EMPLOYMENT TRIBUNALS

Claimant: **Mr T Joseph**

Respondent: **Abellio East Anglia Limited**

Heard at: **East London Hearing Centre**

On: **15 & 16 July 2021**

Before: **Employment Judge Crosfill**
Members: **Ms G McLaughlin**
Mr B Wakefield

Representation

Claimant: Mr Hayward a lay representative and friend

Respondents: Mr S Sanders of Counsel

JUDGMENT

1. **The Claimant's claim for unfair dismissal brought under part X of the Employment Rights Act 1996 is not well founded and is dismissed.**

2. **The Claimant's claims for direct discrimination because of race contrary to Sections 13 and 39 of the Equality Act 2010 are not well founded and are dismissed**.

REASONS

1. At the material time the Respondent was a company that amongst other activities ran the overground railway service in East Anglia and Essex. It is a substantial company that in total employs around 2200 people.

2. The Claimant was born on 25 September 1963 to parents born in St Lucia. He identifies himself as being 'black. The Claimant started working for the Great Eastern Railway Limited on 7 July 2003 as a Customer Sales Level 1. The Claimant's employment was transferred to a succession of franchise holders until in 2016 his employment transferred to the Respondent. In 2018 the Claimant was transferred from Thorpe Station

to Wivenhoe. At that station part of the Claimant's responsibilities included 'dispatching' trains. This process was regarded as important to passenger safety.

3. In May 2020 a report was made by the Claimant's line manager that he had failed to dispatch a train safely. The matter was investigated and the Claimant was invited to a disciplinary meeting following which he was dismissed. He appealed that dismissal but his appeal was not upheld.

4. The Claimant contacted ACAS for the purposes of completing the Early Conciliation process on 15 August 2020. On 25 September 2020 the Claimant presented his ET1 to the Employment Tribunal. In his ET1 he complained of unfair dismissal and of direct race discrimination.

The issues and the hearing

5. A preliminary hearing took place on 25 January 2021 before EJ Masserella. His case management order includes the list of issues he discussed with the parties. The issues were very straightforward. The sole allegation of race discrimination concerned the Claimant's dismissal.

6. During the preliminary hearing Mr Hayward made an application for specific disclosure. One category of documents (or perhaps more accurately information) he asked the Respondent to produce was information about the treatment of others in similar circumstances giving a breakdown of their race. The application was resisted by the Respondent on the basis that it was said that the information was not retained centrally. It is clear from the record of the preliminary hearing that EJ Masserella considered that *'a legitimate request for relevant statistical information'* was a common feature of discrimination claims. He required the Respondent to lodge a formal response to the request made by the Claimant. On 10 February 2021 the Respondent's solicitor sent an e-mail to the Claimant and the Tribunal stating that the Respondent continued to resist the request. It apparently took the stance that it would need to search the personnel files of 2,200 employees in order to compile any statistics. In response to the Respondent's e-mail Mr Haywood took a slightly different approach, seeking information not specifically linked to race. There was no order that the Respondents provide the information first requested by Mr Haywood. Below we describe how information about the race of people dismissed in similar circumstances emerged during the hearing.

7. The parties had prepared an agreed bundle of documents that ran to 264 pages.

8. As is now normal, the Tribunal read the witness statements and documents referred to in the absence of the parties. We then heard from the following witnesses:

8.1. Michael William Barry, who was employed by the Respondent as an Area Customer Service Manager and who conducted a disciplinary hearing on 20 July 2020 following which he took the decision to dismiss the Claimant; and

8.2. Lee Ivor Smith, who was employed by the Respondent as the Head of Customer Service, and who heard the Claimants appeal against the decision to dismiss him at an appeal hearing that took place on 5 August 2020; and

8.3. we then heard from the Claimant himself.

9. We invited Mr Saunders to make his submissions first in order to familiarise Mr Hayward with usual format of submissions and the points which were likely to assist the tribunal. Mr Saunders had produced a brief skeleton argument and some authorities which principally dealt with the issue of inconsistent treatment. Mr Hayward had provided the Tribunal with a document he had entitled 'Presentation of the Evidence' at the outset of the hearing. Essentially this set out the arguments that he relied on during the hearing. Mr Hayward then made oral submissions in support of the Claimant's claims. We are very grateful to both parties for the care they took in addressing the points that tribunal needed to consider. We shall not recite the submissions made to us here but shall refer to the significant arguments in our discussions and conclusions below.

10. Regrettably by the time that we had heard the parties submissions it appeared unlikely that we would have sufficient time to discuss the matter between ourselves, reach a conclusion and deliver an oral judgment. With the agreement of the parties decided to reserve our decision.

11. Unfortunately, there has been a considerable delay in providing this decision to the parties. The responsibility for that falls entirely on the Employment Judge. Regrettably the pressure of other work including some very lengthy cases has left very little time for writing up a number of judgements. Employment Judge is acutely aware of the anxiety that this must have caused and apologises for any inconvenience.

Our findings of fact

12. We have heard a great deal of evidence about the events that led to the Claimant's dismissal. We have been careful to limit our findings of fact to those matters which are strictly necessary for us to reach the conclusions on the list of issues. Just because we do not mention any particular fact in these reasons does not mean that we did not have it in mind.

13. We would wish to record that we were satisfied that all three witnesses that we heard from were doing their very best to give an honest account of the events that have given rise to this claim. This is not a case where the outcome turned on the credibility of any witness. Where there were differences between the parties, or between oral evidence and any document, we are satisfied that witnesses were doing their best to recall what had happened. For the purposes of the discrimination claim we remind ourselves that we are required to examine the reasons for any treatment complained of and it is not enough simply to find that a witness, who denies discriminatory motivation, was acting honestly.

14. As we have indicated above the Claimant started working on the railway in 2003. His first role was in the ticket office at Manningtree Railway Station. He received training in that role and was required to be given a Safety Critical Pass as his role involved crossing the railway lines. The Claimant then transferred to the railway station at Thorpe-Le Stoken ('Thorpe') which was conveniently situated just 4 miles from his home. At that station he did not need a Safety Critical pass but he had duties which required him to have regard to the health and safety of himself and others.

15. In 2016 the Claimant's employment transferred to the Respondent. Towards the latter part of 2017 a decision was taken to close the Thorpe ticket office. The Claimant was informed that there would be no compulsory redundancies and having been given a list of possible vacancies he accepted a position at Wivenhoe railway station as a Hybrid Ticket Office Clerk.

16. In addition to working in the ticket office the Claimant's duties as a Hybrid Ticket Of his Clerk included a process known as dispatching trains. Put simply, a dispatcher was required to be on the station platform at least three minutes before the arrival of any train in order to observe the train as it approached the station. The dispatcher was expected to be standing beside a point marked on the platform from which he or she could see both the front and rear of the train (the 'recognised dispatch point'). The station at Wivenhoe was situated on a curved track. The curvature in the track meant that where trains were proceeding in the direction of London the driver would be unable to see the guard unless one or both of them dismounted from the train.

17. The Dispatcher would be expected to ensure that all passengers stood behind the line marked on the platform to prevent, or if that were not possible observe, anybody or indeed anything falling under the oncoming train. The Dispatcher was then required to assist the guard while the passengers alighted the train. Once all passengers were on board the Dispatcher was required to give a clear signal either by hand, that an all lamp to the train guard. The guard would then close the doors after a final check by both the guard and Dispatcher a signal would be given to the driver to proceed.

