EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Kwabla Gad	**v**	**UK Power Networks (Operations) Ltd**

Heard at: Bury St Edmunds Employment Tribunal

On: 10th, 11th, 12th, 13th and 14th October 2022

Before: Employment Judge King

Members: Mr R Allan
Mr A Chinn-Shaw

Appearances

For the Claimant: Mr Renton (counsel)
For the Respondent: Mr Waite (counsel)

RESERVED JUDGMENT

1. The claimant's claim for direct discrimination is not well founded and is dismissed.
2. The claimant claim for indirect discrimination is not well founded and is dismissed.
3. The claimant's claim for victimisation is not well founded and is dismissed.

REASONS

1. This is the judgment of the Tribunal in the above matter which was listed for 7 days commencing on 10th October 2022. Due to judge unavailability there was only a 5 day window in which to hear the case which was communicated to the parties at the outset and was considered sufficient to

determine liability issues save for that judgment may need to be reserved. This hearing was held as a hybrid hearing. The parties and their representatives attended in person but one witness (Bill Blackburn) participated via the CVP link and gave his evidence that way. The panel were all in attendance in person.

2. The claimant was represented by Mr Renton of Counsel. The respondent was represented by Mr Waite of Counsel. We heard evidence from the Claimant and an additional witness Mr Harris who provided limited evidence as the claimant's union representative.

3. On behalf of the respondent, we heard evidence from Mr David Child, Network Control Manager, Mr Bill Blackburn, Operations Manager and William Fullilove, Network Manager.

4. We had helpful written and oral submissions from both sides which assisted the Tribunal. The parties had exchanged witness statements for all of the witnesses and prepared an agreed bundle to which we had regard in the hearing which was substantial and ran to almost 900 pages. There were some issues over additional documentation for the bundle but these were resolved by consent and added to the bundle.

5. At the outset of the hearing the claims were identified as direct race discrimination, indirect race discrimination and victimisation. The claimant relied on the protected characteristic of race. The claimant is Black African and of Ghanian decent. The parties had agreed a list of issues in advance which was in the bundle.

The issues

6. The parties had agreed the issues which we revisited at the outset of the hearing and decided to deal with liability only at the hearing so have not considered the remedy issues identified by the parties on the agreed list of issues at this stage given the time constraints.

7. The Judge raised with the parties that depending on their findings limitation could be an issue in that whether all complaints were in time may need to be determined. This was agreed as an additional issue. Counsel for the claimant helpfully identified that the matters relied on for direct discrimination did not appear on the list of issues in the correct date order and two of the acts/omissions relied on needed to have dates added. We amended the list in this way by consent including changing the date of one of the acts/omissions which was incorrect.

8. In respect of the claim for victimisation, the claimant no longer relied on the raising of a grievance in 2017 as a protected act and the respondent's representative accepted that the matters relied upon as protected acts were accepted to be protected acts.

9. Accordingly the final agreed list of issues following the first morning of the hearing was as follows:

10. *Were all the claimant's complaints presented within the time limits set out in s123(1)(a) Equality Act 2010? Consideration of this issue may include consideration of whether there was an act or conduct extending over a period or a series of similar acts/failures or whether it was just and equitable to extend time?*

Direct discrimination

11. *Did the respondent treat the claimant less favourably than they treat or would have treated, others because of his race in that:*

11.1 The claimant contends that the less favourable treatment was the failure to promote him and a failure to offer appropriate training opportunities specifically ;

11.1.1 The claimant was informed that he was being placed under the poor performance procedure on 8 April 2020;

11.1.2 The claimant was denied a full shift position on 4th May 2020;

11.1.3 The claimant was denied the opportunity to train on 132Kv and to progress to a higher level within the company on 15th June 2020;

12. *The claimant relies on actual comparators (Ian Starbrook and James Wright) and will also contend that a hypothetical White comparator would not have been treated in the same way as he was.*

Indirect discrimination

13. *Did the respondent apply a provision, criterion or practice which is discriminatory in relation to the claimant's protected characteristic of race and specifically:*

13.1 Did the respondent apply a provision, criterion or practice to employees who do not share the claimant's race: The claimant contends that the relevant PCP/PCP's are the respondent's selection procedures for promotion and training and in particular the aspects thereof as defined in the further and better particulars (clarified as from 2019 onwards) as:

13.1.1 The respondent's failure to openly advertise and allow employees to apply for opportunities at 132kv.

13.1.2 The fact that opportunities at 132kv "will not necessarily be the subject of a separate selection process"

13.1.3 A lack of objective assessment of how an individual reaches the appropriate standard.

13.1.4 The fact that employees are effectively invited to progress to 132kv on the basis of their manager's decision without transparency or any process to determine the fairness.

14. *Did those PCPs or any of them put employees sharing the claimant's race at a particular disadvantage compared to others? The claimant says that the disadvantage was a failure to progress within the company.*

15. *Did it put the claimant to that disadvantage.*

16. *If so can the respondent show the PCP's to be a proportionate means of achieving a legitimate aim?*

Victimisation

17. *Did the respondent subject the claimant to a detriment because the claimant had done a protected act or acts?*

18. *The claimant says that he has been subjected to detriment by being denied promotion or training opportunities (as set out at 11.1 above).*

19. *The claimant says this is because he had undertaken protected acts through:*

    19.1 Bringing an earlier Employment Tribunal claim in 2016.
    19.2 Raising a further grievance on 14th July 2020.

20. *The respondent accepts that the acts at 19.1/19.2 were protected acts.*

The Law

Discrimination

21. Race is a protected characteristic under s10 of the Equality Act 2010.

22. Direct discrimination is dealt with under s13 of the Equality Act 2010 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) ……

23. Section 19 Equality Act 2010 (Indirect discrimination) states:

"***19 Indirect discrimination***

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

24. Victimisation is prohibited by s27 of the Equality Act 2010 as follows:

(1) *A person (A) victimises another person (B) if A subjects B to a detriment because—*
  (a) B does a protected act, or
  (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—
  (a) bringing proceedings under this Act;
  (b) giving evidence or information in connection with proceedings under this Act;
  (c) doing any other thing for the purposes of or in connection with this Act;
  (d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

25. S39 of the Equality Act 2010 applies the Equality Act provisions to the work scenario as follows:

Employees and applicants

(1) An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

26. S123 of the Equality Act 2010 may also be relevant as to the time limit in which to bring a claim:

(1) Proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) …….

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

27. The claimant also makes reference to s136 of the Equality Act 2010 concerning the burden of proof to which we have also had regard but for completeness this is as follows:

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.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

(b) …

28. The claimant also provided a helpful skeleton argument which referenced a number of cases to which we have had regard:

Cordell v Foreign and Commonwealth Office [2012] ICR 280
Law Society v Bahl [2003] IRLR 640
Igen v Wong [2005] ICR 931
Nagarajan v London Regional Transport [2000] 1 AC 501
Barton v Investec Securities Ltd [2003] ICR 1205
Shamoon v Chief Constable of the RUC [2003] ICR 337
Glasgow City Council v Zafar [1997] 1 WLR 1659
London Borough of Southwark v Afolabi [2003] IRLR 220
Essop & Ors v Home Office [2017] UKSC 27

29. The respondent provided helpful written final submissions and made reference to an authority referred to by the Claimant already to which we have had regard as follows:

Essop & Ors v Home Office [2017] UKSC 27

The facts

30. The claimant was employed by the respondent having commenced employment in July 2008. On 12th May 2009 the claimant was authorised to operate at low voltage on the Eastern Power Network (EPN).

31. The respondent is responsible for the physical distribution of electricity to the Eastern, Southern Eastern and London areas of the UK. There is a control room which is the centre from which electricity is controlled throughout the regions. The control room responds to faults and authorises actions taken on the network. The control room is operated by control engineers who are managed by network managers. The claimant was a control engineer.

