EMPLOYMENT TRIBUNALS

Claimant: **MR J TOBA**

Respondent: **NETWORK RAIL INFRASTRUCTURE LIMITED**

Heard at: **London South**

On: **27 – 30 November 2023**

Before: **EJ Harley**
Mrs Beeston
Mrs Beckett

Representation

Claimant: **Mr R Cole, representative**
Respondent: **Mr J Crozier (Counsel)**

RESERVED JUDGMENT

1. **The claim of unfair dismissal is not well founded and is dismissed.**
2. **The claim of direct race discrimination is not well founded and is dismissed.**
3. **A claim for unlawful deductions from wages/breach of contract was settled by the parties prior to the hearing and is dismissed on withdrawal.**

REASONS

1. The Claimant, Mr Toba, presents claims for Unfair Dismissal and Direct Race Discrimination against his former employer Network Rail Infrastructure Limited. These were received by the Employment Tribunal on 12 October 2021.

2. The Claimant was employed by the Respondent from 9/12/02 until his dismissal on 20/7/21. The Respondent manages and operates railway infrastructure across Great Britain and until the date of his dismissal employed the Claimant as a Duty Signaller at the Victoria Area Signaling Centre (VASC). In his role the Claimant was responsible for safely overseeing and operating the signals and points for

trains travelling into and out of London Victoria station on specific routes, observing sections of tracks and the trains running on them via a visual display, and communicating directions and changes to train drivers. Part of this safety-critical role involved training other staff to become qualified signallers. On the date of the disputed incident, he was, according to the Respondent, found to be asleep while signed into the most complex signalling panel, leaving an unqualified trainee running the panel. The Claimant disputes this account, saying that although his eyes were closed, he was awake and meditating. He asserts that he regularly meditated while operating the panel, closing his eyes for periods of time while doing so. As a result of an investigation the Claimant was charged with gross misconduct and, after a disciplinary process was followed, he was subsequently summarily dismissed. He appealed but the decision was upheld.

3. The Claimant is of black African descent and considers that being charged with Gross Misconduct in these circumstances constitutes Direct Race Discrimination. His case as outlined in his original claim form (ET1) is that he was unfairly dismissed, and treated less favourably than others were, or would have been treated, in these circumstances because of his race. He disputes the basis for the Respondent's belief that he was asleep, or that his behaviour constituted gross misconduct, the fairness of the dismissal process they followed, and their decision to dismiss him. The Claimant draws particular attention to differences in treatment between himself and other white company employees in various locations and at different times.

4. The Respondents accept that they dismissed the Claimant, but they consider that they had grounds to believe that the Claimant had committed gross misconduct: he was employed to perform a safety critical role in a safety critical environment, he was contractually required to maintain a level of conduct and behaviour whilst on duty which he failed to observe on 27 May 2021. The decision to dismiss him was made after a reasonable investigation, and after fair disciplinary processes were followed and their decision to dismiss him falls within the range of reasonable responses available to an employer. They deny any discriminatory element to the approach they took in dealing with or investigating the incident, or regarding any aspect of the disciplinary process, their decision making or the subsequent appeal.

Issues

5. The issues were agreed at a case management hearing on 13 December 2022 attended by both parties. The listing was confirmed and a hearing timetable agreed with the Claimant's case to be presented first. The Issues were limited to Unfair Dismissal and Direct Race Discrimination as follows: *(the Tribunal has anonymized the names of particular individuals for the purposes of this judgment).*

Unfair dismissal

1.1 What was the reason or the principal reason for the Claimant's dismissal? In particular, was the reason or principal reason for the Claimant's

*dismissal conduct within the meaning of section 98(2)(b) of the Employment Rights Act 1996 (**ERA**)?*

1.2 Was the Claimant's dismissal fair within the meaning of section 98(4) of the ERA? In particular, did the Respondent act reasonably in treating that reason as sufficient for dismissing the Claimant?

Direct Race Discrimination

2.1 The Claimant's protected characteristic is his race. Namely that he is a black African.

2.2 The Claimant alleges that the following acts or omissions took place and amounted to less favourable treatment, and that such treatment was on the grounds of the following protected characteristic(s):

(a) That he was charged with gross misconduct and subsequently dismissed on 20 July 2021.

2.3 Did the Respondent discriminate against the Claimant on the grounds of their protected characteristic contrary to section 13 of the Equality Act 2010? In particular:

2.3.1 With reference to the alleged acts or omissions listed to at 2.2(a), did the Respondent carry out such acts or omissions and, if so, did the Respondent in so doing treat the Claimant less favourably than others?

2.4 If the answer to 2.3.1 is yes:

2.4.1 Was the reason for the less favourable treatment due to the protected characteristic as alleged by the Claimant in terms of section 4 of the Equality Act 2010?

2.5 The Claimant alleges the following real or hypothetical comparator whose circumstances are not materially different to the Claimant's own:

(a) X and Y (Signallers at Three Bridges Rail Operating Centre) who the Claimant says were caught with sleeping bags, blankets and left their workstations to sleep or with the intention to sleep but were never charged with gross misconduct or dismissed. The Claimant says this took place around 2018;

(b) Z (Signaller at Victoria Area Signalling Centre) who the Claimant says left a Trainee Signaller unattended and unsupervised but were never charged with gross misconduct or dismissed. The Claimant says this took place around 2018 or 2019.

2.6 Are the comparators at 2.5(a) – (b) the appropriate comparators? If not, who is the appropriate real or hypothetical comparator?

This list of issues was confirmed as remaining complete and valid at the outset of the hearing by both parties.

Procedure

6. The case was listed as a four day in-person hearing before an Employment Judge and two panel members. All participants appeared in person. The panel offered to accommodate any necessary adjustments but none were required. The panel was supplied on Day 1 with paper bundles prepared by the Respondents which comprised 1679 pages, together with separate paper copy witness statements, an agreed List of Key Documents, a Cast List, and a Chronology. The Claimant's statement ran to 113 pages and while it addressed factual issues in parts it was largely legal argument and submissions which made following it difficult. At the panel's request the Respondents supplied an electronic version of the bundle, and our Clerk helpfully provided us with scanned versions of the statements. The EJ clarified the capacity in which Mr Cole was appearing, and he confirmed that he was the claimant's colleague, he was not a qualified lawyer but that he had studied law in another jurisdiction and had experience of dealing with the issues before us.

7. The Respondent addressed, as a preliminary matter, the question of whether a witness statement from Mr Large (an investigating officer and witness for the respondent) could stand as evidence despite his being unable to attend the hearing. An application had previously been made requesting that the statement be admitted as evidence as if the witness had attended Court and was referred to this Tribunal for consideration. Having established that the application was now simply to admit and consider uncontentious elements of the statement, and that the Claimant no longer objected, the Tribunal admitted the witness statement as evidence. This was on the basis that it contained evidence which both parties might wish to refer to, but the fact that Mr Large was not available for cross-examination meant that the Tribunal would view any contentious elements with caution. The timetable was confirmed and the panel spent the morning session reading the papers. In the afternoon the Claimant's case was opened, his statement was adopted, he was cross examined by Counsel, and was asked questions by the EJ.

8. At the outset of Day 2 the Claimant and his representative were reminded that they would have an opportunity for re-examination at the end of the cross-examination in order to address any issues they wished to explain further. This was because the Claimant had to be repeatedly directed on Day 1 to restrict himself to answering the questions Counsel put to him. The Tribunal also made it explicit to the parties that the panel would only consider and read documents from the bundles to which they had been explicitly referred or to which the panel themselves had referred during their review of the materials. The Claimant's representative asked the panel to read the Claimant's statement and the documents to which it referred, which they agreed to do. The cross examination continued.

9. A regrettable incident occurred at the point at which the Claimant was being challenged in cross-examination on the basis for his race discrimination claim. The EJ intervened when he observed the Claimant's representative gesturing in an attempt to prompt the Claimant to say more, and the EJ warned him that the Claimant was to offer the Tribunal his own evidence and was to do so without interference, prompting or encouragement. There was no recurrence. The Claimant was asked questions for clarification by the EJ and panel members. At

the end of the cross-examination the Claimant's representative was reminded of the opportunity to re-examine the Claimant on points arising. This was declined but the representative proceeded to raise issues once again with how the Claimant had been restrained from answering questions in the way he wished by Counsel's interventions. The Tribunal reiterated to the representative that this was his opportunity to clarify any such issues arising which he or the Claimant wished to expand on. The offer was not taken up with the Claimant stating that everything was covered in his Witness Statement.

10. Later on Day 2 we heard evidence from the Respondent's witness Elison Banan (who at the relevant time was Local Operations Manager (Kent) at VASC) as she was cross examined by Mr Cole. The EJ reminded the representative that it was important that he focused on the elements of the case he needed to prove and put any allegations he wished to later rely on to the witness.

