



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Zireva

**Respondent:** Network Rail Infrastructure Limited

**Heard at:** Reading **On: 26, 27, 28 October and (in chambers) 2 December 2020**

**Before:** Employment Judge Gumbiti-Zimuto  
Members: Ms C Baggs and Ms F Tankard

**Appearances**  
**For the Claimant:** Ms A Johns, counsel  
**For the Respondent:** Ms S Tharoo, counsel

## RESERVED JUDGMENT

The claimant's complaints are not well founded and are dismissed.

## REASONS

1. The claimant's complaints of race discrimination were set out in the Case Management Order made following a preliminary hearing on 30 January 2020. The events that the claimant relies upon as amounting to race discrimination are:
  - (a) 1 February 2018, the failure of Mr Graham Wells to arrange a late interview for the G9 post. The comparator is a hypothetical white British signaller.
  - (b) 24 May 2018, the decision by the respondent to appoint the G9 post pending the claimant's grievance outcome. The claimant comparator is a hypothetical white British signaller.
  - (c) 10 December 2018, the decision by the respondent to not fully uphold the claimant's grievance against Mr Graham wells. The comparator is hypothetical white British signaller.
2. An employer must not discriminate against an employee in the way the employer affords access, or does not afford access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service. An employer must not discriminate against an employee by subjecting him to any other detriment.

3. An employer discriminates against an employee if because of his race he treats the employee less favourably than he treats or would treat others. Race includes colour, nationality, ethnic or national origins. Where the employee seeks to compare his treatment with that of another employee there must be no material difference between the circumstances relating to each case.
4. If there are facts from which the employment tribunal could decide, in the absence of any other explanation that the employer contravened the provision concerned the employment tribunal must hold that the contravention occurred. However, this does not apply if the employer shows that it did not contravene the provision.
5. It is for the claimant who complains of race discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful (i.e. such facts).
6. If the claimant does not prove such facts he or she will fail.
7. It is unusual to find direct evidence of race discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
8. In deciding whether the claimant has proved such facts the outcome at this stage of the analysis will usually depend on what inferences it is proper to draw from the primary facts found.
9. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
10. In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
11. The tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining. Inferences may also be drawn from any failure to comply with any relevant code of practice.
12. Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of race, then the burden of proof moves to the respondent.

13. It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
14. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of race, since "no discrimination whatsoever".
15. That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that race was not a ground for the treatment in question.
16. The claimant gave evidence in support of his own case. The respondent relied on the evidence of Mr Graham Wells, Mr Simon Ponter, Mr Shaun Mahy and Mr Daniel Collins. All the witnesses produced written statements as their evidence in chief. We were also provided with a trial bundle containing 563 pages of documents.
17. The claimant is an African man from Zimbabwe, he is a British citizen and has lived in the United Kingdom since November 2000.
18. The claimant commenced employment with the respondent as a Trackman in May 2006, he has been promoted several times and at the relevant time held the position of Signaller at Grade 7 working at the Thames Valley Signalling Centre (TVSC). At the TVSC Signallers are organised into links which consist of teams of Signallers. The claimant was assigned to Link 3.
19. In November 2017 the claimant applied for a role as Signaller in Link 2 at TVSC this was grade 9 position. A grade 9 role attracted a higher salary and increased levels of responsibility. The claimant was shortlisted and offered an interview for the role. The claimant informed his acting line manager that he had been offered an interview for the role.
20. On an unspecified date the claimant was approached by Mr Wells whose position is that of Line Operations Manager (LOM) in Link 2. Mr Wells said that he could see that the claimant was interested in the role in link 2 and said something along the lines of "*I will talk to the boys see if they will have you*". At the time the comment was made the claimant and Mr Wells enjoyed a good relationship and the claimant says that he "*laughed off his remark*".
21. Mr Wells recalls a conversation with the claimant and whilst unable to recollect using those exact words alleged by the claimant accepts that he may well have said something along those lines. He states that any comment he made should be considered in the context of his relationship with the claimant which was a good relationship involving "*banter*" taking place between them as part of the way they "*often would Jest and have a bit of a laugh together.*"