18. Many stations controlled by the Respondent did not use Dispatchers at all. At Wivenhoe not all of the trains would require the assistance of a Dispatcher. In his witness statement the Claimant said, and we accept, that of the 75 stopping trains passing through Wivenhoe only 34% required the assistance of a Dispatcher. Where no Dispatcher was used the train crew would undertake what was usually referred to as an 'unassisted dispatch'.

19. We find that the Respondent regarded the role of a Dispatcher as being safety critical. The Respondent has produced a Train Dispatch Method Statement which sets out step-by-step what was required. The Claimant was tested on his knowledge of the approved method for dispatching trains on at least two occasions where his actions were observed and recorded in a document entitled Assessment of Competence for Assisted Platform Train Dispatch. The first of these assessments took place on 7 December 2018 and the second on 24 April 2020. The comments of the assessor in both cases were that the Claimant had performed his duties to a very high standard. His familiarity with the

approved dispatch method was noted on each occasion.

20. On 4 May 2020 the Claimant was rostered to start his shift at Wivenhoe station at 6:00am. He left home and drove to Thorpe station intending to catch the first train which he believed would be departing at 05:38. This would have been correct had the train been following the Saturday timetable. The Claimant believed that that was the case because that is what he had been told. On the way to the station the Claimant was delayed by roadworks. He arrived at around 05.29 but the train he intended to catch departed just as he arrived. The next train did not leave until 06:42. This meant that the Claimant was inevitably going to be late arriving at Wivenhoe station. The Claimant was required to clock on and did so using his mobile phone at 06:00 hours. Did not inform the line controller or his manager that he was going to be late for work.

21. The Claimant then caught the next train which should have arrived at Wivenhoe station at 06:57. The Claimant was responsible for dispatching the train that he was travelling on. Unknown to the Claimant, his manager Taran Best had arrived at Wivenhoe station at about 06:00. He later recorded that he had attended the station at that hour because there had been anecdotal reports of a potential dispatch irregularity. We did not hear from Taran Best as to the source of any information he had received. However, there was no significant dispute as to what happened.

22. The Claimant alighted from the 06:57 which had arrived a few minutes late and proceeded to the Recognised Dispatch Position. The events took place during the first lockdown and there were very few passengers boarding the train. Once the passengers had boarded the Claimant visually signalled to the guard that it was safe for the train to depart. Guard had remained on the train during the time it was in the platform. Taran Best did not speak to the Claimant that morning.

23. On 6 May 2020 the Claimant was once again due to start work at Wivenhoe at 06:00. Once again he was delayed due to roadworks and he missed the earlier train. Once again he signed on using his mobile phone indicating that he had started work at 06:00. The Claimant was concerned that he was going to be late for the second time and on this occasion he asked the Guard if on arrival at Wivenhoe the Guard could undertake a 'self-dispatch'. The train arrived at Wivenhoe on time at 06:57. Once again Taran Best had come to the station at 06:00 and observed the Claimant coming off the train. He later recorded that the Guard had performed an *'excellent self-dispatch'*. On this occasion he spoke briefly with the Claimant who asked him why he was there. Taran Best told the Claimant that *'this is not what we want to see, we'll have to look into this a bit further'*.

24. At some point, at around this stage Taran Best made written statements about what he had observed on 4 and 6 May 2020.

25. On 18 May 2020 the Claimant was required to attend a short interview with Taran Best. A record of that interview was included in the bundle before us and we are satisfied that it accurately captures the conversation. The Claimant agrees that he was only asked five questions as recorded. The first four questions were focused on the fact that the Claimant had logged on to work using his mobile phone before he had arrived at

Wivenhoe. When asked where an employee was expected to log on from the Claimant responded saying that it should be his 'home station'. The fifth question is recorded as Taran Best asking the Claimant to give a full description of the dispatch process at Wivenhoe. The answer that is recorded is that the Claimant acknowledged that he needed to be on the platform three minutes before the train arrived. Is further recorded that he did not expand upon that answer.

26. On 19 May 2020 the Claimant was told that he should no longer dispatch any trains and that he should report to Taran Best the following day. On 21 May 2020 the Claimant was interviewed by an area manager Mr Steward. There was some dispute about the purpose of that interview. We are satisfied that there were two separate processes. The Respondent keeps a record of all safety critical incidents. The Claimant's interview with Mr Steward was for those purposes and was not part of the disciplinary process. Mr Steward showed the Claimant the statements made by Taran Best and asked for his account of events. No notes were taken of that meeting but Mr Steward completed an 'Operational Accident/Incident Investigation form. He recorded the Claimant as having no dispute with the account of Taran Best and saying that he was fully aware of the process that he ought to have followed. In a section of the pro forma headed 'Root Cause' Mr Steward said as follows:

> '*The cause of the violation was that the dispatcher deliberately failed to follow the train dispatch method statement for the location. This should be investigated as part of the formal disciplinary process. Another cause of the violation was that the dispatcher was not present at the location at the correct time, despite signing on at the correct time. This should be investigated as per the formal disciplinary procedure.*

27. On 29 May 2020 Taran Best was interviewed as part of a disciplinary investigation into the Claimant's conduct. Other than the fact that Taran Best suggested that his attendance at Wivenhoe on 4 May 2020 was merely a routine station visit (in contrast to his written statement which suggested that he was acting on information about an improper dispatch), Taran Best gave the same account of events as we have set out above and which he recorded in his two statements.

28. On 3 June 2020 the Claimant was sent a letter inviting him to an investigatory interview to take place on 10 June 2020. That letter informed the Claimant that he had a right to be accompanied at the meeting. We were provided with a copy of the Greater Anglia disciplinary procedure. That procedure says very little about the process of investigation other than a note on the final page of the procedure which says *"Investigatory interviews are not a disciplinary hearing or formal part of the disciplinary procedure. If it becomes clear during the course of an investigatory interview that disciplinary action may result, then the interview will be adjourned to enable colleague the right of accompaniment'.*

29. The meeting on 10 June 2020 was conducted by Paul Bellinger who was an Assistant Area Customer Service Manager at Chelmsford. Notes were taken during the meeting by another employee who had attended remotely. We are satisfied that those

notes broadly reflect the discussions that took place during that meeting. At the outset of the meeting the Claimant was asked whether he wanted to be accompanied. He is recorded as saying that he couldn't get anyone to come with him. An offer was then made to find one of the Claimant's colleagues but the Claimant was happy to continue.

30. The Claimant accepted that he had not arrived at Wivenhoe until 06:57 on 4 May 2020 he further accepted that he signed on as having started work at Thorpe Station at 05:44. He accepted that the normal procedure for notifying his employer that he was late for work was to contact his supervisor. He said that he had not done so on this occasion because he was in *'panic mode'*. He explained that he had been stuck at a temporary set of traffic lights. He offered to prove that that was the case but Paul Bellinger is recorded as saying that he did not wish to see any evidence of that. He accepted that he was familiar with the Train Dispatch Method Statement for Wivenhoe station. Also accepted that it had been his responsibility dispatch the train that had been due to arrive at 06:57. He then described what he had done on arrival which did not differ in any material respect from what had been reported by Taran Best. The interview then turned to the events of 6 May 2020 the Claimant accepted that he had once again been late but that he had not reported it. He told Paul Bellinger that on this occasion he had not dispatch the train but had spoken to the Guard and asked them to do it for him. After Paul Bellinger had asked the Claimant questions he asked the Claimant whether he had any questions for him. The Claimant said that he knew that he had not followed those dispatch procedures. He then indicated that other members of staff had asked him to dispatch a train which he was getting off. He showed Paul Bellinger some text messages which suggested that colleagues had asked him to dispatch the train that he was going to be on when it arrived at Wivenhoe.

