



EMPLOYMENT TRIBUNALS

Claimant: Mr B Stirling

Respondent: Associated Society of Locomotive Engineers & Firemen (ASLEF)

Heard at: London Central (Remotely by CVP)
On: 6, 7 and 8 December 2023

Before:
Employment Judge Heath
Mr C Wilby
Mr P Adkins

Representation

Claimant: In person
Respondent: Mr O Segal KC

JUDGMENT having been sent to the parties on **8 December 2023** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant's application to join the respondent trade union was rejected following a meeting at his local branch on 12 August 2021. He says this was:
 - a. An act of direct discrimination, done because of his race, which he identifies as Gypsy: and
 - b. Exclusion from a trade union contrary to section 174 of the Trade Union and Labour Relations Act 1992 ("TULRA").

The Issues

2. The issues in this case were clarified and agreed at a preliminary case management on 7 August 2023 before Employment Judge L Clarke. The parties agreed at the hearing that these were the issues the tribunal was to determine. The respondent drew up a List of Issues from the case management summary of the 7 August 2023 hearing, and this is annexed below.

Procedure

3. This matter was heard over three days. The parties provided us with an agreed bundle of 341 pages, and the claimant provided an additional bundle of 7 pages.
4. The claimant gave evidence on his own behalf. The following gave evidence on behalf of the respondent:
 - a. Mr Grant McLauchlin, train driver and Local Depot Representative of the respondent (first and second statements);
 - b. Mr Trevor Mitchell, train driver and Branch Secretary of the respondent's Tonbridge Branch;
 - c. Mr Mick Whelan, General Secretary.
5. We were supplied with an agreed reading list, and we spent an hour and a half reading into the case at the start of the first day. The respondent provided an opening note.
6. The first day had been converted into a CVP hearing because of transport difficulties. Initially, the remaining two days were scheduled to be in-person. The claimant expressed a preference for the remainder of the hearing being conducted by CVP because attendance in person would involve lengthy travel and disruption to his childcare arrangements. The respondent indicated a (fairly mild) preference for the matter being conducted in person. We decided to convert the remainder of the hearing into a CVP hearing because of the claimant's transport difficulties and childcare arrangements.
7. The evidence was concluded in the late morning of the second day, and the parties gave their closing submissions in the afternoon. We gave an oral decision on the afternoon of the third day. Neither party asked for written reasons at the hearing, but the respondent made a request for written reasons by email on 8 December 2023.

The facts

8. The claimant defines his race as being ethnically Gypsy. He is employed by Southeastern as a train driver. The respondent is an independent trade union for train drivers.

9. The claimant began employment with Southeastern on 4 January 2017, employed initially as a conductor. A colleague of his, Mr Kirby, became a close friend during the course of the claimant's employment.
10. There was a WhatsApp group of Southeastern staff, which Mr Kirby was a member of, in which numerous offensive racist memes were shared between 20 June 2018 and 8 May 2019. The evidence around who was responsible for sending the memes has not been entirely clear. In an additional bundle provided by the claimant, there is a WhatsApp message which shows a picture of a van with a large swastika on it. The claimant says that the metadata from this message shows that it was sent from the address where Mr Kirby lives.
11. On the other hand, in the claimant's statement he refers to a sexist message sent by Mr Kirby and refers separately to "*racist/Nazi pictures exchanged by staff in WhatsApp messages*". He also refers later in his witness statement to further racist memes which he says were sent to him by an anonymous individual who was a member of the Southeastern staff members' WhatsApp group. He did not appear to suggest in his witness statement that Mr Kirby was the one responsible for sending them. Also, in evidence the claimant told us that he had been sent one offensive message by Mr Kirby, but had told him that this was "*not his thing*".
12. Nonetheless, we find that Mr Kirby was a member of a WhatsApp group in which such offensive material was shared.
13. On 12 February 2019 Mr Kirby and the claimant had a WhatsApp exchange. In it Mr Kirby revealed that he had a plan to get out of a day's work. The claimant messaged that it was "*something to do with the bike*". Mr Kirby said "*it's gonna get run over by a train*" with a laughing emoji. Mr Kirby said that he was going to throw the bike "*on the up past Hildenborough on my way in*". He went on to suggest that he would lower the bike down onto the track from a bridge with a rope.
14. On 15 February 2019 Mr Kirby messaged that "*Train went through like a hot knife through butter. All I heard was a little clonk*". Further messages suggested that he would need to use something bigger to wedge under the front of the train as "*that bike literally did fuck all*".
15. On the face of it, it appears that Mr Kirby was confessing to a plan to throw a bike onto the rails track in front of the train, and then commenting on how he had executed this plan. The respondent says this was obviously a joke. Without context, and without knowing the relationship and sense of humour of the parties involved it is very difficult for us to form a judgment.
16. However, if the claimant seriously thought that Mr Kirby had thrown a bicycle in front of a train, he did not mention it to his employers at this point in time.