22. Mr Wells had discussions with a number of the prospective candidates, including the successful candidate who spent some time observing Link 2 in operation.
23. Mr Wells looked at the claimant's application for the role in link 2 and would not have invited the claimant to interview based on his CV.
24. Mr Wells carried out interviews for the role on 31 January CS emerged as the successful candidate. CK who had also applied was not interviewed. CK was an employee of the respondent. CK had been placed on a 12 hour night shift and was not released to attend the interview. Mr Wells was informed prior to 23 January that the claimant's application had been withdrawn, he was not aware of the circumstances behind it at that time.
25. On 1 January 2018 the claimant was off sick. The claimant next attended work on 16 January 2018, on that day he became unwell and had to leave. The claimant first attended at his GP from there he was taken to and admitted into hospital where he underwent an emergency operation. The claimant was to remain in hospital until 29 January 2018. The claimant remained signed off sick after leaving hospital. The claimant's line manager was aware that he had been taken ill and had been in hospital.
26. Whilst the claimant was in hospital an email was sent to the claimant's work email account informing him that he was being contacted to arrange an interview on 31 January 2018. The email, sent on the 12 January 2018, included the following sentence: "*If we do not receive a response to this email, we will assume you wish to withdraw your application from the recruitment and selection process.*"(p180) The claimant did not see that email until after 1 February 2018.
27. A further email was sent to the claimant on 17 January 2018, the email was chasing the claimant for a response to the earlier email. This email also included the warning that a failure to respond would be treated as a wish to withdraw the application. (p181)
28. On 19 January 2018 the claimant was written to by Network Rail recruitment and informed that his application for the Grade 9 role had been withdrawn and the reason given was "*failure to confirm attendance.*" The claimant, who was still in hospital, did not see this letter at the time.
29. The claimant left hospital on 29 January 2018 but did not return to work until 12 March 2018.
30. On 1 February 2018 the claimant telephoned Mr Wells to get an update on what he thought was his pending interview. The claimant informed Mr wells that he had been in hospital. During his conversation Mr Wells told the claimant the interviews for the role had already taken place. Mr Wells also told the claimant he would not be getting an interview because he had withdrawn his application. The claimant insisted he had not withdrawn his application and Mr Wells insisted that his "system" told him that the

claimant had withdrawn the application personally. At some point during this exchange with the claimant Mr Wells said to the claimant "I am not your keeper" and insisted that the claimant was not going to be interviewed. Mr Wells accepts that he made the comment. He explains that he was trying to convey the point that as the recruiting manager it was not his job to know the status of the claimant's application or the status of his sickness absence.

31. After Mr Wells terminated the call the claimant called HR. It was confirmed to the claimant that he was not going to be interviewed. It was at this point that the claimant learnt that he had been sent emails on 12 and 17 January, and a further letter on 19 January 2018.
32. On 2 February 2018 the claimant submitted a grievance. The grievance was about the withdrawal of the claimant's application for the grade 9 role in Link 2. After setting out the events as he saw them the claimant's grievance concluded: "*Which makes me ask the question is Networkrail subjecting me to some form of discrimination... This was not a mistake someone deliberately withdrew my application...*" (p194)
33. The claimant was told that the role in Link 2 would not be filled while the claimant's grievance was being considered.
34. The claimant was told a number of different things by colleagues which left him convinced that there was discrimination on the grounds of race in relation to recruitment into Link 2 which at the time was composed of all white signallers. The claimant now considers the comment made by Mr Wells where he said "*I will talk to the boys*" was an indication that his application had been rejected by Link 2 Signallers in favour of the successful candidate. The successful candidate was CS who is white British.
35. A white British Signaller CK also applied for the grade 9 role in Link 2 and he was not interviewed because he was unable to attend at the appointed time for the interview, he was working on a shift for the respondent he could not be released to attend the interview. He too made a grievance about the way his application was handled.
36. In May 2018 the grade 9 role was filled by the successful candidate CS. This was before the claimant's grievance had been concluded. This came about because in May a second grade 9 vacancy arose in link 2. It was decided that CS, who had been held in a 'limbo' following his successful interview on 31 January, could now be appointed to the role and there would still remain a grade 9 role available. The decision to appoint CS to the role was made by Mr Simon Ponter. Link 2 had been incurring financial penalties as a result of the delay in appointing to the Grade 9 role that CS had been the successful candidate.
37. Mr Shaun Mahy, a Local Operations Manager (LOM) based at Gloucester, was asked by Mr Ponter to investigate the Claimant's grievance.

