Case Number: 2200004/2023

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Mr S Verma		**London Underground Ltd**

REASONS FOR THE JUDGMENT GIVEN ORALLY ON 3 NOVEMBER 2023

Introduction

1 The Claimant, Mr Sanjeev Verma, a man of Asian descent now 53 years of age, entered the employment of the Respondent (or its predecessors) in 1998 or 1999 (documents before us differ on the precise year), as a Station Assistant. In or about August 2000 he progressed to the position of Train Operator, a role which he continued to hold until October 2022 when, following a disciplinary process, he was demoted to the much lower rank of CSA2.

2 By a claim form presented on 7 January 2023, the Claimant brought complaints of unfair dismissal and direct discrimination because of race and age. All claims were resisted on a variety of grounds.

3 The matter came before us for final hearing on 1 November 2023. The parties were both represented by counsel: the Claimant by Mr Majeks Walker and the Respondent by Mr Tim Welch.

4 At the start of the hearing, Mr Welch made the important concession that the demotion of the Claimant had had the legal effect of dismissing him by terminating his contract of employment and offering him a new and materially different contract in its place (which he had accepted).

5 Having heard evidence and argument over days one and two, we gave an oral decision on day three, dismissing all claims. These reasons are given in writing pursuant to a written request by the Claimant, delivered on 14 November 2023.

The Statutory Framework

Unfair dismissal

6 The first requirement of an unfair dismissal claim is a dismissal. The Employment Rights Act 1996 (‘the 1996 Act’), provides that, for the purposes of unfair dismissal, an employee is dismissed (*inter alia*) where the contract under

which he is employed is terminated by the employer (with or without notice) (s95(1)(a)). It is well-established that unilateral imposition by the employer of terms radically different from those provided for under the contract of employment may take effect in law as a dismissal (see *e.g. Hogg v Dover College* [1990] ICR 39 EAT), although this will not be the case where the demotion is pursuant to a power contained in a contractual disciplinary procedure (see *Roberts v West Coast Trains Ltd* [2005] ICR 254 CA).

7 Where a dismissal is shown, attention turns to the 1996 Act, s98. It is convenient to set out the following subsections:

> **(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,**
> **…**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> **(b) shall be determined in accordance with equity and the substantial merits of the case.**

8 We bear in mind the guidance applicable to misconduct cases contained in *British Home Stores Ltd v Burchell* [1978] IRLR 379 EAT (although that authority must be read subject to the caveat that it reflects the law as it stood when the burden was on the employer to prove not only the reason for dismissal but also its reasonableness). The criterion of 'equity' (in s98(4)(b)) dictates that, the more serious the allegation and/or the potential consequences of the disciplinary action, the greater the need for the employer to conduct a careful and thorough investigation (*A v B* [2003] IRLR 405 EAT and *Salford Royal NHS Foundation Trust v Roldan* [2010] IRLR 721 CA). From *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 EAT and *Post Office v Foley; HSBC Bank v Madden* [2000] IRLR 827 CA, we derive the cardinal principle that, when considering reasonableness under s98(4), the Tribunal's task is not to substitute its view for that of the employer but rather to determine whether the employer's decision to dismiss fell within a band of reasonable responses open to him in the circumstances. That rule applies as much to the procedural management of the disciplinary exercise as to the substance of the decision to dismiss (*Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23 CA).

Direct discrimination

9 Direct discrimination based on specified characteristics, which include race and age, is defined by the Equality Act 2010 ('the 2010 Act'), s13 in (so far as material) these terms:

> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

By s23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the claimant's case and that of his or her comparator and that (for these purposes) the 'circumstances' include the claimant's and comparator's abilities.

10 In *Nagarajan* v *London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

> **If racial grounds … had a significant influence on the outcome, discrimination is made out.**

In line with *Onu v Akwiwu* [2014] ICR 571 CA, we proceed on the footing that introduction of the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', etc in the pre-2010 legislation) effected no material change to the law.

