EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Ronald Wilson	**v**	**Network Rail Infrastructure Limited**

Heard at: London Central
On: 14 - 23 July 2025

Before: EJ G Hodgson
Mr R Baber
Mr S Pearlman

Representation

For the Claimant: Mr C Fray, equality officer
For the Respondent: Ms G Crew, counsel

JUDGMENT

1. **All claims of direct discrimination fail and are dismissed.**
2. **The claim of unlawful deduction from wages is not well-founded and is dismissed.**
3. **The allegation for breach of contract fails and is dismissed.**

REASONS

Introduction

1.1 The claimant brought claims before the tribunal on 2 June 2013. Following various hearings, there remained claims against the respondent for direct discrimination, wages or in the alternative breach of contract.

The Issues

2.1 The issues were identified on 14 July 2025 in an initial case management discussion before the judge sitting alone.

2.2 There remained claims of direct discrimination, and failure to pay wages or in the alternative breach of contract.

2.3 The claimant alleges that his dismissal was an act of direct discrimination. He relies on the protected characteristics of race and age.

2.4 He describes himself as Black British Caribbean. He compares himself to those who are younger. He is currently age 57 and was age 55 at the material time.

Evidence

3.1 The claimant gave evidence. In addition, for the claimant, we heard from Mr Simon Porter. Mr Neville Bailey attended on day one, but not thereafter. He did not give oral evidence. The claimant relied on Mr Bailiey's written statement.

3.2 For the respondent we heard from Mr Ian Turner, director, reward; Ms Laura Main, head of High Speed human resources; Ms Louise Duncan, head of stations and passenger experience; Ms Tracey, Emmerton, training and development coordinator; and Mr Daniel Lucas, head of station and passenger experience.

3.3 We received a bundle of documents. We also received documents which were sensitive, as they related to security, and we treated them as private.

3.4 The respondent supplied a chronology and a cast list.

3.5 Both parties provided written submissions.

Concessions/Applications

4.1 This case was listed for eight days before a full tribunal. One of the members was unavailable on the first morning. Initial case management, including final identification of the issues, was conducted on day one in a case management hearing before the judge sitting alone. The full liability hearing commenced on Wednesday, 15 July 2025.

4.2 In the case management hearing, the respondent renewed its application, pursuant to rule 49 Employment Tribunal Procedure Rules 2024, for some documents to be treated as private. I confirmed that the respondent should make a written application. The relevant documents related to the station security plan (SSP).

4.3 The claimant agreed that some documents were sensitive, as they are relevant to security, and should be withheld from the public. The claimant believed that additional sensitive documents, including the station security plan, should be included.

4.4 I noted only those documents which are sufficiently relevant should be put in evidence, and I would consider any applications that were put in writing.

4.5 The respondent sought permission to rely on a supplementary statement from a Ms Laura Main, head of high-speed human resources. The claimant consented and permission to rely on the additional statement was given.

4.6 Following the case management hearing, EJ Hodgson issued instructions which confirmed the need to make applications in writing.

4.7 The respondent sent a written application dated 25 June 2025 which stated the tribunal would need to consider training materials detailed in the station security plan, but not the station security plan itself. It applied for any part of the hearing which those materials refer to to be in private.

4.8 The claimant applied to include additional sensitive documents, including the station security plan.

4.9 The hearing resumed before a full tribunal on day three. The tribunal accepted, in principle, that there were a number of documents, particularly the station security plan and the operation documents arising therefrom, which were sensitive.

4.10 There was much agreement between the parties as to the nature of security checks. It was unclear whether any sensitive document would be referred to. The tribunal ordered, provisionally, that the document should not be referred to in public. If any party wished to refer to a sensitive document, it should say so at the relevant point in cross examination and then the application would be dealt with.