32. Each of the regions is served by its own electricity network. The lowest high voltage authorisation level for a control engineer is HV. A 11kv Engineer is authorised to operate the network up to and including 11kv. Within EPN and SPN, there are two further levels of high voltage authorisation namely 33kv and 132kv. The LPN network is a slightly different network as there is only one additional level of authorisation above 11kv, that of 132kv.

33. In March 2012 the claimant was authorised to operate at 11kv on the Southern Power Networks (SPN) and subsequently gained his authorisation to operate at 11kv on the EPN on 30th October 2014.

34. In January 2016, the claimant brought his first set of employment tribunal proceedings including a claim for discrimination which was subsequently settled in January 2018. The claimant relies upon this as a protected act for the purpose of these proceedings.

35. From October 2017 the claimant was authorised to operate at 33kv on the SPN network following completion of his training. From this point the claimant continued to operate at 11kv and 33kv on the SPN and up to 11kv on EPN.

36. By e-mail dated 25th September 2017 the respondent invited all control engineers to apply for EHV training on both SPN and EPN networks at 33kv. The email confirmed all candidates must be prepared to also train at 132kv and work full shift on their respective networks if required. Appointments would be made on a point scoring basis, as will the order of training, with consideration given to the individuals time served experience in a HV Control environment. Those already authorised at 33 KV on one network need not apply and anybody who had already applied for the EPN training position need not reapply. At that stage the claimant was not quite authorised on the 33kv on the SPN. He was not authorised on 33kv on EPN and it is not in dispute that he did not apply nor seek any clarification from David Bowen, who sent the email, that he was already on the list.

37. We heard evidence that four applicants were successful as a result of this process, Tom Stannard and Ian Starbrook on EPN and Brian Little and James Wright on SPN who were all identified as suitable for the 132kv training in due course as part of that process. Tom Stannard and Ian Starbrook did progress to train at 132kv on the EPN. Brian Little started the training in 2019 for SPN 132kv but this was stopped and he was deployed onto EPN where he was needed. James Wright did not progress but was as set out below offered a full shift position as a result.

38. The respondent had a policy for training of the control team. The most recent version of the policy was included in the bundle of documents for the employment tribunal as it was a written policy. This policy had a specific section - section 7 relating to control engineering training that was applicable to the claimant which contains the following statements:

*"**Selection of candidates for training***
All training and progression opportunities shall be advertised either internally within the control team or via the Intranet careers page as deemed appropriate for the training position.
Individuals who apply for a control engineer vacancy will be shortlisted and those selected will be invited to an interview to assess their suitability for the role.
Control engineers who wish to be considered for progression to higher voltages shall be required to hold the appropriate academic qualification for the role and be selected by interview to assess their suitability."

39. We heard evidence that there was a change in policy and it was possible to allow joint progression as 33kv and 132kv at the same time. The policy also contained a heading training time scales which stated as follows:

"***Training timescales***
When an individual is enrolled onto a training plan, the anticipated time scales for completion of training through each voltage level are:

A control engineer and taking training up to 132kv authorisation may take an average of 18 months to achieve EHV Authorisation, if starting with no authorisation level but with an appropriate electrical engineering qualification."

40. The claimant considered SPN to be his home network although he had worked across all three networks. He was authorised to 11kv on EPN and 33kv on SPN.

41. Contrary to the written policy on training for the control room, it was accepted that there was a change of policy in around 2019 in respect of the 132kv training opportunities. Mr Child confirmed that such opportunities would only be advertised where there was more than one suitable candidate for the role and interviews required to fairly choose between them.

42. Recruitment for 11kv has always been by way of a competitive interview process as the advertisement process could be internal or external and applicants could come from outside the control room. All selections at 33kv since this date have been by way of competitive interview. The company has adopted a more flexible approach with 132kv due to shortage of suitable candidates to train at that voltage. Candidates would only be suitable if they are 33kv authorised on the networking in question, wanted to work at that level and had demonstrated a safe and competent practise at their existing level and either already were working a full shift pattern or demonstrated a willingness to do so. This was not a written policy.

43. No one has been authorised at 132kv on the SPN since 2019 when Stanley Kimuyu secured authorisation after beginning his training in 2018. SPN is the only network upon which the claimant was 33kv authorised. Brian Little was invited to train at 132kv in 2019 but this was discontinued due to operational needs. As set out below two 33kv vacancies were advertised on EPN and SPN in 2017 and that application was to include the potential to progress to 132 KV.

44. Given that the work of the claimant and the respondent's business consists of electricity, there were health and safety elements to the role. Mistakes had consequences that could include loss of power but also loss of life. The higher the voltage, the higher the risk. Generally one progressed up the authorisation scale based on experience and passing the earlier authorisation level. It was accepted by the claimant in evidence that in order to progress up to the next authorisation level as a general principle one had to be operating safely at the current authorisation level. This is also a matter of common sense.

45. If an error was made there was an expectation that individuals would self report. The claimant confirmed there was a process of self reporting so that lessons could be learnt from these issues and knowledge shared. In addition, issues could be raised with the "airline" as it was termed. This could be by the individual themselves, by the network manager or if an error is highlighted as part of a process. A HSS Investigator would be appointed who may or may not be based in control.

46. That investigator would prepare an incident report which is then sent to the manager in question with a call to action. The manager would mark the action as complete and a report log is generated. The incident report sets out the incident date and category. It sets out the incident type, severity and who reported it with a summary of the issue. It names the investigator and each action point has a deadline and a status i.e. "completed". The tribunal had the benefit of the incident reports relating to the claimant's errors.

47. The claimant relied on two comparators for the purpose of his direct discrimination complaint namely Ian Starbrook and James Wright. Ian Starbrook commenced employment on 15th September 1999 and was authorised at 132kv on EPN on 15th March 2021 having gained his 33kv authorisation on 3rd September 2019 and his 11kv authorisation on 4th November 2014 all on the same network. In addition, he was authorised

to 11 KV on the SPN network from 8th May 2018. He was recorded as having two errors one on 9th October 2019 and one on 16th January 2021. Mr Starbrook was selected for his 132kv training in April 2020. He was white British.

48. James Wright commenced employment on 22nd October 2012 and was also recorded as having had two errors on 17th December 2019 and 10th February 2021. He had not been trained at a higher voltage since that error. He was only authorised to 11kv on the SPN from 26th January 2017 and on the EPN network from 11th September 2017. He was white British.

49. A number of other employees were mentioned by the parties so it seems relevant to cover these now. They were not directly named by the claimant as comparators or part of his pleaded case. The first was another Black employee Stanley Kimuyu who commenced employment on 19th February 2007. He became authorised at 132kv on the SPN on 14th November 2019 having gained his 33kv authorisation on 26th August 2014 and his 11kv authorisation on 7th August 2008 on that network. On the EPN network he was also authorised to 33kv having gained that authorisation on 25th August 2016 and his 11 KV authorisation for that network on the same day. He was said to have no recorded errors. There is no evidence any other employee had been authorised at 132kv on SPN since Mr Kimuyu for which training commenced in 2018.

50. Brian Little who was White British commenced employment on 1st February 2007. He was authorised to 33kv on the SPN network on the 14th May 2018 having gained his 11kv qualification on 29th June 2017. On the EPN network he was also authorised up to 33kv having gained this on 4th March 2021 and his 11kv authorisation on 30th September 2011. He was said to have had two errors (one was jointly held with another control engineer). The dates of these were 20th May 2019 and 11th September 2020. He had not been trained at a higher voltage since that second error.

51. Zenzo Mpofu who is Black African and was appointed to network manager which was a promotion by David Child. He commenced employment on

14th April 2009 and gained his 132kv on the SPN on 30th October 2017 having gained his 33kv on 13th March 2014 and 11kv authorisation on 14th February 2011. He also had 11kv authorisation on the EPN since 19th September 2014. The respondent also relied on having similarly promoted Zhen Lu of Chinese origin to the role of network manager during this period.

