to that chronology below, where we set out even more of it, so important was it to our deliberations (despite the fact that it was not formally proved by either Mr Starmer or Ms Usher). Before doing so, we state our findings of fact about the key events of 30 June and 3, 14 and 15 August 2017.

Our conclusions about what happened on 30 June, 3 August, and 14/15 August 2017

Was there a mock MOCOPA audit on 30 June 2017?

52 The claimant's evidence was (eventually) that Mr Lycett had not carried out a mock MOCOPA audit on his work on 30 June 2017, or at any other time. Although the claimant's position was not completely clear in this regard, we interpreted his position to have been arrived on the following basis:

52.1 a mock MOCOPA audit should not have been administered, as the claimant was not told by Mr Lycett that he (Mr Lycett) was going to do a mock MOCOPA audit;

52.2 Mr Lycett was not qualified to administer that audit; and

52.3 Mr Lycett did not tell the claimant that he (Mr Lycett) was going to carry out a mock MOCOPA audit.

53 The respondent put before us a document which contained what Mr Lycett told us were two photographs which Mr Furze had given him and which Mr Furze had had on his laptop computer. The photographs had printed by them what was referred to by the parties as the photographs' metadata. The first photograph was stated to have been taken at 11:20 on 30 June 2017 and was of the claimant standing next to a single phase meter. The second was said to have been taken at 13:28 on the same day and was of the claimant standing next to a classic meter. The claimant claimed that the metadata had been doctored in some way, or that the photographs could not reliably be taken to prove anything about what had happened on 30 June 2017. One reason why the claimant said that was that he said that he could not conceivably have completed a single phase meter installation in the period between 11:20 and 13:28, not least because lunch was

always taken at 13:00. Another was that since the training which was being given to him was to change classic meters to smart meters, and the photographs showed him standing by a smart meter at 11:20 and a classic meter at 13:28, they could not possibly have shown that he had had a mock MOCOPA audit on 30 June 2017, because the audit would have been of the installation by him of a smart meter.

54 We therefore stood back and asked ourselves what evidence there was to justify or undermine Mr Lycett's evidence that he had carried out a mock MOCOPA audit on the claimant's installation of a meter on 30 June 2017. We asked ourselves why it was that Mr Lycett did not send the report of the audit to anyone else until 14 August 2017 when he sent it to Mr Jackson, Ms Usher, Mr Dale Abnett and Mr Furze, under cover of the email at pages 646-647. In fact, the text of that email in no way undermined Mr Lycett's evidence about there having been a mock MOCOPA audit on 30 June 2017. It referred to the claimant being asked whether he was "confident enough to fit the electric meter with me [Mr Lycett] doing a moc [sic] audit". The email in which that was recorded bears repeating in full:

> "Hi James, please find attached a scan of the moc audit I performed with Olalekan Oladepo on Friday 30th June, (please note I wrote the wrong date on the top of the audit but it was on the 30th June which was the Friday that it took place)
>
> As background to this on Tuesday 27th June Ola was observed trying to gain access to the locked workshop without a trainer present before the start of the day; approaching several of the other trainers asking to be let in. The workshop had been preconfigured to present a Neutral fault for a test demonstration to the group and had Ola gained access alone and started working he would have very likely received an injury. Later that day Ola was stopped working by Matt Furze as he had damaged his insulated gloves in several places even though he had been instructed to remove his gloves on several occasions when they didn't need to be worn to avoid this very issue. Part of the testing process means the delegate has to check their gloves are intact before using them, when Ola checked his gloves and they had damage he didn't act on this and was about to continue working with them. He then asked if he had to get a new pair from his van. (We still have these glove should you wish to examine them) On Wednesday 28th June Ola was falling behind with his metering practical work and spoke to Matt Furze stating he felt he was not getting the same level of attention as the rest of the class, in response to this conversation Matt asked me to spend some one on one time with him to ensure he was working within the code of practice and to the safe working methods. I spent Wednesday afternoon going through the process with Ola. On the Thursday I spent the entire day with him, explaining the reasons behind why we do the tests, demonstrating the testing procedures and then walking him through the entire journey to ensure he understood what he was doing and why he was doing it, this included the basic things such as correct length of cable stripping and tightness of screws, which he was still

struggling with. On Friday Ola and myself had a conversation to find out if he was confident enough to fit the electric meter with me doing a moc audit, which he was more than happy with as he said he had been studying the previous night. I explained I was only going to step in if I observed him doing something unsafe, otherwise I would pick up with him afterwards to go through what he did well and what he could have done differently.
I have attached the audit 'notes' I made during the meter install and as you can see I had to stop Ola a total of 24 times with safety issues.
It became apparent that Ola had a very limited understanding of the safety tests, a very poor working practice where he was standing on his tools and test equipment and failing to listen and act on simple instructions (He would appear to listen, agree to what we were instructing him on but then immediately fail to follow those instructions). This was raised with Matt as a matter of urgency and discussed amongst the trainers and decided that as Ola had asked for the extra tuition he would benefit from the next week of mentoring in the field and see how much he had improved the following and final week in the EAE [i.e. the respondent's training academy]. I took control of the group on the Thursday of the 3rd week (as Matt was on holiday), where the delegates were working as a team to fit 6 meters on a MSDB. As soon as I greeted them I was asked by 3 of the delegates if they could have a word in private. They were concerned with the quality of the work Ola had produced and that he would not listen to any of their ideas on fitting the metering system and as a result fitted the meters incorrectly causing the team as a whole to fall behind the other team. I witnessed this first hand when one of the delegates mentioned to Ola that the meter tails were in the wrong terminals to which he said quite sharply that they should worry about their own work and not his... they did try to convince him that it was a team effort but again he snapped at them to mind their own business. I was about to step in to speak to Ola about this when I had to stop him from putting his naked hands into a 400volt MSDB board which had the potential to result in a fatal electric shock and at week 3 (week 7 overall) this most rudimentary of safety procedures should not have be [sic] missed. It was at this point I raised the issue with Ian Greenhalgh, James Jackson and Dale Abnett as I was very concerned for Olas [sic] welfare not only in the EAE but when in a customers property under the guidance of his mentor. I felt that without non-stop one on one supervision he would have injured himself almost immediately.

Hope this sufficiently explains my reasons for escalating this issue, if not I am happy to give more detail where I can at your request."

55 We saw from the training schedule at page 307 onwards that the third week in the training academy was the week of 10-14 July 2017. That was, of course, the seventh week after 5 June 2017. We checked the SM3 forms in the bundle at pages 338-502 and saw that there were none for that week. We noted that there were (it was clear from the oral and other evidence which we had seen) eight members of the class of which the claimant was one. They had all signed the

attendance register at page 322 during the week of 10-14 July 2017 (described in the document at that page itself as "Week 3 Single Phase Metering").

56 Thus, nearly half of the class were reported by Mr Lycett to have asked to speak to him on Thursday 13 July 2017. Mr Lycett was cross-examined about the content of the email at pages 646-647 and he said that the group work that the claimant had undertaken on that day had been done in two groups of four, i.e. the class had been split into two groups. Mr Lycett said that the work that each group had been asked to do included some work on a 3 phase meter (i.e. one which fed three dwellings rather than one), which was necessarily more complicated than work on a single phase meter. We saw that at page 704 there was a document headed "e.on – MSDB – Group Exercise", which referred to groups of 3 or 4 and four exercises in flats (i.e. dwellings which were part of larger structures) and one on a "Landlord supply", which was on a "3 Phase credit meter and 4 pole isolator".