11. At the end of Day 2 the EJ confirmed the timetable and that we would expect the cross examination to conclude by lunchtime Day 3. Mr Cole considered that his time was being restricted as the hearing had, in his view, been delayed by the late supply of papers on Day 1. The EJ confirmed that the first morning had, been allocated for reading time under the agreed Case Management Order, and the Panel would not accept criticism for observing the timetable. So as to assist the Claimant, the EJ took the opportunity to remind the Claimant's representative of the elements of Unfair Dismissal, and Race Discrimination which he understood the Claimant was seeking to prove and to ensure that these were addressed and in particular that any allegations he sought to make to connect the Claimant's treatment to race needed to be put to the relevant witnesses. We confirmed the timetable for Day 3, that we would accept submissions in the afternoon and Day 4 was allocated to panel discussions and decision.

12. Ms Banan's evidence ran into Day 3, when we also heard evidence from Haydn Payne (Operations Manager (Electrical Control Room Thames Valley, Disciplinary Manger) and Toby Willson (Operations Risk Adviser, Sussex Route, Appeal Manager). Each witness was again cross examined by Mr Cole. All witnesses were asked questions posed by the EJ and the panel members.

13. The Panel then accepted written submissions from the Claimant, who also helpfully supplied copies of precedents, and orally in response from Counsel for the Respondent who also helpfully supplied a written note on relevant legal principles.

14. The Panel met to discuss the case on Day 4. Despite hoping to deliver a decision and reasons, and confirming an afternoon listing, this did not in the event prove possible and the decision and reasons were reserved. The EJ apologises for the inconvenience this will have caused the parties.

Facts

11. All findings of fact are made on the balance of probabilities, our having considered the materials presented to us and the oral evidence we heard. Where we have reached a finding of fact where there was conflicting evidence, it is because we preferred that party's evidence. We heard evidence concerning a

range of matters not all of which were relevant to the issues before us. Where we have not referred to a matter put before us, it does not mean that we have not considered it, merely that it was not relevant to our conclusions. The findings were discussed and carefully considered by the panel and reflect our unanimous view. All documents referred to here were within the bundle agreed by the parties.

Background

12. At the point of his dismissal the Claimant was employed as a Duty Signaller. The job description of Signaller is defined as follows:

> *Taking the lead on signalling during your shift, you'll take great care to make sure trains travel safely and efficiently along the network. …*
>
> *As a guardian of safety and good communications on the railway, you'll ensure the safe passage of trains. Maintaining the highest standards in every action you take, you'll make sure each decision is thought through, following clear, calm and methodical analysis. Even under pressure, your standards will never slip. As the focal point of railway operations in your assigned area, you'll be expected to take the lead in your duties during your shift. That means you'll take command of situations, with an assertive approach and clear communication.*
>
> ***Essential Criteria***
> - *The ability to concentrate for long periods*
> - *A calm, methodical and precise approach to your work*
> - *Excellent communication skills*
> - *Good hearing and eyesight, with satisfactory colour perception*
> - *Able to assess situations and consider the impact of your decisions*
> - *A highly conscientious worker*
> - *Willing and able to work shifts, including evenings and weekends*
>
> *This role involves days, nights and weekend working and the job is safety critical.*

13. The Claimant's original employment contract of 12/11/02 (at that stage with Railtrack PLC) included the following provisions on its first page:

> *Railtrack PLC requires the highest standards from you in your performance at work and your general conduct and in particular you must;*
>
> *Be diligent, honest and ethical in the performance of your duties and during working hours devote your time, attention and abilities to them. …*
>
> *Adhere to any policies and/or procedures in force…*

Subsequent relevant provisions include the following:

> *19.2 HEALTH AND SAFETY*
>
> *…you are required to take such steps as are reasonably practicable for your own health and safety and that of your working colleagues and those affected by your work. In this respect any safety responsibility statement applying to your job is an integral condition of employment.*
>
> *19.7 DISCIPLINARY PROCEDURE*
>
> *You are expected to comply with Railtrack PLC's Rules, Policies and Procedures. Failure to do so may result in disciplinary action...*

> *Railtrack PLC is entitled to terminate your employment without notice should you be found guilty of gross misconduct following a disciplinary hearing, if at any time, for example: -*
>
> > *• You are guilty of any dishonesty, serious misconduct, gross negligence or repeatedly breach this contract….*
> >
> > *• You are found to have acted in breach of the code of conduct.*
> >
> > *• You are in breach of Railtrack PLC Policies; particularly including… health and safety*

Signallers are also required to comply with Network Rail's National Operating Instructions and in particular Network Rail Rule Book Module G1 which provides at Part 9:

> *9.1 Safety shall always be your first concern*
>
> *9.1.1 You shall do everything possible to ensure the safety of yourself, others and infrastructure. You shall stop or warn others from placing themselves in danger.*

In his role at the VASC the Claimant was responsible for overseeing and operating the signals and points for trains travelling in and out of London Victoria on specific routes. This is done by watching and operating a 'panel' – a large visual display which provides a real-time picture of specific areas of rail track and train movements. The Signaller communicates with train drivers advising them of platform alterations and advising them as to whether they can proceed, or not. The Signallers are required to communicate with train drivers in real-time giving instructions to ensure the safety of the trains, their drivers and their passengers. It is a safety critical role. There are a number of different panels in VASC, each covering their own section of track, and all contained in a designated signalling room. Each panel is different, and they are graded in terms of complexity. Signallers have to be trained in the operation of each specific individual panel, learning its operation and the geography of the lines it covers. While there are panels across the network, they are all unique, and need specific training to operate.

14. Duty Signallers play a significant role in training staff to become Signallers, and in operating specific panels. This was part of the Claimant's role, he estimated that he had trained 50-60 signallers and had stated that he considered himself one of their best teachers. In evidence he confirmed the model of training he followed, to become a competent Signaller, was to attend technical training at Signalling School for a 12-week period, followed by practical supervision on panels to learn those panels and the routes to which they related. This was the same model he practised in training and teaching trainee signallers.

15. At the time of this incident the Claimant had an unblemished work record having not been involved in accidents, incidents or disciplinary procedures.

<u>The Incident</u>

16. On 27 May 2021 the Claimant was scheduled to work a shift from 0700 to 1900 as a Duty Signaller, supervising a trainee, Naomi Boyd, on Panel 1 (the most complicated and difficult of the panels in VASC). Ms Boyd as a trainee was by definition not qualified to operate the Panel 1 board alone, but she was

permitted to operate it under the direct supervision of a qualified Duty Signaller, while they were both signed into the panel. Ms Boyd had been passed to operate other less complex panels. The Claimant signed on for Duty at 06:33, signing in again at 06:59, at the same time as his trainee. During the shift both the Claimant and the trainee were positioned close to Panel 1. At the time of the incident the Claimant was sitting close to the trainee to her right, and both were sitting on office style chairs on wheels, facing the operating desk for Panel 1.

17. Early in the shift (09:35) the trainee made a signalling error which had to be recorded in the incident logbook. The parties agree that the error occurred as the result of the trainee deviating from a course of action previously agreed with the Claimant and arose from her making a judgment call which proved to be wrong. The Claimant noticed the error, and he ensured that the incident was properly captured in the log-book. There was no suggestion that the Claimant was culpable for the error, and it was accepted in evidence for the Respondent that this was an error an experienced signaller could also have made.

18. At approximately 1440 the witness Elison Banan, who was working elsewhere in VASC went into the Signalling room and sat between two Senior Signalling Managers (SSMs), Mark Camp (SSM Central) and Tony Hoy (SSM Eastern) on the raised area (the 'dais') where they sit, to have an informal conversation with them. The area sits above and at a distance from the Panel 1 board where the Claimant and the trainee were stationed. All three were sitting on office style chairs with high backs, on wheels. Both SSMs had sight of the lower area but only one of the two SSMs had an unencumbered view of the Panel 1 area. The ET Panel were referred to photographs to help us understand the layout and geography of the room.

19. During her conversation with the SSMs Ms Banan noticed that the Claimant's chair at Panel 1 had not moved at all for approximately 10 minutes, which she considered unusual. The chair-back faced the dais, and she didn't initially know who was occupying the chair. It seems most likely from the evidence that during their exchange one of the SSMs identified the occupant of the chair as the Claimant, after which Ms Banan asked: "Is he asleep?". This remark was noted by both SSMs in their written reports, made later that day in their own handwriting. Ms Banan then walked from the dais down to the area where the Claimant was sitting on a chair with his back to the dais. Ms Banan stated that she walked in front of and to the side of the Claimant's chair, close to him, so she was able to observe him from his right-hand side at a slight angle. The parties disagree on what she found and given the central importance of this I will work through the evidence and explain our conclusions at the end.