38. The grievance hearing went ahead on 25 April 2018. Mr Mahy and the claimant agreed the grievance concerned the claimant's removal from the recruitment process for the grade 9 role unfairly; and that Mr Wells made an inappropriate comment when contacted by the claimant regarding the post he had applied for when he said "we the railway management are not your keepers".
39. The claimant confirmed that he felt that he had been denied the opportunity of an interview for a position in Link 2 and that he was now not comfortable being interviewed by Mr Wells due to his comments. The claimant raised concerns about his future at TVSC, citing the possibility of discrimination and/or unconscious bias.
40. At the end of the meeting the points raised were summarised as whether the Link 2 vacancy had been filled; what Mr Wells had meant by the "not your keeper" comment; whether this would affect the claimant's future and whether he could be sure he would not be victimised; clarification whether the recruitment policy had been followed regarding the provision of an alternative date.
41. Mr Mahy met with Mr Wells on 30 May 2018. Mr Wells confirmed he was aware that the claimant had applied for the role he was hiring for but he was not on the final list provided by the Recruitment team for him to interview. Mr Wells said that he had initially rejected the claimant because of his poor CV and the lack of information on it but had then been told by the Recruitment team that he had to interview him, because the claimant was a signaller he had made the shortlist. Mr Wells agreed that he would do so and that this was the last he had seen of this until he noticed the claimant was not on the interview list.
42. Mr Wells knew the claimant was off sick and assumed that he withdrew his application.
43. Mr Wells confirmed that he had subsequently spoken to the claimant who asked him to explain why he had not got an interview. Mr Wells explained the claimant had not been on his interview list and his application was showing as withdrawn on the Oracle system used to communicate with HR about recruitment.
44. Mr Wells as the Recruiting Manager is not responsible for candidates' availability for attending an interview; this is confirmed by the Recruitment team. Mr Wells was not aware that the claimant was in hospital; Mr Wells did not have any conversation with the claimant's Line Manager regarding the claimant being off. Mr Wells could not recall making the "Keeper" comment but if he had, it had been misinterpreted. Mr Wells confirmed that the Link 2 vacancy had now been filled but there was another Link 2 position that had arisen. Mr Wells would not have had any insight into the reason why the claimant's application was withdrawn, unless he was informed by HR and claimant's Line Manager had spoken to him.

