



# EMPLOYMENT TRIBUNALS

## Claimant

## Respondent

Mr Lancelot Lewis

v

Network Rail Infrastructure Limited

**Heard at:** Cambridge

**On:** 28, 29 and 30 July 2020

**Before:** Employment Judge Ord

**Members:** Mrs C A Smith and Ms E Deem

## Appearances

**For the Claimant:** Mr David Lemer, Counsel

**For the Respondent:** Ms Kirsten Barry, Counsel

## RESERVED JUDGMENT

1. It is the unanimous decision of the employment tribunal that:-
  - 1.1 The Respondent failed to investigate the allegation that Mr Cattini described the Claimant as a *“fucking disgusting wog”*;
  - 1.2 That their failure to investigate that matter amounts to harassment contrary to Section 26 of the Equality Act 2010;
  - 1.3 The matter should have been investigated when they came to the attention of the Respondent, which first occurred when Mr Groucott was investigating the grievance brought by Mr Cattini and secondly when Mr Knapp was investigating the grievance brought by the Claimant;
  - 1.4 In all other respects the Claimant’s claims are not well founded and they are dismissed.

## REASONS

### Background

1. The Claimant has been continuously employed by the Respondent since 15 March 2005 as a Signaller. Following a period of Acas Early Conciliation from 28 November 2018 until 28 December 2018, the Claimant presented a claim to the Tribunal on 19 January 2019 complaining that he had been the victim of unlawful discrimination relying on the protected characteristic of his race.
2. The Claimant identifies as Black British and relies on colour as the aspect of race to form his protected characteristic.
3. At a Preliminary Hearing on 11 September 2019 the complaints and issues were clarified.
4. The Claimant's complaint relates to disciplinary action taken by the Respondent against him following an incident on 24 July 2018. The Claimant gave permission for a member of the public to use a level crossing when it was not safe to do so because of the approach of a train. The Respondent says that the Claimant was disciplined because he failed to report the incident. The claimant says that others were not disciplined for similar incidents.
5. The Claimant also complains about comments made by a work colleague (Mr Ian Cattini) and the alleged failure by the Respondent to investigate the same properly or at all.
6. The issues for the Tribunal to determine were set out at the Preliminary Hearing as follows:
  - 6.1 Has the Respondent treated the Claimant (a black man) less favourably than it treated or would have treated a white comparator by the following:
    - a. subjecting him to a disciplinary process following the incident on 24 July 2018? and
    - b. issuing him with a final written warning dated 5 June 2019 following that disciplinary process?
  - 6.2 The Claimant relies upon the following actual comparators:
    - a. Sophie Hurley;
    - b. Les Dart; and
    - c. Ian Cattini.

The Tribunal notes that previously the Claimant also relied upon Christopher Finn and Adam Giles as comparators but does not pursue them as comparators before us.

- 6.3 If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference was because of race?
- 6.4 If so, what was the Respondent's explanation? Does it provide a non-discriminatory reason for any proven treatment?
- 6.5 Did the Respondent, or any employee of the Respondent, engage in any of the following conduct:
  - a. Ian Cattini telling Hayley Giles that the Claimant was a "*fucking disgusting wog*" which the Claimant became aware of on 6 September 2018? and
  - b. failing to investigate Ian Cattini's comments when the Respondent became aware of them?
- 6.6 Is the Respondent vicariously liable for any alleged conduct of Ian Cattini?
- 6.7 Did any of the above acts constitute unwanted conduct related to the Claimant's race?
- 6.8 If so, did any of this conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
- 6.9 If the conduct did not have that purpose but it did have that effect, is it reasonable for the conduct to have that effect having regard to the perception of the Claimant and all the circumstances of the case?

At the Preliminary Hearing jurisdictional issues relating to time limits were raised, but the Respondent has accepted that the Claimant's complaints had been brought in time.

### **The Hearing**

7. The Claimant gave evidence and the Respondent called Jess Cotton (who conducted a Level 1 investigation into the incident on 24 July 2018), Andrew Knowles (Stations Operations Manager who conducted the disciplinary hearing, Stuart Ash (current Operations Manager who heard the Claimant's Appeal against the disciplinary decision of Mr Knowles), Symon Read (Infrastructure Maintenance Engineer who heard Hayley Giles' Appeal against the outcome of the grievance she had brought against Mr Cattini), James Knapp (Project Operations Interface Specialist who investigated the Claimant's grievance around the incident on 24 July 2018) and Paul Groucott (Local Operations Manager who dealt with the grievance brought by Mr Cattini regarding the conduct of the Claimant and Ms Giles and other members of the signalling team) to give evidence.

8. Reference was made to a bundle of documents and all witnesses gave evidence by reference to prepared typed statements.