4.11 When a sensitive document was referred to, the tribunal asked the public to leave so that the application could be heard. The tribunal concluded the documents contained details of the assessment of risk, the response to it, and the relevant monitoring systems. There was a real possibility disclosure of that material may advantage those with hostile intent. The tribunal considered that it was necessary to protect that information and therefore an order should be made. The tribunal ruled that those documents must remain private and any cross examination relating to them should be in private. The documents were put in evidence, cross examination dealt with, and the public were invited back as soon as the sensitive documents had been dealt with. With the consent of the parties, the gist of the relevant evidence was given without giving the sensitive detail.

4.12 Difficulty arose on day four. During the morning session Mr Fray, the claimant's representative, was cross-examining a witness, Mr Turner. It was common ground that Mr Turner was not relevant to the discrimination claims. He had been involved in pay negotiations with the union and he gave relevant evidence about the agreement reached. Part of the agreement provided for payments nominally in respect of a period prior to the agreement. The issue before the tribunal was whether the claimant was a good leaver or not for the purposes of the agreement.

4.13 At the conclusion of the cross examination, EJ Hodgson asked Mr Pearlman if he had any questions and noticed the tribunal member appeared to be asleep. The tribunal adjourned to discuss the implications.

4.14 We should note that the room allocated on day one was oppressively hot. The tribunal had moved to a new room for the start of day 3. The parties had agreed the new room was better. However, the weather was still extremely hot and the room poorly aired and the CO2 monitor appeared not to be working. There was no air conditioning or active ventilation, albeit the windows had been opened.

4.15 On resumption of the hearing, the tribunal gave full disclosure. In summary, Mr Pearlman accepted that he had briefly fallen asleep at the end of the cross examination of Mr Turner. He had made notes of the evidence which revealed that he recorded the vast majority of the cross examination. Our best estimate was that he had fallen asleep momentarily for approximately 30 seconds.

4.16 EJ Hodgson explained that the circumstances raised questions about the integrity of the hearing. In particular it was necessary to consider whether there was a risk that the fairness of the hearing had been impaired are undermined. There are a number of relevant questions. Was there any indication of a general lack of attention? How important to the issues with the evidence being given? How important to the issues was the evidence which appeared to have been missed? Could the situation be remedied by listening to a recording, or repeating the evidence?

4.17 EJ Hodgson asked the parties to consider their positions and take time to do this. There were four broad possibilities. It may be appropriate to abandon the hearing. It may be appropriate to continue with the original panel. It may be appropriate to proceed with the judge and one member. It may be appropriate to proceed with the judge sitting alone.

4.18 EJ Hodgson explained that it is not possible to proceed with one member without the consent of both parties. He explained in the event of disagreement with a panel of two, the judge would have a casting vote.

4.19 He also explained that following the recent changes to panel composition, it may be possible to proceed with a judge sitting alone, and it was unclear whether that would need consent.

4.20 The parties had no specific questions. Following the adjournment, Mr Fray indicated that the claimant was content to proceed with a full panel. The respondent agreed.

4.21 We discussed the practicalities of ensuring that any evidence had been missed was covered. We considered the possibility of listening to the recording. Ultimately, Mr Fray agreed to repeat the final questions of his cross examination. The answers received were the same as originally given.

4.22 Before proceeding, the tribunal considered whether it was appropriate to proceed. Full oral reasons were given. In brief, the tribunal recognised that one member had fallen asleep briefly and therefore has missed a small section of the final part of the cross examination of Mr Turner. It had been noticed almost immediately. The incident was brought to the parties' attention and the full circumstances disclosed. It was possible to identify what evidence had been missed. The evidence was only potentially relevant to the issue of a back payment. Mr Pearlman's loss of concentration was momentary and it was clear from his notes that he listened to all the remainder the evidence carefully and diligently. The relevant evidence missed could be identified and repeated, and therefore would be taken into account. There was no risk that the fairness of the hearing would in any material sense be undermined. Abandoning the hearing was unnecessary and disproportionate. As the evidence was only relevant to the money issue, it may be possible to allow that matter to be decided by different tribunal if requested by the claimant, but that appeared to be disproportionate and unnecessary. It would be possible to proceed with the two panel or one panel tribunal without there being any unfairness, but in the circumstances described that was unnecessary.