31. On 19 June 2020 the Claimant was invited to a disciplinary hearing. The letter set out 4 disciplinary charges. These were:

31.1. that on both 4th and 6th May you signed on your booked time by mobile phone indicating you were present at Wivenhoe Station and on duty; and

31.2. that on both 4th and 6th May 2020 you received payment for time worked when you were not present. This is due to signing on whilst not been present at your place of work; and

31.3. that by your own admission you ignored the lateness reporting procedure; and

31.4. that you knowingly fail to adhere to the dispatch procedure for the Wivenhoe Station on 4th and 6th May.

32. The Claimant was informed that he had a right to be accompanied at the disciplinary meeting by a colleague or trade union representative. He was further informed that it was possible that his employment might be terminated.

33. The letter that was sent to the Claimant was headed 'Summary Discipline Hearing'. The same phrase was used at the outset of the hearing. We were somewhat concerned that this denoted a predetermination of the sanction that would be imposed. Having heard all of the evidence we are satisfied that whilst this is clumsy language all that it was intended to convey was that allegations that were being considered could in the eyes of the Respondent amount to gross misconduct justifying a summary dismissal.

34. The disciplinary hearing took place on 20 July 2020. The Claimant was accompanied by Andy Gordon who was present as a colleague of the Claimant rather than a Trade Union representative. Andy Gordon and the Respondent apparently believing that only a representative from a recognised trade union could accompany an employee. The hearing took place via Microsoft teams with equipment being provided to the Claimant at Chelmsford Station in order for this to take place. The disciplinary hearing was chaired by Michael Barry and again notes were taken of the meeting. Whilst the notes are clearly not a verbatim it was not suggested by either party that there was any significant omissions and we are satisfied that they broadly reflect a summary of the discussions. In advance of the disciplinary meeting the Claimant had been sent what the parties referred to as the 'disciplinary pack'. It appears that the Claimant had not provided a copy to Andy Gordon. That pack included the question and answer session conducted with Taran Best, the two statements of Taran Best and copies of the interviews both of the Claimant himself and of Taran Best together with other documents. In respect of the allegation that the Claimant had signed on improperly at Thorpe Station rather than at Wivenhoe the argument was put forward by Andy Gordon that the Claimant considered that Thorpe Station was his home section and that he was entitled to sign on as starting work there. The basis of that was apparently that the Claimant had believed that he was entitled to travel time when his employment was transferred from Thorpe to Wivenhoe. Michael Barry asked the Claimant whether he had habitually signed on a starting work at Thorpe Station and the Claimant accepted that he had not. He said that he had done so because he had been late due to roadworks. The Claimant accepted that he had claimed for payment whilst he had not been present at Wivenhoe. He also accepted that he had not reported his lateness to a supervisor he explained that by saying *'my thoughts went out the window'*. Andy Gordon on his behalf suggested that *'he did not want to drop himself in it..'.*

35. When the fourth charge was put to the Claimant including the formulation that he had knowingly failed to adhere to the dispatch procedure for Wivenhoe on 4 and 6 May 2020 the Claimant simply recorded as saying that this was correct. On his behalf Andy Gordon said that he had *'monitored the train as it left but not as it arrived'*. The Claimant is recorded, on two occasions, as accepting that he had never observed anybody else stepping off a train and then dispatching it.

36. After pausing to consider the matter Michael Barry announced his decisions to the Claimant. He told the Claimant that he was upholding all four charges and that his decision was that the Claimant should be summarily dismissed he informed the Claimant that he had a right of appeal which had to be exercised within seven days. When he announced his decision orally the notes do not record a separate sanction in respect of each disciplinary charge.

37. The outcome of the disciplinary hearing was recorded in a letter from Michael Barry to the Claimant dated 21 July 2020. In that letter Michael Barry rejected the argument that the Claimant genuinely regarded Thorpe station as his home station. He noted that the Claimant had accepted that he had never signed on as starting work that station before. On that factual basis he concluded that the first two charges were made out. As the Claimant had admitted ignoring the lateness reporting procedure he also upheld that charge. On each of those charges Michael Berry said that the appropriate sanction in his view was a reprimand with a final written warning.

38. In respect of the fourth charge that the Claimant had knowingly failed adhere to dispatch procedure Michael Berry decided that the Claimant should be dismissed summarily. Insofar as the letter sets out his reasons Michael Berry states that he had found that the Claimant had an understanding of the process and understood that he needed to be in the Recognise Dispatch Position in good time to see the train safely into the platform. He described the Claimant's role as being safety critical and considered that the Claimant had had adequate training and continuous assessment to ensure that he did not compromise the safety of passengers. He based his decision in part on an admission by the Claimant that he had knowingly failed to adhere to this process.

39. In the course of the hearing the Claimant and Mr Hayward revealed that the Claimant was so devastated by his dismissal that he could not bring himself to reveal the fact that he had been dismissed to his family. For a period he left the home as if he was going to work spent the time with Mr Hayward rather than admit to his family that he had lost his job. Any dismissal after a long period of service is distressing and the tribunal has no doubt the Claimant was deeply wounded by his dismissal for what was, in his eyes, a momentary error of judgment.

40. The Claimant appealed against the decision to dismiss him by an email sent on 20 July 2020 only hours after his dismissal. His grounds of appeal were brief but clear. He set out that he was appealing the decision on the grounds of its severity. He considered that being dismissed for being late twice and two dispatch irregularities was a very harsh sanction after 17 years of service. He set out his view that the Respondent had sought to make an example of him. He also repeated a point made by Andy Gordon in the disciplinary hearing, that if Taran Best had thought he was behaving unsafely, he had not intervened.

41. Lee Ivor Smith was appointed to hear the appeal. The appeal meeting took place on 5 August 2020. The Claimant was once again accompanied by Andy Gordon. Notes were taken of the appeal meeting which was once again a hybrid meeting taking place in part by Microsoft teams. We are satisfied that the note taker has captured the essence of what was said by all parties in the meeting. At the outset of the meeting Lee Smith pointed out that the only charge that had led to the Claimant being dismissed was the fourth charge relating to the improper dispatch of trains. Andy Gordon stated that that was the only charge which the Claimant wanted to talk about.

42. Andy Gordon on the Claimant's behalf focused on two points. He repeated his stance that had the Claimant's conduct been so grave as to endanger the public it was

surprising that Taran Best had not intervened. The second point that he made was that stated that in his experience nobody had ever been dismissed for failing to dispatch train properly. He drew attention to the Claimant's race and implicitly suggested that this had played a part.

43. The manner in which Lee Smith conducted the interview was to invite the Claimant or Andy Gordon to put forward the points that they wished and then to discuss those points. Lee Smith is recording as saying that whilst every train dispatch incident was 'based' (which we understand to mean assessed) on its own merits he could say for a fact that train dispatchers been dismissed for one train dispatch irregularities as some in his own team had been. He said it all depended on the assessment that the manager made.