**The Facts**

9. Based on the evidence presented to us we made the following findings of fact.
10. The Claimant has been continuously employed as a Signaller since 14 March 2005. He has been a Grade 8 Signaller since October 2006 and has worked at Marston Vale Signal Centre since March 2015.
11. On 24 July 2018, the Claimant gave permission to a member of the public to cross the railway line when he ought not to have done so because a train was approaching the crossing. The member of the public had stopped when she saw the train go past and the Claimant apologised to her.
12. The system at Marston Vale is as follows. Any member of public wishing to cross the line telephones the signal box to ask if it is clear to cross. The Signaller must check that the member of the public can safely cross the railway line and then authorise them to do so at the appropriate time. The member of the public should also telephone the Signaller having crossed the railway line to confirm that they have safely done so.
13. On 24 July 2018, having been advised that it was safe to cross, the member of the public did not do so because they observed a train which passed the crossing almost immediately. They then contacted the Signal Box and advised the Claimant that a train has passed in front of her. The Claimant apologised for his error and allowed the member of the public to cross. They then called to say that they had done so safely.
14. It is accepted by the Claimant that he did not report the incident during the remainder of his shift to Operations Control, nor did he report it to his colleague, nor at the hand over at the end of the shift, or at any time thereafter.
15. The Claimant had been working the "West" panel on 24 July 2018 and had been on duty since 5:39 am until 1:20 pm. There was no record of the incident in the "West" panel Occurrence Book in which a duty Signaller should record any irregularities or mishaps that occur on whilst he or she was on duty.
16. In that book entries show the occasions when crossings take place by date and time, whether a vehicle has been used, the time taken to cross, the time permission was given to cross and the time the user calls the Signal Box back to confirm they have crossed.
17. After the Claimant had stopped work, the husband of the member of the public who had been incorrectly advised to cross the line by the Claimant,

contacted the Respondent to report the incident and make a formal complaint. This report took place at 6:05 pm and was passed to the Bletchley Mobile Operations Manager (“MOM”) who was to investigate the incident including downloading the voice tapes which would record the telephone calls made to the Signaller.

18. One of the Claimant’s colleagues, Tiffany Joiner, who was the on duty Signaller later in the day had also received a call from a member of the public and she reported this to Ms Cotton.
19. As the Local Operations Manager and the Claimant’s Line Manager, Ms Cotton undertook the first level of investigation (Level 1) into the incident. The Claimant was removed from safety critical duties which is a standard procedure as there may be reasons which relate to a Signaller, their health or their training / understanding of processes and responsibilities which have led to the incident under investigation. The removal from safety critical duties is to avoid the risk of recurrence.
20. At the time of the incident, Mr Cattini was also on duty working the “East” panel. The following day he was interviewed and said he had no knowledge at all of the incident the previous day. The Claimant was also interviewed on 25 July 2019. He confirmed that he had received a call from a lady asking to cross the railway line and that when he checked the screens, he had thought that the relevant train had passed the crossing in question. He said that he looked at the panels whilst standing up, not while seated, and thought that his view was “*distorted*”. He felt it was safe to cross and gave her permission to do so, but approximately two seconds after ending that call, he received another call from the same person saying that a train had just gone past and she sounded upset. The Claimant says he apologised profusely and confirmed that there were no further trains and gave her permission to cross. Approximately two minutes later she called back confirming she was safely across and that the gates were closed. The Claimant apologised again and said that he assumed she had accepted his apology as nothing further was said.
21. The Claimant confirmed the correct procedure for granting permission to cross and the check that should be made before giving permission to cross.
22. The Claimant was asked why he had not reported the incident and said that his state of mind at the time clouded his judgment which led to his failure to report the matter to Control. He said that apologising to the user and without any further negative reaction he assumed that his apology had been accepted but agreed that it was his duty to report it.
23. The Claimant said that he had kept replaying the incident in his mind and accepted that he should have made a report at the end of his shift and said that he would have reported it to his colleague had that been someone he could have shared a conversation with. He was aware of the possible consequences of his actions to the member of the public and

knew he should have reported the incident but did not do so because he was in a state of shock.