52. Finally reference was made to Marius because he also had an exceptionally high error rate. He was White European and commenced employment on 10th May 2010. He was authorised at 11kv on the EPN network from 7th December 2018 but had recorded 6 errors since that time and had not been authorised at a higher level as a result.

53. The claimant had five recorded errors against him commencing in April 2018. We adopted the terminology of incidents in the hearing as the claimant did not accept that they were errors. We heard a lot of evidence about the errors themselves, some of which involved technical terminology which we have simplified for the purposes of this judgment as it is not necessary to go into the technical details for these findings.

54. The **first incident** – occurred in April 2018. This error occurred because the screen the claimant was looking at did not represent what was actually in the field. The claimant gave an instruction to the field engineer to carry out an operation that should not have been designed to be operated in that manner. As a result customers lost their supply of electricity. There was some confusion over the time scales over which the electricity supply was lost and some evidence is contradictory on this point. It was not in dispute that supply was lost for a period. We were told that where supply is lost for less than 3 minutes, this was classed as less serious but nevertheless the claimant reported this matter as an incident. It was classed as an error.

55. There was much dispute about whether it could in fact be classed as an error as the claimant considered it not to be so and if it was, it certainly was not his fault as he absolved himself of all responsibility. He felt the onus was on the engineer in the field to communicate that what he was

telling him to do was not what was in front of him. There is no set definition of what a switching error was but it is a technical phrase that is not defined. In simple terms, whether it is called a switching error or not, it is a mistake for which on this occasion the claimant was held partly culpable.

56. On this occasion, there were three contributors to the mistake the claimant, the field engineer and the designer who were all at fault on this occasion. It was classed as serious and was investigated by Bruce Barnes. The action points were that the claimant should receive coaching to make sure he understood why unganged ASL's should not be used to make a break parallels and their other limitations. The field operative had some action points and the designer was also to receive coaching. As a result some action points were also identified that the ASL's needed to be removed from the network. These actions were all subsequently marked as complete.

57. The **second incident** – occurred in September 2018 (less than 6 months later). On this occasion, the claimant energised a section of the network which should not have been energised. He reported this to the network manager. There was already a fault in place but as a consequence his authorisation was temporarily withdrawn but subsequently reinstated the same day after the completion of an initial investigation and a drugs and alcohol for cause test was considered but not deemed necessary.

58. The claimant considered this to be a "near miss" rather than an error as it had no consequences as the network was already broken. The investigation was conducted by Saleem Naeem and three action points were sent to all control engineers as learning points from this incident. It was a genuine mistake but it was nevertheless an error in judgement and the second mistake in six months. We accept that in the respondent's working environment mistakes can have consequences. Whether you call it a switching error or a mistake, it has consequences to health and safety in this risk critical industry.

59. The **third incident** – occurred in January 2019 (4 months later). On this occasion, the claimant was working with a trainee but he was supervising. The incorrect instruction was given to a field engineer and the claimant's position was that he and the trainee noticed this before the action could be carried out. His evidence was that he verbally withdrew the instruction to the field engineer but had not withdrawn it off the screen. In the meantime, another field engineer noted the instruction and escalated the matter telling the field engineer not to operate the instruction. This was reported by the field engineer rather than the claimant. On this occasion the matter was investigated by John Duller who completed an action report with three actions for the claimant and three other actions within the business. Again, this matter was categorised as an error on the claimant's part. This meant that the claimant has now recorded three errors in 12 months.

60. On 12th February 2019 David Child who was the claimant's line manager spoke to him about the fact there had been three switching errors within 12 months and that this was below the standards they would expect and also below the standard he would expect from himself. Mr Child accepted that it was a valid point to say the final error was not necessary classified as such because the act was not carried out however he said it was still the case that the wrong instruction was given. The claimant was told that this was now an informal poor performance issue. The claimant was told that if another issue arose within six months of the last error, then he would have his authorisation removed until the investigation into the error is complete but it might be that he would move to a formal stage of poor performance.

61. This conversation was followed up by Mr Child in writing by e-mail 18th February 2019. It was not formal action just a record of the discussion. By e-mail dated 1st March 2019 the claimant replied and disputed that he had performed poorly in the last 12 months. He felt that as a matter of fact he had only one switching error which if he hadn't mentioned it they would be none the wiser (first incident) but he did not accept he had committed three switching errors in the past 12 months and asked for the decision to place him on an informal poor performance review to be reconsidered.

62. Meanwhile on 27th February 2019, Mr Child sat down with the claimant for his informal performance review. He had requested assessor training which Mr Child refused for now and explained that with his poor performance over switching errors, poor sick record (which we heard no evidence about) and the fact he was not 132kv authorised, he would not currently consider it. Mr Child told him he could ask again in 12 months but he was still likely to say no. Mr Child emailed himself a note of this conversation on 28th February 2019 but did not e-mail the claimant at the same time.

63. The **fourth incident** – this occurred on 14th August 2019 (7 months later). On this occasion the claimant created a parallel in the system and he felt the system misled him. The network manager picked up the error as it caused an alarm when the claimant was away from his station in the kitchen. Mr Child gave evidence that he felt there were two ways that this could have happened the first was the claimant's error or for a system error but the later was ruled out. This was classed as an operating error/switching error.

64. Again, an investigator was appointed and an incident report prepared. The investigator with Saleem Naeem. The investigator noted a couple of explanations that were said to be given by the claimant at the time including that he had a family bereavement and had other issues on his mind and his concern about making arrangements for travel to Ghana may have caused distraction. The claimant did not accept that he gave that explanation at the time however it would be odd for this information to come from anywhere else and we do not accept this suggestion that it was not the rationale given at the time.

65. A number of actions were recommended as a result of this mistake. The claimant had to be placed under personal supervision for a minimum of 5 shifts and his performance assessed. In addition he had to undertake a concentration skills course. This mistake came seven months after the last error. The tribunal noted that on each occasion a similar time period

arose between the claimant's errors. It was apparent that the respondent considered the claimant to have lost concentration on this occasion.

66. On 16th August 2019 the claimant's authorisations were rescinded pending further inquiries. This meant that his authorisation to operate on any part of system unsupervised had been rescinded. An investigation was underway and he had to work supervised in the meantime. A letter dated 16th August 2019 was sent to the claimant confirming that his authorisation had been rescinded. This was reinstated on the 25th September 2019 following a period of supervision.

67. The **fifth incident** - occurred on 28th February 2020 (6 months later). We have dealt with this mistake slightly out of chronological order as the Tribunal made findings in respect of each of the mistakes and then went on to analyse these in relation to the claimant's treatment compared to others such as Marius.

68. On this occasion the claimant received a telephone call from a field engineer and issued an instruction to him which overloaded the system. The claimant felt that he was reliant on the field engineers to tell him that it was not possible. This demonstrates another example of the claimant failing to take ownership or culpability for his errors. The respondent felt that as a competent control engineer he could have added up the capacities and noted that it was far too much on his own and would overload it.

69. This error occurred when the claimant was operating on the EPN as opposed to the SPN which was his home network. On this occasion there could have been serious consequences for health and safety but the claimant was lucky and nobody was seriously injured. The claimant made another mistake and error of judgement on equipment he ought to have known. Electricity was said to have been lost to 700 customers and an incident report was prepared. Saleem Naeem was appointed as the investigator and the seriousness of the mistake meant that there was a recommendation as an action that the claimant be referred to occupational

health to ensure any concerns regarding his mental health and fitness for duty are assessed. He was required to attend a HV switching course and complete an online control engineer's knowledge test. It is clear from the actions the respondent wanted to rule out health reasons for such a serious yet fundamental error.

70. Following this error the claimant was placed on stage A poor performance plan on 7th April 2020. This was an informal process lasting six months in which Mr Fullilove would support the claimant and review any faults and his schedules for any issues. The claimant attended the meeting with his union representative. The claimant was informed by e-mail dated 8th April 2020 that this process would last six months. The claimant relies on the placing of him on a performance plan as an act of discrimination.