11 Discrimination is prohibited in the employment field by s39 which, so far as relevant, states:

> **(2) An employer (A) must not discriminate against an employee of A's (B) –**
>
> **…**
> **(c) by dismissing B ...**

12 The 2010 Act, by s136, provides:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

13 On the reversal of the burden of proof we have reminded ourselves of the case-law decided under the pre-2010 legislation (from which we do not understand the new Act to depart in any material way), including *Igen Ltd v Wong* [2005] IRLR 258 CA, *Laing v Manchester City Council* [2006] IRLR 748 EAT, *Madarassy v Nomura International plc* [2007] IRLR 246 CA and *Hewage v Grampian Health Board* [2012] IRLR 870 SC. In the last of these, Lord Hope warned (as other distinguished judges had done before him) that it is possible to exaggerate the importance of the burden of proof provisions, observing that, where the Tribunal is

in a position to make findings, they have "nothing to offer".[1] That said, if and to the extent that they are in play, we take as our principal guide the straightforward language of s136. Where there are facts capable, absent any other explanation, of supporting an inference of unlawful discrimination, the onus shifts formally to the employer to disprove discrimination. All relevant material, other than the employer's explanation relied upon at the hearing, must be considered. In this regard we bear in mind the provisions governing codes of practice (see the Equality Act 2006, s15(4)) and questionnaires (the 2010 Act, s138) and the line of authority beginning with *King v Great Britain-China Centre* [1992] ICR 516 CA and ending with *Bahl v Law Society* [2004] IRLR 799 CA. We remind ourselves that s136 is designed to confront the inherent difficulty of proving discrimination and must be given a purposive interpretation.

Evidence

14 We heard oral evidence from the Claimant and his supporting witness, Mr Paul Shannon, a trade union representative and, on behalf of the Respondent, Mr Simon Curtis, Trains Operations Manager and Mr Dale Smith, Head of Line Operations (Central Line). All gave evidence by means of written statements.

15 In addition to oral evidence, we read the documents to which we were referred in the agreed bundle, which ran to a little over 400 pages. The Claimant also produced a small bundle of photographs (7 pages).

16 Finally we had the benefit of the skeleton argument handed up by Mr Walker at the start of the hearing and the closing written submissions of Mr Welch.

The Primary Facts

The main narrative

17 On 10 May 2022 at around 07.50 a.m. the Claimant was driving a Central Line train as it entered Holborn station, westbound. Having come to a halt, he opened the doors on the wrong side. The error was quickly corrected and no harm was done. In accordance with the rules, he reported the incident at once and an investigation followed, pending which he was stood down from train operating duties.

18 The investigation was thorough. At least three investigating managers were involved. The Claimant was interviewed on three occasions. Relevant CCTV footage and other sources were interrogated.

19 In the course of the investigation, the Claimant volunteered the unusual circumstances which had led him to open the doors on the wrong side. As the train had entered the station, he had reached in his pocket for his duty book and in doing so had accidentally dropped it. Because the binding was in poor condition the book had come apart on impact, resulting in the pages being strewn across the floor of the cab. He had then crouched down in order to pick them up but, on his

[1] And see to similar effect the judgment of Lord Leggatt JSC in *Efobi v Royal Mail Group Ltd* UKSC 33, especially at para 38.

case, kept a vigilant eye on 'the road ahead' and in particular the 'Platform-Track Interface' ('PTI') throughout. The unusual activity had caused him to be disorientated when the train came to a halt, wrongly believing that he had slightly overshot the applicable stopping mark. In turn, this misapprehension had precipitated, or at least contributed to, the error of opening the doors on the wrong side. He further acknowledged that that error was compounded by his failure visually to check the platform before opening the doors.

20 In unchallenged evidence Mr Curtis told us (witness statement, para 5):

> **The [PTI] is known as the most high-risk aspect of LUL's operations i.e. the place where the platform meets the track and where passengers are therefore most at risk. It is absolutely imperative that a Train Operator is attentive of what is happening in front of them when running the train along the PTI.**

21 The investigation report dated 11 July 2022, issued under the name of Mr Robert Hallinan, Trains Manager, but to which other investigators had contributed, concluded that grounds were shown justifying disciplinary action, and formulated two charges as follows:

(1) Failing to be in control of the train and not observing the road ahead; and
(2) Failing to follow the correct procedure in omitting to 'prove the platform' before opening the doors.