24. Ms Cotton submitted the Level 1 Investigation Report on 26 July 2018. She confirmed that although there was an entry in the occurrence book of the request to cross, there was no record of the incident and no entry in the signal box log or record of the incident reported to Control. The incident was not reported until the husband of the member of the public reported it six and a half hours after the incident itself. She concluded that the fundamental and critical process for granting a user permission to cross had not been followed. The voice communication downloads indicated that the Signaller had not asked what the user was crossing with (e.g. on foot, by cycle, car or other form of transport), nor how much time she required to cross. He had not repeated the request back to the user. The incident had not been reported and the only record was the Level Crossing Occurrence Book which contained no record of contact to Control and no record of any untoward incident.
25. Ms Cotton concluded that the Claimant had been aware of the process to follow in relation to the reporting of unusual activity which he confirmed during his interview with her. He could have contacted the Local Operations Manager (Ms Cotton herself) to advise of a 'close call incident' during or following the conclusion of his shift and she noted that had the call not been received from the member of public's husband, the Respondent would not have been aware of the incident at all. She categorised the failure to report as a "*reckless contravention*".
26. Because of the nature of the incident (although it forms no part of any disciplinary process) a Level 2 Investigation took place under Paul Middleton. The purpose of a Level 2 Investigation is to determine the facts of the incident, the immediate underlying causes and make recommendations of local actions to prevent or reduce the risk of recurrence and the severity of any recurrence. The Level 2 Report did not make any recommendations.
27. Because the failure to report was considered a reckless contravention, a Disciplinary Investigation Report was prepared. The investigation was carried out by Emma Whitehead and she concluded that the matter should be referred to a disciplinary hearing and recommended re-briefing of all staff at the location of the Rule Book requirements regarding telephone calls from users of level crossings, the questions to be asked to ensure permission to cross should be granted and that reminders should be placed on detecting signals as appropriate.
28. As part of the investigation by Ms Cotton, the Claimant had signed notes of his interview which contained words that he accepted that he was in dereliction of his duty by failure to report. The notes were signed by the Claimant on the day of the interview. On 9 August 2018, the Claimant emailed Ms Cotton requesting that that sentence was removed because he was sure they were not his words, Ms Cotton refused, apparently on

the advice of Human Resources, saying it was not appropriate to remove something from a statement that was checked, approved, signed and dated by the relevant person.

29. Ms Whitehead's conclusion was that the matter should proceed to a formal disciplinary action because the Claimant's failure to report the matter, contrary to the requirements in the Respondent's Rule Book was an act of potential gross misconduct.
30. Ms Whitehead had also noted two discrepancies, as she saw them, in the Claimant's account. First, he said that he was in too much shock to remember to report the incident to Operations Control but accepted and stated that he had had several thought processes about what he should do after the incident occurred. Second, whilst he said he was in too much shock to remember to report the incident, he also stated that he would have reported it if another colleague had been present in the signal box with whom he could have discussed it, (stating he could not discuss it with Mr Cattini).
31. A disciplinary hearing was convened and was heard by Mr Knowles. He had not previously worked with the Claimant but had knowledge of the relevant policies and procedures so he could in his view approach the matter in an independent and impartial manner.
32. The Claimant was represented at the hearing by Mr Bellenie, a Trade Union Representative. Prior to the hearing Mr Bellenie wrote to Mr Knowles providing him with a copy of a statement from Hayley Giles concerning two incidents which had taken place in 2016 involving Mr Cattini and a trainee Signaller Mr Huxley. Mr Bellenie advised Mr Knowles that these matters would form part of the Claimant's defence at the disciplinary hearing with the suggestion that there was inconsistency of treatment between the Claimant and those other two individuals. Mr Bellenie advised that at the time of these incidents the Signaller had been given a 'suitable conversation' which is a one to one meeting to discuss the incident but no disciplinary sanction.
33. Ms Giles' statement recalled an incident on 16 February 2016 where she was 'passing out' Mr Chris Finn (i.e. providing on the job training to ensure his competence). Mr Huxley who was then a trainee Signaller, approximately eight weeks into his training and Mr Cattini were on duty. Mr Huxley took a call from the same crossing as involved in the Claimant's incident which resulted in a near miss with a member of the public. Ms Giles said she reported this to the appropriate Manager and told Mr Cattini that she had reported it. At which point Mr Cattini said that the same thing happened earlier in the morning and that had not been reported. Ms Giles also reported that to the relevant Manager. Mr Wheatley was the Manager involved in the matter at the time and he provided a statement to Mr Knowles confirming the recollection of Ms Giles. He revisited the events of the time. He had considered the voice communications and confirmed that no one had called Control on that day.

34. The disciplinary hearing with the Claimant took place on 20 May 2019. Mr Knowles sought to understand why the Claimant had not reported the issue. The Claimant said that he was not disputing his breach of the lifesaving Rules, but that he had been in shock and that the failure to report was out of character. Mr Bellenie submitted this was due to the Claimant being on duty with Mr Cattini who the Claimant did not trust and against whom he had brought a grievance although detail of that grievance was not provided to Mr Knowles.
35. Mr Bellenie also submitted that the Claimant would have reported the matter the next day, but he was contacted by Ms Cotton before he had had the opportunity to ring her.
36. It was further submitted on the Claimant's behalf that there was no attempt to cover up the incident because the Claimant had recorded the fact of the crossing in the Crossing Log Book.
37. Finally, Mr Bellenie referred to another incident which he said was similar and had only come to his attention the week before. This was said to have taken place in January 2019 in North Warwick when a Signaller wrong routed a train which was out of gauge and failed to report it to Control which led only to a reprimand. Mr Knowles made further enquiry about this and was advised by the Local Operations Manager that a failure to report the incident had taken place and that the disciplinary process had been initiated. Mr Knowles was satisfied the matter was being looked into by the Local Operations Team.
38. In his evidence before us, Mr Knowles said that so far as the incidents in February 2016 were concerned, the focus of the investigations was on ensuring that the trainee Signaller involved did not repeat the same actions again. He said he would have expected Mr Cattini to report the incidents as the person in charge of Mr Huxley, but as the incidents were reported to the Local Operations Manager in person and as the Respondent was aware of the safety breach, a call to Control was not in his view needed. He thus differentiated those incidents.
39. After taking some time to consider the matter, Mr Knowles made the decision to issue the Claimant with a final written warning, dated 5 June 2019, of 12 months' duration. He said this was because of the seriousness of the incident, the potentially fatal consequences of it and that because all Signallers know events of this type should be reported. The Claimant's failure to notify Operations Control and his Local Operations Manager immediately meant that no remedial action could be taken which could have involved protecting the Claimant's own well being. The Claimant's conduct had been unsatisfactory due to his failure to report the incident. Taking the Claimant's prior record into consideration but considering the case as a whole, he said that it was a serious contravention of the Rule Book. There had been further opportunities to