57 Mr Lycett said during cross-examination that at the training academy, the groups undertaking the 3 phase meter installation were not told that after the exercise had started, the training team would cut off the electricity so that the trainees would think that the system was energised (i.e. "live") but in fact it was not. That was because it was recognised by the training team that the trainees did not have sufficient experience to be safe in installing a 3 phase meter, but that the training team wanted to give them a challenge, so that the trainees could be stretched by having to work out what to do, in a situation in which no harm would be done if a mistake were made. We accepted that evidence of Mr Lycett.

58 On 19 August 2018, the claimant wrote a long response to the Grounds of Resistance. The email enclosing it was at page 44. The response was at pages 45-79. At page 72, the claimant asserted that Mr Lycett had required him to work on a 3 phase meter on 30 June 2017.

59 In deciding what had happened on 30 June 2017 (and otherwise), we worked on the basis that contemporaneous documentation which was written without any intention to mislead and, if it was written for the purpose of self-protection, was purely intended to be an accurate written record of what had occurred, was most likely to be an accurate guide as to what had happened. We also took into account any indications that there were before us about the reliability of the evidence of the claimant and Mr Lycett. We refer below to several indicators of the reliability of the evidence of the claimant which we took into account in determining any conflicts of evidence between the claimant and any witnesses of the respondent, but at this stage we say here that, as stated above,

59.1 we found Mr Lycett to be an honest witness, doing his best to tell the truth,

59.2 it was in our view unlikely that he would have asked the claimant to carry out a mock MOCOPA audit on a 3 phase meter on 30 June 2017,

59.3 we accepted Mr Lycett's oral evidence that the first time that the claimant was asked to do any work on a 3-phase meter was on 13 July 2017 in the circumstances described by us in paragraphs 56 and 57 above (and, as we say there, we accepted Mr Lycett's evidence about what happened on 13 July 2017 as described by us in those paragraphs), and

59.4 we accepted Mr Lycett's evidence that the notes at pages 650-651 were made by him on 30 June 2017 while the claimant was undertaking what Mr Lycett described as a mock MOCOPA audit on that day, so that

59.5 we accepted Mr Lycett's evidence about what had happened on 30 June 2017 and came to the conclusion that there had indeed been a mock MOCOPA audit on that day, during which the claimant did 24 things that were so unsafe that each of those things would have caused him to fail the MOCOPA test if he had in fact been taking it then.

What, precisely, happened on 3 August 2017 so far as relevant?

60 When cross-examined about what had happened during the installation of 3 August 2017 which Ms Usher had observed, while the claimant accepted that Mr Baptiste and he had carried out an installation during the afternoon of that day and that Ms Usher and Ms Freeman were present during most of the time that the claimant and Mr Baptiste were, the claimant denied many parts of the evidence of Ms Usher and Mr Baptiste about what had happened on that day. For example, Mr Baptiste's evidence was that he had on several occasions tapped the claimant on the shoulder to attract his attention in order to get him to stop what he was doing immediately as it was unsafe. The claimant denied that that had happened. In addition, Ms Usher had then told him to stop working on the installation and the claimant denied that that had happened. Ms Usher's witness statement contained the following passage:

> "12. In any event, and as the Claimant was being mentored on-the-job by Steve, the Claimant started to explain the test procedure that would be used for that job almost perfectly. However, when he started work there was no correlation between what he had said and what he was doing. For example, he started with no PPE and was trying to tag up meter tails while still live – i.e. whilst still connected to the power supply. I would expect anyone working on a real job at any level to be aware of that. Clearly, to work on a live system poses significant risks to both the customer and the Technician themselves. It is not over-exaggerating to say that that action could be fatal.
>
> 13. Steve tried to stop him and, on several occasions, had to support the Claimant through the job by giving verbal directions. I did not expect him to need that level of coaching given the work that he was doing. For example, the Claimant wouldn't stop touching and tugging the cables. Steve was telling him to calm down and take his time. I saw that the

Claimant would acknowledge Steve but then carry on doing it wrong anyway. The Claimant did not always acknowledge Steve and on several occasions ignored Steve when he was asking him to stop on safety grounds.

14. By this point the Claimant had managed to remove the meter from the wall. However, it then took him an hour to screw the new meter to the wall. As part of that, I noticed he was turning the screwdriver anti-clockwise instead of clockwise – an incredibly basic mistake that I wouldn't expect a layperson to make.

15. At this point Keiley also expressed her concern to me. Keiley's main concern was that the Claimant wasn't listening and wouldn't stop when directed or asked to do so. He just didn't appear to know what he was doing."

61 It was the claimant's case that Ms Usher and Mr Baptiste had fabricated their evidence. However, the claimant accepted that he had been accompanied by Mr Simon Overy on the following day and during his cross-examination he accepted that(as Mr Overy had recorded in the statement which he had given to Mr Gray of which there was a copy at pages 693-694)

61.1 Mr Overy had stopped him on one occasion from moving around live cables with his bare hands,

61.2 he (the claimant) had forgotten to put on eye protection until he was reminded to do so by Mr Overy, and

61.3 he (the claimant) was going to remove some seals without his visor on until Mr Overy prompted him to put the visor on.

62 However, the claimant did not remember (as recorded by Mr Overy in that statement) that he had "reinserted the fuse and went to tag the meter tails until he was stopped and asked why he was doing what he was doing".

63 We saw that Mr Overy's statement (which was appended to Mr Gray's investigation report, and which was proved formally by Mr Graham's proving of that report) at pages 693-694 ended with these two paragraphs:

"Following completion of the job, I went to meet Amanda to relay to her my findings of how Olalekan had behaved along with his level of skills and knowledge. She was told In full how I felt the job went, along with my surprise at how far below the expected standard Olalekan was at the time.

I would say the job was of above average hardness, but not overly complicated, due to the shared fuse set up. Everything could be viewed easily as it was all on the same set of boards. The work seemed to be beyond

> Olalekan and if left to his own devices, I do not think the Job would have been completed or completed safely. Whilst the Job was eventually completed, the time required was well in excess of what I expected from someone who should have been a week or two away from submitting a completed portfolio. His behaviour with me was good, and he did do as asked when he was asked. His skills and knowledge though were far below the standard I expected to see and he also had to be guided far more than expected too."

64 The claimant relied heavily in his contention that Mr Baptiste and Ms Usher had fabricated evidence on the fact that both claimed that Ms Usher had carried out her "Go See" on 3 August 2017 in order to assess Mr Baptiste's work as a mentor, and not that the claimant's work. However, as was clear from the second sentence of the email at pages 559-560 which we have set out in paragraph 47 above, that "Go See" was requested by Mr Baptiste. The majority of us (Mr Bhatti and the judge ("the majority")) were of the view that that was an error of the sort which frequently occurs because of the passage of time, and we the majority were also of the view that the reason why that error was made was that both Ms Usher and Mr Baptiste had wanted to avoid as much as possible the claimant feeling under pressure as a result of being observed, and had remembered that part of the situation rather than the fact that Mr Baptiste had been expressing concerns about the claimant's competence and responses to Mr Baptiste's attempts to help the claimant. We record the minority view in this and all other regards where we differed with Mr Sagar in paragraph 131 below, where we have set out his minority judgment, which applies to one (and only one) aspect of the claim.

65 We all concluded (in part from the documents to which we refer below as those on which the claimant relied as showing that his performance was not as poor as it was alleged by the respondent's witnesses to have been, but also from Mr Baptiste's and Ms Usher's oral evidence) that Mr Baptiste had not been as forthcoming with the claimant as he could have been about the claimant's shortcomings. However, we concluded that that was because the claimant was highly resistant to criticism: we came to the conclusion that he could not take criticism in a constructive way and as a result was highly resistant to changing his ways even in the face of what would have been seen by an objective observer as well-placed criticism.