4.23 The tribunal therefore agreed that it was appropriate that the matter should continue before the full panel of three.

4.24 On the first day of the hearing, consideration was given to the timetable and there was discussion about the relevance of various witnesses. Those matters were kept under review throughout. The respondent initially asked for two days to cross examine the claimant and his witnesses. The tribunal considered this to be unnecessary having regard to the issues and the evidence in dispute. The claimant asked for two days to cross examine the respondent's witnesses. The tribunal stated it would set a timetable, and the time allocated for each witness would be extended, if the cross examination focused on relevant questions, but it was not possible to complete cross examination in time.

4.25 The cross examination of Mr Turner introduced a number of matters which were irrelevant. However, Mr Fray was encouraged to deal with relevant matters and the initial time allowed was extended.

4.26 The second witness was Ms Main. She was not directly involved in the investigation, the dismissal, or the appeal. The claimant had alleged there were comparators. Ms Main's evidence concerned the collation of relevant HR documents largely concerning various disciplinary allegations and outcomes related to those individuals. She was not involved directly and therefore was, essentially, collating hearsay evidence. The claimant cross examination of Ms Main included numerous matters which were not relevant to the issues in this case. The tribunal sought to give guidance on several occasions. Mr Fray did not accept that the guidance given was appropriate. He did not accept that he was asking irrelevant questions. He indicated that the tribunal was preventing him from developing his cross examination in the manner he saw appropriate. The tribunal extended time for cross examination of the witness and indicated it would not intervene, but would not extend time further should Mr Fray continue to ask irrelevant questions. Shortly before 1 o'clock on day four, the further time allocated expired. Mr Fray asked for further time. The tribunal considered the matter and reviewed the cross examination. It revealed Mr Fray had persisted in raising numerous irrelevant matters. In the circumstances it was not appropriate to extend time further.

4.27 Following that decision, Mr Fray stated that he had not been able to put relevant questions. He was asked to clarify. He raised a number of matters, the principal matter being that the claimant wished to allege that the dismissal had been orchestrated by another individual, Ms Tracey Moore, and it was relevant to ask Ms Main that question. The tribunal indicated that if he wished to apply for Ms Main to be recalled so those questions could be put, it would consider the application. We adjourned so the claimant could take instructions from the claimant. When he returned Mr Fray stated the claimant did not wish to recall Ms Main.

4.28 Further consideration was given to the timetable throughout. The claimant initially asked for three hours to cross examine Ms Duncan, who was the person dismissed. The tribunal indicated it would give an initial two hours and if the claimant had focused on relevant questions the tribunal would extend time so that the relevant questions could be asked. Ultimately. Mr Fray kept within the timetable for cross examination of all the remaining witnesses.

The Facts

Background

5.1 Network Rail (High Speed) Ltd (NRHS) is responsible for managing St Pancras railway station. St Pancras is managed by NRHS.

5.2 The respondent, Network Rail Infrastructure Limited employed the claimant from 6 August 2007 until 6 February 2023 when he was summarily dismissed. He held the position of customer services assistant at the time of his dismissal. At the time of his dismissal, he was seconded from the respondent to NHRS.

5.3 St Pancras is an international train station. NRHS is responsible to the Department for Transport (DfT) for the management of St Pancras.

Security

5.4 St Pancras is a busy station and a potential target for hostile agencies. There is a risk of terrorist attack. There is a station security plan. It is sensitive, and we do not set out the detailed plan in these reasons. The safety plan seeks to recognise potential threats and records the practices and procedures employed to reduce the risk.

5.5 Planting of explosive devices is an obvious risk. Devices may be left in packages or bags and may be hidden. The safety plan provides for regular inspections. There are areas which are identified as higher and lower risk, and inspections may be tailored accordingly.