17. On or around 6 December 2019 Mr Kirby was successful in his application to become a trainee driver, and the claimant was unsuccessful. The claimant believes that a senior manager helped Mr Kirby to cheat. In separate tribunal proceedings brought against Southeastern, the fact that others, including Mr Kirby, had been provided with answers to interview questions, succeeded as an allegation of direct race discrimination. It would appear that the claimant's relationship with Mr Kirby soured around this time.
18. In January 2020 the claimant raised a grievance against Southeastern managers, which included allegations of giving Mr Kirby answers to interview questions.
19. On 22 April 2020 the claimant contacted his RMT trade union rep to say that he had information, namely the text messages, to show that Mr Kirby had thrown a bike on the tracks. The claimant says that he raised complaints under the Southeastern whistleblowing procedure on 9 July 2020 about numerous things, including staff racially abusing the Gypsy community, ethnicity being taken into account in job applications, various allegations of unprofessionalism among staff, and the sharing of offensive racist memes in the Southeastern WhatsApp group. His allegations also included that of Mr Kirby throwing the bike on the tracks. It also included an allegation that a train driver, Mr Caddock, had allowed Mr Kirby, then not qualified to drive a train, to drive a train under his control in the summer of 2018.
20. On 21 July 2020 the claimant attended a meeting under the whistleblowing policy with Southeastern's managing director, represented by his RMT representative. He expanded on all of his allegations.
21. We have not been provided all of the documentation relating to this allegation and the subsequent investigation, but some emails have been disclosed which indicated that the bike allegation was investigated by the company. On 24 July 2020, an Engineering Performance Manager, Mr Jackson, emailed a colleague to say that a train had been examined on 27 February 2019 (it was alleged the bike was thrown on the track on 15 February 2019) and no issues had been found on examination. A subsequent examination on 7 March 2019 had found some damage following an extensive under-frame examination. He noted "*nothing of the struck object type reported between exam and this date but had an extensive under frame exam*". Essentially, it was concluded that there was evidence of a train striking a metallic object but no evidence to support an allegation that a train had struck an object such as a bicycle.
22. An independent investigator was commissioned to investigate the claimant's allegations. That investigator interviewed the claimant on 18 September 2020. The claimant was questioned about the bike allegation, and he commented that he had been really, really close friends with Mr Kirby. He explained that Mr Kirby had said he was going to throw a bike on the tracks to get out of doing shift, and that he did not take it seriously. He

said that Mr Kirby had texted him little later to explain he was doing sabotage the following day. He said that Mr Kirby had admitted in a subsequent conversation that he had thrown the bike on the tracks. He said that if he had thought the allegation had been true, he would have reported it.

23. Again, we have not been provided with the outcome letter, but it would appear that the claimant's allegations, certainly those involving Mr Kirby and Mr Caddock, were not upheld.
24. The claimant was dissatisfied with the outcome, and it would appear that another investigation was carried out by a Ms Walker, a Southeastern HR professional. Once again, we have not been provided with all of the paperwork relating to this investigation.
25. As part of this investigation, Mr Kirby attended a fact-finding investigation meeting with Ms Walker. He was accompanied by Mr McLauchlan. Mr McLauchlan is a train driver who has been a member of ASLEF for around 24 years. He was one of two ASLEF local depot representative, an elected position, for the Tonbridge depot. He had been a representative for about 10 years. The fact-finding meeting did not attract the statutory right of accompaniment, and Mr McLauchlan was not formally representing Mr Kirby at this meeting.
26. The minutes of this meeting make clear that the investigation was being conducted following a whistleblowing complaint made to Southeastern by the claimant. Relevantly, Ms Walker referred to investigations of engineering records, which indicated that an object had been hit by a train but that this did not fit into the timeframe discussed. Additionally, the allegation that Mr Kirby had been allowed by Mr Caddock to drive a train while unqualified was discussed. Mr Kirby was also questioned about offensive communications. Mr Kirby indicated that he had seen some offensive images, which sometimes got sent around, and which he said he deleted. Mr Kirby denied sending racist WhatsApp messages and reported that the claimant had told him he had hacked his and another colleague's phone. Mr McLauchlan also indicated that he had seen offensive communication which had been in the public domain. Ms Walker confirmed that no action would be taken about the bike allegation unless any further evidence comes to light. She said she would investigate the train driving incident and other matters.
27. Once again, we do not have the outcome letter, but it appears common ground between the parties that Ms Walker did not uphold the allegations against Mr Kirby. It is right to say that the claimant regards both the independent investigation and Ms Walker's investigation as flawed and inadequate. It is impossible to form any sort of judgment on that without having been provided documentation.
28. On 18 November 2020 the claimant was promoted to driver grade.