We will refer to these by their numbers.

22 The Claimant was invited to attend a disciplinary hearing (known as a Company Disciplinary Interview ('CDI')) on 31 August 2022, to consider the two charges. The invitation and all relevant documents and relevant CCTV footage generated by the investigation were served in good time. The Claimant was made aware of his right to be accompanied and that it was possible that the hearing might result in the termination of his employment.

23 The CDI was duly held on 31 August 2022 in the form of a 'remote' hearing by video conference call. It was chaired by Mr Curtis and Ms Sinead Ryan, Service Control Manager. The Claimant attended, accompanied by Mr Shannon. The other persons present were Mr Warren McVeigh, Employee Relations Partner, Mr Alun Evans, described as an 'external' notetaker, and Ms Emily Moody, an observer. The written record of the hearing was not the subject of material challenge and, in any event, we accept it as fairly capturing the essence of what was said.

24 The CDI lasted approximately three hours. The evidence, including the relevant CCTV footage, was closely examined. The Claimant and Mr Shannon were given a full opportunity to make whatever points they wished by way of defence and/or mitigation. There was also some discussion of 'comparator cases'.

25 The case advanced by and on behalf of the Claimant may be summarised as follows. Charge 1 was disputed on the basis that, although he was not on his seat, he was, while picking up the pages of the duty book, maintaining a careful eye on the road ahead and the PTI, which he could see directly through the window at the front of the cab and by watching the internal, live CCTV image.

Moreover, he also had his hand on the Tracking Brake Controller and immediate access to the other two emergency brakes within the cab. As to Charge 2, he acknowledged his error in opening the doors on the wrong side and accepted that he was at fault for failing to check the platform before opening the doors. But he maintained that his mistake was a relatively minor matter and certainly not one meriting a CDI. Generally, it was argued that he should be given credit for his long and proud service. He also mentioned that, at the relevant time, he had been subject to a welfare-support '90-day Agreement' because his mother-in-law had been terminally ill, and that these circumstances had been 'playing on his mind'.

26 Following the CDI, Mr Curtis and Ms Ryan visited Holborn Station to view the site and travelled in the cab of a westbound train from Chancery Lane in order to visualise the Claimant's experience as he had described it in the CDI. They did not tell him of their intention to make this visit and did not consider giving him the opportunity to accompany them.

27 Mr Curtis and Ms Ryan found both Charges proved and (taken together) amounted to gross misconduct. In a letter from Mr Curtis dated 3 October 2022 they explained why. On Charge 1, they found that the Claimant had wrongfully chosen to get on to his hands and knees to recover the duty book and rejected his claim that he had at the same time observed the full length of the PTI as the train arrived. They judged his conduct not only negligent but wilful. As to Charge 2, they found that he was at fault in failing to check the platform visually and place a foot upon it before opening the doors. Turning to the question of sanction, they (a) noted the 90-day agreement but observed that reporting for duty amounted to a declaration of fitness; (b) found that the 'comparator cases' were 'not closely matched' to the Claimant's case; but (c) decided that, in light of his long service, the proper penalty, rather than dismissal, was permanent demotion to CSA2, a role without safety-critical responsibilities.

28 The Claimant appealed against the CDI panel's decision. Under the Respondent's procedures, appeals take the form of a review of the original decision, taking into account the procedure followed and any new information which has come to light.

29 The appeal was assigned to Mr Dale Smith, then Head of Line Operations on the Central Line. Before hearing the appeal, he read the investigation report and appendices, the notes of the CDI hearing, Mr Curtis's letter conveying the outcome and the grounds of appeal. We accept his unchallenged evidence that, in line with the Respondent's normal practice, no information or material was put before him from which it would have been possible for him to discern or infer any relevant characteristic of any of the individuals cited as comparators.