45. Mr Mahy then met with Mr Simon Ponter on 11 June 2018. After the meeting with Mr Ponter, Mr Mahy made some further enquiries with the Recruitment team about the signaller recruitment process.
46. Mr Mahy had a further meeting with the claimant on 26 June 2018 when they discussed Mr Mahy's findings following his investigations.
47. Mr Mahy explained to the claimant that it was at the discretion of the interviewing Manager whether an alternative date for interview is given. Mr Mahy considered that "*it was evident that another date had not been given due to Godfrey's application having been withdrawn by the Resourcing team in Manchester*". Mr Mahy said to the claimant that he did not consider this had anything to do with "*colour or creed*" and the claimant "*had fallen foul of the recruitment policy*".
48. In his letter to the claimant confirming the outcome of the grievance Mr Mahy confirmed that Mr Wells had admitted to using the phrase 'I'm not your keeper' with his staff, in the context of him not regarding himself as a signaller's parent. Mr Mahy could not find any evidence that Mr Wells had used it in a discriminatory manner. Mr Wells was prepared to apologise to the claimant if it had been misinterpreted. This part of the grievance was not upheld. In respect to the allegation that the claimant had been unfairly removed from the TVSC grade 9 position unfairly, Mr Mahy concluded that the process had been followed by the HR Recruitment team. The process did not adequately cater for people who had applied for a position and were then subject to long-term absence from work during that process. This part of the grievance was upheld.
49. The claimant was offered an automatic sift to interview stage for the next grade 9 vacancy but declined the offer. The claimant complains that the decision on his grievance was discrimination on the grounds of race.
50. The claimant confirmed he would like to appeal on 12 July 2018
51. Mr Daniel Collins, a Senior Commercial Scheme Sponsor for the Western Route of Network Rail, was asked by Mr Ponter to hear the claimant's grievance appeal.
52. The claimant's grounds of appeal focussed on three areas, namely: Mr Wells' comment "I am not your keeper"; that the grievance outcome letter was silent on how the claimant would be compensated, such as loss of potential earnings; and the issue of CS having been confirmed into the link 2 Vacancy on 25 May 2018, prior to the claimant's grievance having been finalised.
53. The appeal hearing took place on 25 September 2018 when Mr Collins met with the claimant.

54. Mr Collins met with Mr Wells on 26 October 2018. Mr Collins asked Mr Wells to explain what he meant by the comment "I'm not your keeper". Mr Wells explained it meant someone who was not responsible for someone-else's activities. Mr Wells explained the point he was making to the claimant was that he had no knowledge of the sickness, despite the claimant's expectations that he would know this from his line manager. Mr Wells' view was he was not responsible for what the claimant did. Mr Wells' view was that the claimant thought that once he had told someone in Network Rail about sickness that everyone in Network Rail would know that he was in hospital and had been unable to open his letters/emails about the interview.
55. After the meeting with Mr Wells, Mr Collins contacted the Recruitment Team Manager based in Manchester.
56. Mr Collins reconvened the grievance appeal hearing on 28 November 2018 to go through the investigation and the outcome of the appeal. Mr Collins upheld parts of the grievance appeal, but there were also parts where he could find no fault in the decisions that had been made.
57. As regards the first allegation, to the comment by Mr Wells "*I'm not your keeper*", Mr Collins concluded that whilst the behaviour was not well addressed, and the use of the phrase was not the best phrase to use, he did not consider that the phrase was discriminatory, he could find no evidence of racial motivation. Mr Collins recommended training for the management team. This aspect of the grievance appeal was not upheld.
58. Regarding the claimant's concerns about being removed from the TVSC grade 9 position selection process and not receiving clarification how Network Rail would address this issue, given that part of the original grievance was upheld and his view he should be compensated for loss of potential earnings: Mr Collins explained that he had taken the opportunity to discuss this with the Resourcing Team and they had confirmed the system was not sophisticated enough to correlate sickness and the recruitment process. The Resourcing Team was aware the claimant was off sick and did not take account of this or pass this onto the Recruiting Manager.
59. The claimant was told that as this job application for a grade 9 post did not progress to a permanent offer, it was not possible to pay loss of earnings, however, it was acknowledged this was no fault of the claimant's and an automatic opportunity to interview for a grade 9 position was recommended. This part of the grievance appeal was partially upheld.
60. The third aspect related to the issue of CS being confirmed into the grade 9 Link 2 role on 25 May, before claimant's grievance had been finalised and in the claimant's view making the whole grievance and appeal process a "dead rubber". The claimant submitted his grievance after the interviews had taken place, it was within the hiring manager's gift to offer the role to one of the candidates that had been interviewed. However, it was



acknowledged that through no fault of his own, the claimant did not confirm his ability to attend an interview. It was recommended the claimant be automatically selected and interviewed for one of the other grade 9 positions that were available in Link 2. This part of the grievance appeal was partially upheld.