5.6 Inspections are undertaken by customer service assistants in accordance with inspection plans. There are different zones. The frequency and nature of the checks is dictated by risk identified in each zone.

5.7 A physical security check involves a customer service assistant (CSA) walking a particular zone and paying attention to the high risk areas, as identified in the plan. This will include checking designated areas which pose a high risk. There may be structures, such as a post-box, behind which a device could be hidden. Those areas are to be checked.

Training

5.8 The claimant was trained on the requirements of various security plans. He received refresher training in April 2022, and then on 28 September 2022. Although there has been some dispute about whether he signed the document demonstrating his attendance, he accepts he attended the training. The whiskey 3 training included reference to a specific post-box. Behind the post-box is a narrow area where a device could be concealed. Customer service assistants are required to look behind the post-box as part of the relevant check. At all material times, the claimant understood the post-box was part of the whiskey 3 area and that he must look behind the post-box.

5.9 The claimant had frequently undertaken the whiskey 3 inspection and had checked behind the post-box. There are a number of potential concealment areas which need to be checked, and the claimant was familiar with those areas. Those areas were covered again in the September refresher.

The role of Department for transport (DfT)

5.10 NRHS is monitored by the Department for Transport, which has the overriding responsibility. As part of its role, and in order to test the

compliance with security measures, DfT undertakes covert testing. Part of that testing may include planting dummy suspect packages. The DfT officer then normally observes the area to ascertain whether an inspection takes place, and if so whether the dummy devices found. If there is a failure, NRHS is required to explain, and there may be consequences in the form of sanctions.

Events of 18 October 2022

5.11 On 18 October 2022, the claimant was designated to undertake a number of inspections, including whiskey 3.

5.12 On that day, DfT carried out a covert inspection. As part of that inspection, the DfT operative planted a dummy device behind a post-box in the whiskey 3 area. The device was planted at a time when the claimant was designated to undertake the inspection. The claimant had a set period of time to complete the inspection. The inspection should have been completed by 09:30.

5.13 The DfT inspector observed that no CSA checked behind the post-box during any time allocated to the claimant for the inspection. Following the claimant's allocated time, there was a further inspection. The next allocated CSA found the dummy package at approximately 09:44. That CSA reported a suspect package to Mr Jake Lomas, the station security manager.

5.14 The CCTV footage was checked by the DfT operative who had left the suspect package. The CCTV footage demonstrated that no customer service assistant had attended the vicinity in the relevant period leading up to 09:30. The DfT operative subsequently reported that no staff member was observed conducting a security check in the vicinity of the post-box, in accordance with the station safety plan.

5.15 The claimant had been delegated to undertake the search leading up to 09:30. The records demonstrated the claimant had radioed in at approximately 09:22 to confirm that the check had been completed and this was recorded as "all appears in order." By contacting control to say the check was complete, the claimant was confirming that he had complied with his responsibility to undertake the security check.

5.16 The claimant went on a break at 09:24, six minutes before the end of the period for his patrol.

5.17 In his evidence to the tribunal, the claimant accepted that he had not completed the security check and that he had failed to check behind the post-box.

5.18 The DfT completed a report. We have seen an extract from the report reproduced in the investigation documentation, but we have not seen the original report.

5.19 We have not seen the original CCTV. The claimant was able to view it as part of the investigation.

The immediate response

5.20 Following initial investigations, the claimant was suspended from security duties at approximately 18:30. He was permitted to continue working and perform his other duties. He did not return to security check duties.

The investigation

5.21 On 1 November 2022, Ms Tracey Emerton, training and development coordinator, was asked by Ms Tracey Moore, employee relations business adviser, to undertake an investigation.

5.22 Ms Emerton was provided with documentation. She checked the claimant's training record. She read the DfT report. She read a statement from the DfT operative who had spoken to the claimant after the failed spot-check. That statement recorded the claimant as confirming he had not checked the relevant location around the post-box and had reported he had been interrupted by a medical emergency which had prevented him from completing the task, but had nevertheless radioed in to say the check had been completed. She reviewed the CCTV. The CCTV related to the area covering the post-box and was for a limited time period.