30 The appeal hearing took place on 19 January 2023. It was attended by Mr Smith, the Claimant, Mr Shannon and Mr Warren McVeigh, who took a note. We are satisfied that his note, as amended following representations on behalf of the Claimant, is a fair record of what was said. The main points advanced by and/or on behalf of the Claimant were the following. First, at the CDI, some evidence was overlooked or excluded, in particular CCTV footage from one of the three cameras at Holborn Station. Second, the CDI panel failed to have any or sufficient regard to

the 90-day Agreement and the fact that it had not been reviewed. Moreover, by attending for work the Claimant was not necessarily declaring his fitness for duty. Third, the CDI panel wrongly failed to disclose to the Claimant details of their visit to Holborn Station or give him the opportunity to comment on what they had observed. Fourth, the CDI panel had wrongly found that the Claimant had been at fault in failing to 'prove the platform' by placing a foot upon it: that was no longer required under the rules. Fifth, the CDI panel had failed sufficiently to investigate the 'comparator' cases relied on by the Claimant and had wrongly distinguished them from his case. Sixth, in all the circumstances, the sanction imposed was unduly harsh and a written warning would have met the justice of the case.

31 Following the appeal hearing, Mr Smith took time to consider the matter. He also investigated the location of the third CCTV camera (footage from which had not been disclosed) and established that it was pointed at the back of trains entering the station westbound, and accordingly could not have yielded any evidence relevant to the case.

32 By a letter dated 3 March 2023, Mr Smith delivered his decision. In summary, he upheld the findings of the CDI panel, save that he corrected the point about 'proving the platform' by placing a foot upon it, which had ceased to be a requirement. Turning to sanction, he softened the penalty imposed by the CDI panel by limiting the restriction on safety-critical working to 52 weeks (expiring on 31 August 2023) and adding a written warning to remain in place until 9 May 2023. He explained that he judged dismissal a permissible option but that, having regard to the Claimant's length of service and the fact that he had reported the incident in the correct manner, a demotion with liberty to apply after a year for safety-critical work was appropriate. He also noted some mitigation in his family circumstances underlying the 90-day agreement and in his 'remorse' over the error with the doors (although on the latter point he also expressed regret that the Claimant had not fully acknowledged that his actions (particularly in respect of Charge 1) had compromised safety.

33 Ordinarily, disciplinary proceedings end at the appeal stage, but the Respondents permit a further 'Director's Review' in certain cases, where an appeal outcome is challenged with support from a trade union. In the Claimant's case, a Director's Review was held, conducted by Mr Nick Dent, Head of Customer Services. His decision, given following a meeting on 10 May 2023, was conveyed in a letter dated 28 July 2023. By it, he upheld Mr Smith's decision and reasoning save that he deleted the final written warning, judging that imposing it amounted to an 'increase in sanction', which was not permitted under the disciplinary proceedings.

The 'comparator' cases

34 As we have noted, a point pursued through the disciplinary proceedings and before us was that the sanction imposed on the Claimant was disproportionate and out of keeping with the normal run of sanctions in London Underground cases. In support of this contention, he relied on a number of previous cases. Those that need to be mentioned are summarised below. The names of the individuals concerned are irrelevant and we will anonymise them.

35 Having opened the doors of his train with the result that a passenger fell to the platform, Comparator A was summarily dismissed. On appeal, he was regraded to CSA and prevented from re-applying for a safety-critical role for 52 weeks. The manager who heard the appeal based her decision on a finding that, at the relevant time, Comparator A was unsighted. This did not amount to a full defence, since it was found that he had been careless in failing to view the PTI fully before closing the doors, but did constitute valid mitigation. Following a Director's Review, Comparator A's sanction was adjusted to permit him to return to a Train Operator role without applying for a vacancy, subject to certain conditions.

36 Comparator B drove his train away from a station without carrying out a visual check to see that the doors had closed. They had not. Found at CDI to have acted carelessly, he was dismissed (suspended for 52 weeks) and regraded to CSA2, with liberty to reapply for safety-critical roles at the end of the period. His appeal was dismissed but following a Director's Review, he was permitted to return to his Train Operator role without reapplying. The basis of the Director's decision was that the proper outcome would leave Comparator B free to return to train driving, subject to availability of such work and re-training. The difference between the result at the CDI stage and that delivered by the Director appears marginal.

37 Comparator C was involved in a Signal Passed At Danger ('SPAD') incident with aggravating features. He was dismissed (suspended for 52 weeks) and regraded to CSA2, with liberty to reapply for train-driver roles at the end of the period. On appeal, it was recognised that there was 'unusual and possibly unique' mitigation and the dismissal was revoked and a regrading to CSA2 substituted, again with liberty to apply for safety-critical roles after the expiry of the original 52-week period.