44. Lee Smith is recorded as agreeing that it might have been appropriate for Taran Best to have removed the Claimant from dispatch duties immediately after 4 May 2020. However he then went on to dismiss the appeal. He gave oral reasons at the hearing. In summary he set out his view that the Claimant had been adequately trained. He placed some considerable weight on the most recent assessment that the Claimant had had on 23 April 2020. From this he concluded that the Claimant was aware of the process that should be followed. He categorised the Claimant's decision to dispatch the train in breach of the standard procedure has being a conscious decision. In response to the suggestion that Taran Best should have intervened he said that Taran Best could not have been aware of what the Claimant was going to do.

45. In the concluding notes of the hearing it is recorded that the Claimant was upset. Just before he left he referred to his 17 years of service. Lee Smith responded giving his view that it really didn't matter whether a person who working for two months or 45 years he says: *'if you do not follow our processes and you have made the decision to behaving the way where you do not follow our safety processes, then your length of service does not influence the decision made where clear decisions were made by you and the process has intentionally not been followed'*.

46. We shall briefly deal with evidence that we heard about events after the dismissal and appeal but consider that they have no bearing on the outcome of the decisions that we need to make. After Lee Smith confirmed that he was not upholding the Claimant's appeal the Claimant wrote a long letter taking issue with the decision. On 2 September 2020 Lee Smith responded. The first part of his letter is uncontentious, he set out that the appeal process was the final stage in the disciplinary process and that he would not revisit the matter. He then raised a new matter which concerned the suggestion that, when the Claimant's locker had been emptied a stamp had been found showing the name of the doctor's surgery and a 'fit note' bearing the stamp had also been discovered. There is an implicit if not express allegation that the Claimant had been responsible for producing fit notes in order to claim sick pay. The Claimant was incensed by this allegation and, on his behalf, Mr Hayward has been vociferously complaining about this. It was not suggested during the hearing that either Michael Barry or Lee Smith had any personal involvement with this matter. They both proceeded to take the decisions that they did on facts which were largely agreed. We were not invited to adjudicate on whether or not the Claimant's colleagues had in some way set him up or whether the Claimant was responsible for some wrongdoing. We have not needed to make any finding on this matter.

47. We shall refer to additional fact below when comparing the Claimant's treatment to the treatment of others.

The law to be applied

Unfair dismissal

48. The right not to be unfairly dismissed is conferred by Section 94 of the Employment Rights Act 1996. Where, as here, there is no dispute that an employee was dismissed the question of whether any such dismissal was unfair turns upon the application of the test in Section 98 of the Employment Rights Act 1996. The material parts of that section are as follows:

98 General.

> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*
>
> *(2) A reason falls within this subsection if it—*
>
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
>
> *(b) relates to the conduct of the employee*
>
> *(c) is that the employee was redundant, or*
>
> *(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*
>
> *(3) …..*

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

49. For the purposes of Section 98(2) ERA 1996 'conduct' means actions 'of such a nature whether done in the course of employment or outwith it that reflect in some way upon the employer/employee relationship': ***Thomson v Alloa Motor Co Ltd*** **[1983] IRLR 403**, EAT. It is not necessary that the conduct is culpable ***JP Morgan Securities plc v Ktorza*** **UKEAT/0311/16**.

50. Where the reason, or principal reason, for the dismissal is established as conduct then it will usually, but not invariably, be necessary to have regard for the guidance set out in ***British Home Stores Ltd v Burchell*** **[1978]** IRLR **379**, which lays down a three-stage test: (i) the employer must establish that he genuinely did believe that the employee was guilty of the misconduct; (ii) that belief must have been formed on reasonable grounds; and (iii) the employer must have investigated the matter reasonably. Following amendments to the statutory scheme the burden of proof is on the employer on point (i) (which goes to the reason for the dismissal) but it is neutral on the other two points ***Boys and Girls Welfare Society v McDonald*** **[1996] IRLR 129.**

51. The correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision itself. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: ***Iceland Frozen Foods Ltd v Jones*** **[1982] IRLR 439**. That test recognises that two employers faced with the same circumstances may arrive at different decisions but both of those decisions might be reasonable.

52. The range of reasonable responses test applies as much to any investigation and the procedure followed as it does to the substantive decision to impose dismissal as a penalty ***Sainsbury's Supermarkets Ltd v Hitt*** **[2003] IRLR 23**.

53. In terms of the reasonableness of the investigation and the procedure that was followed and the decision to dismiss itself, the "relevant circumstances" referred to in Section 98(4) include the gravity of the charge and their potential effect upon the employee ***A v B*** **[2003] IRLR 405**

54. ***A v B*** also provides authority for the proposition that a fair investigation requires that the investigator examines not only the evidence that leads to a conclusion that the employee is guilty of misconduct but also that which tends to show that they are not. However, where during any disciplinary process an employee makes admissions a reasonable employer might normally be expected to proceed on the basis of those admissions ***CRO Ports London Ltd v Mr P Wiltshire*** **UKEAT/0344/14/DM**.

55. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

> *"any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question."*

The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

56. The ACAS code suggests that the proper approach to investigating disciplinary matters is as follows:

> *5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.*
>
> *6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.*
>
> *7. If there is an investigatory meeting this should not by itself result in any disciplinary action. Although there is no statutory right for an employee to be accompanied at a formal investigatory meeting, such a right may be allowed under an employer's own procedure.*
>
> *8. In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action.*

57. The passages of the ACAS code that deal with sanctions for misconduct or performance issues say as follows:

> *19. Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning.*
>
> *20. If an employee's first misconduct or unsatisfactory performance is sufficiently*

serious, it may be appropriate to move directly to a final written warning. This might occur where the employee's actions have had, or are liable to have, a serious or harmful impact on the organisation.

21. A first or final written warning should set out the nature of the misconduct or poor performance and the change in behaviour or improvement in performance required (with timescale). The employee should be told how long the warning will remain current. The employee should be informed of the consequences of further misconduct, or failure to improve performance, within the set period following a final warning. For instance that it may result in dismissal or some other contractual penalty such as demotion or loss of seniority.

22. A decision to dismiss should only be taken by a manager who has the authority to do so. The employee should be informed as soon as possible of the reasons for the dismissal, the date on which the employment contract will end, the appropriate period of notice and their right of appeal.

23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence. But a fair disciplinary process should always be followed, before dismissing for gross misconduct.