61. In reference to the issue that Network Rail had acknowledged the system disadvantaged people on long term sick but had not addressed how this would be corrected in the future: This part of the grievance appeal was upheld.
62. Regarding the issue of the claimant saying there had been a lack of credible explanation why he had not been given an interview, and as a result this had left him with the only explanation being that it was racially motivated. Mr Collins found that the claimant had initially been offered an interview by an automated system generated email. The recruitment system and employee records system did not "talk" to each other, they were not linked. There was a flaw in the recruitment process, it did not take account of a lack of response due to sickness.
63. The hiring manager's IT system had identified that the claimant had been withdrawn but not the reason. This was because the Resourcing Team had tried to contact the claimant but had been unsuccessful, albeit this was through no fault of the claimant.
64. The Resourcing Team had been made aware that the claimant was off sick and should have passed this information onto the hiring manager. Mr Wells had selected, but not offered, the highest scoring candidate the job after interview on 31 January 2018.
65. Mr Collins explained that the subsequent approach from the claimant on 1 February 2018 and the realisation that the claimant had not accepted the interview because of sickness, was not the hiring manager's issue to resolve. Mr Wells could either have accepted a late interview, which was outside the process he knew, or reject it, which he did. It was not morally the right thing to do but it was his choice as a manager.
66. Mr Collins concluded there was no evidence the decision was racially motivated and it was in fact the recruitment process that was at fault. The hiring manager could have resolved this by undertaking an interview. This part of the grievance appeal was partially upheld.
67. In respect to the claimant's concern regarding his chances of having a fair interview for another grade 9 position, Mr Collins found there was no evidence of discrimination. To remove the risk of conscious or unconscious bias, it was recommended the claimant be automatically selected for the next round of interviews. The claimant would be interviewed by independent recruiting managers. This part of the grievance appeal was upheld.

68. Regarding the claimant's request for an explanation why he was allowed to carry on with his grievance when there was already someone in post, Mr Collins explained there appeared to be a misunderstanding around the grievance process. There was nothing in the Recruitment Policy that stopped an interview recruitment process, whilst a grievance investigation was underway. It was within the hiring manager's gift to offer the role to one of the candidates that was interviewed. The grievance was raised because the process was flawed and the claimant did not get an interview, not just because he did not get an interview.
69. Mr Collins reviewed the claimant's CV and found that one reason for the hiring manager deciding not to interview him was the claimant's CV was not of a high standard in comparison to the other candidates. This was not explicitly a reason cited in the claimant's case. This part of the grievance appeal was upheld.
70. Mr Collins made a number of recommendations. Mr Collins sent the claimant a copy of the appeal outcome report and a summary of his decision.

### **Conclusions**

*1 February 2018, the failure of Mr Graham Wells to arrange a late interview for the G9 post. The comparator is a hypothetical white British signaller*

71. There is a two-stage process to the drawing of inferences of direct discrimination. 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. 'Could conclude' means 'a reasonable tribunal could properly conclude' from all the evidence before it. The claimant has to 'set up a prima facie case'. A difference of status and a difference of treatment is not sufficient to reverse the burden of proof automatically.
72. Whether the burden has shifted is 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. The focus of the tribunal's analysis must at all times be the question whether they can properly and fairly infer race discrimination.
73. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that he or she has relevant circumstances which are the 'same, or not materially different' as those of the claimant. The 'stage 1' requires more than simply pointing to detrimental treatment and a hypothetical comparator. More than this is required: a tribunal must construct an appropriate hypothetical comparator.