20. Ms Banan says she found the Claimant in the chair with his eyes closed, body slumped, with head and chin downwards, giving the appearance of being asleep. She stated that after pausing for a few moments to consider what to do in this situation, having not previously encountered a sleeping signaller, she said his name out loud, and when he didn't register any response, she gave him a gentle tap and then shook his upper arm. The SSM who had a view of the area

confirms seeing Ms Banan touching the Claimant. The Claimant accepts that Ms Banan tapped him and confirms that his eyes were closed.

21. The Claimant insists that at this point he was awake, and alert, despite his eyes being closed. Under cross-examination the Claimant could not dispute Ms Banan's account of her standing close to him before she tapped him, nor could he dispute or say how long she had been standing there. He acknowledged that he had not sensed or responded to her presence, and while he accepted that she tapped him, he did not accept that she shook his shoulder. He did not suggest he responded to her calling his name. This contradicted the earlier account he gave in the uncontested interview note during the investigation where, having been asked how Ms Banan had got his attention, he said that she had called his name and he had turned around. He made no mention of a tap in that interview.

22. Ms Banan stated that after rousing him he woke up and appeared dazed, in the manner of someone waking up from sleep. The Claimant denies this, saying this was 'her impression'. He rejects Ms Banan's account of his being asleep, and the suggestion that she could have legitimately thought that he was asleep as "*I gave no impression of being asleep"*. This was significant as later on the day of the incident, in an account in his handwriting and timed at 15.22, he stated:

> *"As I sat on the panel next to my learner (word crossed through) I closed my eye to meditate and pray in me* ***though it seems am sleeping*** *but I am not."*

And later:

> *"I apologise for posing that I was asleep".*

When challenged about this the Claimant said that '*posing*' was a word Ms Banan had used during their earlier exchange which he then repeated in writing, and that he felt the need to apologise to her because "*she was going on and on*" about his being asleep. His acknowledgement at the time in his own words that he had potentially given the impression of being asleep, and that Ms Banan in fact challenged him at that moment for being asleep, undermines the suggestion that Ms Banan had no basis to believe he was asleep. This itself was inconsistent with what he said at interview – again reiterating that Ms Banan had accused him at that point of being asleep, and saying that he was sorry if he had '*misled*' Ms Banan by giving her the impression that he was asleep, saying:

> *"I have said to myself if I get out of this I will perhaps stand, keep my eyes open, look more awake and not give the impression I'm asleep."*

His account at interview, that he responded to her calling his name, changed by the time of his statement and the hearing, where he acknowledged she had tapped him to get his attention.

23. The parties agreed that they then walked to Ms Banan's office. Ms Banan says that on the way the Claimant apologised, saying "*it would not happen again*" (which she says she took to mean sleeping on duty), and then in the room that he explained that he had dozed off, had repeatedly dozed off during the shift, that he found the shift boring and needed interaction, and that the trainee would kick

him when she needed his attention. He further indicated that he at times supervised the trainee from the dais (so not while able to observe the panel), and he would get up and walk to shake off sleep but didn't do so on that day as he didn't want to leave the trainee alone.

24. The Claimant accepts that he apologised but says this apology was to assuage Ms Banan, that he was apologizing for giving the impression he was asleep, and that he mentioned that he was meditating. He denies the other comments. Ms Banan was adamant that meditation was not mentioned until his written account, after that meeting, which she asked for after seeking input from a colleague.

25. The Claimant was given a ten-minute break, and after Ms Banan took advice from a colleague, Mr Anthony Mason, who confirmed that she needed to carry out a Level 1 investigation, obtain a written statement from Mr Toba and request a drugs and alcohol test (also referred to as a "for cause screening") to establish whether this might have contributed to Mr Toba's behaviour. She asked Mr Camp, Mr Hoy and Ms Boyd to provide written accounts (Staff Report Forms) of what had occurred.

26. Ms Banan then asked the Claimant to produce a note to explain what had happened, which he brought to her five minutes later (the 15:22 note mentioned above). At this point Ms Banan says he verbally informed her that he was a Christian and that he had been meditating when she saw him and that he was fasting that day. This was reflected in the note he produced. Ms Banan says this was the first-time meditation, fasting or religion were mentioned.

27. Ms Banan sent an email to herself and two colleagues at 16:08 capturing the events and outlining that the claimant had initially apologised, he had accepted he'd dozed off, he had been dozing all day, he found the shift boring, and the trainee was capable but was 'dragging it *(her training)* out', and that the trainee would give him a kick to get his attention, implying that this had happened before. She further captures that he subsequently produced a note saying he was meditating and fasting.

28. The Claimant was stood down from duties for the rest of the shift by Ms Banan, and the Claimant submitted to the 'for cause' drugs test, the results of which came back as negative. The Claimant was then informed that he was being formally 'stood down' from duties on 2 June 2021 by Simon Horwood (his Line Manager) pending the disciplinary investigation.

29. The Claimant suggested during cross examination that Ms Banan was lying about her account of the incident, and that she had no legitimate reason to produce a safety report. When pressed to explain why he thought she would lie the Claimant replied, "*I don't know*". He was repeatedly pressed on this but did not offer any reason or motivation for Ms Banan creating a false account of this incident. At no point was it suggested to Ms Banan that there was a racial element motivating or featuring in her approach to the Claimant. I will return to these issues below.

The Investigation

30. Ms Banan subsequently completed a Detailed Incident Report as per her understanding of the Respondent's safety and risk management procedures and as advised by Mr Mason, on 8 June. This is separate from any disciplinary process. The report is compiled using an electronic system called IRIS and the level of report is determined by reference to an Investigation Matrix. The levels run from 0 to 4 in increasing levels of seriousness and this was conducted as a Level 1 Investigation.

31. The report identified a breach of the Respondent's life-saving rules, which could be attributed to the Claimant's deliberate actions in being asleep whilst signed on to a live panel and whilst supervising a Trainee Signaller. The report refers to a Fatigue Index score, which is generated by an online tool and produces a theoretical calculation of the fatigue level an individual is likely to be experiencing by reference to their working hours and working pattern to that point considering breaks, rest periods, cumulative effects and so on. It was completed using data for the Claimant's shifts to the date of the incident and the Claimant scored an index score of 24.1, the maximum permitted by the Respondents being 28.7. The report was reviewed in accordance with the process by a Designated Competent Person (DCP) who confirmed that the investigation had been adequate, and the causes had been properly identified. The DCM here was Tim Leighton, who recommended re-grading the level of risk to a lower level, on the basis that while this was a risk, other safeguards existed which would mitigate a situation where an unqualified but experienced trainee was left operating the panel alone. This process automatically triggers a review by an Independent Review Panel (IRP) who were required to consider and assess the behaviours identified. It is attended by 6 people: the Chair, a HR Business Partner, a Lead Health & Safety representative, a Lead Health & Safety representative from the TSSA (Trade Union), the Head of Rail Safety, Health and Environmental and Safety & Sustainable Development and a Route Accident Assurance Investigator. The IRP considered the matter on 18 June 2021. They noted the following:

> *"The duty mentor Signaller written report state they chose to begin to pray and mediate, close their eyes whilst being signed onto a live panel. This written statement differs from the LOM's recollection of the event and also from the Mentor Signaller's initial statements so there is reason to believe that it is not a truthful account. Even if it was true, this was an inappropriate time to engage in these activities which should be carried out in the quiet time of a personal needs break. …*
>
> *The Panel therefore concluded that the Signallers actions were reckless by leaving a Trainee Signaller unsupervised."*

32. Finally, the IRP confirmed the investigation had, from their perspective, covered the necessary issues and recommended disciplinary action against the Claimant.

Disciplinary Investigation

33. On 21 June 2021 Alistair Large (LOM, Three Bridges Rail Operating Centre) was appointed to undertake a disciplinary investigation. He had no previous knowledge of or relationship with the Claimant. The Claimant subsequently

alleged that there was a personal relationship between Mr Large and Ms Banan – this was denied by both Ms Banan and Mr Large in their witness statements and was not put to Ms Banan by Mr Cole. No evidence was supplied to substantiate this allegation and to the extent that neither Ms Banan nor Mr Large made the ultimate disciplinary decisions here, the allegation is not relevant.

34. As part of the investigation Mr Large reviewed documents supplied including the contemporaneous written accounts from Ms Banan, the SSMs, the trainee and the Claimant. He invited the Claimant for interview in writing, confirmed that he could be accompanied and request or bring documentation for reference. It was made clear that the interview was to consider misconduct and the result could include dismissal without notice. He interviewed the Claimant on 2 July 2021, and the Claimant chose not to be accompanied.