66 In addition, while the claimant firmly and repeatedly denied during cross-examination being told by Ms Usher to stop working during the installation of 3 August 2017, that was not what the claimant said to Mr Bhaiji on 30 August 2017. The judge noted this exchange during the claimant's cross-examination:

> "Q: Do you remember Mr Baptiste trying to tap you on your shoulder to stop you? And Amanda and Steven telling you to stop what you were doing?
> A: It did not happen."

67 However, in his interview with Mr Bhaiji of 30 August 2017, the claimant is recorded to have said this (page 522):

> "Amanda came and asked ola, can you come assess this meter I told her what I should do, steve then came to me and told me to do the wrong things and he was yelling at me and after I removed the old meter she asked me to stop".

68 That point was then picked up by Mr Bhaiji, who is recorded on the next page to have asked "Did Amanda tell you why she was stopping you", to which the claimant is recorded to have replied: "No all she said I was slow". In addition, in the document at pages 587-593 which (as we describe in paragraph 77 below) the claimant sent to Mr Bhaiji in the morning of, and before, the interview of 30 August 2017, the claimant wrote this:

> "Midway into the job, Amanda Ushers [sic] asked me to stop and let Steve Baptiste take over. She then left. I did put a call to Amanda after she left and I inquired to know, why she asked me to stop the meter installation midway, despite observing all tests and safety procedures which I was taught by my mentor."

69 In general, as with the other witnesses for the respondent, the majority found Mr Baptiste to be an honest witness, doing his best to tell us the truth. In addition, Mr Gray's evidence was that he was asked to carry out the investigation about which he gave evidence to us "On or around the beginning of October 2017". We saw from pages 602-603 that by 3 October 2017, Mr Gray had already been asked to carry out the investigation, as he wrote in the first of the emails on those pages to Mr Baptiste, Mr Starmer and Ms Usher stating that he "would be conducting the investigation around [the claimant]". He was at about that time (as we record in paragraph 50 above) given the chronology at pages 542-549 of which we have set out a significant part above and of which we set out a further part below. That chronology was therefore written on any view only shortly after the events (and probably very shortly after the final events) to which it related. The chronology was entirely consistent with the oral evidence of both Mr Baptiste and Ms Usher about the events of 3 August 2017, and the majority concluded that it was the best evidence of what happened on that day. We also saw that Ms Freeman had written an email on 17 October 2017 to Mr Gray, at the latter's request, and described what had happened when she had been with Ms Usher on 3 August 2017. It was at pages 690-691, and it was proved by Mr Gray. It was also entirely consistent with the evidence of Ms Usher and Mr Baptiste about what had happened during the afternoon of 3 August 2017. In all of the circumstances, the majority accepted the evidence of Ms Usher and Mr Baptiste to which we refer in paragraph 60 above about what had happened on 3 August 2017.

<u>Did Ms Usher say on 14 or 15 August 2017 that she would put the claimant's portfolio in the dustbin?</u>

70 On page 67, the claimant's response to the grounds of resistance included the assertion that Ms Usher had said on 14 August 2017 in the presence of Mr Starmer that his (the claimant's) "portfolio will end up in dustbin" (sic).

71 Ms Usher firmly denied saying that. She said that she had not seen the claimant on 14 August 2017, but that she was with Mr Starmer when he had met with the claimant on the following day. Her witness statement contained the following passage:

> "23. Ian met with the Claimant on 15 August to confirm his suspension and discuss his retraining. It was Ian's decision to suspend the Claimant and I wasn't aware he was being suspended until just before that meeting. As part of that meeting, I was asked by Ian to review the Claimant's portfolio as I had experience in doing so for others. The portfolio is the document that the Trainees are meant to compile to show all of the work that they have undertaken and the feedback they have received from their mentors on that work.
>
> 24. As soon as I began my review, I noticed a number of photographs of completed jobs were missing. It was the 'during the job photos' that are used to prove that the technician did complete the work themselves that were absent from the portfolio. I found that the Claimant was trying to use photographs of jobs he hadn't completed, some far more advanced than his level. I therefore called Chris Snow, one of the Electrical Technical Advisors from Quality & Standards, who would be assessing the portfolios and explained what I had in front of me. Chris confirmed my belief which was that the Claimant would not pass his training based on the portfolio content.
>
> 25. I then went back to the Claimant and said without the necessary evidence of him completing the jobs he could not be passed. The Claimant then asked me what would happen with his portfolio and I said I don't know but it wouldn't be able to be submitted. I did not say I would throw it in the bin. I just said it wasn't passable."

72 We (for the avoidance of doubt, that means all three of us; any usage below of the word "we" is, unless otherwise indicated, a reference to a unanimous decision) accepted that evidence of Ms Usher in its entirety.

The investigation into the claimant's allegedly unsafe working practices, the manner in which it was restarted, and the audit of the claimant's van

73 The chronology at pages 542-549 contained, at pages 547-549, the most comprehensive explanation of the background to the starting and restarting of the investigation into the claimant's allegedly unsafe working practices which was commissioned by the respondent at the time that the claimant was suspended. The final part of that chronology, on those three pages, was in the following terms:

Date	Time 24hr	Action	Summary Comments

17/08/17	Munir invites Ian Starmer to a private and confidential meeting	Ian Starmer accepted invitation on 18/08/2017 and Ian booked room F at Westwood.
21/08/17	Ian Starmer attends fact finder	At start of meeting Ian Starmer asked Munir what was being investigated, was it allegations, unsafe working, myself? Munir replied that he was investigating the whole thing. That fact that I was subject to a fact finding investigation was confusing as I was expecting to be asked for a statement as ER had indicated and what I have been subsequently made aware has been the situation with Simon Overy's input.
23/08/17	Copy of fact finder notes sent to Ian Starmer from Ryan Goucher.	Ian Starmer received a copy of the notes from his fact finder. Concerns were raised with Andy Mullis that the notes were of a poor standard and unsigned. Ian was unable to sign them as a true reflection as they were unintelligible.

23/08/17	Ian Starmer made aware of damage to Olalekan Oladepos work van.	Ian Starmer made an unannounced site visit on Steven Baptiste whilst he was mentoring Richard Turner. This was prompted by one of the allegations from Olalekan that Steven was in the habit of leaving new starters alone to work on electric meter installations. Steven and Richard were unaware of my presence for 5 to 10 minutes, in which time I observed Steven in full attendance, wearing correct PPE and giving a high standard of mentoring to Richard Turner. During this visit both Steven and Richard made comment regarding damage to Olalekans work van. Steven stated that he must report this to his FTL several weeks earlier. Ian Starmer has still not received a report of this from Olalekan. Ian escalated this to Andy Mullis and ER, ER stated that this must be part of the ongoing investigation and that he should not contact Olalekan himself as this could be seen as harassment. Ian Starmer passed on the relevant information to Munir on 24/08/17.
21/08/17 to 24/08/18	Ian Starmer sends case information to Munir	Ian Starmer sends all emails and relevant case information to Munir.
29/08/17	Amanda Receives voice mail from Munir Bhaiji	Amanda returned to work after a week off on 29/08/17 and due to IT issues was unable to gain access to emails for first few hours of the day. A voicemail from Munir informing her that she had been invited to a fact finder at 10:00 that day at the Hilton J21 Leicester. it was past 10:00 at this point and was only 2 hours after her return to work. Amanda was under the impression that this was for the purpose of giving a statement on the unsafe practices that she had observed