74. The claimant must prove the facts on which he places reliance for the drawing of the inference of discrimination, actually happened. If the complainant's case is based on particular words or conduct by the respondent employer, he must prove (on the balance of probabilities) that such words were uttered or that the conduct did actually take place—not just that this might have been so.
75. That conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof. Unreasonable conduct must not be equated with discrimination.
76. 'Statistical' evidence that may tend to show a discernible pattern of treatment by the employer to the claimant's racial group could lead a tribunal to infer unlawful discrimination.
77. It is established that Mr Wells did not arrange a late interview for the claimant. It is also established that Mr Wells had authority to arrange a late interview for the claimant.
78. Mr Wells' approach was (i) the claimant been withdrawn from the interviews, (ii) the interviews had taken place, (iii) both the earlier events were in accordance with the recruitment process, therefore there was no obligation on the part of Mr Wells to offer the claimant a rearranged interview.
79. The same approach was adopted by Mr Wells towards CK. CK was offered an interview on a date and at a time he was on a roster to work (i.e. 31 January 2018). The respondent refused to release CK to attend the interview. Prior to interviews taking place, CK requested that the interview is rearranged and explained the reason why. Mr Wells refused to rearrange the interview and he did not offer CK an alternative interview time and date. CK is a signaller. CK is white British.
80. The comparator evidence does not support the claimant's case. CK is in our view a comparator whose circumstances are not materially different to the claimant. He too was not interviewed because of reasons beyond his control. Other than the claimant's assertion there is no evidence from which it is possible to conclude that a hypothetical white British signaller would have been treated differently. The evidence is that white British signaller was treated exactly the same way as the claimant.
81. Link 2 was all white at the relevant time. The evidence that the Tribunal heard included evidence that link 2 had not always been all white and that Mr Wells had recruited non-white employees including the claimant. There is no evidence that Link 2 put any pressure on Mr Wells to keep it that way to favour a particular candidate. The claimant relied upon things he had been told by other people who were unnamed and whose alleged statements were unverified. These rumours or gossip in our view do not dislodge the facts which have been proven namely that a white signaller

was treated in the same way as the claimant in circumstances which are not materially different.

82. The claimant has relied on the fact that the “keeper” comment was made by Mr Wells. The claimant’s evidence on the significance of this was not always consistent or clear, at times he suggested that it was a clear indication of a racial animus operating on the part of Mr Wells and at other times he appeared to accept that the comment was inappropriate and unprofessional but that it did not signify a racial animus. Our conclusion is that the words in themselves or in the context used by Mr Wells bear no racial animus. What Mr Wells intended to convey was that it was not his responsibility as a manager to make sure that the employee, in this case the claimant, did all that he should do with regard to communicating with HR about his interview.
83. The claimant has not shown facts from which we could conclude that there was discrimination on the grounds of his race.

24 May 2018, the decision by the respondent to appoint the G9 post pending the claimant’s grievance outcome. The claimant comparator is a hypothetical white British signaller.

84. Both CK and the claimant brought grievances arising out of the way that the respondent had behaved toward them. By the 24 May 2018 CK’s grievance had been resolved. The claimant’s grievance was still in progress Mr Mahy had met with the claimant but he had yet to make further investigations including talking to Mr Wells.
85. In May 2018 Mr Ponter took the decision that the respondent proceed with the appointment of CS into the original the grade 9 vacancy in link 2. At this time it was known that a second potential grade 9 vacancy was going to arise. This second role would be held open pending the outcome of the claimant’s grievance. In making the decision Mr Ponter was taking into account the fact that a number of people were affected by the delay in appointing to the post and the financial implications for the respondent in continuing to fail to appoint to the role.
86. The claimant complains that appointing CS to the grade 9 position in May 2018 made the ongoing grievance process a “dead rubber”. The Tribunal does not accept this positioning by the claimant. The view of the Tribunal is that one outcome for the claimant on his grievance was to interview him for the grade 9 post and if he was successful appoint him to the role. This was still possible even after CS was appointed to the role in May 2018. The respondent waited until May 2018 to ensure that the claimant might be able to have an effective remedy. In appointing CS to the role in May 2018 the claimant was in our view not subjected to any less favourable treatment. The claimant has not been able to explain what appreciable difference it would make to the claimant if he was appointed to a grade 9 role with CS also in such a role or with CS not appointed to the role.