35. During the meeting, according to the unchallenged notes, the Claimant explained that he was not asleep at the panel but that he had been meditating when observed by Ms Banan. He denied being fatigued, confirming that on the day he was fit for work. He indicated that he meditated all the time, with his eyes closed and while they were open, and that had the trainee required any assistance from him, he would have heard her talking and been able to help her. He confirmed that he had been working 10 days in succession at the time of the incident. In response to a question about what he had said to Ms Banan in her office:

> *"I didn't think it would get to this level. When she called me into the office, and she was saying things I wasn't taking it that serious. She said, "YOUR EYES WERE SHUT". I said they weren't shut for like an hour. She asked what if a quick decision had to be made. I said, "THIS LADY IS NOT NEW AND SHE COULD MAKE THE DECISION." Also, on this panel you say it all out loud so I would have heard her talking and been able to help…. The reason I say this is as a person I don't argue. If I knew we were going this way I would have said I wasn't asleep."*

36. Following the investigation interview the Respondent determined that there was a disciplinary case for the Claimant to answer. It was suggested by the claimant that Mr Large should have revisited the witnesses and taken further evidence from them. It was also suggested that he should have investigated his claims that he was meditating. We will consider this below. It appears however that Mr Large considered that there was sufficient evidence to warrant proceeding, which was also the view of the IRP.

Disciplinary Hearing

37. Haydn Payne was appointed to hear the disciplinary hearing. Mr Payne had no previous involvement in the disciplinary process, no previous knowledge of the Claimant, or Ms Banan and limited knowledge of but no working history with Mr Large. On 8 July 2021 the Respondent wrote to the Claimant to invite him to a disciplinary hearing on 20 July 2021 to consider allegations of gross misconduct. The letter informed the Claimant of the allegations against him and stated that one potential outcome of the hearing might be summary dismissal on the grounds of gross misconduct. The Claimant was informed of his right to be accompanied at the hearing by a colleague or trade union representative.

38. The Claimant attended the disciplinary hearing accompanied by Mr Cole. Mr Payne was accompanied by a note taker. Mr Payne initially indicated that Mr Cole could not speak, as he was not a union representative. Mr Cole quickly corrected him, that the Claimant could be represented by a colleague and the hearing proceeded. At the beginning of the hearing the Claimant confirmed he did not wish to call any witnesses. The allegations were put to the Claimant. The Claimant denied being fatigued, asserted he was fit for work and repeated his account of having been meditating at the relevant time. The Claimant was given the opportunity to state his case, call witnesses and ask questions. No mention was made at this point of other officers' treatment, nor was any request made to consider sanctions which had been levied in similar cases which Mr Payne should consider when deciding this case. After the disciplinary officer had heard the Claimant make his case the hearing was adjourned for approximately two hours. Mr Payne called HR at approx. 13:18 where they captured his concerns in bullet point form:

- *Hayden you called in the adjournment today.*
- *The learner was quite competent but not on that panel.*
- *You are struggling with any outcome other than summary dismissal because of the seriousness of what could have happened.*
- *The issue of falling asleep is very serious whilst competent on a signalling panel.*
- *He feels he was unfairly treated because there was no harm or incident you think this is why he feels that way.*
- *He changed his story. He told the LOM on the night he was sorry he fell asleep he is now denying this and said he was praying and meditating.*
- *You discussed with him "meditating" whilst on duty as the lead signaller in charge and he was unable to give a satisfactory answer.*
- *You would expect him to remove himself to go pray or meditate rather than do it whilst still on duty and in charge.*

39. Having considered this information and HR's advice, the disciplinary officer reached a decision that the Claimant was guilty of misconduct and, despite having considered mitigation repeatedly mentioned by Mr Cole in interview, the Claimant's length of service and previous disciplinary record, decided that the Claimant should be dismissed without notice. The disciplinary outcome was confirmed to the Claimant in writing on 22 July 2021. The Claimant's employment terminated on 20 July 2021.

Disciplinary Appeal

40. The Claimant appealed against the decision to dismiss him by way of a letter dated 28 July 2021. Toby Willson was appointed to hear the appeal. Mr Willson had not been involved in the Claimant's case previously but had previously met him in the context of an unrelated grievance where the Claimant was a witness. The Claimant made no issue of this. On 12 August 2021 the Respondent wrote to the Claimant to invite him to an appeal hearing on 20 August 2021. The letter informed the Claimant of his right to be accompanied by a colleague or trade union representative.

41. The Claimant attended the appeal hearing on 20 August 2021. The Claimant was again accompanied by Mr Cole. At the hearing Mr Willson was accompanied by a note taker. The appeal was conducted as a review of the original decision, not a re-hearing. Mr Willson mentioned the Level 1 report, Mr Cole indicated that they were unaware of this document and asked for a copy, which Mr Willson provided, giving the Claimant and his representative an opportunity to read the report on their own, in private. At the hearing the Claimant was given the opportunity to put forward his points of appeal. The Claimant's main grounds for appeal were that he denied he was asleep at his post on 27 May 2021, he was not fatigued, he was meditating; that there was insufficient evidence to substantiate the allegation; that he had never had an allegation of sleeping on duty made against him previously; that he felt summary dismissal for gross misconduct was disproportionate and was inconsistent with sanctions applied to other employees in two separate cases (this was the first mention of comparator cases); and that even if he had been asleep other measures meant he would have been alerted to issues requiring his attention at the time he was alleged to be sleeping and that Ms Boyd was competent on Panel 1. In his appeal the Claimant also stated that he had received no formal training as a trainer or assessor, and that he felt he had been treated unfairly and discriminated against by the Respondent. He also identified a motivation for Ms Banan to act against him as his refusal to accept her offer of Deputy SSM when he had applied for and failed to secure the advertised SSM role. Once the appeal officer was satisfied he had heard the Claimant's appeal, which ran over 5 hours, the hearing was concluded. The appeal officer informed the Claimant that he would provide his decision in writing.

42. Following the appeal hearing, Mr Willson carried out further investigations including calls and email correspondence with:

- Simon Horwood: addressing the suggestions that the Claimant was not trained in or competent to train staff. His response was this had never been raised by the Claimant and indeed was part of the job spec.;

- Ms Banan: addressing the claim that it was unreasonable for her to conclude that he was asleep, that she was motivated to commence disciplinary proceedings against him because he had failed to secure an SSM role, asking her view as to whether he was in charge of the panel at the relevant time. Ms Banan confirmed her account of her observations on 27/5: that Mr Toba had apologised for being asleep and that when she initially questioned him about this he was blasé and admitted to dozing off but later changed his written statement, apologising for "*appearing to be asleep*", that he admitted to getting the Trainee to "*kick him*" if she needed his attention. She confirmed that she had interviewed Mr Toba for an SSM role previously but was not aware of any animosity between herself and Mr Toba as a result of this. She confirmed her view that he was not observing or in control of the panel.

- Mr Large: addressing the question why had he not re-interviewed witnesses. His response was, in his view, there was sufficient information in the statements to proceed.

- Mr Payne: Why had he not provided the Level 1 report, and why he had not followed up questions regarding Ms Banan’s evidence? He responded that he had not intended to rely on the report so didn’t disclose it, and that he’d not

thought it necessary to reapproach Ms Banan, as he'd asked Claimant if he thought Ms Banan was lying and he'd said no.

In addition, there is contemporaneous evidence in the form of emails and draft letters that Mr Willson considered and reflected on the comparator cases raised, that he conferred with HR and concluded that there were differences between this case and both other cases such as enabled him to conclude that those cases would not impact on the decision to dismiss in this case.

The appeal officer considered the responses to these further investigations, the Claimant's points of appeal and what the Claimant had to say during the appeal hearing. The appeal officer determined that considering everything, the decision to dismiss was fair and reasonable in the circumstances, particularly given the safety critical nature of the Claimant's role.

43. On 26 August 2021 Mr Willson wrote to the Claimant to confirm that he had decided to uphold the decision to dismiss him. The appeal officer informed the Claimant that the decision was final. Mr Willson's decision was based on his consideration of the evidence before him, and the points made by the Claimant at the appeal. Bearing in mind the safety critical nature of the Claimant's role he was concerned by the Claimant's apparent lack of understanding or appreciation of the risk he created by not being alert, and his minimisation of what had occurred. He represented a potential safety risk, and he could not justify re-instatement,

Conclusions

44. With regards to the incident, having considered the accounts, the oral evidence and the contemporaneous notes the Panel were satisfied that on the balance of probabilities:

- The Claimant was asleep while he was signed into and responsible for Panel 1, while supervising an unqualified trainee. We considered his account of having been meditating at the time to be untrue and importantly, it was not provided when he was initially challenged. His accounts were inconsistent and contradictory. Had he been awake and alert to the extent he suggested, to a level required to keep active awareness of what was going on, he would be expected to notice a member of management standing over his chair, and if not – with eyes closed but applying intense concentration - to have immediately responded to his name being called. We are content that this was not the case.
- Ms Banan found the Claimant to be asleep at the desk while he was signed into Panel 1, as a result of her having noticed his lack of movement;
- We are satisfied that his original explanation that he had been dozing on and off all day was correct and that his other comments were accurately captured by Ms Banan and reflected the reality of the situation. We accept that he initially apologised for having been asleep, that that he admitted to being aware that he was fatigued – that he repeatedly dozed off. His exchange with Ms Banan unfolded as it did because she believed him to

be asleep and that he had inadvertently acknowledged that by repeatedly referring to it.