71. All of the witnesses before the Tribunal were credible. The claimant clearly believed he had been discriminated against and was very passionate about what he perceived to be mistreatment. It was also clear from the witness evidence of all the witnesses and before us that he felt he had not committed the errors (bar one he partially took responsibility for) and that he had no culpability in respect of the high error rate. He was reluctant to take on criticism and took it personally. He felt he was being wrongly accused of errors. The Tribunal heard considerable technical evidence about the errors and does accept that the claimant made mistakes and errors of judgments.

72. After the Tribunal looked at the five errors by the claimant, the tribunal went on to look at the errors of Marius who was not formally named in the pleadings but was being referred to by both parties. The claimant alleged that he had been treated more severely than Marius. We accepted the evidence that Marius accepted his errors.

73. The errors were not the same in nature but the respondent's position was that he was treated in a similar way. Marius made five errors with a sixth error being made on 19th April 2022 once the tribunal proceedings were underway. Marius' errors were made on 18th February 2019, 16th May

2019, 25th May 2020, 3rd September 2020, 23rd June 2021 and then more recently on 19th April 2020 which we have discounted for the purposes of our analysis as it post dates this claim. We noted that Marius made five errors in a 28 month period and the claimant made five errors within a 22 month period.

74. We noted that as far as the claimant was concerned nothing happened following the first two errors. On the third error he was subject to drug and alcohol testing and put on an informal informal performance plan. By the 4th error his authorisation was revoked for six weeks and he was monitored as well as undergoing a drugs and alcohol test. By the 5th error he was on a stage A PIP.

75. Whereas the nature of the errors are not directly comparable, it was noted that on the 4th error Marius was drugs and alcohol tested and treated in the same way as the claimant by the 5th error as he was on stage A PIP. Marius has had a 6th error more recently which has resulted in a verbal warning and the claimant has not had an error since the tribunal proceedings were issued.

76. We then considered the errors of Ian Starbrook, the claimant's comparator in these proceedings. The claimant considered his error as more serious than the claimant's own error. This matter was looked at as part of the grievance report (see below) which identified that the control engineer's actions did not cause the loss of supplies. This happened due to a genuine fault. The control engineer was right to contact the field engineer working on site and ask if any protection had operated to cause the circuit trip and he was misled by an assurance from site (incorrectly) that no protection had operated. Due to the system set up the alarm generated skipped the current alarm screen into the historic log and he should have checked both current and historical alarm logs before attempting to reclose.

77. This was Mr Starbrook's second error in a period of 22 months. The incident was no more serious than any of the claimant's operational errors

and the grievance found that he was treated in exactly the same way as the claimant for his first, second and fifth errors. In a 22 month period Ian Starbrook had two errors whereas the claimant had had five.

78. Returning now to the chronology after the claim had settled but before the claimant committed his first error, David Child sent an e-mail to HR on 21st of February 2018 stating that the claimant was becoming extremely difficult to manage. The claimant relied upon this e-mail as evidence towards his victimisation complaint in terms of its content and as a factor to shift the burden of proof. It made reference to Mr Child encouraging the claimant to apply for a role even if others had concerns about him and would leave. Of particular note are the following extracts:

"I don't think he understands that he has become a problem because he can't see any faults in his own behaviour."

"His relationship with his colleagues has completely broken down (in terms of trust) although again, I don't think he understands this. This is now a safety issue as I've been told that his colleagues are saying they will not report any errors they may find he made because they believe that if they do they will instantly be accused of having nefarious motives and many them believe that at some point he will be taking one of them back to court. I understand their fear, but of course I have to remind them that they have certain duties and they must overcome this there and do what they must do."

"Also - it is clear that he wants to become a 132kv control engineer and a network manager and as it stands he displays qualities that mean he is profoundly unsuited to the role. He is too thin skinned and takes everything personally and also tends to react poorly when under pressure. No doubt I, or we as a company will face future legal action if it does not get promoted to where he wants to be. Again - he has a profound lack of understanding of the way promotion should work through the company (on merit and

interview) and just believes he should get whatever opportunities are about because he has better paper qualifications that many of his colleagues."

"All of this is creating a corrosive atmosphere around him which I don't think he really understands or recognises, and as much as we all try ad move forwards from the court case it has left a scar which he is not helping to heal."

79. On 17th October 2018 Stanley Kimuyu was selected for 132kv training on the SPN.

80. By email dated 3rd October 2019 the claimant raised a complaint to Steve White (head of control operations) to complain of bias and asked to arrange a meeting with him. The claimant felt the current training/progression schedule for the control team on SPN/EPN was biased towards him and disadvantaged him irrespective of his time in control and his experience on the networks.

81. On 9th October 2019 a meeting took place between the claimant and Steve White where the claimant raised his dissatisfaction with progression opportunities. He believed had been side lined and Mr Child was biased and he was not satisfied with his treatment for operational errors. He did not feel the policies were being applied fairly such as the inconsistent application of drugs and alcohol testing. He didn't agree his operational errors had been categorised correctly and he wanted to progress. The claimant was told he was not likely to be considered for 132kv training if he had a number of operational errors and potential poor performance.

82. On 13th November 2019 Brian Little was selected for training at 132kv on the SPN with his training due to commence in February 2020. He subsequently ceased this training as due to operational reasons he was moved to the EPN network. He was the last candidate put forward for training. The claimant was not offered this opportunity. Concerns had already been raised about his error rate earlier this year.

83. On 14th November 2019 Stanley Kimuyu was authorised to operate at 132kv. Also on this day, David Child emailed HR concerning a long conversation he had with the claimant. The claimant approached Mr Child concerning the classification of his errors. The claimant also raised he was not happy to have not been considered for 132kv training. Of particular relevance within the context of this case are the following extracts from this e-mail:

"I did explain that his error rate was too high at the moment but it was within his power to put himself into consideration in the future should he wish to do so. To do that he needed an extended error free period, and he needed to give me reasons to train him at 132kv (eg start working on the training material available). He is not happy that we changed interview process so that we generally now interview for all EHV voltages in one go, rather than separate out 33kv and 132kv as we did previously. I assured him that the next time we look to have a 132kv candidate, should he have an extended error free period then he would be in the frame. I told him that should we have more than one candidate that they would interview everyone, even those who had previously been through the EHV interview to make sure all was open and fair - but at this time he was not considered because of the rate of mistakes."

"He pointed out a couple of people he feels have overtaken him (and I think it is important to note that both of them are BAME, even though that was not any part of the decision making process)."

"He clearly wanted me to promise him the next 132 training position on time served basis - and I made it clear that time served is not a criteria we work on. I think it is fair to say we had a robust discussion but we also ended on positive notes about his potential and an assurance that neither of us were taking any of this personally (to be frank, I'm not. I think I understand his frustrations, but I don't think he understands that he has demonstrated shortcomings)."

84. This email was disclosed late as it was not picked up on the DSAR request as it did not name the claimant by name and had the title of the emails as "Pears". It was not in dispute that the claimant at no point prior to the hearing had started to work on the training material available to him as Mr Child suggested.

85. On 5th February 2020 the claimant applied for a position having noted an advertisement on the Internet for the position of control engineer on the LPN. The claimant was not successful in his application and the matter was subsequently investigated as part of his grievance. There were thirteen applications for the role including Ian Starbrook. The claimant did not get the role. After the application period closed, changes were made to the job description where the role was downgraded by a band and then re advertised for a further two weeks in late February 2020. Recruitment was paused in March 2020 due to the COVID situation but re advertised on the 10th July 2020 for two weeks.

86. In July 2020, all applicants were notified of the revisions to the job description but the claimant withdrew his application on 12th August 2020. The decision to downgrade the role was taken because the business did not want experienced control engineers changing networks but to instead attract new people into the network control team. The claimant was naturally disappointed as he felt this may be good progression to 132kv as the LPN had no 33kv equivalent. His later grievance was not upheld in this respect but the process was criticised as neither the claimant nor his comparator had been advised what was happening and that they were considered unsuitable for the position because the business was trying to recruit new people into the control team. Neither the claimant nor his comparator were successful in that application.