29. On 19 November 2020 Mr Caddock attended a fact-finding meeting with Ms Walker. Mr Caddock, who had been a driver and ASLEF member for a number of years, was represented by a Mr Garland. Mr Caddock denied allowing Mr Kirby to take the controls of a train he was driving. There was a discussion about the timeframe of the allegation, and Mr Caddock set out in detail what he had been doing during that period, which consisted of 13 months of route learning and significant amounts of annual leave. He indicated that he was shocked by the allegation, and was surprised that an allegation with such serious safety implications not been raised straightaway.
30. On 17 December 2020 Ms Walker wrote to Mr Caddock to confirm that the matter was now closed as it was evident that Mr Caddock had been route learning during the period in question and was being monitored by various means, including camera. This had been confirmed by a route learning manager and was clear from his attendance records.
31. Mr Caddock took out a grievance on 11th February 2021 in which he alleged that the claimant had made a "*malicious accusation*" against him which had been investigated and which he had been found "*exonerated completely*". He said the "*potentially life changing accusation could have resulted in my dismissal affecting my home life, resulting in me seeking help from a therapist to deal with it, potentially damaging my career with colleagues and management.. The result of this could have been gross misconduct*".
32. On 17 March 2021 the claimant qualified as a train driver.
33. On 18 June 2021 the claimant made an application to join the respondent trade union by filling in online application form. In it he described his ethnic origin as "*Gypsy or Irish Traveller*". On 23 July 2021 the claimant emailed Mr Mitchell, a train driver with Southeastern based at the Tonbridge depot, who was the branch secretary of the Tonbridge depot branch, a position he had held for about 12 or so years. He was, along with Mr McLauchlan, one of the two local depot representatives. There was an exchange of emails in which Mr Mitchell indicated that no application had been received at head office, and so the claimant filled out a paper application form which he put in Mr Mitchell's pigeonhole. Mr Mitchell indicated that the application would be considered at the August branch meeting.
34. At the relevant time, there were around 140 members of the Tonbridge branch. We had evidence from the respondent, which we accept, that because of the rostering of train drivers, the areas in which they live, the timing of branch meetings and other factors, that branch meetings are generally only attended by a "hard core" of members, generally low in number.
35. The respondent trade union has rules which govern its objects, functions and membership conditions, amongst other things. Its object are set out in rule three, and include the following:

Rule 3. Objects of ASLEF

3.1

(i) To ensure ASLEF achieves the maximum possible membership density within the grades ASLEF organises or represents as a trade union.

(ii) To ensure and recognise that the only way our members shall prosper is through the promotion of unity amongst the membership.

(iii) To gain for all our members, the best terms and conditions of employment that befits their status and professionalism and to secure for our retired members security and dignity in their retirement.

(iv) To regulate relations between workers and employers, and to settle and negotiate differences and disputes between members of ASLEF and their employers.

(v) To regulate relations between workers and workers who are members of ASLEF, by the promotion of unity at all times.

...

(viii) To promote, and develop and enact positive policies in regard to equality of opportunity of employment and treatment in our industries and ASLEF regardless of gender, sexual orientation, marital status, religion, creed, colour, race or ethnic origin or age.

Rule 4. Conditions of ASLEF membership and contributions rates

4.1 Ordinary members

(c) No person shall be admitted into membership unless they are prepared to accept and abide by the rules of the union.

4.2. Procedure for Applications of Membership

(a) An application for membership must be presented to the next meeting of the branch covering the location at which the applicant is employed.

(b) A majority vote of members present at a branch meeting shall make a recommendation whether or not the applicant should be admitted as a member of ASLEF and this recommendation must be forwarded to the General Secretary within seven days of the branch meeting.

(c) In the event of the General Secretary not affirming a branch recommendation to reject an application for membership the branch

will be informed of a right to appeal to the Executive Committee against the decision within a period of 6 weeks of the date of the notification sent by the General Secretary.

(d) In the event of the General Secretary deciding that the person concerned shall not be admitted in accordance with Rule 4.1, the branch shall be advised of the reasons for the decision and of a right to appeal to the Executive Committee against the decision within a period of 6 weeks of the date of the notification sent by the General Secretary.

(e) In the event of the branch appealing to the Executive Committee against the decision of the General Secretary and if the Executive Committee decide not to admit the person concerned the decision will be conveyed, in writing, to the branch. The decision of the Executive Committee shall be final.

(f) In the event of the Executive Committee deciding to admit an applicant such decision shall be conveyed in writing to the branch. The decision of the Executive Committee shall be final.

(g) Where an application for membership of ASLEF is rejected the individual concerned shall not be eligible to re-apply for a period of four months from the date of rejection.