enter a written record or to report the incident, but the Claimant had clocked off and gone home.

40. The Claimant was advised of his right to appeal and did so.
41. The Claimant appealed on three grounds, namely; on the interpretation of facts of the original hearing, the severity of the punishment and his feeling that he had been treated unfairly due to race.
42. Mr Knowles says he was taken aback by the third ground of appeal because at no point during the disciplinary process had the Claimant raised anything regarding to race. He took the unusual step of contacting Mr Bellenie to find out why this point had been raised. Mr Bellenie agreed that it had not been raised during the disciplinary hearing and that he would speak to the Claimant to confirm whether or not he wished to pursue that ground of appeal. On 17 June the Claimant confirmed in writing that he did not wish to proceed with that third point of appeal.
43. The Claimant did not raise before Mr Knowles (but does in his Tribunal claim) he was treated differently to Sophie Hurley.
44. Mr Knowles was also made aware as part of this claim of two incidents involving Mr Dart. The first was not brought to his attention during the disciplinary process – that was an incident which occurred on or about 30 October 2018. The second incident with Mr Dart in 2019 led to his being summarily dismissed.
45. The Claimant's Appeal took place on 16 October 2019. It was delayed as the Claimant had a period of sickness absence and due to the availability of Mr Bellenie.
46. At the beginning of the Appeal Hearing, Mr Ash (the appeal officer) reminded the Claimant and his representative that the matter for which the Claimant had been disciplined was not the incident itself but his failure to report it. The Claimant confirmed the importance of reporting an incident immediately which Mr Ash told us demonstrated his understanding of the importance of following the guidance and procedures in relation to the reporting of incidents. The Claimant confirmed that he could not remember how long after the incident he first thought about reporting it, but it was possibly before he ended his shift and that he had not reported it because he felt isolated and that his judgment had been clouded by his relationship with Mr Cattini.
47. After considering the matter and all the evidence put before him, Mr Ash concluded that he should uphold the original decision. The Claimant had had a number of opportunities to report the incident but failed to do so and understood how serious the failure to report an incident immediately was. He noted the relationship with Mr Cattini which was a difficult situation and was taken into consideration by the disciplinary chair. Mr Ash reflected

upon the fact that a final written warning was given in relation to a matter which could have led to summary dismissal.

48. The Claimant then said that it was custom for a Signaller not to report incidents of this type, but Mr Ash was of the view that a regular review of voice communications from within a signal box (which takes place) would reveal any incident which had not been reported and that would then be taken up by the relevant Manager.
49. That concluded the disciplinary process in which the Claimant was involved.
50. Hayley Giles had raised a grievance against Mr Cattini. There was an allegation of bullying which had been investigated by the Performance Improvement Manager Mr Myers. In the grievance document Ms Giles had said that Mr Cattini had historically made racist comments and during the investigation she had been asked to elaborate on the point but had only referred to the general use of racist or derogatory terms. On request she could not provide specific examples. The allegation was not corroborated by anyone else. Mr Cattini and Ms Giles were spoken to as part of the investigation and that part of the grievance was not upheld.
51. Mr Read conducted the Appeal against that decision. He confirmed that at no point during that Appeal did Ms Giles mention any issue of racist or derogatory comments being made. He therefore assumed that she was not pursuing that part of the grievance. Had she done so, he would have conducted a thorough investigation. The Appeal was not upheld and Mr Read in particular noted the lack of specific detail and lack of corroboration in relation to any of the allegations which Ms Giles had made.
52. In the meantime, Mr Cattini himself had raised a grievance claiming that he had been subject to bullying and harassment by being excluded from a secret vote to implement a roster change. He said he was victimised due to other ongoing grievances within the team. Mr Groucott dealt with that grievance which was not upheld.
53. Mr Groucott found that there had been no “*secret vote*” and did not believe that the previous grievances raised by Ms Giles and Ms Hurley against Mr Cattini were spurious or designed to harass or bully him. Mr Groucott had not had access to the grievance brought by Ms Hurley but was satisfied from what she told him that the grievance was raised in good faith due to concerns at the time.
54. It was in a statement which Ms Giles gave to Mr Groucott that she made the specific allegation that Mr Cattini had referred to the Claimant as a “*fucking disgusting wog*”. No further enquiry was made by Mr Groucott into that matter. Mr Groucott told s that he believed the matter had been investigated as part of Ms Giles’ own grievance.