87. The claimant during the imposition period of his performance improvement plan was subject to monthly audits which were conducted by Mr Fullilove. There were no major concerns highlighted and this process was handled in a positive manner with Mr Fullilove passing critique of both things the

claimant did well and things were improvements could be made. Overall the claimant was marked as having satisfactory performance. The tribunal considered Mr Fullilove to have handled the process fairly and in a supportive manner. The respondent relied upon the process to illustrate the fair manner in which the claimant was being treated and that he was not unjustly criticised or held back anyway during this process.

88. On 19th April 2020 control engineers were invited to cover a full shift position on the EPN network on a secondment basis to start as soon as possible. The claimant did not apply for this role. After the claimant's fifth error he maintained that he did not wish to work on the EPN network but to stay on his home network SPN. The claimant's evidence was he did not apply as he was concerned it would stall his progression on the SPN network.

89. The claimant alleges that on 4 May 2020 he was denied the opportunity to obtain a full shift position on the SPN network. He was informed on 25 May 2020 that the role had been given to James Wright who is White British. The claimant relies on this as an act of discrimination.

90. Mr Child gave evidence that the claimant had never expressed a desire to work a full shift pattern. A full shift pattern was one which covered the full 24 hour period. The claimant worked part shift pattern which was daytime working and Mr Child believed this was the pattern he wanted to work. James Wright was invited to work a full shift but Mr Child believed he wanted to work that pattern and had been interviewed for his most recent training opportunity at 33 KV on the basis he would be willing to do so.

91. The full shift pattern would not have carried any financial benefit to the claimant as he was paid on a full shift basis despite his working pattern. Mr Child's evidence was that it was not a precursor to getting a 132kv opportunity for training. It is common for a person to be already working a full shift pattern or to at least have worked one for a period before commencing training at level to avoid them finding themselves unable to manage the full shift pattern. Mr Child's evidence was that not working a

full shift pattern had no bearing on the decision not to advance the claimant to 132kv training as long as he was so willing. Mr Child said this decision was based purely on his error record and the fact that nobody been authorised at 132kv on the claimant's network since Stanley Kimuyu in 2009.

92. There was no documentary evidence that the claimant had asked for a full shift position, the only email referencing that was for the EPN network and the 33kv opportunities the claimant did not respond to. We heard evidence from the respondent that in a conversation in February 2020 the claimant had declined to work full shift and that this was also the case in May 2021. The claimant denied that this was a reference to the SPN but said this related to the EPN. Given that he asked not to work on EPN and was not asked to after February 2020 this cannot be correct. It must have been a reference to SPN.

93. On balance, we took into consideration that Mr Fullilove's evidence on this point was not in his statement but on balance we prefer the respondent's evidence on this issue given the limited supporting documents and that the claimant was not shy of raising matters by email if he thought he was getting overlooked for opportunities. There was no benefit to the claimant financially, he could work dayshifts and be paid the same and as there were no actual training opportunities for 132kv he was applying for or being considered for, there was no need to be working full shift at that stage. In addition, the claimant had not voluntarily started working on the training material towards 132kv to indicate his willingness and we consider that he did not consider working full shift at that time either.

94. On 15th June 2020 the claimant alleges that he was denied the opportunity to train on 132kv on the EPN network which was given to Ian Starbrook who is white. The claimant relies on this as an act of discrimination. It is not denied that as a matter of fact this occurred.

95. This was within the claimant's poor performance period. We accepted Mr Child's evidence that working at 132kv carries an additional layer of

responsibility. At this level the control engineers are responsible for the supply of electricity to the largest number of customers so an error can interrupt the power supply to large towns and all the safety considerations which are present on the live electricity network are prevalent but at a higher voltage. Mr Child's evidence was that he did not consider the claimant to be suitable to progress until he was able to demonstrate a sustained period of error free practise.

96. Mr Child explained that the claimant complains about Ian Starbrook but he is not a correct comparator. The 132kv training position in 2020 was on the EPN network. The claimant would not have been eligible for that position as at the time he was not 33kv authorised on the EPN as his 33kv authorisation was on the SPN. He did not believe he had any interest in becoming authorised at 132kv on the EPN and lastly Mr Starbrook had not committed same amount of errors as the claimant and wherefore was eligible for selection.

97. On 14th July 2020 the claimant raised a formal grievance concerning career progression and promotion opportunities. The claimant complained that the acts were because of his race and his previous race discrimination tribunal complaint. In addition, the claimant felt that progression or delayed progression occurred for black African control engineers and in some cases no progression at all for at least 10 years compared to their white British employees. The claimant gave three names of black African control engineers CD, HC, and AN as examples. The claimant raised the fact that Ian Starbrook was chosen to train at 132kv in 2020 even though the claimant had been authorised for a longer period and that he thought he was being bypassed.

98. Mr Blackburn was appointed to investigate his grievance. There was a delay in processing the grievance but during this period a thorough investigation took place into the claimant's complaints. It must also be borne in mind that this was the period of COVID.

99. As part of the grievance process, the respondent interviewed the three named employees mentioned who were said to be black African. On 17th November 2020 Mr Blackburn interviewed HS. He did not specifically reference his colour or race but understood this was the context of the discussion. He did feel that his progression had been slow and he had not been given the opportunity to train with no reasons given. He explained that he had had a breakdown and felt that he had not been supported and had given up on progressing his career as it was too painful and difficult and he felt he needed to shield himself away from further stress. He felt he had wasted 10 years of his career and noted that some people that had started the same time as he did were now 132kv authorised or network managers.

100. On 30th December 2020 Mr Blackburn interviewed AN who was very dismissive of the suggestion he felt he had been held back in anyway. He spoke very positively of the company and that he had been actively encouraged to progress but did not want to. He said, it would be wrong and unfair to say he had been held back. He gave evidence that everyone complains about the training programme for control engineers as it was a one size fits all approach which did not suit everyone but this was not determinative of race as it was across the board. His experience was within the LPN network but that it requires an individual to grab hold of their training and make it work for them.

101. On 31st December 2020 Mr Blackburn interviewed CD who raised all manner of issues going back to 2011 with the company. He complained about pay protection being applied because of this colour, that no one wanted to sit with him and train him due to his colour. He complained of the poorest training ever. He confirmed he had never complained formally about these matters but raised race issues in the call centre, dispatch teams and with his manager over working from home during COVID. He generally had a very negative feedback in connection with his time at the company. He would be retiring in two years time if he could not leave sooner.

102. The Tribunal was concerned about the additional evidence of concerns raised by 2/3 of the other black African employees and noted that 1/3 had no such concerns and that there was clear evidence of both Black African and employees who were not White British of being progressed and trained.

103. The Trade union representative Mr Harris gave evidence on behalf of the claimant concerning the grievance and appeal process and highlighted the concerns of CD and HC. He considered the claimant's failure to progress more quickly as unusual. He gave evidence in his statement that the managers who heard the grievance were trying to dismiss them from the nature of the questioning. A position he very much rowed back from in oral evidence accepting that the process was thorough.

104. The outcome of the grievance was sent to the claimant by letter dated 8th January 2021 which set out that the grievance was not upheld. The grievance was thoroughly investigated and a 15 page outcome letter provided to the claimant to explain Mr Blackburn's rationale for his decision.

105. By letter dated 22nd January 2021 the claimant appealed the grievance outcome again citing victimisation and discrimination.

106. The grievance appeal was conducted and by letter dated 20th May 2021 Mark Simmons did not uphold any of the points in the claimant's appeal. That was the end of the internal process.

107. Meanwhile, the claimant commenced ACAS Early conciliation on 16th July 2020 and the certificate was dated 16th August 2020. The claimant submitted his claim to the Tribunal on 15th September 2020 bringing claims of direct and indirect race discrimination and victimisation as set out above. A preliminary hearing took place by telephone on 26th July 2021 to clarify the claims, issues and make case management orders in the usual way.