5.23 On 4 November 2022, she wrote to the claimant inviting him to an investigation meeting. The letter confirmed the purpose of the interview was as follows:

> **The interview has been arranged to investigate the following allegations: You failed to complete a security check in the … area whilst on shift on Tuesday 18th October 2022. And then falsified the documentation to say you had completed it.**

5.24 The claimant was invited to supply any relevant information and he was given the right to be accompanied at the interview.

5.25 The investigation interview took place on 5 December 2022. The claimant was accompanied by Mr Simon Porter, in his capacity as a trade union representative. All viewed the CCTV footage. The claimant stated he believed he had completed the check and felt he had sight of the post-box from his position between Starbucks and M&S. He was read the DfT report, which reported the claimant's alleged contemporaneous statement that he did not check the location.

5.26 Ms Emerton discussed the claimant's training. The claimant initially stated he did not recall when he last attended training. He went on to say the training was inadequate and was a "tick box exercise." He alleged that he had raised the point in his last training session.

5.27 There were further investigations. Ms Emerton spoke to Mr Jake Lomas on 8 December 2022. He confirmed the claimant told the DfT operative he had not completed the security check to the standard required because of a medical emergency. Mr Lomas, therefore, confirmed the DfT operative's account. Ms Emerton attended the area and stood between Starbucks and M&S. She confirmed there was no clear view of the post-box. Ms Emerton met with Ms Lauren Clancy, who was a station manager at St Pancras, and who had undertaken the training. Ms Clancy stated the claimant reported the training was good. She confirmed that a line of site was not acceptable in terms of physical check. There was a requirement to check behind the post-box. Ms Emerton prepared her report which set out the facts she had ascertained.

The disciplinary

5.28 Ms Tracey Moore nominated Ms Louise Duncan, head of stations and passenger experience, to undertake the disciplinary.

5.29 On 24 January 2023, Ms Duncan wrote to the claimant and invited him to a disciplinary hearing to take place on 6 February 2023. The allegation was as follows

> **The purpose of the hearing is to consider the following allegation of gross misconduct against you. The allegation of failing to carry out the security check in full, which is a breach of the Disciplinary Policy and Procedure Section 1.20.2 deliberate falsification of records. Specifically, that on the 18th October 2022 at St Pancras International Station you failed to carry out a security check in the Red Zone, which you are required to check every [xxx][1] and then complete the paperwork in the control room to confirm this has been done. The Department for Transport (DfT) planted a covert package and because of the failed patrol, this package was never found. You allegedly failed to comply with the station security plan and falsified the records.**

5.30 The letter detailed the findings of the investigation. She provided copies of relevant evidence, including statements, records of interviews, the signed CCTV request, relevant security station plans, details of relevant training presentations, relevant rosters, the daily check sheet, signed attendance sheets, the assistant duty list, and the disciplinary procedure.

5.31 Mr Simon Porter accompanied the claimant at the meeting on 6 February 2023. Ms Duncan did not review the CCTV, albeit she gave the claimant's representative the opportunity to do so. She asked the claimant for his version of events. The claimant referred to attending a woman who was unsteady on her feet. He stated that had taken his attention. Nevertheless, he alleged he carried out the checks in accordance with the station security plan. He referred to viewing the area from Starbucks to the escalator and having a view of the post-box.

[1] The specific timings may be sensitive and have been omitted.

5.32 Mr Porter alleged that all whiskey 3 patrols were falsified because part of the area could not be accessed. It does not appear he was referring to the post-box.

5.33 The claimant objected to the CCTV having been viewed, as it should not be used as part of disciplinary proceedings. The claimant maintained that he had completed the security check. The claimant appeared to deny being trained in the whiskey 3 area. The whiskey 3 area training, as set out in April and September 2022, was shown to the claimant. Both show the requirement to look behind the post-box.