55. In due course the Claimant became aware of this and on 19 November 2018 he raised a grievance. The grounds of the grievance were that the question of which allegation would proceed to a disciplinary investigation following the incident on 24 July 2018 (i.e. was it the incident itself or his failure to report it) has not been clear; that he was subject to disciplinary procedures when others (specifically Ben Huxley and Ian Cattini) were not and thirdly, the alleged use by Mr Cattini of racist language about him. In particular the Claimant submitted the extract from Ms Giles' statement which contained the relevant words.
56. The Claimant also said that one week after his incident, another similar incident had taken place but there was no Level 1 Investigation. This was the incident concerning Mr Adam Giles.
57. The question of which allegation would proceed to the disciplinary hearing was not pursued during the grievance hearing and the Claimant confirmed that the grievance he wished Mr Knapp to consider was twofold. First, those that had made the same mistake as he had had not been subject to the same level investigation which he believed was due to discrimination on the ground of race and the second point was racial discrimination in the workplace.
58. The Claimant relied on Sophie Hurley, Ian Cattini, Ben Huxley, Adam Giles and Les Dart as comparators.
59. Mr Knapp investigated each of those issues and found differences between them and the Claimant's position which explained any difference in the level of action taken which was unconnected to race.
60. Sophie Hurley had committed a similar offence, but the Local Operations Manager was aware of it and judging by the time scales it appeared that she was still in training when the incident occurred. She was in any event leaving and the Claimant's allegation was that nothing was done because she was due to leave. Mr Knapp found that to be the case and that that was unconnected to race.
61. So far as the incident concerning Mr Cattini and Mr Huxley were concerned, Mr Knapp found that there had been two Level 1 Investigations and Mr Huxley had been given a Development Action Plan which Mr Knapp considered was the appropriate action to take at the time. The incidents were reported and he did not consider it would have been appropriate to hold Mr Cattini to account for Mr Huxley's mistakes.
62. Mr Giles was considered by Mr Knapp to be in a different position because remedial action had been taken immediately (the Signalman had contacted the driver who in turn had reported the matter). Level 1 and Level 2 Investigations took place and an Action Plan was issued.
63. There were two incidents involving Mr Dart. The first had been reported by another Signalman, a Level 1 Investigation was carried out and the

matter was handled by entirely different Managers. The second incident involving Mr Dart led to his summary dismissal.

64. Mr Knapp did not uphold this part of the Claimant's grievance. Each incident had, in Mr Knapp's view, been investigated properly and there had been Level 1 Investigation Reports and action taken based upon them. Mr Knapp did not identify any indication that race had played a part in any of the decisions taken in those cases.
65. In relation to the allegation of racial discrimination by Mr Cattini, the Claimant referred to the comment of Hayley Giles. He thought that that had come from Hayley Giles' own grievance although it transpired much later it was in fact the statement which Ms Giles had given when she was the subject of a grievance brought by Mr Cattini. The Claimant had also referred to comments placed on the whiteboard (he believed by Mr Cattini) as a 'public' reminder to test the fire alarm when the Claimant had forgotten to action this on his turn and a further comment which he again believed to have been written by Mr Cattini stating "*it looks like you need a vagina here to work and go off sick*".
66. Mr Knapp made enquiries regarding the grievance brought by Hayley Giles, which had not been upheld. Mr Knapp took the view that the comment raised by the Claimant as part of his grievance, which he said originated from Ms Giles' grievance, had already been investigated. Mr Knapp now accepts that this was wrong. He had not had sight of the documents regarding Hayley Giles' grievance and in any event, this was in fact raised by her as part of her statement for the grievance raised by Mr Cattini himself in 2018.
67. Mr Knapp further concluded that there was no evidence of racist language or intent in relation to the comments on the notice board.
68. For those reasons Mr Knapp did not uphold the Claimant's grievance. The claimant was given the opportunity to appeal the outcome but he did not do so.