Conclusions

Direct discrimination

108. *Did the respondent treat the claimant less favourably than they treat or would have treated, others because of his race in that:*

108.1 The claimant contends that the less favourable treatment was the failure to promote him and a failure to offer appropriate training opportunities specifically ;

108.1.1 The claimant was informed that he was being placed under the poor performance procedure on 8 April 2020;

108.1.2 The claimant was denied a full shift position on 4th May 2020;

108.1.3 The claimant was denied the opportunity to train on 132Kv and to progress to a higher level within the company on 15th June 2020;

109. *The claimant relies on actual comparators (Ian Starbrook and James Wright) and will also contend that a hypothetical White comparator would not have been treated in the same way as he was.*

110. The first issue is whether because of the claimant's race as set out above, the respondent treated the claimant less favourably than they treat or would have treated, others (namely James Wright and Ian Starbrook and/or hypothetical comparator) in the following ways:

110.1 *The claimant was informed that he was being placed under the poor performance procedure on 8 April 2020;*

110.2 *The claimant was denied a full shift position on 4th May 2020;*

110.3 *The claimant was denied the opportunity to train on 132Kv and to progress to a higher level within the company on 15th June 2020;*

Leading to the conclusion that there was a failure to promote him and a failure to offer appropriate training.

The claimant was informed that he was being placed under the poor performance procedure on 8 April 2020;

111. It is not in dispute that the claimant was placed on a poor performance plan on 7/8 April 2020.

112. For direct race discrimination to occur, less favourable treatment must be because of race. We need to consider the reason why the claimant was treated less favourably and this can include an examination of the employer's (or decision maker's) conscious or subconscious reason for the treatment in accordance with *Nagarajan v London Regional Transport and others [1999].* Here we were in the fortunate position of having heard evidence from the person who decided to implement the performance improvement plan, Mr Child. He was cross examined at length and in our judgement was a credible witness.

113. What the claimant will need to show is that he has been treated less favourably than the comparator whose circumstances are not materially different to his. The claimant relies on the hypothetical comparator for this act.

114. It is not in dispute that the respondent placed the claimant on an informal performance plan. The claimant was placed on a performance improvement plan after he made five errors in a 22 month period. This error rate was almost unprecedented within the respondent. The claimant was placed on a stage A performance improvement plan. There is only one employee with the same rate of errors as the claimant, Marius he was white European and he too was placed on a stage A performance improvement plan by the fifth error.

115. There was no other employee without the same amount of errors as the claimant. Mr Starbrook committed two errors in a period of 22 months and was not on a PIP. In our view given the number of errors and that the

claimant was working with electricity in a position of responsibility, it was entirely appropriate for him to be placed on a performance improvement plan. Whilst the claimant was still not exactly accepting a position of culpability in relation to the errors, the tribunal accepts that the claimant did make mistakes. He was monitored more closely for a 6 month period. The claimant has now been error free for a period.

116. In order for the claimant to succeed in a claim for direct discrimination he must establish a prima facie case of discrimination in accordance with s136(2)-(3) Equality Act 2010. Where the claimant relies on a real comparator, a tribunal requires a difference in treatment and a difference in race but there must be more as this would only indicate the possibility of discrimination. A prima facie case requires the tribunal to conclude from all the evidence that there could have been discrimination. In this case the claimant does not rely on a named comparator but the hypothetical comparator. We do however have another employee who does not share the claimant's race who was treated the same. It is therefore difficult to see how the claimant can establish less favourable treatment as we have a real scenario where he was not so less favourably treated.

117. Claimant's counsel invites us to consider that the burden has shifted to the respondent because of five factors, two generic factors and one specific to each allegation of direct discrimination which we have considered. We deal with these under the first allegation of discrimination but they equally apply to the other allegations made by the claimant.

118. We do not place the same interpretation on the email of 21st February 2018 as the claimant's counsel invites us to do so in that it is stero-typing the claimant as an angry black man. The claimant was clearly angry before the Tribunal and very passionate about his cause. The email does accurately record the claimant's inability to take on board anything he perceives as criticism. We consider this email more pertinent to the issues of victimisation as set out below and not enough to tip the burden alone or collectively.

119. We do not accept that by April 2020 Mr Child had a history of placing black workers on capability procedures for seemingly objective reasons as submitted. The claimant had been warned by email in February 2019 that his error rate was unacceptable. It was. We do not accept that the performance plan of the claimant was more onerous than that of Marius. Even if it was, in circumstances where an employee refuses to accept culpability this could be seen as more reason to work with them under a PIP as the issue is far bigger than someone who accepts they made errors and is willing to learn from them.

120. We do not accept that the fourth and fifth facts as invited to in the claimant's submissions are to be given the interpretation of claimant's counsel for the reasons set out below.

121. We examined with the witnesses the possibility that the claimant was in someway treated differently because of his race in the reporting of his errors. We are satisfied that this was not the case. They were all classified as serious errors and the grievance investigation looked into this issue in some detail as to whether there had been any bias in the way the claimant's errors had been treated.

122. We do not find that this is the case. There is no evidence to support this. On some occasions the claimant self-reported, on other occasions he was reported by others including those not managing him. The matters were investigated by a number of different investigators and on many occasions actions arose that did not just impact the claimant but others within the organisation where others had been found to have some degree of culpability. The claimant gave evidence that all engineers were under a duty to self-report if an issue arose. Indeed, it is not the case that the claimant was the only control engineer with errors logged against him. Whilst with exception of him and Marius, no one was quite so prolific, other control engineers did have errors logged against them just not to the same extent.

123. There is no evidence to suggest race played any part in the categorisation of the errors and at the end of the day the tribunal was satisfied the claimant made mistakes or errors of judgement even if he will not himself accept this. We consider that with both the claimant and Marius it was within the respondent's gift to place either of them on a performance improvement plan earlier than they actually did but we accept Mr Child's evidence that he had never been in this situation before with being faced with that many errors.

124. We conclude that the reason why the claimant was subject to a performance improvement plan was because he had made so many errors. This was the reason why the claimant was subject to a performance improvement plan and this was not because of the claimant's race. Other employees who did not share the claimant's race but shared his error rate were subject to the same treatment.

125. We therefore find that the claimant was not less favourably treated because of his race by being placed on a performance improvement plan.

The claimant was denied a full shift position on 4th May 2020;

126. Turning now to this allegation and the claimant relies on the comparator of James Wright and the hypothetical in the alternative. The claimant now accepted that there was no financial disadvantage to him not working a full shift position contrary to his understanding when he brought the claim. We do accept the claimant's counsel's submission that there does not need to be a financial loss for denial of a full shift position to amount to less favourable treatment. This does however require the failure to offer a full shift position to be less favourable treatment. There was no financial impact and it was not a precursor to gaining authorisation at 132kv. The claimant was not clear how else this could be less favourable treatment.

127. Given our findings of fact, the claimant did not apply for a full shift position on the EPN network on a secondment basis. We do not accept that the

claimant had asked for a full shift position or in any way indicated that he was willing to do this now, to enable him to be considered when the opportunity arose. We found that we preferred the respondent's evidence that the claimant had declined this on two previous occasions. The claimant was happy to receive the full shift pay whilst on what daytime hours. The claimant took no issue not working full shift at the time, what he really took issue with was that he had still not been trained at 132kv on the SPN network.

128. James Wright was offered the full shift position but we accepted the evidence of Mr Child that he did not know the claimant wanted to work full shift so he was not offered it. Further, we noted that the email of 25th September 2017 that the claimant had not replied to, impacted several of the decisions the claimant has subsequently complained about. James Wright applied and was trained on the 33kv SPN network as a result and had indicated that he was willing to work a full shift and wanted to progress to the 132kv as part of that process. The claimant had not so indicated this save for it was well know that he wanted to train on 132kv.