		on 03/08/17. Arrangements were made for the same location on 31/08/17 at 10:00. Backed up with a text message from Munir. Being a little confused over being called to a fact finder rather than being asked for a statement and the instruction that she could bring representation, Amanda contacted Andy Mullis to ask what it was about. To the best of Andy and Amandas knowledge it was to explain what had been witnessed on 03/08/17.
30/08/17 14:52	Amanda received phone call from Munir	Phone call received from Munir requesting that an outage be entered for Steven Baptiste on the 31/08/17 to attend a Fact Finder. Steven had been waiting at the venue to [attend a] fact finder that day but the previous fact finder had over run.
30/08/17 15:00	Amanda received voice mail from Stephen Baptiste	Voice mail from Steven strongly expressing concern that he had been left waiting when he could have been working and that he was most unhappy that he then saw Olalekan exiting the meeting room with the same union rep that was representing him, something that his union rep had not informed him. Amanda explained to Steven that he should contact his union but that she would inform Andy Mullis of his concerns. Andy Mullis informed verbally.
31/08/17 10:00	Amanda attends fact finder	At start of fact finder when Munir was explaining what verbatim meant and [the] fact that the notes were intended to be a true reflection, Amanda ask Munir if she was being investigated or had been accused of anything and was told no, this was not minuted. Aside from being asked to recount the safety issues observed, Amanda was asked if she had told Olalekan that she was going to bin his portfolio, this suggested to Amanda that she was being

		investigated and had been accused of something. Amanda was asked if a digital signature would be ok for the notes and this was agreed, but as Ryan had mentioned that the notes needed tidying up Amanda assumed that a corrected version on the notes would be forwarded to her to be signed digitally and returned. This assumption was made as the notes that were shown to Amanda on the day were unreadable and what appeared to be a very rough draft. It was very rushed at the end of the fact finder Steven and Nigel entered the room before Amanda had left.
31/08/17 PM	Amanda Usher phones Andrew Mullis with concerns	Amanda phoned Andy with concerns that she was being investigated and not being made aware of allegation made against her and that the notes that had been sent to her via email were not a true reflection as they were unintelligible in the main, missing context, in some cases stating the opposite of what had been said. Andy was interviewing at the time of the phone call so suggested a discussion the following day.
31/08/17	Amanda receives a phone call from Steven Baptiste	Steven reported that he felt he had been questioned by his union rep during the fact finder and that it had not been minuted, that the notes did not make sense and he was particularly upset that he felt investigation was asking questions about Amanda. Amanda suggested that Steven speak to Andy Mullis about his concerns as she felt discussing this could be seen as inappropriate at best
01/09/17	Amanda escalates concerns via	Email with notes attached and concerns over the way the investigation has been conducted sent to Andy Mullis. At this point Amanda Usher has still not been

	email to Andy Mullis	informed that any allegations have been made against her.

74 During the course of the hearing, on 31 July 2020, we were sent a copy of the notes which were recorded in the above chronology as having been sent to Ms Usher on 31 August 2017 at the end of her interview with Mr Bhaiji. The majority were of the view that they were indeed in many respects unintelligible. We were not given a copy of the email of 1 September 2017 referred to in the final box of the chronology as set out immediately above. However, we did hear from all three of the persons referred to in the chronology as having been dissatisfied with the way in which the investigation of Mr Bhaiji had been conducted, and it was clear that they all felt very strongly that the investigation had been conducted in an unexpected and irregular manner, and that they had been treated unfairly by Mr Bhaiji in that regard (although Mr Sagar's assessment of the impact of that differed to the extent stated in paragraph 131 below). One of the reasons why it was said by witnesses for the respondent that it was inappropriate for Mr Bhaiji to act in the way described in the chronology was that he was on the same level in the respondent's hierarchy as Ms Usher and Mr Starmer, so that it was inappropriate for him to carry out an investigation into their conduct. In addition, while Mr Gray was, he told us (and we accepted) not involved in the decision-making process about the recommencement of the investigation into the claimant's allegedly unsafe working practices, he told us also that (1) that decision was made by "senior management", and (2) he would not have given the task of carrying out the investigation to a new Field Team Leader with no experience. The majority of us accepted the first of those two things. We all accepted the second of those two things. We saw that the respondent's Grounds of Resistance contained this paragraph (number 22) on page 29 of the bundle:

> "The Respondent carried out an investigation into the matter. Munir Bhalaji [sic], Field Team Leader, was initially appointed as Investigation Officer. However, Mr Bhalaji was replaced due to issues relating to the investigation notes. A number of the interviewees claimed the notes were not accurate and did not reflect what had been discussed. The Respondent took the decision that in order to ensure a correct and fair process was followed and everything was recorded accurately, the process should start over. The Respondent informed the Claimant of this and the Claimant agreed that he was happy with the investigation starting over."

75 The claimant did not at any time say that Mr Bhaiji was not a Field Team Leader. He responded in detail to paragraphs 22 and 23 of the Grounds of Resistance in his document sent to the respondent and the tribunal on 19 August 2018 at pages 44-79. The response to those paragraphs was at pages 73-74 and no issue was taken with the statement that Mr Bhaiji was a Field Team Leader, although for example at page 71, the claimant had written:

"I am of the opinion, that Emma Noble of Pinsent Masons representing EON energy is either inadequately briefed or is yet to do a diligent enquiry into the supporting documents of this case."

76 However, as was evident from what the claimant wrote at pages 73-74 and elsewhere throughout the hearing bundle as well as during the hearing before us, the claimant was far from happy with "the investigation starting over". Rather, he was extremely disappointed that that had happened. What we could see had happened, however, was that he had alleged to Mr Bhaiji during the latter's interview with him on 30 and 31 August 2017 that

76.1 Mr Baptiste had been "rude and insulting me on a daily basis" (page 527) including by saying (page 527) "Stupid and told me many times get your head around this/ fuck off and fuck you";

76.2 Mr Baptiste had otherwise been at fault in a number of ways (including by saying that "he was threating me [sic] if I don't do what he does I would get bad assessment comments and he did that for about 7 jobs" (page 527); and

76.3 he (the claimant) had the feeling that Ms Usher and Mr Starmer "just want to get rid of me" (page 526).

77 In addition, the claimant had sent an email at 06:29 on 30 August 2017 (pages 585-586) to Mr Bhaiji, copying it to Mr Starmer, Mr Andrew Mullis (Mr Starmer's line manager) and a number of other people, enclosing a 6-page response to the fact that he was suspended because it had been alleged that he was using unsafe working practices (pages 587-593) in which the claimant had alleged a number of discreditable things about Mr Baptiste and Ms Usher. On the final page, the claimant had written this:

"**Sixth; Portfolio as evidence seized**

The entire portfolio has now been impounded and seized by Amanda Ushers(FTL) who promised to throw the entire portfolio into dustbin in the presence of my FTL. This type of comments traumatized me.

My FTL did countered her straight away and promised, I will get the portfolio back. I have requested the portfolio back in the last meeting. She refused to hand it back to me. She said, it contained some positive feedbacks. That should be a plus and not a basis to impound it. That seems like a vested interest.
Therefore, any disciplinary measures against me, including allegations of unsafe practice or termination of my employment based on these Amanda's allegations, comments, action or recommendations will not be fair and transparent. This will also be against the ethos of E.ON UK as a corporate organisation."

78 When giving oral evidence, the claimant accepted that Mr Bhaiji had asked him to go to his van during the interview that he had had with Mr Bhaiji on 30 August 2017. That interview was the subject of the "Meeting Minutes" at pages 517-528. That document showed that the "van audit" about which the claimant complained as harassment was carried out at the end of that interview, and that Mr Bhaiji told the claimant about the plan to carry out the audit at the start of the interview.

79 The claimant alleged to us during submissions for the first time that Mr Starmer had called Mr Bhaiji during the interview of 30 August 2017 and asked Mr Bhaiji to carry out the van audit. However, the meeting minutes showed at page 517 that Mr Bhaiji said that he had been sent an email the week before with a request to carry out an audit of the claimant's van when investigating the reasons for the claimant's suspension. In fact, the wording of the relevant entry was very hard to decipher, since it was not in a readily intelligible form: it was this:

> "Mb Late last week I received email to van that may have both been reported".