### **The Law**

69. Under Section 6 of the Equality Act 2010, race is a protected characteristic.
70. Under Section 9 of the Equality Act 2010, race includes colour, nationality or ethnic or national origins.
71. Under Section 13 of the Equality Act 2010, a person discriminates against another if, because of a protected characteristic, they treat that person less favourably than they treat or would treat others.
72. Under Section 26 of the Equality Act 2010, a person harasses another if they engage in unwanted conduct related to a relevant protected

characteristic and that conduct has the purpose or effect of violating the person's dignity or creating for them an intimidating, hostile, degrading, humiliating or offensive environment. In deciding whether that conduct has the effect referred to, each of the following are to be taken into account:

- 72.1 the perception of the person allegedly harassed;
  - 72.2 the other circumstances of the case; and
  - 72.3 whether it is reasonable for the conduct to have that effect.
73. Under Section 136 of the Equality Act 2010, if in any proceedings relating to the Act, there are facts upon which the Court or Tribunal could decide in the absence of any other explanation that a person has contravened the provisions of the Act, the Court must hold that the contravention has occurred unless that person can show that they did not contravene the provision.

### **Conclusions**

#### Subjecting the Claimant to a disciplinary process and issuing him with a final written warning

74. The incident on 24 July 2018 was a serious one.
75. The Claimant, a trained and experienced Signaller, was contacted by a member of the public seeking to cross the railway line. His observations of the location of trains at the time the request was made was faulty and he advised the member of the public that it was safe to cross the line when it was not.
76. Indeed, the train was so close that the member of the public had not even begun to cross the line when the train went past. She contacted the Claimant immediately and advised that a train had just gone past, for which the Claimant apologised. He then re-checked, confirmed that it was safe for her to cross and she did so.
77. The Claimant was not disciplined for this failure. That was a matter of training and guidance. However, under the Respondent's Rules, such incidents must be reported and reported promptly. This is to enable steps to be taken which might include steps to safeguard the welfare of the Signallers themselves if they are unwell or otherwise unable to continue their shift as a result of the incident.
78. The Claimant should have reported this incident immediately and he should have recorded it in writing. He did neither.
79. The Respondent only became aware of the incident because the husband of the member of the public involved contacted the Respondent to raise a complaint about the incident. Had he not done so, then the matter would never have come to light.

80. In those circumstances, where there had been a complete failure to report the incident, contrary to the Respondent's Rules, it was entirely reasonable to subject the Claimant to a disciplinary process. That process involves a Level 1 Investigation which then determines whether disciplinary action should be taken; if so, a disciplinary investigation and thereafter a disciplinary hearing.
81. We are satisfied that race played no part in any aspect of that process.
82. Given the circumstances of the incident and the Claimant's admitted failure to make a report, a Level 1 Investigation was bound to take place. There was no suggestion made by the Claimant at any stage that to carry out a Level 1 Investigation was motivated by race. That Level 1 Investigation indicated that there was a disciplinary case to answer and the matter was thereafter investigated and a disciplinary hearing held.
83. It was only when the Claimant was issued with a final written warning following the matter and he lodged an appeal against it, that the question of race was raised for the first time.
84. It is surprising that on receipt of the Grounds of Appeal, including an allegation of unfair treatment based on race, the disciplining Manager should then contact the Claimant's representative and question why this matter was being raised on Appeal. We can accept that Mr Knowles would be taken by surprise and in his words, "*taken aback*" by the matter being raised as it was, given that it had not formed part of any aspect of the disciplinary case up to that date. However, it was in our view, inappropriate for Mr Knowles to question the matter with Mr Bellenie, the Claimant's representative as he did.
85. The Claimant thereafter did not pursue the allegation of race discrimination as part of his disciplinary Appeal. During the course of his evidence he suggested that this was as a result of advice from Mr Bellenie. That may be so. If it is the case, then that is a matter between the Claimant and his Trade Union Representative. Other than to express surprise that Mr Knowles discussed the matter with Mr Bellenie on receipt of the Appeal and further, that Mr Bellenie, as the Claimant's representative, was willing to engage in discussion about why the matter was raised for the first time on Appeal we can take that matter no further.
86. The decision to subject the Claimant to a disciplinary process following the incident on 24 July 2018, was in our view appropriate and was not motivated in any way by race. It arose out of his admitted failure to report a potentially serious incident.
87. The Claimant received a final written warning. He was facing an allegation of gross misconduct. One of his comparators, Mr Dart, was summarily dismissed for a similar incident.