58. Even where the Tribunal find that the employer has a reasonable belief that the employee had committed gross misconduct it does not necessarily follow that dismissal is the only reasonable sanction. An employer should treat every case on its own facts and take into account any relevant mitigation - ***Brito-Babapulle v Ealing Hospital NHS Trust*** **UKEAT/0358/12/BA**

59. Where an employer imposes inconsistent disciplinary sanctions on employees that may be a matter that renders the dismissal unfair – see ***Post Office v Fennell 1981*** **IRLR 221, CA**. The Tribunal is not entitled to substitute its own view as to the reasons for any different treatment it finds established. It must look at the employer's explanation and ask whether it was reasonable ***Securicor Ltd v Smith*** **1989 IRLR 356, CA**. More recently in ***Paul v East Surrey District Health Authority*** **[1995] IRLR 309** Bedlam LJ said:

34. I consider that all industrial tribunals would be wise to heed the warning of Waterhouse J, giving the judgment of the Employment Appeal Tribunal in Hadjioannou v Coral Casinos Ltd [1981] IRLR 352 where, in paragraph 25, he said:

'We accept that analysis by counsel for the respondents of the potential relevance of arguments based on disparity. We should add, however, as counsel has urged upon us, that industrial tribunals would be wise to scrutinise arguments based upon disparity with particular care. It is only in the limited circumstances that we have indicated that the argument is likely to be relevant, and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument. The danger of the argument is that a tribunal may be led away from a proper consideration of the issues raised by s.57(3) of the Act of 1978. The emphasis in that section is upon the particular circumstances of the individual

employee's case. It would be most regrettable if tribunals or employers were to be encouraged to adopt rules of thumb, or codes, for dealing with industrial relations problems and, in particular, issues arising when dismissal is being considered. It is of the highest importance that flexibility should be retained, and we hope that nothing that we say in the course of our judgment will encourage employers or tribunals to think that a tariff approach to industrial misconduct is appropriate. One has only to consider for a moment the dangers of the tariff approach in other spheres of the law to realise how inappropriate it would be to import it into this particular legislation.'

35 I would endorse the guidance that ultimately the question for the employer is whether in the particular case dismissal is a reasonable response to the misconduct proved. If the employer has an established policy applied for similar misconduct, it would not be fair to change the policy without warning. If the employer has no established policy but has on other occasions dealt differently with misconduct properly regarded as similar, fairness demands that he should consider whether in all the circumstances, including the degree of misconduct proved, more serious disciplinary action is justified.

36 An employer is entitled to take into account not only the nature of the conduct and the surrounding facts but also any mitigating personal circumstances affecting the employee concerned. The attitude of the employee to his conduct may be a relevant factor in deciding whether a repetition is likely. Thus an employee who admits that conduct proved is unacceptable and accepts advice and help to avoid a repetition may be regarded differently from one who refuses to accept responsibility for his actions, argues with management or makes unfounded suggestions that his fellow employees have conspired to accuse him falsely. I mention this because I consider that if the industrial tribunal in this case had had regard to these factors they would not have regarded the actions of the employers in Mrs Rice's case as disparate or have said that Mr Verling's misconduct should have been treated just as seriously, if not more seriously, than Mr Paul's.

60. When looking at the process followed a tribunal should look at the entirety of the process including any appeal see ***Taylor v OCS Group Limited*** **[2006] IRLR 613**. That case is also authority for the proposition that there is no rule of law that a defective first instance hearing cannot be cured by a review rather than a full rehearing.

The discrimination complaints

Equality Act 2010 - Statutory Code of Practice

61. The power of the Equality and Human Rights Commission to issue a code of practice to ensure or facilitate compliance with the Equality Act 2010 is afforded by Section 14 of the Equality Act 2006. Such a code must be laid before Parliament and is subject to a negative resolution procedure. The current code was laid before parliament and came into force on 6 April 2011. Section 15 of the Equality Act 2006 sets out the effect of breaching the code of practice. Paragraph 1.13 of the code explains that:

> *The Code does not impose legal obligations. Nor is it an authoritative statement of the law; only the tribunals and the courts can provide such authority. However, the Code can be used in evidence in legal proceedings brought under the Act. Tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.*

The burden and standard of proof – discrimination cases

62. The standard of proof that we must apply is the civil standard that is the balance of probabilities. In other words, we must decide whether it is more likely than not that any fact is established.

63. The burden of proof in claims brought under the Equality Act 2010 is governed by section 136 of that act the material parts of which are:

> *136 Burden of proof*
> *(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.*

64. Accordingly, where a claimant establishes facts from which discrimination could be inferred (a prima facie case), then the burden of proving that the treatment was in no sense whatsoever unlawful passes to the respondent. The proper approach to the shifting burden of proof has been explained in ***Igen v Wong*** **[2005] ICR 9311** which approved, with some modification, the earlier decision of the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd*** **[2003] IRLR 332**. Most recently in ***Base Childrenswear Limited v Otshudi*** **[2019] EWCA Civ 1648** Lord Justice Underhill reviewed the case law and said:

> *17. Section 136 implements EU Directives 2000/78 (article 10) and 2006/54 (article 19), which themselves derive from the so-called Burden of Proof Directive (1997/80). Its proper application, and that of the equivalent provisions in the pre-2010 discrimination legislation, has given rise to a great deal of difficulty and has generated considerable case-law. That is not perhaps surprising, given the problems of imposing a two-stage structure on what is naturally an undifferentiated process of fact-finding. The continuing problems, including in particular the application of the principles identified in Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 93, led to this Court in Madarassy v Nomura International plc [2007] EWCA Civ 33, [2007] ICR 867, attempting to authoritatively re-state the correct approach. The only substantial judgment is that of Mummery LJ: it was subsequently approved by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37, [2012] ICR 1054. In Efobi v Royal Mail Group Ltd [2017] UKEAT 0203/16, [2018] ICR 359, the EAT held that differences in the language of section 136 as compared with its predecessors required a different approach from that set out in Madarassy; but that decision was overturned by this Court in Ayodele v*

Citylink Ltd [2017] EWCA Civ 1913, [2018] ICR 748, and Madarassy remains authoritative.

18. It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:

(1) At the first stage the claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):

> *"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*
>
> *57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. …"*

(2) If the claimant proves a prima facie case the burden shifts to the respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

> *"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."*

He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.

65. Inferences can only be drawn from established facts and cannot be drawn speculatively or on the basis of a gut reaction or 'mere intuitive hunch' see ***Chapman v Simon*** **[1994] IRLR 124** see per Balcombe LJ at para. 33 or from 'thin air' see ***Chief Constable of the Royal Ulster Constabulary*** **[2003] ICR 337**.

66. Discrimination cannot be inferred only from unfair or unreasonable conduct **Glasgow *City Council v Zafar*** **[1998] ICR 120**. That may not be the case if the conduct is unexplained ***Anya v University of Oxford*** **[2001] IRLR 377, CA.** Whilst inferences of discrimination cannot be drawn merely from the fact that the Claimant establishes a difference in status and a difference treatment see ***Madarassy v Nomura International plc*** **[2007] ICR 867** 'without more', the something more *"need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred"* see ***Deman v Commission for Equality and Human Rights*** **[2010] EWCA Civ 1279** per Sedley LJ at para 19.

67. Where there are a number of allegations each single allegation of discrimination should not be viewed in isolation, but the history of dealings between the parties should be taken into account in order to determine whether it is appropriate to draw an inference of racial motive in respect of each allegation ***Anya v University of Oxford***.

68. The burden of proof provisions need not be applied in a mechanistic manner ***Khan and another v Home Office*** **[2008] EWCA Civ 578**. In ***Laing v Manchester City Council*** **2006 ICR 1519** Mr Justice Elias (as he then was) said

> *"the focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race""*

Such an approach must assume that the burden of proof falls squarely on the Respondent to prove the reason for any treatment. It is an approach that should be used with caution and is appropriate only where we are in a position to make clear positive findings of fact as to the reason for any treatment or any other element of the claim. We shall indicate below where we consider that it is open to us to follow this approach.