- We are satisfied that for reasons of his own, he decided to adopt and maintain the 'meditation' explanation after his initial conversation with Ms Banan but before he supplied his written account.

Turning to the legal issues the Tribunal will consider direct race discrimination first, because if it is established that there was a discriminatory element at play here it will affect the other aspects of the case before us.

Direct discrimination: Law

45. S13(1) Equality Act 2010 precludes direct discrimination:

> *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.*

Under s4 of the Equality Act 2010, a protected characteristic for a Claimant includes race, which includes: (a) colour; (b) nationality; and (c) ethnic or national origin. The examination of less favourable treatment because of the protected characteristic involves the search for a comparator and a causal link. When assessing an appropriate comparator:

> *"…there must be no material difference between the circumstances relating to each case*": s23(1) Equality Act 2010.

46. S136 Equality Act 2010 requires the Claimant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination, and it is then for the employer to prove otherwise. The cases of ***Barton v Investec Henderson Crosthwaite Securities Ltd*** [2003] ICR 1205 and ***Igen Ltd v Wong*** [2005] EWCA Civ 142, [2005] ICR 931 provide a 13-point form/checklist which outlines a two-stage approach to discharge the burden of proof. In essence, this can be distilled into a 2-stage approach:

a. Has the claimant proved facts from which, in the absence of an adequate explanation, the tribunal could conclude that the respondent had committed unlawful discrimination?

b. If the claimant satisfies (a), but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed?

47. The Court of Appeal in ***Igen*** emphasised the importance of *could* in (a). The Claimant is nevertheless required to produce evidence from which the Tribunal could conclude that discrimination has occurred. The Tribunal must establish that there is prime facie evidence of a link between less favourable treatment and, say, the difference of race and that these are not merely two unrelated factors: (***University of Huddersfield v Wolff*** [2004] IRLR 534). It is usually essential to

have concrete evidence of less favourable treatment. It is essential that the Employment Tribunal draws its inferences from findings of primary fact and not just from evidence that is not taken to a conclusion: (***Anya v University of Oxford*** [2001] EWCA Civ 405, [2001] ICR 847). The burden is therefore on the claimant to prove, on a balance of probabilities, a prima facie case of discrimination. In ***Madarassy v Nomura International plc*** [2007] EWCA Civ 33 the Court of Appeal held at paragraph 56:

> "The court in ***Igen*** expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the Tribunal could conclude that the respondent could have committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. It was confirmed that the claimant must establish more than a difference in status (e.g., race or sex) and a difference in treatment before a Tribunal will be in a position where it could conclude that an act of discrimination had been committed. Even if the Tribunal believes that the Respondent's conduct requires explanation before the burden of proof can shift there must be something to suggest that the treatment was due to the Claimant's race. It is not sufficient to shift the burden onto the Respondent to say that the conduct is simply unfair or unreasonable if it is unconnected to a protected characteristic. ***B and C v A*** [2010] IRLR 400 EAT, para 22, and ***St Christopher's Fellowship v Walters-Ellis*** [2010] EWCA Civ 921 at paragraph 44:
>
> The Respondent's bad treatment of the Claimant fully justified findings of constructive unfair dismissal, but it could not, in all the circumstances, lead to a finding, in the absence of an adequate explanation, of an act of discrimination.

We also note ***Nagarajan v London Regional Transport*** [2000] 1 AC 501, where Lord Nicholls stated at 512-513:

> Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds, even though it is not the sole ground for the decision. A variety of phases, with different shades of meaning, have been used to explain how to legislation applies in such cases: discrimination requires that racial grounds were a cause, the aggravating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided. So far as possible. If racial grounds or protected acts has a significant influence on the outcome, discrimination is made out.

48. The Tribunal notes that while a different decision maker in two cases may, in some cases, amount to a material difference (where they were operating different policies at different times, or operating at different levels) it is not a given that this will amount to a material difference, as the employer is

responsible for the decisions made by both decision makers[1]

Direct Race Discrimination: Conclusions

49. The Tribunal accepts the summary dismissal of the Claimant by the Respondent constitutes unfavourable treatment.

50. The Claimant invites the Tribunal to consider that the dismissal he suffered was because of his race and that he was treated more harshly than the Respondent treated or would treat others. We are required therefore to consider his treatment in relation to comparators, actual or hypothetical, and then consider if the treatment was linked to race.

51. The Claimant originally proposed two groups of comparators, with a third added and considered during the hearing. In considering these we must remind ourselves that the circumstances of a comparator must be the same as those of the claimant, or at least not materially different (s.23 of Equality Act 2010). The circumstances need not be precisely the same, provided they are close enough to enable an effective comparison. [2]

52. The first set were a group of signallers (signallers and SSMs) who were found in March 2019, asleep at 4am in a signalling box at Three Bridges. No trains were running, although track maintenance workers would have been working at that time, creating risk. We are not sighted on the detail of what the non-managing Signallers were accused of, or what process they were subject to, but the white SSMs were, like the Claimant, subject to Disciplinary Proceedings, and like the Claimant, were charged with Gross Misconduct. The situations are markedly different - the SSMs both admitted that they had been asleep, and acknowledged the potential effect these actions could have had, albeit to varying degrees. By contrast, the Claimant was found to be asleep while running a live Panel covering active passenger routes at 2pm, while supervising and training a trainee. Unlike the proposed comparators, the Claimant consistently denied having been asleep, failed to take any personal responsibility and at every point has sought to minimise the suggestion of risk by asserting that the trainee was competent to run the panel. While not determinative[3], there is no overlap between the decision makers in these cases. The situations are not in our view analogous, and the comparison therefore does not stand.

53. We noted that as a result of this incident a briefing was issued to all Signallers on 28 March 2019 warning them that in future:

> *…I expect SSM's and even fellow signallers to challenge and report such behaviour. I expect my Managers to continue making such visits and will support them in any investigation into any incidents that are brought to light.*

[1] Olalekan v Serco Ltd. UKEAT/0189/18/RN at para 31
[2] Hewage v Grampian Health Board [2012] UKSC 37
[3] Olalekan v Serco Ltd UKEAT/0189/18/RN

The Claimant denied ever having seen this warning, or been aware of it, despite asserting that he was closely aware of the incident itself and the surrounding circumstances and aftermath.

54. The Second proposed comparator was a Signalling Mentor who, in 2019, left a trainee unsupervised on Panel 4 for a short period to take a comfort break. During his absence the trainee made an error and failed to record it. The trainee, a white man, was made subject to Disciplinary Action, he was suspended and was charged with Misconduct. The trainee accepted full responsibility for something which was determined to be his personal responsibility and within his knowledge (failing to report an operating irregularity arising during verbal communications with a driver). The notes suggest the Signaller's absence was for a short period, that the incident came to light after the event, and appears to have been regarded as arising from a failure in procedure. The Signaller was not asleep, he admitted his absence and as a result of discussions about what had happened the reviewing officer issued guidance around ensuring handover of responsibility for trainees in such situations. The Signaller was not charged with any offence. We do not accept that admitting to a short absence from supervising the lowest complexity panel is an equivalent situation to denying being asleep while overseeing the busiest panel. While not determinative of the issue, we also note that the decision makers in this situation were not involved in the Claimant's case. The Claimant has not established this to be a comparator for these purposes.