80 However, we interpreted that unclear wording as being a record of Mr Bhaiji saying that he had received an email the week before about the claimant's van, and in the circumstances it must have been a reference to the damage that had been reported, although who "both" were was not clear. Nevertheless, the chronology at pages 542-549 showed (in the entry at the top of page 548) that Mr Starmer had "passed on the relevant information" about the van to Mr Bhaiji on 24 August 2017. The reference to "both" can in addition be seen from the content of the same box at the top of the page, which included these words:

> "During this visit both Steven [Baptiste] and Richard [Turner] made comment regarding damage to Olalekans work van. Steven stated that he must report this to his FTL several weeks earlier. Ian Starmer has still not received a report of this from Olalekan."

81 In fact, the issue of the possibility of damage having been done to the claimant's van was then discussed by Mr Bhaiji at the start of the interview with the claimant (as can be seen from the notes on page 518), and the van check was carried out at the end of the interview, as can be seen from what is recorded at page 528.

82 During cross-examination, Mr Starmer said that he had been advised by the respondent's ER team not to carry out an audit of the claimant's van himself, as that might be seen as harassment. Thus, he confirmed the accuracy of the chronology at page 548, which recorded that advice. He also said that he had made the decision to suspend the claimant on the advice of the respondent's ER team.

83 Subject to the reservations of Mr Sagar recorded in his minority judgment set out in paragraph 131 below, we concluded that that chronology was in all respects an

accurate record of what had happened, including therefore not only the reason for and the manner in which the van audit occurred but also the reasons for Mr Starmer's suspension of the claimant, namely that he was advised by the respondent's ER team to suspend the claimant and that it was because of that advice that he suspended the claimant.

Mr Gray's investigation

84 Mr Gray's witness statement proved his investigation report and its appendices at pages 637-839 and described the reasons why he had decided that the claimant should be the subject of formal disciplinary action. As we say in paragraph 69 above, Mr Gray started his investigation early in October 2017. He completed his report on 9 November 2017.

85 We found Mr Gray to be an honest witness, doing his best to tell the truth. We accepted his evidence in its entirety. The evidence which he accepted and which he included in his report and its appendices amply justified his decision that the claimant should be the subject of disciplinary action.

86 We saw from the notes of the interview with the claimant that Mr Gray had carried out on 6 November 2017 that the claimant had said (as noted on page 713) about Ms Usher:

> "I would disregard anything AU says about me as she is biased she wished mentor was harder with me, she said she want my portfolio thrown in the bin. I won't identify with anything she writes in her reports. Her reports have led to my suspension, and meter she observed was not documented. It's all biased. On observation she always tells lies on me."

87 On the next page, the claimant is recorded to have said that Mr Baptiste "instructed me wrongly, whispering wrong steps in my ears".

88 Those two things are consistent with what the claimant had written in his response to his suspension, at pages 586-593.

89 In addition, the claimant was recorded on page 714 to have said to Mr Gray:

> "It's a lie that I'm not working to safe policy's/practices. If I had right mentoring I would be good at the job and would grow."

90 The claimant is also recorded to have responded "No" to the question: "You don't accept that you have been stopped for safety reasons on any of these events." In response to the question "How do you feel about returning to training", the claimant is recorded to have said this:

> "That's what I want. I have audited myself. If I fail training I will leave. SB has attitude issues, I don't want to continue with SB. He said he hated Africans as they sold them to Caribbean's, I said you can't take it out on me."

91 However, while the claimant alleged as noted on page 706 that he "Felt discriminated", when asked by Mr Gray "What way", the claimant responded as noted at the top of page 707 to the effect only that he felt disadvantaged by not being given as much of Mr Furze's time as when "someone else asked a question".

Mr Wilson's decision that the claimant should be given a first written warning

92 Mr Wilson considered the case against the claimant by first hearing from the claimant in person without having read the report of Mr Gray and its appendices. That was, he said to us (and we accepted) because he wanted to approach the matter without any risk of being prejudiced against the claimant. Mr Wilson was also an honest witness, doing his best to tell the truth.

93 Mr Wilson's reasons for deciding that the claimant should receive a first written warning were stated in the following manner in his witness statement:

> "18. I confirmed to the Claimant that I found that he was guilty of misconduct by reason of safety breaches and that he should be awarded with a first written warning.
>
> 19. I came to that decision on the grounds that, amongst others:
>
> 19.1 the Claimant had been given additional support during the training program in that he was given extra mentoring from Brandon Lycett, another of the Trainers. He should therefore have been performing at least as well as would have been expected of a trainee at his level;
>
> 19.2 I could see no justification for the Claimant being entitled to touch cables with his bare hands, as was suggested by his representative;
>
> 19.3 I disagreed that the statements of Amanda or Steve should not have been accepted or that they had colluded in any way; and
>
> 19.4 ultimately, the Claimant had failed to adhere to the safety instructions given to him by both the Training Academy or his Field Team Leader and that that was unacceptable as it risked compromising safety which must be paramount."

94 We accepted that evidence of Mr Wilson.

The appeal heard by Mrs Woodward

95 Ms Woodward was initially surprised that the claimant had been given only a first written warning, and not a final written warning. She told us that that was because she knew of previous cases where employees had put themselves and/or others at the risk of death by their failings and been given either a final written warning or been dismissed. She therefore had expected the claimant to have been given a final written warning. She said that she understood that the reason why the claimant had been given only a first written warning was that he was a trainee.

96 The claimant pressed Mrs Woodward in cross-examination to accept that the decision that he be given any kind of disciplinary sanction was wrong. She stood firm by what she initially said in cross-examination, which was that she was "more than happy that the written warning was the right outcome in the circumstances".

97 Mrs Woodward was pressed about the respondent's approach where discrimination was alleged, and Mrs Woodward said that during the appeal hearing which she held, the claimant made no mention of racial bias or discrimination because of race. The claimant said that if he was underperforming then he should simply have been put on an improvement programme. Mrs Woodward said she felt that the claimant "really needed to understand the seriousness of [him] not following the procedures." She said that what he had done could have put the respondent's customers in danger and that her upholding of the giving to him of a written warning had not been done with a view to harming him but was, rather, done with a view to protecting him by making clear to him "the severity of [his] actions" and the need for him to comply with the respondent's safety procedures and requirements.

98 As noted in paragraph 43 above, Mrs Woodward told us about the extensive efforts made by Mr Jackson to promote the cause of diversity in the respondent's business.

99 We accepted all that evidence of Mrs Woodward, whom we found to be also an honest witness, doing her best to tell us the truth. In addition, what she said about the reason for upholding the warning was consistent with the refusal by the claimant to accept that he had done anything unsafe (as we record at the end of paragraph 89 above).

Robin Canham

100 The claimant accepted that he had made mistakes (although he alleged that Mr Baptiste and Ms Usher had fabricated evidence about things that he had done incorrectly and in a hazardous way), and it was his case that he had been treated in response to his mistakes less favourably because of his race than he would have been if he had been white. His comparator in that regard was Mr Robin Canham, and we therefore now turn to what the claimant alleged that Mr Canham had done incorrectly and the manner which the respondent reacted to the claimant's allegation of Mr Canham's failings.

101 At page 223, there was a copy of a document created by the claimant in which he inserted photographs of himself and Mr Canham on two separate jobs. In relation to the photograph of Mr Canham the claimant had asserted that Mr Canham had

101.1 been "Drilling in LIVE Cut-Out"

101.2 not been wearing insulated gloves while doing so

101.3 not been wearing fire-retardent clothing while doing so, and

101.4 not been wearing eye protection glasses while doing so.