36. When a branch meeting is to be held, notification is sent to members advising them that a meeting is due to take place and giving an idea of the agenda. If membership applications are to be considered, the names of the applicants are not set out.
37. The claimant's application for membership was considered at the branch meeting of 12 August 2021. The minutes of that meeting were in the bundle. The meeting was chaired by a Mr Cox, and was attended by eight other members. We accept the evidence that this sort of turnout for a branch meeting was not unusual. We note that neither Mr Kirby nor Mr Caddock were in attendance.
38. The meeting considered the application for another trainee driver applicant, whose application was recommended to be admitted unanimously.
39. In respect of the claimant's application the minutes read as follows (BS is the claimant, GM Mr McLauchlan and TM Mr Mitchell):

Ben Stirling trainee driver Tonbridge - an objection was raised by GM regarding Rule 3.1 unity amongst the membership. GM further explained that ongoing allegations made by BS could have resulted in the dismissal of members concerned. Due to confidentiality GM explained that he was unable to elaborate on any specifics regarding individual cases. MM commented that he believed that

due to the fact that BS was back at Tonbridge the issues between BS and Southeastern had been resolved.

TM responded that the discussion was not regarding BS and Southeastern, but that we are dealing with an application for membership for ASLEF Tonbridge branch. GM then explained that raising the objection had been a very difficult decision and one that had not been taken lightly. GM then proposed that BS be recommended not to be admitted to ASLEF. TM seconded the proposal. A vote took place the result of which was a unanimous decision to accept GM proposal. TM informed meeting that this would now go the General Sec with a branch letter for a final decision.

40. On 13 August 2021 Mr Mitchell sent an undated letter, bearing his stamp, to Mr Whelan, the general secretary of the respondent. The original application form was included with the letter, but became detached from it. No issue was made about this matter. The letter read as follows:

Enclosed is an application for ASLEF membership from Ben Stirling (trainee driver Tonbridge) the branch has recommended that this individual should not be admitted for the following reasons.

B. Stirling has made false and malicious allegations against 2 of our members which could have resulted in dismissal of the members concerned. This has led to these individuals having to take out a grievance and harassment against B. Stirling which is currently ongoing. The branch believe that B. Stirling would not abide by the ASLEF rule of unity.

Tonbridge branch are also of the belief that individual would bring nothing but disruption and conflict to our branch resulting in loss of membership.

This decision was not taken lightly and is the first instance of its kind at Tonbridge in recent history and we respectfully ask that our recommendation is upheld.

41. On 14 August the claimant emailed Mr Mitchell to ask about his application. On 15 August 2021 Mr Mitchell replied "*Hi Ben unfortunately your application for membership to join ASLEF was recommended not to be accepted, and has been submitted to the general secretary who will make the final decision.*"
42. The claimant asked Mr Mitchell what was the reasoning behind the decision, and Mr Mitchell said that he could not say more as it was in the hands of the General Secretary. The claimant responded asking Mr Mitchell to forward two attachments to the General Secretary. It is not entirely clear, but one of these attachments may have been an undated letter to a the General Secretary.

43. This letter set out the claimant's background and application. He set out his understanding that the decision was due to an ongoing tribunal claim he had against Southeastern railways in which complaints had been made against ASLEF members who had subsequently taken out grievances against him. He also indicated that his ethnicity was that of Gypsy. He pointed out that historically ASLEF members have taken out grievances against each other numerous times but the union has never unlawfully allowed one member not be represented. He said that as a member of an under-represented BAME community his ethnicity had been a factor in the decision. He set out his understanding of the legislation relating to exclusion from the trade union and complaints. He concluded his letter with a series of bullet point requests, which included that his application be accepted, a full-time ASLEF member or legal representative be assigned to support him for various grievances, that his local ASLEF representative's decisions regarding leave be checked for fairness by the respondent, that the respondent's representatives at Southeastern adhere to legislation, and that the decision to reject his application be fully investigated. If these were not done, he said that he would make a claim to the employment tribunal for compensation for race discrimination and detrimental treatment for making a public interest disclosure.
44. Through the of general enquiries form on its website the claimant sent a communication that he had made an application to join ASLEF which had been rejected by his local representatives on discriminatory grounds. He said "*Please accept this email as me fulfilling my 14 day pre-action protocol before commencing court action*".
45. Mr Whelan is the General Secretary of the respondent. He has a staff of around 20. Applications for membership fluctuate with recruitment of train drivers, but recommendations to reject an application are not common. We accept Mr Whelan's evidence that his staff sift the branch recommendations, and that he countersigns all recommendations for refusal, of which he estimates that there are around ten a year.
46. We further accept Mr Whelan's evidence, that it would be rare for him to go against the recommendation of the branch. We also accept Mr Whelan's evidence that he was not aware of the claimant's Gypsy heritage when he made the decision that he did to follow the branch's recommendation and reject the claimant's application for membership. Mr Mitchell's letter made no mention of the claimant's race, although the claimant had indicated this in his application.
47. Mr Whelan gave evidence, which was not challenged, that the union receives numerous complaints from time to time, some of which are threats of legal action. We accept his evidence that the respondent often ignores these, and waits to see if anything comes of them. Mr Whelan indicated that the respondent does not take to being blackmailed, as it sees it. No reply was sent to the claimant in respect of his emails. We find Mr Whelan, or more probably members of his staff, ignored the emails to see what might come of them. The claimant's ethnicity had no role in this.