55. The third proposed comparators are Signallers who were the subject of a news article in a national newspaper from 2022, where it was alleged that they were asleep while on duty in the VASC in July 2021. Candid photographs of their blurred faces were published in the newspaper. The incident is alleged to have occurred in the early morning when trains were not running. Having sought clarification on this case the Tribunal was advised by Counsel on behalf of the Respondent that the incident is the subject of a "wide-ranging" Level 2 Safety Investigation, and that processes are ongoing. As such no treatment has yet been imposed on these Signallers from which differential treatment can be deduced, nor have any options been ruled out. There is no suggestion that the company was aware of this incident at the time of the Claimant's dismissal, or that any of the decision makers in his case were aware of it or were influenced by it in their decision making. Nor is there a suggestion that they are involved in disciplinary processes involving these individuals. The Claimant sought to argue in his final submission that the Respondent's failure to suspend these Signallers demonstrates differential treatment and is evidence of discrimination. The question of suspension, or of these officers suspension and whether any difference in approach amounted to discriminatory treatment was not one of the issues before the Tribunal. It was not identified as or added as a new issue at the outset of the hearing. Nor was it put to any of the witnesses, nor indeed were these staff identified as potential comparators in the list of issues. In any event, it became clear during the hearing that the Claimant himself was not in fact at any point suspended during this process, but rather was "stood down" from safety critical work. The Tribunal does not wish to comment on or prejudice any ongoing or contemplated actions concerning the staff alleged to be involved in the matter under investigation. In any

event, we are not in a position to consider these individuals can qualify to be considered as comparators.

56. In addition, in his written submissions the Claimant offers arguments that the decision to conduct a safety investigation here was discriminatory. Again, this was not identified as an issue for determination, or a basis for this case. We note in passing the unchallenged assertion that a Level 2 safety investigation was called in respect of the last group of suggested comparators. The Claimant accused Ms Banan of mishandling this issue and launching a safety investigation without reason. Aside from this safety investigation being separate from the disciplinary process, the suggestion that she should not have conducted this investigation was extraordinary. The panel considered that suggesting this incident did not warrant investigation as a safety issue reflected a lack of risk awareness on the part of the Claimant. It was Ms Banan's duty to report this event, and this was reiterated to her by another manager Mr Mason, when she sought his advice on what to do that afternoon. If it had later emerged that this was not warranted, it seems likely that the IRP would have made their views on that clear. In fact, the IRP were clear that this was an incident which gave them cause for concern, and interestingly, they opined that meditation while working at the panel was inappropriate.

57. In the absence of an actual comparator the Tribunal may consider how the Respondent might treat a hypothetical white comparator in the Claimant's situation. How would they have treated a white Duty Signaller, found by a manager asleep while signed into Panel 1 and supervising a trainee, who admitted, but then flatly denied that he was asleep but claimed to be meditating? It was the Panel's view, having heard and considered the evidence, that this hypothetical white Duty Signaller, like the Claimant, would have been subjected to a safety investigation, disciplinary proceedings and would have been summarily dismissed.

58. Was the Claimant subjected to unfavourable treatment because of his race? This is the crucial question we are asked to consider in every direct discrimination case: *What was the reason for his treatment?* In this case, was he charged with gross misconduct and dismissed because he is Black African? Or was it wholly for other reasons?[4] The Claimant in his ET1 and statement suggested his unfavourable treatment was because of his race and that this led to his dismissal. It was however striking that when given repeated opportunities in cross-examination to outline why Ms Banan would have decided to produce a false account on 27 May he offered no reason at all for her wishing to do this beyond what was before us. He did not even mention the issue Ms Banan identified as their only previous encounter (where she had interviewed him for SSM, did not appoint him, but offered him a Deputy SSM role which he refused) which he had previously raised as a motivation to act against him in the Appeal interview. He offered no nefarious reason as to why the Disciplinary Officer, or Appeal Officer acted as they did. At no point did the Claimant offer his race, or any racial element

[4] Shamoon v Chief Constable of the Royal Ulster Constabulary (NI) [2003] UKHL 11

as being at play here. It was equally striking that, despite this being such a significant element of the case, the Representative did not put it to any of the witnesses that race was an element in their decision making, either consciously or unconsciously. The Representative was given the opportunity to re-examine the Claimant but did not do so. He was repeatedly reminded of the need to put his case to the witnesses, he was referred back to the issues to ensure the issues were being addressed, and the EJ went so far as to extract the specific elements of Unfair Dismissal and Race Discrimination to ensure that he was clear as to what needed to be addressed.

59. The Representative did suggest to witnesses Mr Payne and Mr Willson in the hearing that the Claimant was being treated differently to white colleagues, although during the process this was only raised with Mr Willson. The Claimant indicated at one point, with feeling and sincerity, that he felt that he was treated differently to colleagues. He said: *"The way I was treated was different to how others were treated".* We did not doubt that this was his belief, but the hard truth is that in order to prove direct discrimination based on race, there must be an element of race at play in the mind of the decision maker. It does not need to be the overriding motivation, but it must be present.

60. There was no evidence in the papers, or in oral evidence which could allow the panel to construe a motivation based on race, or connected to race, on behalf of the decision makers here. He did not make this argument in respect of any of the witnesses at the hearing, nor did he produce or direct us to any evidence to support that suggestion. Indeed he did not even ascribe such a motivation to Ms Banan, who despite not being a decision maker the claimant appears to blame for his situation, because she instigated the safety investigation. Counsel emphasized that the race discrimination case was not put to the witnesses. While his Representative did not put the case to the witnesses, despite repeated prompting from the EJ to put his case, that is not fundamentally why that part of the claim cannot succeed. It is because the Claimant did not produce any evidence or offer any suggestion that race was in play, or that it motivated the decisions here. While he may believe that he was treated differently to white staff in similar situations (and having considered their situations we do not accept that to be true) that is not enough to establish a discrimination claim. A difference in treatment, without there being a link to a protected characteristic, is not direct discrimination.

61. The Tribunal considers that the Claimant failed to establish that his treatment was something that arose from his race or had proved facts from which the Tribunal could conclude that the respondent had committed unlawful discrimination. It is our view that the decision makers found themselves considering the Claimant's dismissal not because of his race, but because of his conduct. There was no discrimination.

Unfair Dismissal : Law

62. The Respondent's case is that this was dismissal for conduct (gross misconduct). That is a potentially fair reason under s 98(2)(b) Employment Rights

Act 1996 ('ERA'). Section 98 of the Employment Rights Act 1996 (ERA) provides as follows:

> 98. (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
> (a) The reason (or if more than one, the principal reason) for the dismissal, and
> (b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it – …
>
> (b) Relates to the conduct of the employee, …

If the Respondent establishes that reason, a determination of the fairness of the dismissal under s98(4) ERA is required.

> 98 (4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismiss is fair or unfair (having regard to the reason shown by the employer) –
> (a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and
> (b) Shall be determined in accordance with equity and the substantial merits of the case.

63. This involves an analysis known as the *Burchell* test [5] - whether the Respondent's decision makers had a reasonable and honest belief in the misconduct alleged, and whether there were reasonable grounds for such a belief after such investigation as a reasonable employer would have undertaken. The burden of proof is neutral in relation to the fairness of the dismissal once the Respondent has established that the reason is a potentially fair reason for dismissal. The Tribunal must also determine whether the sanction falls within the range of reasonable responses to the misconduct identified. This test of band of reasonable responses also applies to the belief grounds and investigation referred to.

64. The factors that may inform the standard of reasonableness of investigation vary with the circumstances. An employee being caught in the act or admitting the misconduct requires less in the way of investigation than a case based on inference. [6] In other cases, a relevant factor may be the likely sanction. An allegation likely to lead to dismissal will typically require more by way of investigation than one likely to lead to a first warning. Similarly, the greater the impact and consequences the decision will have on an individual being able to work in their chosen field in the future, the more that will be expected of the investigation. [7]

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[5] British Home Stores Limited v Burchell [1978] IRLR 380
[6] Gravett v ILEA [1988] IRLR 497
[7] A v B [2003] IRLR 405 EAT, Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721 CA

65. Considering paras 58 – 63 of ***A v B***[8], where Elias J said at para 60, on the reasonableness of investigations in serious cases (where dismissal is likely):

> *"Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the inquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him."*

66. The Tribunal also notes ***Sneddon v Carr-Gomm Scotland Ltd*** [9] at para 15, where the Court of Session described the approach to deciding whether the sufficiency of an investigation into misconduct is adequate: -

> *"…the tribunal necessarily has to examine and consider the nature and extent of the investigations carried out by the employer and the content and reliability of what those investigations reveal before it can reach a view on whether a reasonable employer would have regarded the investigatory process as sufficient in matters such as extent and reliability or as calling for further steps. That decision is essentially one for the assessment of the tribunal, as a specialist, first instance tribunal."*

67. The Tribunal must not to substitute its own view regarding the investigation into misconduct or regarding the decision to dismiss.[10] This means that we must decide not whether we would have investigated things differently, but whether the investigation was within the range of investigations that a reasonable employer would have carried out. The Tribunal must assess the reasonableness of the employer not the potential injustice to the Claimant [11] and only consider facts known to the employer at the time of the investigation and then the decision to dismiss.[12] It is not for the investigator to undertake a forensic investigation – she is required to conduct a reasonable investigation, and the reasonableness of that investigation is assessed by reference to the way the Claimant puts his case during the internal procedure.