Direct Discrimination

69. Section 13 of the Equality Act 2010 contains the statutory definition of direct discrimination. The material part of that section read as follows:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
> (2) If the protected characteristic is age then A does not discriminate against B if A can show that A's treatment of B is a proportionate means of achieving a legitimate aim."

70. In order to establish less favourable treatment it is necessary to show that the claimant has been treated less favourably than a comparator not sharing her protected characteristic. Paragraphs 3.4 and 3.5 of the code say:

> *3.4 To decide whether an employer has treated a worker 'less favourably', a comparison must be made with how they have treated other workers or would have treated them in similar circumstances. If the employer's treatment of the worker puts the worker at a clear disadvantage compared with other workers, then it is more likely that the treatment will be less favourable: for example, where a job applicant is refused a job. Less favourable treatment could also involve being deprived of a choice or excluded from an opportunity.*
>
> *3.5 The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated – another person.*

71. Section 23 of the Equality Act 2010 provides that any comparator must be in the same, or not materially different, circumstances. What is meant by 'circumstances' for the purpose of identifying a comparator it is those matters, other than the protected characteristic of the claimant, which the employer took into account when deciding on the act or omission complained of see - ***MacDonald v Advocate-General for Scotland; Pearce v Governing Body of Mayfield Secondary School*** **[2003] IRLR 512, HL**. Where no actual comparator can be identified the tribunal must consider the treatment of a hypothetical comparator in the same circumstances. Paragraphs 3.22 – 3.27 say (with some parts omitted):

> *3.22 In most circumstances direct discrimination requires that the employer's treatment of the worker is less favourable than the way the employer treats, has treated or would treat another worker to whom the protected characteristic does not apply. This other person is referred to as a 'comparator'.*
>
> *Who will be an appropriate comparator?*
>
> *3.23 The Act says that, in comparing people for the purpose of direct discrimination, there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator.*
>
> *Hypothetical comparators*
>
> *3.24 In practice it is not always possible to identify an actual person whose relevant circumstances are the same or not materially different, so the comparison will need to be made with a hypothetical comparator.*
> *3.25 In some cases a person identified as an actual comparator turns out to have circumstances that are not materially the same. Nevertheless their treatment may help to construct a hypothetical comparator.*
> *3.26 Constructing a hypothetical comparator may involve considering elements of the treatment of several people whose circumstances are similar to those of the claimant, but not the same. Looking at these elements together, an Employment Tribunal may conclude that the claimant was less favourably treated than a hypothetical comparator would have been treated.*
>
> *3.27 Who could be a hypothetical comparator may also depend on the reason why the employer treated the claimant as they did. In many cases it may be more straightforward for the Employment Tribunal to establish the reason for the claimant's treatment first. This could include considering the employer's treatment of a person whose circumstances are not the same as the claimant's to shed light on the reason why that person was treated in the way they were. If the reason for the treatment is found to be because of a protected characteristic, a comparison with the treatment of hypothetical comparator(s) can then be made.*

72. An explanation of the differing ways in which treatment might be because of a protected characteristic was given in ***Amnesty International v Ahmed*** **[2009] IRLR 884** by Underhill P (as he was). He said

'33. In some cases the ground, or the reason, for the treatment complained of is inherent in the act itself. If an owner of premises puts up a sign saying "no blacks admitted", race is, necessarily, the ground on which (or the reason why) a black person is excluded. James v Eastleigh [Borough Council [1990] IRLR 288] is a case of this kind. There is a superficial complication, in that the rule which was claimed to be unlawful – namely that pensioners were entitled to free entry to the council's swimming-pools – was not explicitly discriminatory. But it nevertheless necessarily discriminated against men because men and women had different pensionable ages: the rule could entirely accurately have been stated as "free entry for women at 60 and men at 65". The council was therefore applying a criterion which was of its nature discriminatory: it was, as Lord Goff put it (at p.294, paragraph 36), "gender based". In cases of this kind what was going on inside the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose – will be irrelevant. The "ground" of his action being inherent in the act itself, no further inquiry is needed. It follows that, as the majority in James v Eastleigh decided, a respondent who has treated a claimant less favourably on the grounds of his or her sex or race cannot escape liability because he had a benign motive.

34. But that is not the only kind of case. In other cases – of which Nagarajan is an example – the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, ie by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions) …'

73. The proper approach to deciding whether the treatment was afforded 'because of' the protected characteristic is to ask what the reason was for the treatment. If the protected characteristic had a significant influence on the outcome then discrimination will be made out see - ***Nagarajan v London Regional Transport*** **[1999] UKHL 36; [1999] IRLR 572.**

74. The reason for the unlawful treatment need not be conscious but may be subconscious. In ***Nagarajan*** Lord Nicholls said:

'I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did.'

Discussion and Conclusions

Unfair Dismissal

75. The first issue that the tribunal need to determine is whether the reason, or if more than one, the principal reason for the dismissal was conduct. In order to answer that question we have to have regard to the facts known and opinions held by Michael Barry. When Mr Hayward asked Michael Barry questions he focused on the issues of whether or not the dismissal was fair or unfair. He did not suggest that Michael Barry was a party to any conspiracy to dismiss the Claimant for any improper reason.

76. Insofar as the Claimant pressed the suggestion that his dismissal was to do with some personal characteristic or grudge against him his case was focused on the question of why he was singled out for observation by Taran Best. We considered whether the principal established by ***Royal Mail Group Ltd v Jhuti*** **[2019] UKSC 55** was any assistance to the Claimant. In that case the Supreme Court answer the question of law which they had identified as the key to the case by saying: *'if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason'*. What is clear from the decision of the Supreme Court is that generally speaking the reason for any dismissal will be the facts known to and opinions held by the person who took the decision itself. Only rarely will that be displaced. Whether that ordinary position is displaced will turn on the facts of each individual case.

77. In the present case, there was no dispute by the Claimant as to the core factual matters which had led to disciplinary action being instigated against him. He did not actually dispute in any significant way Taran Best's account of what he observed. Whatever Taran Best's motivation was in attending the Wivenhoe Station on 4 May 2020, he gave an accurate account of what he observed. When that was reported it led to the disciplinary action. This was not therefore a case where any report by Taran Best could be regarded as 'an invented reason'. We do not consider that the principal in ***Jhuti*** is engaged in these circumstances.

78. We find that in this case, at the very least, the principal reason Michael Barry dismissed the Claimant was because he believed that the Claimant had failed to dispatch a train in accordance with the recognised procedure. We are satisfied that that reason falls within the definition of conduct within Section 98(2)(b) of the Employment Rights Act 1996 as explained in ***Thomson v Alloa Motor Co Ltd.*** It follows that we need to determine whether or not the dismissal was fair or unfair.

79. The Claimant was not dismissed because he was late or because he had signed on at Thorpe Station. We do not therefore need to deal with the question of whether or not the conclusion that the first three disciplinary charges levelled against the Claimant was made fairly. Had we needed to do so; we would have accepted that Michael Barry was entitled to reject the Claimant's explanation for signing on at Thorpe Station on the basis

that it was his home station. Michael Barry was entitled to regard that as less than credible in circumstances where the only two times that the Claimant had done that were when he was late. Without overly criticising the Claimant it appears to us that this was a somewhat desperate excuse principally put forward by Andy Gordon on his behalf rather than the Claimant who simply explained that he had panicked. Had Michael Barry dismissed the Claimant for the first three charges the Tribunal would have anxiously scrutinised whether for a first breach of discipline that fell within a range of reasonable responses. In our view Michael Barry sensibly recognised that it might not do so and we are therefore relieved of the task of making a decision for ourselves.