48. On 26 October 2021 the claimant's claims of direct race discrimination and race -related harassment on numerous grounds against Southeastern succeeded. Neither the parties nor I have been able to locate any written reasons.
49. On 17 January 2022, Mr Caddock was informed by Southeastern HR that his grievance could not proceed against the claimant, as the claimant's claims had been brought under the whistleblowing policy, and he was thereby protected from detriment.
50. The claimant did not reapply for membership after the four month period allowed under the union rules.

The law

Direct race discrimination

51. In respect of direct discrimination, Section 13(1) of the Equality Act provides as follows:

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.

52. The burden of proof provisions are set out in section 136 Equality Act 2010:-

(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.

53. Tribunals are cautioned against taking too mechanistic an approach to the burden of proof provisions, and that the tribunal's focus should be on whether it can properly and fairly infer discrimination (*Laing v Manchester City Council* [2006] ICR 1519). In *Shamoon v chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 the House of Lords explained that "there is essentially a single question: "did the claimant, on the proscribed ground, receive less favourable treatment than others?"

54. The Court of Appeal in *Nagarajan v London Regional Transport* [2000] AC 501 made clear that the claimant does not have to show that their protected characteristic was the sole reason for the less favourable treatment, and that "if racial grounds or protected acts had a significant influence on the outcome, discrimination is made out". This case also made clear that a discriminator may act consciously or subconsciously.

55. The Court of Appeal has emphasised that "The bare facts of a difference in treatment, without more, sufficient material from which the tribunal "could conclude" that, on the balance of probabilities, the

respondent had committed an unlawful act of discrimination” (Madarassy v Nomura International plc [2007] IRLR 246). “Something more” is needed for the burden to shift.

Section 174 TULRA

56. S. 174 provides:

(1) An individual shall not be excluded or expelled from a trade union unless the exclusion or expulsion is permitted by this section.

(2) The exclusion or expulsion of an individual from a trade union is permitted by this section if (and only if)—

...

(d) the exclusion or expulsion is entirely attributable to conduct of his ...

57. “Conduct” includes statements and omissions (TULRA s 177(1)).

58. The editors of Harvey have the following to say about these provisions at Division M:

[2700]

The main thrust of the enactment is clearly directed to matters of substance: cases where a person's conduct shows him to be an unsuitable candidate for membership. No union should be compelled to admit villains, fraudsters, cheats, those who have no genuine interest in furthering trade unionism or those who join with positively subversive intent. In theory, the enactment could also apply to cases where an applicant is excluded because of some procedural lapse on his part—say, where he has failed to comply with the union's (reasonable) admissions procedures; but in practice, a union is unlikely to want to exclude a person from membership over matters of mere procedure.

[2701]

The difficulty is that the question whether a person's conduct makes him an unsuitable candidate is essentially a matter of judgment. In principle, it is for the union itself to set its own standards of suitability: that question is, strictly speaking, not a justiciable issue... The enactment is clearly open to interpretation, but the tribunal ought not to interpret it in such a way as to impugn a union's decision to reject on grounds of unsuitability, where the decision is a reasonable and honest one. Indeed, a tribunal is positively obliged to respect the union's freedom of association (European Convention on Human Rights art 11), a freedom which incorporates the notion that a union is free to exclude whomsoever it wishes to exclude provided it does not thereby abuse a dominant position.

59. In the context of the legitimacy of trade union disciplinary proceedings, the Court of Appeal held in *Longley v National Union of Journalists* [1987] IRLR 109 that it is for the union itself to decide, applying its own standards, what is detrimental to it.

Conclusions

60. We will consider the agreed list of issues which are extracted from the Case Management orders sent to the parties on 7 August 2023. Essentially the complaints of race discrimination and exclusion from trade union membership focus on the reason why the claimant's application for membership of the union was not accepted.