38 Comparator D was involved in a SPAD incident. He acted correctly in accordance with the Respondent's policy and was found to have done nothing calling for disciplinary action.

39 Comparator E was also involved in a SPAD incident. She was accused of 'aggravating' the incident by proceeding to move her train, which she could do only by overriding the safety feature which would otherwise have halted it. But the CDI panel accepted that this error itself stemmed from her understanding that the safety feature had engaged owing to a fault which was common in that particular location and that she had not believed that any SPAD incident had occurred. She was also credited with being entirely honest and straightforward in the disciplinary investigation. A final written warning was imposed.

Secondary Findings and Conclusions

Unfair dismissal

40 Was the Claimant dismissed? Yes: the Respondent rightly conceded that the Claimant was dismissed: the demotion took effect as a dismissal for the purposes of unfair dismissal law, as explained in *Hogg* (cited above), it being

common ground that this was not a case of the *Reynolds* type (also cited above), the disciplinary procedure being non-contractual

41 Has the Respondent demonstrated a potentially fair reason for dismissal? Here again, there was no real contest. We are satisfied that the Respondent has shown that the reason was one relating to the Claimant's conduct, namely the belief of the decision-makers that he had misconducted himself in the respects summarised in the two disciplinary Charges. That was a potentially fair reason for dismissal.

42 Did the Respondent act reasonably in treating the reason as a sufficient reason to dismiss? We remind ourselves that the statutory question must be addressed by asking whether, as a matter of substance and process, the Respondent's actions and decision-making fell within a range of reasonable choices open to it in the circumstances.

43 Starting with substance, we are satisfied that the CDI panel found both Charges proved on the evidence before it and was eminently entitled to do so. As to Charge 1, it found, and was entitled to find, that the Claimant had been at fault in attempting to take his duty book from his pocket when he was entering the station and had greatly compounded that error by a conscious choice at that moment to get down on to the floor of the cab to collect the loose pages. The panel further found, and again was fully entitled to find, that his claim that he had been diligently observing the 'road ahead' and the PTI throughout the 17 seconds which passed before the train came to a halt was untrue and, more generally, to reject his claim to have been fully in control of the train during that time. As to Charge 2, the panel found and, given that the evidence was undisputed, properly found, that the Claimant had opened the doors on the wrong side as a consequence of being distracted and disorientated by his efforts to recover the contents of his book and had, as a result, overlooked the requirement to check the platform visually before opening the doors.

44 Given those findings of fact, the CDI panel was, in our judgment, plainly also entitled find that the Claimant's conduct amounted to a very serious breach of the rules designed to ensure passenger safety and constituted gross misconduct. Charge 1 by itself was sufficiently serious to meet that standard.

45 At the appeal stage, as we have found, Mr Smith upheld the CDI findings, essentially on the same grounds. He explicitly rejected as 'not credible' the Claimant's claim to have maintained full control of the train. In our judgment, Mr Smith was equally entitled to the findings he made.

46 For all of these reasons, we are satisfied that the Respondent was entitled to find that the two charges were made out.

47 Did the Respondent operate a reasonable disciplinary procedure? Again, the question is whether the process fell within a range of reasonable options. In our judgment, it did. There was a thorough investigation. A comprehensive investigation report was produced. The disciplinary charges were clearly formulated. The Claimant received due notice of the CDI, appeal and Director's

Review meetings. His right to be accompanied was respected. At each stage of the process he was given a full opportunity to present his case. The decisions at each stage were fully and clearly explained in writing, as was his right to appeal from the first-instance decision.

48 Faced with these incontestable facts, Mr Walker raised a challenge on process of limited scope. He took three points, which we will address in turn. First, a 'FAIR Flowchart and Summary/Actions/Recommendations' document was omitted from the pack of papers prepared for the CDI hearing. This omission was not in dispute. It was, however, remedied prior to the decision of the panel. Moreover, no prejudice was caused to the Claimant because the omitted document contained no information which was not included in full form in the 'Outcome of Disciplinary Investigation' letter of 26 May 2022. Mr Walker did not identify any particular prejudice.