80. A dismissal will not usually be fair unless the employer has carried out a reasonable investigation. An employer may act unreasonably if it does not follow its own procedures. The first point made by the Claimant in this respect is that he views the interviews he had with Taran Best and in particular Mr Steward as amounting to investigatory interviews. On his behalf Mr Hayward points to the Respondent's disciplinary procedure and suggests that it was improper to continue those interviews once it became apparent that disciplinary proceedings might follow without permitting the Claimant to be accompanied. We have accepted above that investigation carried out by Mr Steward was for the purposes of recording a health and safety event. He did recommend that disciplinary proceedings were instigated. After that, the Claimant was formally interviewed and given the opportunity to be accompanied. We see some force in Mr Hayward's argument. Despite the fact that the Claimant was being interviewed for the purposes of recording health and safety events he was being asked about matters where it was quite possible that disciplinary proceedings would be instigated. It may have been more in keeping with the spirit of the disciplinary procedure to have permitted the Claimant to be accompanied at that meeting. We shall evaluate the effect of that conclusion when looking at the fairness of the dismissal in the round.

81. Other than that point there was really no complaint made by the Claimant about any failure to investigate the allegations that he ultimately faced. The Respondent had obtained a statement from Taran Best and had obtained the Claimants account. What the Claimant complains of is the failure to investigate his account of why he was late for work. It is true that the Respondent did not follow through on the Claimant's offer to prove why he was late. Whilst an employer must carry out a reasonable investigation it is entitled in our view to decide to proceed on the basis that some aspect of the employee's account is true. If it does so then there is no need to investigate the matter any further. We find that that was the approach taken in the investigatory interview and indeed at the disciplinary hearing before Michael Barry. The Respondent's approach was to assume that the Claimant had a reasonable excuse for being late on both occasions. The Claimant was not being disciplined for being late per se but for what he did as a consequence of being late. We consider that that approach was one which it was open to a reasonable employer to take. The point has more bearing on the first three charges faced by the Claimant and little or no relevance to the matter for which she was ultimately dismissed for.

82. The key issue that we have to determine was whether or not the decision to dismiss itself fell within the range of reasonable responses. There were really two points for us to decide. Firstly, whether the Claimant had been treated differently to other employees in the same situation. Secondly, whether or not the decision to dismiss the Claimant was so harsh that in the circumstances it could be said to fall outside the band of

reasonable responses. We shall deal with both of those points in turn.

83. We have set out above the fact that on the Claimant's behalf Mr Hayward had sought further information from the Respondent about disciplinary action taken against three individuals. It is not necessary for the purpose of this determination to name those individuals. The Respondent had indicated on 3 March 2021 that no disciplinary action was taken against any of the individuals.

84. Two of the individuals named by the Claimant was said by him to have engaged in clocking in or clocking out activity analogous to his own. In respect of one individual the Respondent had disclosed documentation which suggested that whilst a potential disciplinary matter had been investigated the explanation that was given by that individual was deemed to provide a sufficient explanation that disciplinary proceedings were unnecessary. In short, a conclusion was reached that there had been an honest mistake. There was no evidence that Michael Barry had any part in the decisions not to discipline any other individual for a clocking in or clocking out issue. We consider that a reasonable employer would have regard to each case on its particular merits. The Claimant was disciplined for signing on as being present at work in order to disguise the fact that he was late. Each time he did so he signed in about one hour before he arrived at work. The Claimant's comparators were not in the same position. We do not consider that a decision to give the Claimant a final written warning in the particular circumstances of his case was unreasonable. We do not need to examine in any great detail any disparity argument where clocking in or clocking out is the issue. The Claimant was not dismissed for that reason. Had the point been relevant we do not find that the Claimant has established that Respondent behaved in an unreasonable way in giving him a final written warning for what he admitted he had done.

85. Of more relevance is the Claimant's point that guard on the train on 4 May 2020 had not descended onto the platform prior to the Claimant signalling to him that he could safely close the doors and after a further signal depart. The Claimant is correct that the standard dispatch procedure envisages that the Guard will descend to the platform. We consider that the cases are not entirely the same. It would have been reasonable to consider the Claimant's breach of the procedure as being considerably more serious than the Guard. That said the Guard did also breach the procedure.

86. The Respondent had disclosed documentation which showed that other individuals had been dismissed for a failure to follow the dispatch procedure. In his oral evidence Lee Smith in particular was able to talk about the occasions where he personally had dismissed others. We had a dismissal letter dated 2 April 2019 which showed that an individual had been dismissed amongst other reasons for turning his back on a train that he had dispatched before the train had fully departed the station. Michael Barry had personally dismissed somebody for using a mobile telephone whilst dispatching a train. Lee Smith told us orally about similar incidents. Overall we had evidence that on a number of occasions people had been dismissed for failing to follow the dispatch procedure regardless of whether there was any injury. We are prepared to accept what Lee Smith said to the Claimant during the appeal meeting that dispatch irregularities are treated on a case-by-case basis but commonly result in the dismissal of an employee even on the first occasion.

87. We turn to the question of whether a dismissal for an error of this nature fell within a range of reasonable responses. We should record that all of us felt some sympathy for the Claimant. The Claimant strike us as being a decent and honest employee who had loyally served the Respondent for over 17 years. The knowledge that the Claimant had effectively hidden his dismissal from his family through shame struck us as being tragic. In our discussions we touched upon the fact that the incidents that led to the dismissal took place at the height of the first lockdown in 2020 where railways were virtually deserted. However, in his submissions Mr Sanders rightly reminded us of our function in a claim of unfair dismissal. It is not for us to substitute our view of the gravity of any offence for that of the employer. The question for us was whether it was reasonable for the Respondent to regard the events of 4 and 6 May 2020 as being sufficiently serious to justify dismissal.

88. Both Michael Barry and Lee Smith explained to us the Respondent's view of the importance of following the dispatch procedure. They explained that the purpose of the dispatch procedure was to prevent injury. They explained that the purpose of having a dispatcher watch the train approach the platform was to see if anything or anybody fell on the tracks. They explained that there had been incidents on the railway system where a person had fallen onto the tracks unobserved but who had survived the train pulling into the station only to be killed because the train was dispatched because the fact that there was a person under a train was unknown.

89. They explained that whilst not every train was dispatched that did not detract from the need to dispatch trains correctly. They told us that when a train was going to self-dispatch both the driver and guard would be aware of that. The Driver would therefore be especially alert to observe if anybody fell or was dragged under the train. The Guard would know that it was there responsibility and theirs alone to dispatch the train. They explained that their industry was highly regulated and had to answer to the regulator and Health and Safety Executive.

90. We have already set out our findings about the training and testing that the Claimant had. We are satisfied that the Respondent did take the issue of dispatch as seriously as Michael Barry and Lee Smith described and that they had very good reasons for doing so. For the avoidance of doubt we have accepted the explanations and evidence set out above and supplement our findings of fact in those respects.

91. A dismissal for the first breach of a disciplinary policy can only usually be justified if the employer could reasonably regard the matter as gross misconduct. We are satisfied that taking into account all of these matters the Respondent could regard the error made by the Claimant on 4 May 2020 as gross misconduct.