68. The test as to whether the employer acted reasonably in section 98(4) ERA 1996 is an objective one. We have to decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have

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[8] [2003] IRLR 405 EAT
[9] [2012] IRLR 820
[10] Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23.
[11] Chubb Fire Security Ltd v Harper [1983] IRLR 311
[12] W Devis and Sons Ltd v Atkins [1977] IRLR 31

adopted.[13] We have reminded ourselves of the fact that we must not substitute our view for that of the employer.[14]

69. There is always an area of discretion within which a Respondent may decide on a range of disciplinary sanctions all of which might be considered reasonable. It is not for the Tribunal to ask whether a lesser sanction would have been reasonable but whether the dismissal was reasonable.[15]

Unfair Dismissal: Conclusion

70. The first question to be determined here is what was the reason for the dismissal? The reason given by the Respondent for the dismissal was gross misconduct. Counsel for the Respondent put it to the Claimant under cross examination that if the Respondent believed he was sleeping while in charge of the panel that this would constitute gross misconduct. While he denied being asleep, he accepted that being asleep at the panel would be gross misconduct. The Tribunal accepts that based on the contemporaneous evidence supplied, considering what was known at each stage and the evidence that emerged at the ET hearing that, on the balance of probabilities, the Respondent dismissed the Claimant for what they believed to be his gross misconduct. As is established in law, a reason for dismissal which is related to conduct is a potentially fair reason under section 98(2)(b) of the ERA 1996.

71. Next: did the Respondent (specifically the decision maker) reasonably and honestly believe, based on reasonable grounds, and after an appropriate investigation that the Claimant had in fact committed the misconduct?

72. The Claimant challenges the basis for the Respondent's belief that he was guilty of gross misconduct – and the disciplinary investigation which underpinned it. He alleges that Ms Banan, Mr Large, Mr Payne and Mr Willson conspired in this process against him. This was despite the fact that the latter three players were not involved in the process until considerably after 27 May. The Claimant suggested under cross-examination that the process was pre-planned but was hesitant when asked if it predated 27 May, initially saying not, but then seeking to suggest that the events he identified after 27 May (inconsistencies, failure to follow processes) pointed to there having been a plan. He could offer us no reason or motivation for Ms Banan, or indeed any of the decision makers, to have wanted to target him. When asked he offered us no evidence of history or bad feeling between them, or between him and the other witnesses.

73. The decision makers were presented with evidence assembled by the investigator including an account from a senior manager stating she had found a Duty Signaller asleep in the early afternoon while he was supposed to be in charge of Panel 1, which was being operated by an unqualified trainee. Her account, and those of the two SSMs outline the circumstances in which this discovery occurred. The statements together confirm a simple scenario, that Ms Banan had noticed that the occupant of the Duty Signaller's chair might be asleep, she had voiced that

[13] Iceland Frozen Foods Ltd v Jones [1982] IRLR 439
[14] Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82, London Ambulance Services NHS Trust v Small [2009] EWCA Civ 220
[15] Boys & Girls Welfare Society v McDonald [1996] IRLR 129

thought, was motivated to check whether that was indeed the case and having done so found him to be asleep.

74. It was suggested on behalf of the Claimant that the Level 1 safety investigation then undertaken by Ms Banan was unnecessary, that it was actually a more serious Level 2 investigation, and that this was an example of Ms Banan pursuing a campaign against the Claimant. In fact, aside from Ms Banan's own stated view that the report was warranted and required (on the basis of its inherent seriousness) the report was independently recommended by a colleague (Anthony Mason). The Report was in form and content a Level 1 investigation. This evidence was ultimately presented to the Independent Review Panel which confirmed the incident warranted a disciplinary process. The Claimant did not identify any procedural issue with the preparation of this report such as would concern the panel with regards to how it might affect the disciplinary process. We heard a great deal of evidence from the Claimant regarding administrative issues, and supposed errors, but these did not lead us anywhere or advance the Claimant's case.

75. We considered but could not identify any issue with Mr Large's appointment or his assembling of the investigatory case. He reviewed the statements, which identified a case to answer, and having invited him to interview, which he attended alone, the Claimant volunteered that he had not appreciated the seriousness of the situation when first challenged, he did not then (and still did not) accept that there was a risk from a trainee running the panel, despite being aware of and describing the error she made earlier in the shift, and he denied being asleep. There was sufficient evidence to warrant a charge, given the circumstances outlined, the breaches revealed, and the Claimant's attitude to what had occurred. The investigator admits to not reading the Level 1 report, but as that report found its roots in the statements provided it is not clear what detrimental effect this would have.

76. The Claimant suggests that during the process further investigations should have been undertaken – that witnesses should have been asked further questions. The law is clear that in a situation where someone is in effect caught 'red-handed', or admitted the position, the level of investigation required is less than in a situation where there may be no witnesses, or facts have to be deduced[16]. The Claimant had in effect been caught, and candidly admitted the position at the outset, before changing his account. There will always be scope for investigations to be more detailed, but it is not the role of the Tribunal to impose an idealized approach on employers. Employers are not required to undertake forensic investigations – they are required to undertake reasonable investigations.

77. The Claimant complained that Mr Large failed to interview Ms Boyd further, on the basis that she could establish that the Claimant was not asleep. Ms Boyd had in fact already provided her statement. She provided it one day after the other witnesses supplied theirs, having been asked for it in the same time period. She was evidently aware of the reason for the request (having been present throughout this incident) and had taken additional time to prepare it. She made no reference at all to whether or not she had seen the Claimant asleep. She pointedly states that she was concentrating on the board, conscious of her earlier mistake, when

[16] Gravett v ILEA [1988] IRLR 497

she heard Ms Banan speaking to the Claimant. She says nothing that contradicts Ms Banan's account. However tempting it may be to speculate, Ms Boyd gave her account. Taking the statement at face value there was nothing to suggest Ms Boyd would volunteer further, or different, insights on the events if approached by Mr Large. It was open to the Claimant to approach Ms Boyd and ask her to act as a witness for him at that stage, or later in the appeal (or indeed at this hearing) if he considered that would assist his case. He was repeatedly offered the opportunity to produce witnesses to assist him during the process.

78. The investigator considered that he had sufficient evidence at that point to refer the matter on and a basis to believe that the facts justified a gross misconduct charge. This was not unreasonable, given the same view had been formed by the Independent Review Panel. The Claimant suggests he should have researched his account of having been meditating. It is not clear what this investigation would consist of, or what it would have been its purpose. Mr Large had an account from a senior manager that she found the Claimant asleep, that he had to be roused, was dazed, apologised and admitted to dozing off. Looking at the investigation the Respondent followed to that point, was it reasonable – were all the steps taken and questions asked, including questions arising from challenges raised by the Claimant, that would be expected of a reasonable employer in these circumstances? It is our view that it was.

79. On the meditation point, meditating with your eyes closed was considered by the IRP to be inappropriate during working periods on the panel. It is self-evident that if your work involves observing and reacting to a live visual display, checking inputs and information for signs of risk, that closing your eyes for any period, let alone an extended period, is dangerous. The Claimant volunteered to the panel that he might close his eyes for around a minute while at the panel. A great deal can happen on a railway line in a minute. We asked the Claimant to explain what he meant by meditation. His answer described being in deep thought, concentrating on finding answers, and prayer. He described it as part of his religious practice, but that it was not prescribed, it was simply something he would do as and when it seemed helpful. He described his approach to answering our questions, listening and thinking about the responses, while watching us, as also meditating. The Claimant suggested that he also meditated with his eyes open, but it was always clear that at the relevant time he accepted that his eyes were closed. Even if he were meditating with his eyes closed, which we do not accept, this would have still created a risk. He was required to maintain focused attention on the panel and:

> *"…take the lead in your duties during your shift. That means you'll take command of situations, with an assertive approach and clear communication.*
>
> ***Essential Criteria***
> - *The ability to concentrate for long periods.*

It is not the Panel's wish to deny the benefits of meditation, or of practices which may lead to better concentration. It is however extraordinary to suggest that when your duty and responsibility lies in attentively watching a visual display, which represents in real-time the safety and lives of thousands of people, observing and overseeing the actions of a trainee, listening carefully to what she is saying and how she is communicating with others, and being ready to step in and proactively take over, that it could ever be appropriate to turn from the panel

and close your eyes, even for a minute. It was evident from his exchange with Mr Large regarding his approach that he did not regard his role as overseeing the panel and the trainee's activities but rather that he was acting as a reference point for the trainee when she considered that there was an issue. This presupposes that the trainee recognises that there is an issue and ignores the fact that the mentor is supposed to be at all times overseeing what the trainee is doing.