88. We cannot see that the giving of a final written warning was in any way an act of less favourable treatment nor that it related to the claimant's race.
89. In reaching those conclusions we have considered the three comparators that the Claimant relies upon before us:
- 89.1 First, Sophie Hurley. Ms Hurley was not subject to disciplinary action because she was leaving. There is a difference in treatment, we have heard no evidence to support the allegation or to establish a fact that this could be related to race, but even if it had been, the fact that Ms Hurley was leaving would, in our view, amount to a suitable non-discriminatory reason for the difference in treatment.
- 89.2 Second, Les Dart. So far as Les Dart is concerned there were two incidents. In respect of the second, the employee was summarily dismissed and the Claimant does not rely upon it for the purpose of comparison. The first incident involving Mr Dart involved Mr Dart clearing the route for a train but by the time the train arrived, the signal was at danger as the 'slot' was no longer available. The driver contacted Mr Dart who talked the driver past the signal without contacting the next Signaller down the line. The matter had been reported (by the next Signaller down the line) and the evidence before us is that there was therefore no separate obligation on Mr Dart to make the report as well. There was a Level 1 Investigation into the matter, conducted by a Manager who had no involvement in the Claimant's case, and no recommendation of disciplinary action was made. No evidence has been produced to link the difference in treatment to race. The Respondent takes the view that one person having reported the matter satisfies the obligation of reporting in full, and that in any event is a non-discriminatory explanation for the difference in treatment. In this instance, the matter was reported, in the Claimant's case it was not and it was that failure to report which led to his disciplinary action.
- 89.3 Ian Cattini was the third comparator. There was clearly some animosity between the Claimant and Mr Cattini, indeed there appears to have been animosity between Mr Cattini and other members of the Signalling staff who worked with him. The incidents (two on the same day) which the Claimant relies upon when using Mr Cattini as a comparator, both involve the trainee Signaller Mr Huxley. The Respondent took the view that the essential matter was to ensure that Mr Huxley was fully aware, during his training of the correct procedures to follow and avoid future incidents. The crucial difference between the incidents involving Mr Huxley and Mr Cattini on the one hand and the Claimant on the other, is that the matters were reported orally to Ms Cotton who reported them in turn to the appropriate Manager. Thus, reports were made. The Respondent took the view that it would be wrong to hold Mr Cattini responsible for the errors of Mr Huxley who was a trainee and that the report of those incidents had, in any event, taken place. On that

basis, we are satisfied that any difference in treatment afforded to Mr Cattini as opposed to the Claimant, was unrelated to race. The reason why Mr Cattini was not disciplined was because the error was that of Mr Huxley (which the Respondents say would be wrong to visit upon Mr Cattini) and that the matters in question were reported, whereas in the Claimant's case they were not.

90. Accordingly, the Claimant's complaints that he was the victim of direct discrimination on the grounds of race when he was subjected to a disciplinary process following the incident on 24 July 2018 and subsequently issued with a final written warning on 5 June 2019, are not well founded and are dismissed.

Harassment on the grounds of race

91. There are two parts to this claim. The first is the alleged use by Mr Cattini of words to Ms Giles that the Claimant was a "*fucking disgusting wog*" and the second is a failure to investigate those comments.
92. In relation to the first matter, the use of the words, we are not satisfied on the balance of probabilities that the words were used.
93. We say this because the report of them comes from a statement made by Ms Giles when she was facing a grievance brought against her by Mr Cattini. She had previously brought a complaint about Mr Cattini and included in that complaint was an allegation that he used derogatory and racist language. When asked to give a specific example of that, Ms Giles could not do so. We find it therefore surprising that some time later, Ms Giles was able to recall, with precision, those specific words upon which the Claimant relies when bringing his claim for harassment.
94. The Claimant understood that the words had been put before the Respondent as part of Hayley Giles' own grievance but that was not the case.
95. It is for the Claimant to establish on the balance of probabilities that these words were used and that the Claimant was thereby harassed. He has not satisfied us as to the first of those matters. We have not heard from Ms Giles whose recollection of the use of language improved between her own grievance and the response which she gave to Mr Cattini's grievance which we find surprising and which would doubtless have been an area for cross examination of her had she appeared before us.
96. Accordingly, that first limb of the Claimant's complaint of harassment fails as he has not established, on the balance of probabilities, that the conduct complained of occurred.
97. The final limb of the Claimant's complaint of harassment is that the Respondent failed to investigate properly the allegation that Mr Cattini used the words complained of.



98. The Respondents had this matter put before them twice. First, Mr Groucott had it put before him when he was investigating the grievance brought by Mr Cattini.
99. According to his evidence, he confirmed that Ms Giles had prepared a typed statement which she brought to his meeting with her on 27 June which contained the allegation that Mr Cattini had referred to the Claimant as a "*fucking disgusting wog*" for leaving his things in the kitchen.
100. Mr Groucott told us that the reason why he was meeting Ms Giles was to interview her as a witness in relation to Mr Cattini's grievance. He told her that he had no direct power or authority to re-hear previous grievances because Ms Giles mentioned grievances that she and Mr Hurley (another Signaller) had raised and that they were unhappy with how those grievances were handled. Mr Groucott agreed to look into the historic grievances "*in a general sense*" and subject to his findings would escalate issues to his Managers or Senior Human Resource Officer for a further consideration.
101. Mr Groucott, suspicious that these grievances might be connected, sought permission from Ms Giles to access her grievance file which she gave. Mr Groucott considered that Ms Giles had been through a full grievance process, was given the opportunity to discuss her concerns and provide evidence and support specific allegations but failed to do so. He took the view, therefore, that the points raised in Ms Giles statement which were before him, had been investigated already and Ms Giles had exhausted the internal process in that regard.
102. Mr Knapp came to a similar conclusion but did so without access to the original file relating to Ms Giles' grievance. However, Mr Knapp, like Mr Groucott, noted that when Ms Giles was asked to do so as part of her grievance, she could not give specific examples of the language allegedly used by Mr Cattini. Notwithstanding that, he said that it appeared to him that the specific comment being raised by the Claimant as part of his grievance had already been investigated.
103. It is clear from the information we have regarding Ms Giles' own grievance, the evidence of Mr Groucott and the evidence of Mr Knapp, that this specific allegation has not been investigated at all.
104. Mr Groucott and Mr Knapp both concluded that it had been investigated as part of Hayley Giles' own grievance, but that is impossible to accept when placed alongside the fact that both of them confirm that during that grievance Ms Giles had been asked to provide specific examples of language used and had failed to do so.
105. When the Claimant raised this during his own grievance, it should have been apparent to Mr Knapp (and indeed it should have been apparent to Mr Groucott when he conducted the enquiry into Mr Cattini's grievance)