5.34 Ms Duncan confirmed the claimant had gone on his break at 09:24. She raised with him the DfT report and the contradictory account. The claimant denied recalling the alleged conversation with the DfT operative.

5.35 Mr Porter complained about the time it had taken to investigate the allegations.

5.36 Ms Duncan concluded that the claimant was seeking to deflect from the actual allegations and findings of the investigation, rather than admit any failure to carry out the security check. She did not accept that any alleged shadowing of an unwell woman rendered the claimant unable to complete the check. The claimant had not phoned in any medical emergency. The evidence suggested the member of the public declined assistance.

5.37 Mr Porter suggested Ms Duncan should consider previous incidents and the sanctions applied. He did not identify any specific incident.

5.38 Ms Duncan adjourned for approximately 2.5 hours to consider all the evidence and review the documentation before she reached a decision. She elected to dismiss the claimant. She summarises her reasons in a statement as follows:

> **(a) I did not accept Ron saying he felt he completed the security check and was ensuring safety of passengers was a mitigation; he had failed to check behind the post box during a Whiskey 3 …, while also failing to find a DfT covert package. It was therefore plain that the check had not been completed, putting passenger safety at risk.**
>
> **(b) Ron said he operated under the Station Security Plan which states the … must be checked every [xxx]. Ron had not completed the check, and so had not complied with the Station Security Plan.**
>
> **(c) I found no evidence of Ron assisting the woman and distracting him from his check; it was not logged or radioed. That was the action Ron should have taken if attending the passenger would mean a full security check could not be carried out.**
>
> **(d) Ron attended team training in September 2022; the training pack showed that behind the post box must be checked as part of a Whiskey 3 Patrol. I did not accept Ron's claim that he had not been properly trained on this, as the training pack showed that he was, there was a signed attendance sheet confirming that he attended this training, and he did not provide any evidence that he had raised any problems with this training or**

raised concerns about being unsure of his job requirements prior to the incident.

(e) Ron did not feel his health and family bereavements affected his performance.

(f) I considered his service of 15 years, low sickness levels and no current warnings.

(g) Ron said he felt shame and regret for failing the DfT check, but when I asked if he would do anything differently he said he would not help the passenger and focus just on security checks. I considered whether there was a likelihood that in the same situation he would act the same again, and I found on the balance of probabilities he would because of the abovementioned lack of remorse shown by Ron.

(h) St Pancras is the UK's only international passenger station and is a very real terrorist target. Security breaches could cause injury, damage or death and could potentially affect thousands of people. Ultimately, if the package had not been a covert package placed by the DfT, there was a serious risk that Ron had not identified it and the consequences could have been grave. NR relied on Ron and his team to keep the Station safe;

(i) Ron made a false report; this was serious as making a false report breaches trust and potentially amounts to gross misconduct (pages 100-101) (as was the case here).

The Appeal

5.39 The claimant appealed the dismissal. The appeal was heard by Mr Daniel Lucas, head of stations and passenger experience. The appeal hearing proceeded on 22 March 2023. We do not need to record the detail of the appeal. We are satisfied that a fair appeal process was followed. The appeal was rejected. Full reasons were given.

Comparators

5.40 During the hearing, we heard evidence about a number of employees or previous employees who have been referred to by the claimant and potentially were put forward either as actual, or evidential comparators. During the hearing the full names of those comparators were used. However, none of the alleged comparators was called to give evidence and it is unclear if any (except NB) understood their personal circumstances were being referred to. We have considered whether it is necessary to name those individuals in these reasons. We find that the specific identities are largely irrelevant, it is the general circumstances which may be relevant. We considered the balancing exercise having regard to the interests of open justice and their right to privacy. As regards the balance, we are satisfied that we must anonymise them.