102 At page 506 there was a document in which a person whom the respondent had asked to consider the claimant's allegation of unsafe practices by Mr Canham had responded to those allegations as follows, in the sequence in which they are set out in the preceding paragraph above:

> "There is no evidence of drilling in a cut out in the detail provided. What is shown is a battery screwdriver being used on a terminal block cover.
>
> It is assumed that the supply has been isolated so no requirement to wear insulated gloves.
>
> As above, no need to wear fire retardant clothing.
>
> Eye protection should be worn although photograph is not clear enough to determine whether or not these are being worn."

103 The claimant pressed the respondent's witnesses and us to accept that the photograph at page 223 showed that Mr Canham was not in fact wearing safety glasses or protective eyewear. In fact, it was impossible to tell from the photograph whether or not he was actually wearing eye protection.

104 Ms Usher, when asked what she would have done if Mr Canham had in fact not been wearing eye protection at the time, said that eye protection was a requirement at all times when working on an installation, even if only to protect against the risk of a small piece of debris flying out of whatever was being worked on and going in the eye of the employee. She said also that if the respondent had concluded that Mr Canham had been at fault and had not been wearing eye protection, then he would have been given an informal oral warning only, since the safety failure would not have affected anyone but him. We accepted that evidence of Ms Usher.

105 The claimant accepted that

105.1 Mr Canham was not operating a drill when he was photographed, but was instead using a battery operated screwdriver;

105.2 Mr Canham was not working in the cut-out itself but was working adjacent to it; and

105.3 the part of the installation on which Mr Canham was working had been isolated.

The evidence on which the claimant relied as showing that he had been treated less favourably because of his race than a hypothetical comparator would have been

106 There were in the bundle a number of documents which had been in the claimant's training portfolio (the one which it was alleged by the claimant Ms Usher had said should be put thrown in the bin). They were at pages 338-502. A number were completed SM3 forms of the sort which Mr Overy completed on 4 August 2017 as we describe in paragraph 48 above, i.e. entitled "Smart Metering Dual Fuel Apprenticeship – SM3 – Single Phase Meter On Job Assessment Form". The first one, at page 338, was dated 3 July 2017. Most of the boxes on those forms were ticked to show that the claimant had passed the relevant assessment criteria. However, in a few, failures were recorded. These were recorded on the following pages and were in respect of the following matters:

106.1 338, where it was recorded that there was a failure to store equipment and materials safely on the vehicle and/or the vehicle was not tidy;

106.2 339, where it was recorded that the claimant was not "aware of procedures for reporting damage/defects/hazards etc. at the meter and cut out";

106.3 342. where it was recorded that

106.3.1 the claimant's "general standard of workmanship" was not "acceptable", and

106.3.2 some "copper" was "showing";

106.4 347, where it was recorded that on 4 July 2017

106.4.1 the claimant had not worn "mandatory PPE [i.e. personal protection equipment] at the correct times" and

106.4.2 that the claimant was not "aware of procedures for reporting damage/defects/hazards etc. at the meter and cut out";

106.5 350, where it was recorded that on 4 July 2017 in the same installation "the pigtails" were not "present";

106.6 357, where it was recorded that on 5 July 2017 "the pigtails" were not "present";

106.7 375, where it was recorded that on 6 July 2017

106.7.1 the claimant had not worn "eye protection throughout", and

106.7.2 that the claimant was not "aware of procedures for reporting damage/defects/hazards etc. at the meter and cut out";

106.8 376, where 6 failures concerning communication with the customer were recorded to have occurred on the same installation of 6 July 2017;

106.9 378, where it was recorded that in that installation of 6 July 2017, "the pigtails" were not "present";

106.10 447, where it was recorded that on 25 July 2017 "the seals/wires, rubbish etc," had not "been removed from working area";

106.11 486, where it was recorded that on 2 August 2017, the claimant had not worn "eye protection throughout";

106.12 489, where it was recorded that in the same installation of 2 August 2017,

106.12.1 the claimant's "general standard of workmanship" was not "acceptable",

106.12.2 "the seals/wires, rubbish etc." had not "been removed from working area", and

106.12.3 "a Network Defect" had not been "reported by the apprentice" as necessary;

106.13 495, where it was recorded that on 3 August 2017, the claimant had not "cleared up and removed waste from working area".

107 Nevertheless, Mr Baptiste had in no place recorded that the installation had not been completed correctly. For example, on 5 July 2017, Mr Baptiste had recorded (page 361) in a form headed "SM5 - Expert Witness Statement" that the installation of that day (as referred to in paragraph 106.6 above) had been "completed to a satisfactory standard as required by the processes and procedures outlined in the relevant Codes of Practice, E.ON Working Practices and relevant Industry Regulation". There were in the bundle SM5 forms at pages 303, 430, and 596, but they were for installations of 20 July 2017, 24 July 2017, and 21 July 2017, and

none of those installations had been marked as having involved any failure by the claimant.

108 More significantly, the claimant had in all cases, including where failures had been recorded by Mr Baptiste, stated that he had completed the job satisfactorily. Also, Ms Usher told us (and we accepted) that any failure by the claimant would not be recorded for his portfolio: rather, any record of a failure would be used as training material. She said that only completed jobs that had been passed would be included in a training portfolio.

The respondent's disciplinary procedure provisions concerning trade union representation and the respondent's evidence on whether trade union representatives were ever invited to be present at meetings at which employees were suspended

109 The respondent's disciplinary procedure was at pages 270-277. At page 273, this was said:

> "**D6.4.1** Individuals who are the subject of disciplinary allegations and any witnesses have the right to representation at all stages of the formal procedure, including investigations. The representative may be a Full Time Trade Union Official, a certified lay official or a fellow employee."

110 At page 272, there was this passage:

> "**D6 The formal Procedure**
>
> **D6.1** Immediate Suspension
>
> **D6.1.1** Immediate suspension from duty will only occur in exceptional circumstances and after careful consideration, where the Company considers there is a risk to people or property or believes an alleged act of gross misconduct is incompatible with the employee remaining at work and there are no viable alternatives, such as temporary re-deployment. Any such suspension will be on full pay. The employee will be made aware of why they have been suspended and that the action is not a disciplinary penalty (this will be confirmed in writing)."

111 Mr Starmer was asked by us whether or not the respondent ever gave an employee whom the respondent was proposing to suspend an opportunity to be represented by a trade union officer at the meeting at which the suspension was imposed and he said that the respondent never did that. He said that during August 2017, when deciding what should happen to the claimant, he checked with the respondent's ER team about entitlement to a trade union representative, and the person or persons to whom he spoke said that the claimant had no right to trade union representation in relation to an immediate suspension. We accepted that evidence of Mr Starmer, in part because we found him to be an honest

witness, doing his best to tell us the truth but also because the Employment Relations Act 1999 does not confer a right to be represented, whether by a trade union official or a workplace colleague, at a meeting at which the employee is formally suspended.

In what circumstances would a new smart meter installer be given training on fitting a gas meter?

112 Mr Starmer's oral evidence was that if he had not passed his MOCOPA test for electrical installations, then he would not have been able to train to install gas meters, and that the respondent wants installers to get the electrical qualification before moving onto gas training. Mr Baptiste had "never heard" of anyone who was struggling with electricity training being started on a course for the installation of gas meters. We accepted that evidence of Mr Starmer and Mr Baptiste.

The relevant law

113 In considering the issues, we were obliged to apply section 136 of the EqA 2010, which is in these terms:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

114 However, in some circumstances, it is possible, or even necessary, either instead or in addition to apply the decision of the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 and therefore to ask why that which is the subject of the claim occurred.