Direct race discrimination

Mr McLauchlan's proposal to reject the claimant's application

61. Mr McLauchlan was one of two local depot representatives, along with Mr Mitchell. It was his proposal of the motion to reject the claimant's membership application which was foundational to the decision to reject it.
62. According to the minutes, which we have no reason to consider inaccurate, rule 3.1 unity amongst membership was a key consideration. Expanding on this, Mr Mitchell explained that the claimant's allegations could have resulted in the dismissal of the respondent's members.
63. Mr McLauchlan had accompanied Mr Kirby in the latter's involvement with the investigation into the bike allegation, and other allegations levelled at him. Those allegations were not upheld by Southeastern. It is inevitable that fulfilling this role would have given Mr McLauchlan some information which may have informed his perspective of the claimant's complaints.
64. Additionally, as a local depot representative, we find little difficulty in accepting that he would have discussed matters with Mr Mitchell. The suggestion that the claimant's complaints were an "open secret" within the workplace is also not difficult to accept, perhaps more so as he had been suspended from the workplace (or "banned" in his words). The industrial experience of the tribunal is that most workplaces have open secrets, along with gossip and rumour.
65. We accept Mr McLauchlan's evidence that, while not directly involved in the allegation against Mr Caddock, he had heard information which informed an opinion of that allegation. It is right to say that he accompanied Mr Kirby in formal process, and it was Mr Kirby who the claimant had alleged had driven Mr Caddock's train.
66. What is common to both allegations, is that they are both extremely serious allegations which, in Mr Kirby's case, would inevitably have led to his dismissal for gross misconduct, and probably would have done so in the case of Mr Caddock. Additionally, both were allegations of safety potentially being compromised in a very serious way, and the claimant not

volunteering any information to his employer about it for between 14 months and two years. The information was only volunteered, it would appear, after the claimant had fallen out with Mr Kirby. Common to both allegations, is the fact that neither was upheld.

67. From Mr McLauchlan's perspective, having accompanied Mr Kirby during workplace investigations, it might not be entirely surprising that he formed the impression that the claimant had made false allegations, which ran the risk of getting ASLEF members dismissed, as part of a dispute with Mr Kirby. We need not make a finding that that was in fact the claimant's motivation, but it is a reasonable conclusion that this was an impression that Mr McLauchlan would have formed from his perspective.

68. The claimant invites us to infer that the reason Mr McLauchlan proposed a motion to reject the claimant's application for membership was racially motivated. His case is Mr McLauchlan was "*generally racist and was party to and/or send racially offensive WhatsApp messages*".

69. When setting out his claim at the case management preliminary hearing of 8 September 2022, the claimant said he took issue with:

... part of a group of ASLEF members who he reported to his employer as having been involved in WhatsApp messages that are offensive in respect of race, sex and other protected characteristics. He says that this group, which included the person who proposed his exclusion from the Union at the Branch meeting, were intent on preventing him becoming a train driver and excluding him from the union.

70. As the evidence before us unfolded, it became clear that the undoubtedly grossly offensive racist WhatsApp's had been exchanged in a WhatsApp group of Southeast trains staff between June 2018 and May 2019. It may well be that Mr Kirby sent one or more of them, and he certainly did not distance himself from a group that was sharing these. However, this was not an ASLEF WhatsApp group, and there is no evidence whatsoever that Mr McLauchlan was a member of the group. It was also the case that Mr Kirby was not a member of a ASLEF at the time.

71. The claimant says that he has been told by someone he has not named that there are WhatsApp messages from Mr McLauchlan of a racist nature. These have not been produced. Mr McLauchlan also points to the fact that his ex-wife and mother of his children is Jamaican, and his current wife is Thai. We do not for one moment conclude from his personal relationships that he is immune from harbouring racial bias against the Gypsy or traveller community. However, this evidence does assist us in not accepting the claimant's suggestion that he was "generally racist" and was party to offensive WhatsApp messages.

72. The claimant further prays in aid the suggestion that Mr McLauchlan and Mr Mitchell represented Mr Kirby in unfounded grievances Mr Kirby

made against the claimant. We have not seen those grievances and have not heard evidence about them.

73. The claimant also relies on Mr McLauchlan and Mr Mitchell banning the claimant from undertaking particular shifts Southeasternern trains. We heard no evidence about this, and on the face of it we cannot see how there is a racial component there which assists in inferring discrimination.
74. More generally, the claimant says that the Tonbridge branch of the respondent is inherently racist as demonstrated by its behaviours in respect of the racist and offensive messages on WhatsApp. However, as stated before, these are WhatsApp exchanges by Southeasternern staff and this was not an ASLEF group. In the case of Mr Kirby it was prior to his joining the respondent trade union.
75. There is significant material to support Mr McLauchlan's evidence that the reason why he proposed a motion to reject the claimant's membership occasion was that he considered that he had made unfounded, potentially career-ending allegations against two of the respondent's members. It is easy to see how this would have informed a belief that the claimant's membership might be potentially damaging to the fundamental principle of unity.
76. We find that the reason why he proposed the motion to reject the claimant's membership was not because of his race.
77. Approaching the matter by way of the burden of proof provisions, we conclude that there are no facts from which we could conclude in the absence of an explanation that the respondent discriminated as alleged. In any event, we accept it's explanation for its actions