129. Taking into all the circumstances, we do not consider that the claimant has raised a prima facie case of direct discrimination to shift the burden onto the respondent. Whilst the claimant was more experienced than James Wright when he was offered full shift position, we have not found any evidence that the claimant requested this or indeed indicated that he was willing to work full shift position on the contrary he declined it on two occasions.

130. Whilst it is a difference of treatment, it is not clear how this was less favourable. Further, given James Wright's application indicated that willingness even if the claimant had raised a prima facie case this combined with the fact the claimant had not indicated his willingness to work full shift would have given the respondent a non-discriminatory reason for the less favourably treatment.

131. We conclude that the reason why the claimant was not offered a full shift position was because he had not indicated a willingness to work it. This was the reason why the claimant was not offered a full shift position and this was not because of the claimant's race.

132. We therefore find that the claimant was not less favourably treated because of his race by not being offered a full shift position.

The claimant was denied the opportunity to train on 132Kv and to progress to a higher level within the company on 15th June 2020;

133. Turning now to this allegation and the claimant relies on the comparator of Ian Starbrook and the hypothetical in the alternative.

134. Claimant's counsel further relied on a matter in relation to this allegation to suggest the burden of proof should be shifted aside from those already dealt with above. It was submitted that Mr Starbrook had more recently passed his 33kv training than the claimant and this was evidence of a prima facie case where a less experienced white employee was put forward. We do not accept that. What is significant but overlooked is that Mr Starbrook had passed this authorisation level on the EPN network. On the EPN network the claimant was actually less qualified than Mr Starbrook having only been authorised up to 11kv. Counsel also seeks to draw a comparison between Mr Starbrook's two errors and his five that he denies committing. We have found as a matter of fact the claimant did make mistakes and had a greater error rate to Mr Starbrook. All errors were classed as serious incidents and we do not accept this submission.

135. The opportunity the claimant relies upon was in fact on the EPN network which the claimant was not qualified for as he was not yet 33kv authorised. At the time of the opportunity the claimant had expressly requested not to work on the EPN network after the fifth incident on 28th February 2020. Rather contradictory to his previous allegation regarding the full shift position, he claims he did not apply for the full shift position on the EPN

network following the e-mail in April 2020 as he really wanted to progress on the SPN network. It is clear he did not consider this to be a precursor to the training.

136. As such we do not find that the respondent should have simultaneously trained the claimant on 33kv and 132kv on the network he did not wish to work on. The opportunity was one that was effectively not open to him for fundamental reasons, it was on the wrong network. Even if the claimant had been able to overcome this significant hurdle to establish a difference in treatment that could be related to race, we find that the respondent had a genuine reason of the treatment for not progressing the claimant to the higher level which is not based on discriminatory reasons.

137. It is a matter of common sense in any industry that an employee who is currently on a performance improvement plan who has made a series of mistakes should not be put forward to train at a higher level. Particularly in this role given the consequences risks of operating at higher level when the claimant has failed to demonstrate at that time that he had the competence to operate at 33kv. Some of his errors were so basic that it caused the respondent to wonder if there was an underlying cause for this and to refer him to OH and to ensure he had basic knowledge by resitting tests. At that time the claimant had made 5 errors within 22 months and in any industry it is self evident that an employer would not further train an employee at a higher level when they are not performing at the current level. To suggest otherwise indicates a lack of insight on the claimant's part.

138. Further, the last employee to be trained at this level was in fact of the same race as the claimant which would indicate that the claimant was not denied this opportunity due to his race. He needs to more closely examine his own conduct as to why this would be the case.

139. Whilst not a comparator relied on by the claimant, we have also given consideration to Brian Little who started the training in 2019. He was white British but this is not something the claimant expressly complains about.

We have considered if this provides any additional evidence to the wider picture or shifts the burden in any way. We considered the reason why he was offered the opportunity and we have accepted the respondent's evidence that this was as a result of his application in response to the e-mail of 25th September 2017 as he was one of two individuals who were identified as suitable for the 132kv as part of that process.

140. In essence there are three candidates who have been put forward for the training within the window of 2018 - 2020. Two on the SPN and one on the EPN network. The later for all the reasons set out above should be discounted but of the two opportunities on the SPN, one was given to a white British individual and the other one was given to a black African individual. At the time of the 2019 opportunity, the claimant already had a significant error rate as he had four errors by November 2019. The 2019 incident was not pleaded and in any event would be significantly out of time.

141. We conclude that the reason why the claimant was not offered an opportunity to train at 132kv network in June 2020 was because he was less qualified, it was on a different network he had no desire to work on and even overcoming these issues, his error rate would have precluded him for being trained to a higher level. This was the reason why the claimant was not offered the opportunity to train at 132kv and this was not because of the claimant's race.

142. We therefore find that the claimant was not less favourably treated because of his race by not being offered him the opportunity to train at 132kv in June 2020.

Indirect discrimination

143. *Did the respondent apply a provision, criterion or practice which is discriminatory in relation to the claimant's protected characteristic of race and specifically:*

143.1 Did the respondent apply a provision, criterion or practice to employees who do not share the claimant's race: The claimant contends that the relevant PCP/PCP's are the respondent's selection procedures for promotion and training and in particular the aspects thereof as defined in the further and better particulars (clarified as from 2019 onwards) as:

143.1.1 The respondent's failure to openly advertise and allow employees to apply for opportunities at 132kv.

143.1.2 The fact that opportunities at 132kv "will not necessarily be the subject of a separate selection process"

143.1.3 A lack of objective assessment of how an individual reaches the appropriate standard.

143.1.4 The fact that employees are effectively invited to progress to 132kv on the basis of their manager's decision without transparency or any process to determine the fairness.

144. We have considered whether the matters relied on by the claimant as PCP's were actually in operation as a matter of fact.

145. We accept that under the written policy all opportunities should be openly advertised. The respondent accepts that there was a change in policy. It is however not the case that no opportunities for training at 132kv were not advertised. The e-mail on 25th September 2017 sent to all control engineers invited them to apply for 33kv training and then progress onto 132kv training.

146. The tribunal was less impressed with the respondent's position on the 132kv opportunities. Mr Child confirmed that such opportunities would only be advertised where there was more than one suitable candidate for the role and interviews were required to fairly choose between them. The difficulty is the transparency in the process and how any employee would know whether there was more than one suitable candidate for the role in the circumstances. It is about perception.

147. Given the evidence of Mr Child, on the change of policy, we accept the general principle the respondent did have these PCPs of not openly advertising the opportunities and allowing individuals to apply, not always carrying out a separate selection process and that they are invited to progress on their manager's discretion. It is however clear that there was a joint interview to consider both 33kv and 132kv.

148. It is clear that those chosen to progress to the 132kv training were chosen as a result of the September 2017 application process which gave the respondent the pool for the next period. The claimant was already working towards his 33kv qualification and was told he did not need to reapply. The claimant was in theory in that pool as a result although he did not enter it in the same way as those referred to earlier who were given that opportunity.

149. By deciding who should progress to 132kv in this way, it left the respondent open to the suggestion that managers were just through a nod and a wink allowing progression. This could lead to difficult conversations and ill feelings. It is not clear why the respondent diverted from its written policy across the board which clearly needs updating. Whilst on this occasion as set out below, it was not because of race it could lead to unjust results and the dealing of unfairness amongst all employees.

Did those PCPs or any of them put employees sharing the claimant's race at a particular disadvantage compared to others? The claimant says that the disadvantage was a failure to progress within the company.

150. We have evidence of two employees that felt they were held back who are black African as well as the claimant. We spent considerable time discussing this as a Tribunal and the impact of this on the claimant's case. We had evidence that Stanley Kimuyu benefited from this process and another black African employee who did not share the same views as others as to progression.

151. There is however no group disadvantage. It is not clear how this process would actually disadvantage black African employees in some way. There is evidence that some felt held back but not that this was as a result of the PCP or that there was any group disadvantage, how employees felt including any genuinely held feelings the claimant may have had, does not demonstrate group disadvantage.