115 When applying section 136, it is possible, when considering whether or not there are facts from which it would be possible to draw the inference that the respondent did what is alleged to have been less favourable treatment because of a protected characteristic, to take into account the respondent's explanation for the treatment. That is clear from the line of cases discussed in paragraph L[807] of *Harvey on Industrial Relations and Employment Law*, as follows:

> "Whether considering, then, the legacy legislation or the Equality Act burden of proof provision, the two-stage process remains the starting point. In the first place, the complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination against the complainant.

According, to the Court of Appeal in *Madarassy v Nomura International plc* [2007] IRLR 246, [2007] ICR 867, CA, 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it (also restated in *St Christopher's Fellowship v Walter-Ennis* [2010] EWCA Civ 921, [2010] EqLR 82). That means that the claimant has to 'set up a prima facie case'. In *Madarassy* it was held that a difference of status and a difference of treatment was not sufficient to reverse the burden of proof automatically; Underhill P in *Hussain v Vision Security Ltd and Mitie Security Group Ltd* UKEAT/0439/10, [2011] All ER (D) 238 (Apr), [2011] EqLR 699 warned that this must not be given the status of being a rule of law. Whether the burden has shifted will be a matter of factual assessment and situation specific. The second stage, which only applies when the first is satisfied, requires the respondent to prove that he did not commit the unlawful act. A note of caution, however, is necessary against taking from *Igen* [i.e. *Igen Ltd v Wong* [2005] ICR 931] a mechanistic approach to the proof of discrimination by reference to RRA 1976 s 54A. In *Laing v Manchester City Council* [2006] IRLR 748, [2006] ICR 1519 Elias P observed as follows:

> ''71. We would add this. There still seems to be much confusion created by the decision in *Igen v Wong*. What must be borne in mind by a tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race.
>
> 72. The courts have long recognised, at least since the decision of Lord Justice Neill in the *King* case to which we have referred, that this would be unjust and that there will be circumstances where it is reasonable to infer discrimination unless there is some appropriate explanation. *Igen v Wong* confirms that, and also in accordance with the Burden of Proof directive, emphasises that where there is no adequate explanation in those circumstances, then a Tribunal must infer discrimination, whereas under the approach adumbrated by Lord Justice Neill, it was in its discretion whether it would do so or not. That is the significant difference which has been achieved as a result of the burden of proof directive, as Peter Gibson LJ recognised in *Igen*.
>
> 73. No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865 (at para 17), it may be legitimate to infer that a black person may have been discriminated on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other

white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single right answer and tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages.''

In *Commissioner of Police of the Metropolis v Maxwell* UKEAT/0232/12, [2013] EqLR 680 it was emphasised that particularly in cases where there are a large number of complaints the tribunal is not obliged to go through the two stage approach in relation to each and every one."

116 The law of harassment within the meaning of section 26 of the EqA 2010 might be thought to raise issues which are different from those which apply when considering a claim of direct discrimination within the meaning of section 13. However, the test for determining whether or not conduct was unwanted within the meaning of section 26 is in many cases the same as that which applies when considering a claim of direct discrimination. That is for the following reasons.

117 Section 26 of the EqA 2010 provides so far as relevant:

"(1) A person (A) harasses another (B) if–

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of–

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account–

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

118 There is in the judgment of Underhill LJ in *Unite the Union v Nailard* [2019] ICR 28 a very helpful discussion about the impact (or otherwise) of the use of the words "unwanted conduct related to a relevant protected characteristic" in section 26(1)

of the EqA 2010 instead of the words in section 13, namely "because of a protected characteristic". Only rarely will a claim of harassment add anything to a claim of discrimination. In addition, as Underhill LJ confirmed in paragraphs 83-101 of that judgment, a mental element is required in a claim of harassment as much as in a claim of direct discrimination.

Our conclusions on the claimant's claims

The claim of direct discrimination because of race

119 Taking them in the order in which they appear in paragraph 29 above, but ignoring the issues numbered 1 and 9 in that list, given that the claimant was no longer pressing those claims, our conclusions are as stated below. All of them bar one are unanimous. Our conclusion in regard to the question whether the decision to restart the investigation into the claimant's allegedly unsafe working practices was to any extent tainted because of the claimant's race was made by a majority and was made for the reasons stated in paragraphs 125-130 below. The reasons of the minority in that regard (Mr Sagar) are stated in paragraph 131 below.

Did Mr Lycett change the date on the document at pages 650-651 to any extent because of the claimant's race?

120 No; there was no doubt in our minds that there was nothing whatsoever amiss in the changing of the date on page 650, and that Mr Lycett did not in any way treat the claimant less favourably because of his race. There was nothing in the circumstances from which we could draw the inference that the claimant had been treated less favourably by Mr Lycett because of his (the claimant's race), and in any event we were satisfied that Mr Lycett's actions towards the claimant were in no way tainted by discrimination against the claimant because of his race.

Was the claimant suspended to any extent because of his race?

121 No, the claimant was not suspended to any extent because of his race. We could see no evidence from which we could draw the inference that the claimant had been treated less favourably by being suspended than he would have been if he had been white. As indicated in paragraph 83 above, we accepted Mr Starmer's evidence that he suspended the claimant on the advice the respondent's ER team. In fact, we were of the view that all of the evidence pointed towards the necessity from the point of view of safety, both the claimant's and that of others, of suspending the claimant at that point, so that the real reason why the claimant was suspended was purely a concern for his and others' safety. Thus we were satisfied that Mr Starmer's suspension of the claimant was in no way tainted by discrimination against the claimant because of his race.

Was the decision to take disciplinary action against the claimant in respect of the unsafe working practices to any extent made because of the claimant's race?

122 No. There was in the circumstances as we found them to be nothing from which we could draw the inference that the claimant had, by being subjected to disciplinary action, been treated less favourably because of his race. In any event, we were completely satisfied by Mr Gray's evidence, seen against the background of the facts as we found them to be, that his decision that the claimant should be subjected to disciplinary action was made because of the claimant's unsafe working practices, which he (the claimant) was reluctant to accept were unsafe.

Was the claimant not permitted to have a union representative at the meeting of 15 August 2017 at which he (the claimant) was suspended to any extent because of his race?

123 No. While it was possible to read the parts of the respondent's disciplinary procedure which we have set out in paragraphs 109 and 110 above as conferring a right to trade union representation at a meeting at which an employee was formally suspended, as we say in paragraph 111 above, we accepted Mr Starmer's evidence that he was advised that there was no right to such representation at such a meeting, and that he acted on that advice. Thus, there was nothing in the circumstances from which we could draw the inference that the claimant was treated less favourably because of his race in being suspended, but if there had been then we were satisfied that the failure to permit the claimant to be represented at the meeting at which he was formally suspended was in no way tainted by discrimination because of the claimant's race.

Was the decision that the investigation into the "allegations of unsafe working practices" by the claimant was commenced by Mr Munir Bhaiji but was then restarted by Mr Gray made to any extent because of the claimant's race?

124 This was the most difficult question for us, because of the absence of evidence from the person or persons who made the decision to restart the investigatory process. We therefore stood back and asked ourselves whether we could draw the inference that the termination of the investigation being carried out by Mr Bhaiji was to any extent done because of the claimant's race.