92. Mr Saunders reminded us that an employee's length of service of service may always be a relevant consideration (relying on ***Strouthos v London Underground Limited*** **[2004] IRLR 636**) but that long service will not always prevent an employee's dismissal for a serious breach of any standards. We agree that long service may support a conclusion that the employee ought to have known better. The approach of Lee Smith was to regard the matter as neutral in the case of a serious breach of health and safety procedures. We do not consider that that was an unreasonable position to adopt.

93. In the outcome letter that we saw Michael Barry and Lee Smith did not spend much time distinguishing between the events of 4 May 2020 and 6 May. On 6 May 2020 the Claimant had informed the guard that he should do a self-dispatch and that was carried out in accordance with the usual procedure. As such in our view a reasonable employer would have regarded that as far less culpable than the errors made on 4 May 2020. In their oral evidence both of the Respondent's witnesses demonstrated that they did recognise that there was a difference between the Claimant's actions on both dates. Their focus was very much on the actions of the Claimant on 4 May 2020. We consider they could perhaps have been clearer about that.

94. We are required to look at the whole process - ***Taylor v OCS Group Limited***. We would accept that the Respondent may have departed in a minor way from the spirit of its own policy by not allowing the Claimant to have a companion at the interview with Mr Steward. We would accept that the Claimant might feel aggrieved knowing that no action was taken against the train Guard on 4 May 2020. That said there were material differences in culpability. In addition there was evidence that dismissal was a common sanction for errors of the type made by the Claimant.

95. Despite our sympathy for the Claimant the counterbalancing safety concerns in this case are of such a magnitude that we would not describe the decision to dismiss the Claimant as harsh even if that were the proper test. The test we must apply is to ask whether the decision as a whole was one which a reasonable employer could have taken. We find that it is. It follows from that conclusion that the dismissal was fair for the purposes of the Employment Rights Act 1996.

Direct discrimination

96. We rely on our findings of fact set out above but also on our conclusions that the dismissal, whilst based on a brief lapse of judgment could not be regarded as harsh or surprising given the importance understandably placed by the Respondent on following a safe dispatch procedure.

97. The Claimant has complained that his dismissal was discriminatory. That places the emphasis on the reasons why Michael Barry dismissed him or perhaps additionally why Lee Smith dismissed the appeal. The Claimant complains of dismissal and not of the fact that his conduct was reported. We have referred to ***Jhuti*** above and said why we did not consider that that case assists the Claimant in his unfair dismissal claim. We find that the same is true of any discrimination claim. A dismissal will not in our view be 'because of' race where the decision maker dismisses because of a genuine report of wrongdoing which is then acted upon. The Claimant might have brought a claim relying on the decision to report his wrongdoing but he did not do so and the Respondent has not called evidence on that basis. We therefore focus on the evidence in relation to the dismissal itself.

98. Approaching the matter in the manner suggested in ***Igen v Wong*** the first question we must ask is whether the Claimant has proved facts from which we could, in the absence of any explanation from the Respondent, infer that his dismissal was because

of race. We remind ourselves that 'because of' only requires that race be a reason for the dismissal. Our finding in the unfair dismissal claim that conduct was the principal reason for the dismissal does not excuse us from this further enquiry.

99. We did note that Mr Hayward did not address the race discrimination claim with any great enthusiasm. The focus of the cross examination of Michael Barry and Lee Smith was on the fairness or otherwise of the dismissal. Despite this we considered that Michael Barry and Lee Smith understood the thrust of the Claimant's case and had an opportunity to deal with it.

100. The Tribunal was somewhat surprised at the reluctance of the Respondent to provide at least some of the statistics that Mr Hayward had initially asked for. We do not think it would have been very arduous to have compiled statistics showing the racial origins of every person dismissed for 'dispatch errors'. We would accept that it would have been harder to have found records of those not dismissed but we do not consider that the task would be overwhelming. As EJ Masserella suggested at the preliminary hearing, records of this type are a vital tool in promoting equal opportunities.

101. Lee Smith told us of two other employees that he knew of who had been dismissed for dispatch errors. The documents in the bundle related to one of these cases. He told us that that individual was black.

102. We were left with a partial statistical picture. Between them Michael Barry and Lee Smith had told us of 4 other people who had been dismissed for dispatch errors (we are not certain if there was any overlap). At least 2 people dismissed were black. Given the proportion of black people in the general population it would appear that black people were overrepresented in number of people dismissed. This is a very small sample and perhaps wholly unreliable but the Respondent must share some of the responsibility for this.

103. The Claimant asks us to have regard to the treatment of others who he says were treated more leniently in relation to clocking offences. We would accept that we might have regard to the treatment of others generally to see whether any inference of discrimination could be supported. We would accept that there was some evidence that clocking offences were occurring. There was more limited evidence about whether they had been drawn to the attention of management. One case where we had documents suggested that the decision not to take any disciplinary action was supported by the explanation given by the employee. We do not consider that evidence of a more lenient approach to clocking offences (committed by non-black individuals) gives a great deal of support to the Claimant's case that his dismissal for a dispatch error although it is not incapable of providing some evidence.

104. In further and better particulars which were then referred to and adopted in his witness statement the Claimant says that he has never felt accepted by his work colleagues and recalls one occasion where a colleague has said 'look out here comes that black bastard'. We accept the Claimant's account. We see no reason not to place some weight on the Claimant's opinion that he was not accepted as 'one of the lads'. Whilst that

is not supported by concrete examples we consider that the Claimant can properly provide a view on whether he was or was not accepted on equal terms.

105. We are prepared to accept that the Claimant has proven facts from which we could infer discrimination. Whilst there was an ostensibly good reason for the dismissal we cannot have regard for the Respondent's explanation of the importance of safe dispatch at this stage. In the absence of any such explanation we find that we could properly infer that race had played some part in the reasons for the dismissal. We therefore conclude that the burden shifts to the Respondent to show that race had nothing to do with the dismissal.

106. We are satisfied that the Respondent has discharged that burden. We have reminded ourselves that discrimination need not be conscious. We have had regard to the whole of the evidence. We have set out above the explanation that Michael Barry and Lee Smith gave us for placing such importance on the safe dispatch of trains. The Claimant had admitted what he had done. We find as a fact that they both believed that the Claimant knew what he ought to have done. They had overwhelming evidence to support that both from the Claimant and from the fact that the Claimant had recently been assessed. We further find that they both believed that the Claimant acted deliberately. Again there was a reasonable basis for that. The Claimant knew on 4 May 2020 that he had not observed the train entering the platform but nevertheless gave the signal that it was safe to depart. We find that both managers regarded what they believed the Claimant had done was an extremely serious breach of a critical safety policy. We find that this was the reason why Michael Barry dismissed the Claimant and Lee Smith upheld the appeal.

107. We are satisfied that both Michael Barry and Lee Smith would have dismissed any person (or their appeal) of any race or nationality that had admitted the same actions. We have concluded that the Respondent has satisfied us that the reason for the dismissal was in no sense whatsoever because of race.

108. For the reasons set out above the Claimant's claims are dismissed.

109. We would thank both of the representatives for their assistance during the hearing. In particular Mr Hayward, who has no legal training, prepared the Claimant's case thoroughly and represented him with great skill.

Employment Judge Crosfill
Dated: 25 March 2022