152. We accept the respondent's submission but there is no objective societal evidence that line manager selection instead of an advertisement and interview process disadvantages black African employees. Further there was no evidence from which we could infer that it disadvantages control engineers within the respondent which is the correct pool for comparison. Indeed, the most recent beneficiary of line management selection at 132kv was black African (Stanley Kimuyu) and the claimant was himself selected for training at 33kv without an interview.

153. Therefore do not find that any of the PCP's put employees sharing the claimant's race at a particular disadvantage compared to others. As such his claim for indirect discrimination fails.

Did it put the claimant to that disadvantage.

154. Even if the claimant had been able to establish group disadvantage, we accept the respondent's counsel's submission that the claimant was not disadvantaged for the purposes of s19(2)(c) of the Equality Act 2010.

155. There must be a causal link between the PCP and the disadvantage suffered by the individual. In this case, it is the claimant's performance which disqualifies the claimant from consideration for training at 132kv. As set out above this is a genuine reason and self-explanatory. On the last occasion when a vacancy arose at that authorisation on the SPN network in November 2019, the claimant had four errors and that would have disqualified him from consideration regardless of what selection method the respondent had chosen for the reasons already indicated. There is no

causal link between the PCP and the disadvantage suffered by the claimant.

156. In respect of the pleaded case and in respect of Mr Starbrook's appointment in 2020, there is even less of a causal link between the PCP and the disadvantage suffered by the claimant. Not only was the claimant performance a factor but the other significant factors were that this vacancy was on the EPN network which the claimant had already indicated he did not wish to work on and was not required to do so after the fifth error in February 2020. He was also not authorised at 33kv on the EPN network at that time in any event.

157. Notwithstanding the tribunal's concerns about the lack of transparency for employees in general in the way selection occurred, a general feeling of unfairness is not sufficient to give the claimant any grounds for complaint. In accordance with *Essop v Home Office* there were separate and distinct reasons why the claimant would not be eligible for selection regardless of the selection method adopted.

158. We therefore find the claimant's complaint of indirect discrimination is not well founded.

If so can the respondent show the PCP's to be a proportionate means of achieving a legitimate aim?

159. Given that the above matters have been decided against the claimant we have not gone onto consider proportionality and whether the respondent had a legitimate aim.

Victimisation

160. *Did the respondent subject the claimant to a detriment because the claimant had done a protected act or acts?*

161. *The claimant says that he has been subjected to detriment by being denied promotion or training opportunities (as set out at 11.1 above).*

162. *The claimant says this is because he had undertaken protected acts through:*

162.1 Bringing an earlier Employment Tribunal claim in 2016.
162.2 Raising a further grievance on 14th July 2020.

163. The respondent accepts that the acts at 19.1/19.2 were protected acts. It is not in dispute that the claimant raised a grievance in July 2020 and brought prior tribunal proceedings. In essence the claimant complains of the same things for this claim that formed the basis of his direct discrimination complaint.

164. The contents of his grievance thus have little bearing on this claim as the specific acts of victimisation the claimant relies on pre-date that grievance. We do not accept the claimant's counsel's submission that there is an ongoing act that the claimant has been disbarred from applying for progression opportunities since the end of the PIP or indeed since he presented the case to the Tribunal. That is not the claim before this tribunal.

165. There is no evidence that there have been any such opportunities since the claim was presented. Indeed, we heard evidence that there were no further opportunities since that time. Each of the matters the claimant relies upon were either one off acts or decisions with ongoing consequences, as in the case of the PIP that prevented training whilst the claimant was on it and specific appointment or decisions in respect of the offering of training to Mr Starbrook and the full shift position.

166. There were two particular matters which troubled the tribunal when considering the victimisation complaint and that is specifically the e-mail to HR written by Mr Child on 21st February 2018 referring to a scar being left by the previous proceedings. This was raised by Mr Child again his

interview with Mr Blackburn who was investigating the grievance when he referred to the scar tissue but he was not able to talk about. We considered this pertinent to the victimisation claim.

167. However, the contents of the e-mail of 21st February 2018 cannot be taken out of context and parts taken in isolation. It was clear when reading the full content of the e-mail that his colleagues felt that around the claimant following the tribunal proceedings, they were in essence walking on egg shells but that Mr Child felt that they needed to manage the situation and just get on and do the job irrespective of the consequences. There is also evidence within the body of the e-mail that the claimant was being encouraged by Mr Child to apply for a position even in the face of adversity from colleagues.

168. If the claimant is right that he had been victimised by not being allowed to have training opportunities or progress as a result of the first tribunal claim then it is treatment of such a kind that a reasonable worker would take the view that it was to his detriment in accordance with *Shamoon v Chief Constable of the RUC* and the claimant felt that way.

169. The tribunal reminds itself that victimisation need not be consciously motivated. If the respondent's reason for subjecting the claimant to a detriment was unconscious it could still constitute victimisation as per *Nagarajan.* The protected act need not be the main or only reason for the treatment. It does however need to be the real reason. The reason why. We must ask ourselves why the claimant was subject to a performance process, not been offered a full shift position or not offered the opportunity to train on 132kv and what consciously or unconsciously was the reason for that.

170. It is clear from the evidence that Mr Child knew of the previous tribunal proceedings. Was this the reason why the claimant was subject to those detriments? There must be a link.

171. The claimant's counsel helpfully reminded us in his submissions of the tests in *Igen v Wong* and *Nagarajan* that the protected act must have a significant influence which is more than trivial, be the cause, the activating cause, a substantial and effective cause, a substantial reason or an important factor. We have this in mind when considering the reason why the claimant was subject to the matters he complains of:

Placed on the performance plan in April 2020

172. For all the reasons set out above in paragraphs 114-123, we do not accept that the protected act was the reason why. Instead for the reasons set out when considering the direct discrimination case, we consider the reason why (and to be clear the sole reason why) the claimant was placed on the performance plan was his error rate and that he did make mistakes and that this was a genuine reaction to those mistakes. Even if the claimant had not brought a claim previously he did commit those errors and that is why he was placed on the performance plan.

Not being placed on full shift on May 2020

173. For all the reasons set out above in paragraphs 127-130, we do not accept that the protected act was the reason why. Instead, for the reasons set out when considering the direct discrimination case, we conclude that the reason why the claimant was not offered a full shift position was because he had not indicated a willingness to work it and he declined it. This was the reason why the claimant was not offered a full shift position and this was not because the claimant had done a protected act. James Wright was selected via the interview process and in the circumstances where the claimant had declined to work full shift this was the reason.

132kv training opportunity in June 2020

174. For all the reasons set out above in paragraphs 134-138, we do not accept that the protected act was the reason why. Instead for the reasons set out

when considering the direct discrimination case, we conclude that the reason why the claimant was not offered an opportunity to train at 132kv network in June 2020 was because he was less qualified, it was on a different network he did not want to work on and even overcoming these issues, his error rate would have precluded him for being trained to a higher level. This was the reason why the claimant was not offered the opportunity to train at 132kv and this was not because of the claimant having done a protected act.

175. For completeness, whilst the 2019 incident was not part of his pleaded case for all the reasons set out above in paragraphs 139-140, we do not accept that the protected act was the reason why. Instead for the reasons set out when considering the direct discrimination case, we conclude that his error rate at that time also precluded him from being trained at a higher level.

176. As such, we find that the claimant's claim for victimisation is also not well founded and is dismissed.

Summary

177. We have found that the claimant's claim for direct discrimination was not well founded and is dismissed. We have found that the claimant's claim of indirect discrimination is not well founded and is dismissed. We have found that the claimant's claim for victimisation is also not well founded and is dismissed.

178. The Tribunal will write to the parties separately concerning vacating the listing for a remedy hearing.

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Employment Judge King

Date: ……22.12.22……..

Sent to the parties on: 23 December 22

For the Tribunal Office