49 Second, it was said that it was unfair for Mr Curtis and Ms Ryan to carry out a 'site visit' without inviting the Claimant to attend or at least offering him the chance to do so. We accept that it would have been open to them to extend such an invitation but we do not consider that the course which they took was unfair. They had his evidence, which had been tested at great length through the investigatory meetings and the CDI meeting and they were, in our view, perfectly entitled to think that they had received a complete account from him. In visiting the station and travelling in the cab, they were exercising an inquisitorial function against the evidence which he had given. In our judgment that was entirely permissible. (Of course, if the visit had resulted in any new and significant evidence emerging, it would not have been fair to take that into account without giving the Claimant the opportunity to comment upon it. But that is not this case.)

50 Third, Mr Walker persisted with the complaint about the CCTV footage. With respect, this was a notably bad point. The evidence from the third camera was irrelevant and rightly did not feature in the case.

51 Weighing up the process in the round, we are entirely satisfied that it fell well within a range of permissible action open to the Respondent in the circumstances.

52 Was the sanction reasonable? Again, the question is whether the dismissal fell within a range of reasonable options. Before addressing that question we pause to make two points. The first is that this is an unusual case of dismissal. It is one which left the Claimant with a job, albeit (at least for the time being) at a much lower level than that which he had occupied prior to the disciplinary action. Generally speaking, we do not find ourselves differentiating one dismissal from another since, in the ordinary run of things, dismissal involves a forcible separation of employer and employee. But it is right to bear in mind that here, in accordance with its disciplinary procedure, under the Respondent imposed a form of dismissal which was less drastic than the norm. The second point is that it is trite, for the purposes of unfair dismissal law, that dismissal is a process, not an event. It follows that the Claimant's substance-based complaint necessarily rests on a challenge to the fairness of the ultimate outcome of the disciplinary process,

following the Director's Review. As we will explain, the analysis is otherwise under the 2010 Act.

53 Mr Walker based his creditable submissions on sanction on five points. First, no or insufficient significance was attached to the 90-day Agreement. Second, no or insufficient credit was given to the Claimant for his long service. Third, no or insufficient credit was given to the Claimant for his clean disciplinary record. Fourth, no or insufficient credit was given to the Claimant for acknowledging that he had made a mistake. Fifth, dismissal was a disproportionate sanction in all the circumstances, particularly having regard to the 'comparable' cases. We will deal with these briefly in turn.

54 We see no substance in the first point. The CDI panel and Mr Smith were clear in their view that attendance for duty by a train operator carries with it an implicit confirmation of fitness to perform safety-critical duties. That was an entirely proper view to take. Moreover, it was no part of the Claimant's case at any stage of the disciplinary process to argue that he had been unfit for work on the day of the incident.. At its highest, it went no further than to suggest that his mind might have been 'clouded' by his personal worries. This was consistent with the additional information elicited by Mr Smith at the appeal stage, that the 90-day Agreement had not raised any question about the Claimant's fitness and was concerned only with practical arrangements to do with his working hours designed to accommodate the medical needs of his mother-in-law.

55 As to the second point, the Claimant's long service was acknowledged in the disciplinary process. There is no reason to think that he was not given credit for it.

56 Turning to the third point, we note that there was no suggestion at any stage of the disciplinary proceedings of any prior act, omission or event being held against the Claimant. He was, quite rightly, treated as having a clean disciplinary record.

57 As to the fourth point, it is beyond question that the Claimant acknowledged fault in the disciplinary process in opening the doors on the wrong side and failing to check the platform. He was given only limited credit for that in the disciplinary process, but that was, in our view, understandable and justified in circumstances where he had adamantly refused to acknowledge any failure to maintain complete control of the train. In addition, inconsistencies in his case at different points in the disciplinary procedure did not assist him. In our judgment, these factors were properly taken into account at first instance and in the two appellate stages.