80. With regards to the Disciplinary stage, we were not persuaded that this was a flawed process. In terms of shortcomings, it is correct that Mr Payne did not share the Level 1 report with the claimant, despite having been prompted to do so by HR. He was challenged on that and made it clear that this was an oversight and not by design, he did not intend to rely on it as he did not consider it relevant and did not consider it of importance. As we have said, we can see nothing in the Level 1 report that would have assisted the Claimant, or which would have prejudiced him by not having it, and the Claimant was not able to point to anything in it that it wanted us to consider. We note that this was Mr Payne's second disciplinary process hearing as chair. Mr Payne also erroneously told Mr Cole that he could not speak during the meeting, as he was not a union rep. This could have created unfairness, but Mr Cole was able to correct him and it is to both their credits that the hearing proceeded without rancour.

81. It was put to Mr Payne that his decision to dismiss, having indicated during the meeting that his position was 50:50, was unfair, that he must have prejudged the case. His response is that his view was 50:50 before he considered what he heard from the Claimant and his representative, and having considered that and spoken with HR he reached his decision. In fact, it is evident from the note of the call with HR, from 13:18 (the hearing having adjourned at 12:18) that Mr Payne had taken time to think, and was grappling with any outcome other than summary dismissal in the light of what he had heard (the Claimant insisting he wasn't asleep, his having changed his story, the inherent risk an unqualified trainee running the panel represented, and so on). It is evident that this was a decision he took seriously, had considered the evidence, reflected on the submissions and sought independent input on.

82. It was argued that the Dismissal letter was insufficiently detailed with regards to the Gross Misconduct. This is a fair criticism, but it is evident that the full reasons for the Gross Misconduct charge were considered and addressed in the hearing and outlined at the end of the hearing. The Claimant would have been in no doubt as to the basis for the dismissal, but it would have been better had the letter been specific about the allegations and findings in the interests of fairness and transparency. There were shortcomings with this part of the process, but not to the extent that the Claimant was denied a fair hearing.

83. When asked about the treatment of other white employees, Mr Payne indicated that he was not involved in their processes and was not aware of their details at the time. It was not put to him that he himself had any discriminatory motivation or intent in his decision making here. There was nothing we were shown or taken to which led us to consider the decision made here, by this decision maker in this

case as being anything other than reasonable. He had considered the representations made, considered the evidence, the hearing was fair, if flawed, and his decision fell within the bands of reasonable responses open to a reasonable employer.

84. Finally, Mr Willson chaired the appeal process, took time to give the Claimant the opportunity to raise and address concerns he had, supplied the outstanding Level 1 report, and went to considerable trouble after the hearing to check concerns raised by the Claimant, including investigating similarities between this case and those of the two sets of alleged comparators identified at that stage. Having done so he was satisfied that the decision made was sound, reasonable and within the bands of reasonable responses open to a reasonable employer.

85. The process adopted by the Respondent was in our assessment appropriate and complied with ACAS requirements under their "Code of Practice on disciplinary and grievance procedures". A manager was appointed to investigate, comprising a minuted meeting, held with notice, with the Claimant being offered the opportunity to be accompanied. An independent manager handled the disciplinary process, the meeting was minuted, and the Claimant brought a representative. An appeal process followed headed by another independent manager, held with notice, minuted, again with the Claimant represented. The overall process was sufficient to ensure that the Respondent captured and dealt with any queries and challenges raised by the Claimant. Any deficiencies identified during the process were, in our view, fully addressed by Mr Willson the end of the appeal, and did not in any event prejudice the Claimant. We are satisfied that it was reasonable to rely on this investigation, that the decision maker, and appeals manager, both had grounds to believe, and did reasonably and honestly believe on the basis of the investigation and their enquiries that the Claimant was guilty of misconduct. It follows that the three elements of the Burchell Test are satisfied in this case.

86. Did the dismissal fall within the band of reasonable responses? Was it reasonable to dismiss for the misconduct outlined, in the circumstances? The range of sanctions open to an employer is wide, as is well established. The Claimant was employed in a safety critical role, in a safety critical industry. He was aware of his contractual and personal responsibilities. The Respondent conducted a reasonable investigation and disciplinary procedure and the circumstances outlined place the dismissal within the range of reasonable responses. The Respondent was presented with a Signaller who was found asleep at his desk while responsible for train movements, driver safety and the safety of the travelling public. Their care and safety were unwittingly entrusted to an unqualified trainee, contrary to safety policies, who had that very day made a significant error. The Claimant's contract was explicit that gross negligence, serious misconduct or breaches of safety policy may lead to summary dismissal. Instead of accepting what had occurred, dealing with the issue honestly and seeking to address what had caused this event, the Claimant denied what had happened, failed to take any responsibility and displayed a lack of judgment in the manner he handled the outcome. He has gone on to accuse his managers of racial discrimination and other baseless claims. The Claimant's continued insistence on asserting that he

was not asleep undermined his credibility. It seems likely that had he accepted he was asleep, apologised, accepted responsibility for the risk this represented and explored the reasons for that, the outcome here may not have been what it became. It seemed entirely likely on the evidence we heard that the Claimant (a parent with four children, who had worked 10 days in a row) would have had reason to be fatigued. He described the 5-weekly pattern of shifts comprising one week of early shifts, one week of late shifts, one week of early shifts, one week of late shifts ending with one week of night shifts. He described typical daytime shifts running from 7am to 7 pm with two 40-minute breaks. He suggested that on some occasions signallers could find themselves working through without a break, where there was no cover, suggesting this could happen once per week. This was not disputed by the employer. We noted the reference to the Fatigue Index and were supplied with material from the Investigators Handbook which describes the tool and indicates that the HSE's maximum score levels were 35 for daytime work, 42 for night-time work, so the alert level adopted by the Respondent appears conservative by comparison with HSE standards and what they permit. The handbook also recognises that these tools are not definitive, and we were not clear as to the methodological basis for the scoring generated by the tool. We note however that the handbook indicates that other factors should also be considered when considering whether fatigue was a factor in an incident, rather than simply relying on a score to determine actual fatigue levels and risk. These would include actual sleeping time, work schedule, workload, sleep duration and propensity to be able to sleep – or experience sleep loss, domestic circumstances and responsibilities, travelling time and so on. It appeared to the panel, on the facts presented that the Claimants fatigue was a factor here. However, this was consistently denied and rejected as a factor by the Claimant throughout the investigation, dismissal and appeal process and it was no part of the Claimant's ET case that fatigue played any part in this situation, or that there was any medical or other explanation for his being asleep at Panel 1.

87. For the Claimant to deny what a manager saw with her own eyes, to maintain that position, to accept no responsibility for the incident, and to deny his fatigue undermined his future credibility in this role. Where the employee is required to fulfil a safety critical role, and to conscientiously oversee others' work, to ensure public safety, to record incidents faithfully and accurately and so on, trust and credibility are essential. The Claimant's lack of conscientiousness with regard to his responsibilities (monitoring his own fitness to work, overseeing those he was training, overseeing the panel) and the lack of insight or concern for the potential consequences of his actions for his employers, his co-workers and the travelling public was concerning. The fact that he was teaching staff and role-modelling this behaviour is disturbing. We are satisfied that the Claimant was guilty of gross misconduct. This was our unanimous view. We are satisfied that the Claimant's own actions and failure to take responsibility for his fitness to work in accordance with his contractual duty triggered this incident, and his lack of judgment and candour in how he dealt with the consequences led to this outcome. The Claimant's conditions of employment could not be clearer. Respect for the health and safety of drivers, of colleagues and the public are at the heart of this work. The Claimant, despite his positive work record before this point, failed to maintain those standards here.

88. The Claimant invited us to consider that the decision to dismiss was unfair when considered against the treatment afforded to other employees. We are reminded that the focus of the statute is whether the employer was justified in dismissing this employee, in these circumstances, and unless you can identify another employee in a directly parallel situation who was treated more leniently, comparators are of limited relevance to considering the fairness of a dismissal.[17] We have carefully considered his arguments but not found another employee whose treatment suggests this Claimant could have been afforded a more lenient outcome. Focusing on s98(4) - the panel agrees that the treatment of the dismissal was reasonable, the processes followed were reasonable and the decision to dismiss this employee was within the band of reasonable responses. It is the Respondent's fundamental duty to ensure rail safety. Despite the Claimant having had a clear work record with the Respondent, the Tribunal is satisfied that he failed to fulfil his fundamental responsibility to uphold and role-model the safety requirements associated with his role. The decision to dismiss was well founded and within the bounds of reasonable responses for an employer in this industry. The Claimant was fairly dismissed for reasons of conduct. His contract provided for summary dismissal in this scenario and summary dismissal was justified and reasonable in the circumstances.

All claims are hereby dismissed.

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Employment Judge **Harley**

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Date 4 January 2024

[17] Levene Solicitors v Dalley [2006] UKEAT 0330_06_2311