that no investigation into this matter had taken place. The precise words reported by Ms Giles did not form part of the grievance which she had raised against Mr Cattini some time earlier. This was abundantly apparent to Mr Groucott because he had access to Ms Giles' file. Mr Knapp did not seek access to that file but was aware from his investigation that Ms Giles had failed to provide specific examples of allegedly racist language used by Mr Cattini.

106. The words allegedly used by Mr Cattini were clearly racist on nature and accordingly to Ms Giles were directed towards or were about the Claimant. Although she failed to give this example during her own grievance hearing, she did give it to Mr Groucott during his investigation into Mr Cattini's grievance and it was put before Mr Knapp as part of his investigation into the Claimant's grievance. Neither investigated the matter in any meaningful way at all, choosing to come to the conclusion – which we cannot see could possibly be justified on the basis of the information before them – that this matter had already been investigated.
107. Accordingly, we conclude that the Respondent did fail to investigate the allegation made by the Claimant in his grievance and in the grievance brought by Mr Cattini that he had used the language complained of.
108. The Respondent had not sought to deny that it is vicariously liable for any conduct of Mr Cattini.
109. The next question for us, therefore, is whether the failure to investigate amounted to unwanted conduct related to the Claimant's race. We conclude that it was unwanted conduct and that it did relate to the Claimant's race.
110. The Claimant clearly put the matter as part of his grievance before Mr Knapp. It warranted investigation. The investigation carried out by Mr Knapp was, at best, cursory. He knew and he has told us that Ms Giles did not give any specific examples of racist language when she brought her grievance. Accordingly, it cannot be the case that those specific words were investigated as part of the grievance which was in turn not upheld. The same points apply to Mr Groucott's approach to the matter when dealing with Mr Cattini's grievance.
111. In both cases, we have concluded that the reason why the matters were not investigated, were because of the nature of the allegations – i.e. that serious racist language of this type, which should warrant investigation, was not being investigated because of the nature of the allegation itself. There was a willingness to investigate all other matters, but allegations of racism were not investigated properly by either Mr Groucott or Mr Knapp. In the absence of any other explanation for that, we have concluded that the reason why they were not investigated is because they related to race.
112. The effect of that failure to investigate is to violate the Claimant's dignity and create an atmosphere for him which can be described as intimidating,

hostile, degrading, humiliating or offensive. Alleged comments made regarding his race have been put before his employer and have not been investigated. We are satisfied that having regard to the perception of the Claimant and all the circumstances of the case, that conduct has the effect set out in the Act and recited earlier in this Judgment, and reasonably so. An employee who has been the victim of alleged racist abuse has the justifiable expectation that his employer will investigate such matters with appropriate rigour, this Mr Groucott and Mr Knapp both failed to do. When the claimant became aware of the alleged comment, he raised the matter in a grievance of his own. The respondent failed to investigate the matter (as it had done when raised by Ms Giles) relying on a view which could not be reasonably maintained that it had previously been investigated (notwithstanding the fact, known both to Mr Groucott and Mr Knapp) that Ms Giles' own grievance had failed due to a lack of specificity of the allegations she was raising.

### Summary

113. The Respondent failed to investigate the allegation that Mr Cattini described the Claimant as a "*fucking disgusting wog*".
114. That failure to investigate the matter amounts to harassment contrary to Section 26 of the Equality Act 2010.
115. These matters should have been investigated when they came to the attention of the Respondent which first occurred when Mr Groucott was investigating the grievance brought by Mr Cattini and secondly when Mr Knapp was investigating the grievance brought by the Claimant.
116. In all other respects the Claimant's claims are not well founded and they are dismissed.

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Employment Judge Ord

Date: 23 September 2020

Sent to the parties on: ..09/10/2020

Jon Marlowe  
For the Tribunal Office