58 Turning to the fifth point, we have been reminded again of the wise warning of the EAT in *Hadjionnou* of the inherent difficulty for claimants in basing unfair dismissal claims on supposedly 'comparable' cases. Truly comparable cases are very hard to find. Moreover, if in a previous case another CDI panel or appeal officer had imposed an exceptionally mild sanction in a case similar to the Claimant's, that would not of itself have rendered an otherwise proportionate and just outcome in his case unlawful simply because of the difference in the level of penalty. This is because the central obligation of the employer is not to strive for

some ideal level of consistency but rather to address, by application of the 'range of reasonable responses' test, the question posed by the 1996 Act, s98(4). Further and in any event, we are satisfied that the ultimate outcome at the end of the Claimant's disciplinary process was in line with the general trend of the previous cases debated before us.

Conclusion on unfair dismissal

59 For all of these reasons, and having stepped back to review all the circumstances of the case, we are satisfied to a high standard that the sanction of dismissal (which here carried the unusual advantage of leaving the Claimant still in employment and free after a year to apply to recover his position as a Train Operator) was not unreasonable and fell comfortably within a range of permissible choices open to the Respondent in the circumstances. It follows that the dismissal was not unfair.

Discrimination

60 For the purposes of the discrimination complaint, the Claimant maintained allegations of direct race and age discrimination against the decision-makers at each of the three stages of the disciplinary procedure. In the course of the hearing we pointed out some apparent difficulties with that approach. In particular, three of the 'comparators' relied upon suffered *more* severe penalties than did the Claimant at the CDI stage. Self-evidently, this argued *against* the theory of discrimination by the CDI panel, if the 'comparator' cases were relevant at all. This point was met with the riposte that the discrimination lay in the ultimate outcome. But here the Claimant faced two further difficulties. First, if the complaint was only about the ultimate outcome, and not about the first-instance decision, the proper course would have been to withdraw the allegations of discrimination against the CDI panel. But that was not done. Second, on the new hypothesis, the Claimant's allegations of discrimination against Mr Smith and Mr Dent rested on decisions which, in each case, involved a *softening* of the initial penalty. The obvious implausibility of a case so put can be left to speak for itself.

61 Even if these considerable obstacles were left to one side, the Claimant's case on discrimination was, to our minds, quite unsustainable, however put. In so far as it rested on actual comparators it could not prevail because the cases relied upon were not genuinely comparable. The requirement for the circumstances of comparator cases to be the same or not materially different (see the 2010 Act, s23(1)) was not met. Apart from anything else, findings of wilful misconduct of the sort made against the Claimant case were not to be found in the 'comparator' cases. Nor was any 'background' evidence led tending to support any theory of a trend or pattern of discrimination within the Respondent's organisation (in disciplinary decision-making or generally), based on race, age or any other protected characteristic. We were provided with simply no evidence from which we might have inferred that a hypothetical comparator would have been treated more favourably than the Claimant. In short, no *prima facie* case of unlawful discrimination was raised. No question was posed demanding an answer from the Respondent.

62 Not only did the Claimant fail to raise a *prima facie* case of discrimination, we are also satisfied that the Respondent raised a compelling case to the contrary. In particular, as we have noted, we have accepted Mr Smith's evidence that he was provided with no information concerning the protected characteristics of the comparators on whose cases the Claimant relied. That rendered any discrimination (conscious or subconscious) on his part impossible. Nor was it suggested that Mr Dent was privy to more information concerning the alleged comparators than Mr Smith.

Conclusions on discrimination

63 For all of these reasons, we are satisfied to a high standard that there is nothing on which to sustain the Claimant's complaints of unlawful discrimination, and we unequivocally acquit Mr Curtis, Ms Ryan, Mr Smith and Mr Dent of any discrimination whatsoever.

Outcome and Postscript

64 For the reasons we have given, the Claimant's claims are dismissed.

65 We would not wish to leave this case without saying that it is a sad one. It arose out of an isolated aberration. As we have recorded, Mr Curtis acknowledged the Claimant's commitment to the Respondent and his proper pride in his position and long service as a Train Operator. It is not in question that he has contributed much in that role and we hope that he can now put this unhappy episode behind him and soon take up his career again.

EMPLOYMENT JUDGE – Snelson
25/01/2024

Reasons sent to the parties on 25/01/2024

For Office of the Tribunals