5.41 Comparator MA - much of the focus has been on the circumstances of MA. This person was employed as a CSA, is white, and failed a security check at the station. It was alleged MA falsified records by confirming a full check had been completed. MA was disciplined and was found guilty

of misconduct. She received a first written warning. MA failed to review the total area in a zone which carried a lower risk than the whiskey 3 area. MA had not received refresher training for three years. The failure to give recent training appears to be an important factor in deciding the sanction applied. MA's circumstances were not known to Ms Duncan. The sanction post-dated the claimant's dismissal.

5.42 Comparator JA is said to be black British African. JA was employed as a CSA. In April 2021 it was alleged he failed to complete a full security check. There is no allegation that he had falsified records. He failed to notify the station that the checks were incomplete. He did not notify them as completed. He received a first written warning.

5.43 In April 2022, there was a further allegation that JA failed to complete a full security check at the station. On this occasion it was alleged he had falsified records. MA was accused of gross misconduct. He resigned before completion of the disciplinary hearing.

5.44 Comparator NB is described as black Caribbean. NB was accused of failing to complete a security check in June 2012 and falsifying records by confirming the full check had been completed. There are incomplete records about how NB was treated at the time. However it appears he remained employed.

5.45 NB was accused of failing to complete a full security check and falsifying records in October 2022. Following a disciplinary, he was dismissed on 7 February 2023. He was not dismissed by Ms Duncan.

5.46 Comparator JW was employed as a CSA and is white. JW was subject to disciplinary action in October 2018 for failing to ensure a person attending a delivery yard had appropriate identification. The disciplinary took no further action.

5.47 Comparator PM is a CSA who is white British. There is no record of any disciplinary matters involving PM.

5.48 Comparator BD is referred to by the claimant, the respondent was unable to locate any records. The claimant refers to this individual statement, but gives no details.

5.49 Comparator TM was a shift station manager. There is dispute as to the relevant circumstances concerning TM. However, it is common ground that they revolved around the alleged use of racist language. Disciplinary action was taken. There was an appeal and ultimately a resignation.

5.50 Comparator CK is white and was over two decades younger than the claimant. CK , who was employed as a CSA, was dismissed on 1 December 2022. It was alleged that in April 2022 CK had falsely confirmed completion of a security check. CK was dismissed on grounds of gross misconduct. The decision was upheld on appeal. The claimant

mentions this individual in his statement, but gives no evidence as to CK circumstances.

5.51 Comparator PK is a black man. PK was dismissed on April 2023. He failed to complete checks in the area whiskey two. This led to a member of the the public being found behind security barriers. This was not during a DfT covert inspection. He was alleged to have deliberately falsified records by stating the inspect was complete. He was initially dismissed , but was reinstated on appeal. The claimant allege the reinstatement was because he PK alleged discrimination. The respondent does not accept that race was relevant

5.52 The appeal outcome letter. Refers to PK having personal issues which were taken into account. He was not offered the opportunity to see the CCTV and this was considered unfair.

The law

6.1 Direct discrimination is defined in section 13 of the Equality Act 2010.

> **Section 13 - Direct discrimination**
> **1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**
>
> **(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.**

6.2 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

> **employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. (para 10)**

6.3 **Anya v University of Oxford** CA 2001 IRLR 377 is authority for the proposition that we must consider whether the act complained of actually occurred (see Sedley LJ at paragraph 9). If the tribunal does not accept the there is proof on the balance of probabilities that the act complained of in fact occurred, the case will fail at that point.

6.4 When considering these claims, we have in mind the helpful guidance given by the Employment Appeal Tribunal in **London Borough of Islington v Ladelle 2009** IRLR 154. In particular, we note paragraphs 40 and 41 as set out below:

> 40. Whilst the basic principles are not difficult to state, there has been extensive case law seeking to assist tribunals in determining whether direct discrimination has occurred. The following propositions with respect to the concept

of direct discrimination, potentially relevant to this case, seem to us to be justified by the authorities:

(1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in **Nagarajan v London Regional Transport** [1999] ICR 877, 884E – "this is the crucial question". He also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.