87. The reason for the decision to appoint CS at this time has not been shown to do with race. The timing arose because it became clear that a grade 9 vacancy was going to be present. The considerations which Mr Ponter had in making the decision related to impact on the careers of other candidates who applied for the grade 9 role in November 2017 interested in the outcome of the selection process and the financial impact on the respondent of not appointing to the role.
88. The claimant has failed to show any facts from which we could conclude that the decision to appoint CS to the grade 9 role in link 2 in May 2018 was because of his race. The claimant makes the assertion that a hypothetical white British comparator would have been treated differently however he does not show a basis for such a conclusion. The facts establish that the reasons for the decision were not related to race.
89. The claimant has not proved facts from which we could conclude that the decision to appoint CS in May 2018 was on the grounds of race.

*10 December 2018, the decision by the respondent to not fully uphold the claimant's grievance against Mr Graham wells. The comparator is hypothetical white British signaller.*

90. The respondent partially upheld the claimant's grievance. We have not been able to conclude that the failure to uphold the grievance in full was because of race.
91. The claimant has shown that Mr Wells made the "keeper" comment. The claimant has also expressly accepted that the comment is not one that is racially loaded. The claimant has not put forward a basis for concluding that Mr Mahy or Mr Colins had any racial bias in the decisions they came to in the grievance.
92. It was put to Mr Mahy that he did not take the claimant's complaints seriously because he is non-white. Mr Mahy's response was: "*I am not from TVSC, I have no idea of the colour of the people on one side or the other. I do not know what colour or creed CS is.*" Beyond putting the allegation to Mr Mahy and his denial there is no evidence of a fact that points to race. The conclusions that Mr Mahy reached were criticised, however, those conclusions do not in themselves point to race even if they are wrong.
93. We have considered the evidence that has been given by Mr Mahy, we consider that it shows that he conducted the grievance investigation thoroughly. He did not conclude that there was any race discrimination in the process that had acted unfairly towards the claimant. We accept the evidence that he has given that in coming to these conclusions he formed the genuine belief that race was not a factor. It is the conclusion of the Tribunal that the respondent has shown that race was not a factor in the decision that Mr Mahy reached on the grievance.

94. Mr Collins was challenged in respect of the way that he conducted the grievance appeal. It was put to Mr Collins that he did not take the claimant's appeal seriously. Mr Collins denied this but accepted that the grievance took too long. Mr Collins accepted that the claimant told him of comments made on the "grapevine". Mr Collins did not look into these comments. It was put to Mr Collins that he was trying to protect colleagues and protect the process where claimant was making complaints against white people. Mr Collins response was: "*I deny that I do not have anything to do with TVSC on a day to day basis I was asked to do appeal and did the process to the best of my ability.*"
95. The grievance process took too long to complete, even if account is taken for the time that the claimant is off sick. There are criticisms that can properly be made about the way that the grievance investigation was conducted. Mr Collins accepted that he was informed of comments made on "the grapevine" and that he did not pursue them. The Tribunal are satisfied that these matters could in the absence of an explanation lead to a conclusion that the claimant's race was a factor.
96. Mr Collins interviewed Mr Wells as part of his grievance appeal investigations. In his interview Mr Wells admitted that CS had spent time in the link before the interviews and that he was the preferred candidate who was ultimately successful. Mr Collins in his grievance appeal investigations addressed all the issues that the claimant had raised as part of his appeal (the "grapevine" comments were raised but not pursued as part of the grievance appeal). He made a number of recommendations stemming from his conclusions. Mr Collins recognized, among other matters set out in the report, that the claimant had been treated unfairly in the recruitment process, that recruiting managers should be educated about the recruitment process, that the appeal process he conducted had taken too long. Mr Collins also concluded that there was no evidence of racism.
97. The Tribunal accept Mr Collins' evidence that he carried out his investigation of the appeal grievance to the best of his ability. We do not consider that the conclusions he arrived at were tainted by considerations of race, notwithstanding the failure to follow up on the "grapevine" comments. The respondent in our view has been able to show that the decision on the grievance appeal was not at all on the grounds of race.
98. The claimant's complaints are not well founded and are dismissed.

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Employment Judge Gumbiti-Zimuto

Date: 30 December 2020

Sent to the parties on: .....

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For the Tribunals Office

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