The majority judgment

125 The majority (Mr Bhatti and the judge) reasoned that

125.1 Mr Bhaiji had not been asked to investigate the conduct of Mr Baptiste, Ms Usher or Mr Starmer, but, rather, that of the claimant;

125.2 the claimant had then made allegations of serious wrongdoing by Ms Usher and Mr Baptiste, which Mr Bhaiji had then chosen to investigate as part of his investigation into the claimant's allegedly unsafe working practices;

125.3 Mr Bhaiji was (for the reasons stated by us in paragraphs 74 and 75 above) on the same level as Ms Usher, which made any investigation into her conduct by Mr Bhaiji at the very least unusual;

125.4 Mr Gray would not (as we record in paragraph 74 above) have given the task of carrying out the investigation into the claimant's working practices to a new Field Team Leader with no experience;

125.5 Mr Bhaiji had only recently been promoted to the same level as Ms Usher (Field Team Leader), and Ms Usher was by then a highly experienced Field Team Leader;

125.6 Mr Bhaiji had then not informed Mr Baptiste and Ms Usher about the allegations of the claimant about them which he was investigating before the start of the interviews with them, but he did indicate that they might want trade union representation at the interview; and

125.7 the notes which Mr Bhaiji sent to Ms Usher were indeed, as she said to us and as recorded in the chronology at pages 542-549 (the accuracy of which, as we say above, we accepted) inaccurate and in some cases incomprehensible; the same was true of the part of the interview note of the claimant which we have set out in paragraph 79 above and discussed in paragraph 80 above.

126 We took into account the fact that we would have expected any allegations of misconduct or bias on the part of a manager who had alleged unsafe working practices on the part of an employee to be the subject of separate investigation from the investigation of the alleged unsafe working practices: such an allegation of bias would have to be taken into account in deciding whether or not the employee's working practices were unsafe, but would then normally, both in order to ensure that the existing investigation was kept focused on the allegation of unsafe working practices, and as a matter of fairness to the manager, be the subject of a separate investigation.

127 The claimant did not make an allegation of discrimination because of his race to Mr Bhaiji. The first time that he alleged discrimination as such to either Mr Bhaiji or Mr Gray was on 6 November 2017 as noted at pages 706-707, but (see paragraph 91 above) he did not explain what he meant by that, i.e. he did not say that he felt discriminated against because of his race by Mr Furze, although he did say as we note in paragraph 90 above, that Mr Baptiste had said to him (the claimant) that he (Mr Baptiste) "hated Africans as they sold them to Caribbean's."

128 Mr Baptiste is black, and, we concluded, rather than being negative and inappropriately critical towards the claimant when he was the claimant's mentor, was not sufficiently overtly critical towards him. The claimant himself (see paragraph 31 above) withdrew the allegation that Mr Baptiste had harassed him by saying the things that the claimant alleged as set out in paragraph 29.9 above.

129 In those circumstances, we the majority could see nothing which would justify the drawing of the inference that the recommencement of the investigation by stopping Mr Bhaiji's investigation and having Mr Gray carry out an investigation starting afresh, occurred to any extent because of the claimant's race. We then asked ourselves about a hypothetical white comparator (i.e. a white employee who had done the same things as the claimant had). We the majority could see no reason to conclude that the situation would have been dealt with any differently if the claimant had been white.

The majority conclusion on this point

130 For all of those reasons, the majority concluded that the claim that the decision that the investigation into the "allegations of unsafe working practices" by the claimant was commenced by Mr Munir Bhaiji but was then restarted by Mr Gray was made because of the claimant's race, had to fail.

The minority judgment on this point

131 The minority, Mr Sagar, came to a different conclusion on this element of the claim. It is as follows:

131.1 "I inferred from the evidence that Mr Baptiste gave positive written feedback to the claimant through the whole of July 2017 and was uncomfortable giving negative feedback to him. He asked his manager, Ms Usher, to conduct an audit of the claimant's work. Ms Usher carried out this audit on 3 August 2017 but maintained to the claimant it was actually an audit of Mr Baptiste. Both Ms Usher and Mr Baptiste's evidence was problematic as they did not admit this until pointed to documentary contemporaneous evidence in the bundle showing that. Ms Usher also claimed to have spent over two hours on 3 August 2017 with the claimant whereas other accounts suggested it was much less.

131.2 Ms Usher in effect suspended the claimant from 7 August 2017 although his formal suspension took place only on 15 August 2017 with her present.

131.3 From the evidence only Mr Baptiste and Ms Usher (unlike what the chronology says Mr Starmer did not say this in evidence) were dissatisfied with Mr Bhaiji's investigation notes. Neither were able to point specifically to parts of notes in the bundle they wanted corrected. From the evidence Mr Bhaiji was removed as the investigator because of their complaints. I inferred that in fact they were unhappy Mr Bhaiji was asking them questions about their conduct in response to the claimant's allegations of bias and unfair conduct.

131.4 From the evidence I do not infer that Mr Bhaiji was carrying out investigations into Ms Usher or Mr Baptiste or Mr Starmer's conduct or

that it was a material fact in the change that he was equal in status to Ms Usher and Mr Starmer and that he was conducting his first investigation.

131.5 The respondent did not provide evidence about who exactly took the decision of disbanding Mr Bhaiji's investigation nor evidence from that decision-maker of their reason(s). Nor did they provide evidence that the claimant was told adequately as to why the change to a new investigator was made. The claimant ended up spending about five months under suspension when policy provided for a much quicker resolution.

131.6 The respondent also did not provide any evidence why claimant's allegations against Ms Usher and Mr Baptiste were not investigated separately. In addition, when the claimant provided a photograph and allegation against Robin Canham it was investigated but without Mr Canham even being notified and assumptions being made that he had not breached health and safety rules.

131.7 The respondent is a relatively large employer with considerable administrative and other resources.

131.8 I have concluded that they would not have disbanded an ongoing investigation of suspension against a hypothetical white employee under similar circumstances."

Was the giving to the claimant on 20 December 2017 by Mr Wilson of a first written warning done to any extent because of the claimant's race?

132 No. We saw nothing in the circumstances from which we could draw the inference that the giving to the claimant of a written warning was tainted by race discrimination. In any event, we had no doubt at all that the warning given to the claimant by Mr Wilson was fully merited and that it was in no way tainted by the claimant's race.

Did the failure by the respondent to permit the claimant during his suspension to commence training to become a smart gas meter installer occur to any extent because of the claimant's race?

133 No; given the evidence to which we refer in paragraph 112 above, there was nothing in the circumstances from which we could draw the inference that the failure to start the claimant on gas meter installation training occurred to any extent because of his race. In any event, it was objectively wholly justifiable to decline to put the claimant on a gas meter installation course when he had not proved that he was a safe electrical meter installer.

Did Ms Usher say to the claimant: "I will put your portfolio work in the dustbin"?

134 No. As we indicate in paragraph 72 above, we concluded that Ms Usher did not say that to the claimant. She indicated to him that his portfolio contents were insufficient to enable him to pass the MOCOPA test, but she did not say to him that she would put his portfolio work in the dustbin, or anything like that.

Was the conducting of an audit of the claimant's company van on 30 August 2017 to see whether it had suffered any physical damage unwanted conduct related to the claimant's race?

135 No. Having accepted

135.1 Mr Starmer's evidence about the allegation made to him by Mr Baptiste and Mr Turner as recorded in the chronology at pages 542-549 as set out in paragraph 73 above and

135.2 that Mr Starmer had then passed on to Mr Bhaiji responsibility for investigating that matter on the advice of the respondent's ER team because carrying out that audit could have been seen by the claimant as harassment,

we could see nothing in the circumstances which could justify the drawing of the inference that the conducting of the audit of the claimant's van on 30 August 2017 was to any extent related to the claimant's race. In addition, the claimant was at that time suspended and it was objectively reasonable to have the audit carried out after he had attended the work-related investigatory meeting that occurred on that day.

In conclusion

136 In conclusion, none of the claimant's claims succeeds. They are therefore all dismissed.

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Employment Judge Hyams

Date: 24 August 2020

JUDGMENT SENT TO THE PARTIES ON

7 September 2020

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FOR THE TRIBUNAL OFFICE