Mitchell seconding the motion

78. Much of the reasoning to the first allegation of direct race discrimination applies to the second. As the other local depot representative, it is inevitable, as Mr Mitchell says in his statement, that there would be discussion with Mr McLauchlan about various work related and trade union related issues within the branch.
79. Mr Mitchell accompanied Mr Kirby at one meeting within the investigation. Mr Kirby had been the person the claimant alleged had been allowed to drive by Mr Caddock. It is therefore unsurprising that Mr Mitchell was aware of both the driving and bicycle issues. Furthermore, we accept as evidence that he was kept abreast of matters in regular conversations with Mr McLauchlan. We accept that Mr Mitchell had sufficient grounding in the actual allegations made, and the investigative process, and that he was not simply relying on the rumour mill.
80. In the circumstances, we also conclude that Mr Mitchell's reasoning for seconding Mr Morton's proposal was broadly in line with Mr McLauchlan's reasoning.

81. In his letter to the general secretary, Mr Mitchell referred to “*false and malicious allegations against two of our members which could have resulted in dismissal of the members concerned*”. This is strongly worded, but we can see why Mr Mitchell’s might say this. From his perspective, the claimant had sat on information for up to two years, and only brought it forward, apparently in the context of a falling out with Mr Kirby, and the allegations were not upheld.
82. Mr Mitchell makes reference to having friends and family in the Gypsy and traveller community. We find this provides little assistance in our conclusions.
83. We conclude that the reason why Mr Mitchell seconded the motion to reject the claimant’s membership application in no sense related to the claimant’s race. The burden of proof does not pass to the respondent to provide a non-discriminatory explanation. We accept the one that they give.

False and misleading information

84. Following from our findings and conclusions in respect of the previous issues, we do not conclude that the meeting was provided with false and/or misleading information. From the perspective of Mr McLauchlan and Mr Mitchell, the claimant had made exceptionally serious allegations against two of the respondent’s members which could have resulted in their dismissal. These allegations were not upheld, and the circumstances of the making of the allegations (the fact that the claimant delayed for so long in making them, and did so apparently in the context of his dispute with Mr Kirby) could have supported the narrative that he would be a threat to the unity amongst the membership.
85. We do not conclude that false or misleading information was provided to the meeting. We therefore do not find that there was anything that can be regarded as less favourable treatment. Nonetheless, we go on to conclude that the reason why Mr McLauchlan and Mr Mitchell gave the information they did had nothing to do with the claimant’s race.

Excluding the claimant

86. The decision to exclude the claimant from membership by rejecting his application was made by the general secretary, Mr Whelan. We accept his evidence that he was following the recommendation of the branch, which was something he would always do. While the claimant had indicated his ethnicity in his application form, there is no information from which to conclude that this information played a part in Mr Whelan’s decision. That certainly was not put to him by the claimant.
87. We conclude that the reason why the application was rejected by Mr Whelan, was that he accepted the recommendation of the branch, and that the claimant’s race had no part to play in this position. There are no

facts from which we could conclude, the absence of an explanation from respondent, that claimant had been discriminated against.

Failure to explore appeal

88. The respondent's rules do not allow an appeal against rejection from membership. If the claimant is talking more broadly, about his complaints to Mr Whelan, we accept Mr Whelan's explanation that the respondent receives many complaints and what it sees as threats of litigation, and that it often ignores these to begin with to see if anything further comes of them. Nothing was put to Mr Whelan about any race-related motive in the way this issue was dealt with. We conclude that Mr Whelan and his staff's dealings with the claimant's correspondence was not tainted by race.

Exclusion from a trade union – section 174 TULRA

89. Our focus here is whether the claimant's exclusion from membership of the union was "entirely attributable to conduct of his".

90. The claimant's case is that his exclusion was as a result of misinformation provided by Mr McLauchlan and/or Mr Mitchell, and that the reason why this was provided was because of his race.

91. We have concluded earlier that Mr McLauchlan and Mr Mitchell did not misinform the meeting. We have also concluded that the reason why they provided the information they did stemmed from their genuine belief informed by their experience of the complaints.

92. Focusing on the reason why the claimant was excluded from the union, it was because Mr Mitchell and Mr McLauchlan genuinely believed that the claimant, in bringing the complaints he did, in the manner that he did, would threaten the unity of the branch and cause problems.

93. The respondent's assessment of the claimant's conduct is a matter for its judgment. We accept the principle that it is for the union to set its own standards of suitability and that, in the words of the editors of Harvey's, "*that question is, strictly speaking, not a justiciable issue*". There is little scope to impugn a trade union's decision if it is, as Harvey's says, "*a reasonable and honest*" one.

94. We have concluded above that Mr Mitchell and Mr McLauchlan honestly believed that the claimant had made unsubstantiated, career ending allegations against the respondent's members in circumstances where there was a reasonable basis for them to conclude that such were not made in good faith.

95. The claimant makes the point he is a whistleblower. He says his allegations, which formed the basis of the decision not to admit into the union, were protected disclosures raising safety concerns made to his employer.

96. Initially there was a whistleblowing claim against this respondent. It was struck out as such a claim can only be pursued by a worker against their employer. We have considered the claimant's contention that he is a whistleblower, at least as regards to his employment with Southeastern, in the context of whether the trade union's decision is a reasonable and honest one.
97. We have not been provided with much of the paperwork in relation to the investigations and outcomes in relation to the claimant's complaints, but they were not upheld. We have not been told whether any conclusions or observations were made about the claimant's reasonable belief in the public interest of making such complaints or his good faith in making them. We conclude that the fact that the claimant was treated as a whistleblower by Southeastern does not undermine the reasonableness or honesty of the respondents actions. As we have commented on a number of occasions (for example paragraphs 67, 75, 81 and 84), from the perspective of the trade union decision makers the was a reasonably sustainable belief that the claimant had acted in a way that threatened the unity of the union.
98. The claimant also makes the point that bigoted and unacceptable behaviour is tolerated and overlooked in respect of some of the respondent's members which makes his exclusion hypocritical and unreasonable. Again, it is a matter for the union what conduct is tolerated and what is not and we would guard against making comparisons.

Employment Judge **Heath**
4 January 2024

REASONS SENT TO THE PARTIES ON
26 January 2024

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FOR THE TRIBUNAL OFFICE

ANNEXE

**IN THE EMPLOYMENT TRIBUNAL
LONDON SOUTH
CASE NUMBER: 2303492/2021
BETWEEN**

BEN STIRLING

Claimant

and

**ASSOCIATED SOCIETY OF LOCOMOTIVE
ENGINEERS & FIREMEN (ASLEF)**

Respondent

LIST OF ISSUES

Extracted from paragraph 62 of the case management orders dated 7 August 2023 [56] for the tribunal's convenience. The correct spelling of Mr McLauchlan's name has been substituted.

I. Direct race discrimination (Equality Act 2010 section 13)

1.1. Did the respondent do the following things:

- 1.1.1. At the meeting on 12th August 2021 Mr Grant McLauchlan proposed a motion to reject the Claimant's membership application.
- 1.1.2. At the meeting on 12th August 2021 Mr Trevor Mitchell seconded the motion to reject the Claimant's membership application.
- 1.1.3. At the meeting on 12th August 2021 Mr Grant McLauchlan and/or Mr Trevor Mitchell provided false and/or misleading information about the Claimant to those present.
- 1.1.4. Exclude the Claimant from membership by rejecting his application.
- 1.1.5. Fail to consider properly and/or to reply to the Claimant's appeal against the rejection of his membership (referred to as complaint).

1.2. Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

The claimant has not named anyone in particular who he says was treated better than he was.

1.3. If so, was it because of race? The Claimant says that it was and relies upon:

- 1.3.1. Mr McLauchlan was generally racist and was party to and/or sent racially offensive Whatsapp messages.
- 1.3.2. Both Mr Grant McLauchlan and Mr Trevor Mitchell represented Aaron Kirby in relation to unfounded grievances that Mr Kirby made against the Claimant to his employers,

London and South Eastern Railways Ltd, and during the course of that representation independently sought to have the Claimant dismissed.

- 1.3.3. Both Mr Grant McLauchlan and Mr Trevor Mitchell banned the claimant from undertaking particular shifts for the Claimant's employer, London and South Eastern Railways Ltd.
- 1.3.4. The Tonbridge Branch of the Respondent is inherently and endemically racist as demonstrated by the behaviour of its members (including the exchange of racist and offensive messages on Whatsapp by members of the branch who are employed by London and South Eastern Railways Ltd).

2. Remedy for discrimination

- 2.1. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?
- 2.2. What financial losses has the discrimination caused the claimant?
- 2.3. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?
- 2.4. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?
- 2.5. Should interest be awarded? How much?

3. Exclusion from Trade Union membership – s.174 TULRA 1992

- 3.1. Was the Claimant excluded from membership in contravention of s.174 TULRA or was it permitted because the exclusion was entirely attributable to conduct of his (that was not protected or excluded conduct) (s.174(2)(d))?
- 3.2. The Claimant relies on the matters at 1.1 and 1.3 above and says that he was excluded from membership as a result of misinformation provided to the voting membership by Mr Grant McLauchlan and/or Mr Trevor Mitchell. Further that the reason why false and/or misleading information was provided was because of his race.

4. Remedy

- 4.1. How much should the claimant be awarded?