(2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial: see the observations of Lord Nicholls in **Nagarajan** (p.886F) as explained by Peter Gibson LJ in **Igen v Wong** [2005] ICR 931, para 37.

(3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the **Burden of Proof Directive** (**97/80/EEC**). These are set out in **Igen v Wong**. That case sets out guidelines in considerable detail, touching on numerous peripheral issues. Whilst accurate, the formulation there adopted perhaps suggests that the exercise is more complex than it really is. The essential guidelines can be simply stated and in truth do no more than reflect the common sense way in which courts would naturally approach an issue of proof of this nature. The first stage places a burden on the claimant to establish a prima facie case of discrimination:

> **"Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably [on the prohibited ground], then the burden of proof moves to the employer."**

If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the Tribunal *must* find that there is discrimination. (The English law in existence prior to the **Burden of Proof Directive** reflected these principles save that it laid down that where the prima facie case of discrimination was established it was open to a tribunal to infer that there was discrimination if the employer did not provide a satisfactory non-discriminatory explanation, whereas the Directive requires that such an inference *must* be made in those circumstances: see the judgment of Neill LJ in the Court of Appeal in **King v The Great Britain-China Centre** [1991] IRLR 513.)

(4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employee has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne Wilkinson pointed out in **Zafar v Glasgow City Council** [1997] ICR 120:

> "it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances."

Of course, in the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an

explanation: see the judgment of Peter Gibson LJ in **Bahl v Law Society** [2004] IRLR 799, paras 100-101 and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ pointed out, the inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment.

(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the Tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the **Igen** test: see the decision of the Court of Appeal in **Brown v Croydon LBC** [2007] ICR 897 paras.28-39. The employee is not prejudiced by that approach because in effect the tribunal is acting on the assumption that even if the first hurdle has been crossed by the employee, the case fails because the employer has provided a convincing non-discriminatory explanation for the less favourable treatment.

(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in **Anya v University of Oxford** [2001] IRLR 377 esp.para.10.

(7) As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in **Watt (formerly Carter) v Ashan** [2008] ICR 82, a case of direct race discrimination by the Labour Party. Lord Hoffmann summarised the position as follows (paras.36-37):

> "36 The discrimination … is defined … as treating someone on racial grounds "less favourably than he treats or would treat other persons". The meaning of these apparently simple words was considered by the House in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337. Nothing has been said in this appeal to cast any doubt upon the principles there stated by the House, but the case produced five lengthy speeches and it may be useful to summarise:
>
> (1) The test for discrimination involves a comparison between the treatment of the complainant and another person (the "statutory comparator") actual or hypothetical, who is not of the same sex or racial group, as the case may be.
>
> (2) The comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in either case should be (or be assumed to be), the same as, or not materially different from, those of the complainant…
>
> (3) The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect different) may nevertheless be evidence from which a tribunal may infer how a hypothetical statutory comparator would have been treated: see Lord Scott of Foscote in *Shamoon* at paragraph 109 and Lord Rodger of Earlsferry at paragraph 143. This is an ordinary question of

> relevance, which depends upon the degree of the similarity of the circumstances of the person in question (the "evidential comparator") to those of the complainant and all the other evidence in the case.
>
> 37 It is probably uncommon to find a real person who qualifies….. as a statutory comparator. Lord Rodger's example at paragraph 139 of *Shamoon* of the two employees with similar disciplinary records who are found drinking together in working time has a factual simplicity which may be rare in ordinary life. At any rate, the question of whether the differences between the circumstances of the complainant and those of the putative statutory comparator are "materially different" is often likely to be disputed. In most cases, however, it will be unnecessary for the tribunal to resolve this dispute because it should be able, by treating the putative comparator as an evidential comparator, and having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator. If the tribunal is able to conclude that the respondent would have treated such a person more favourably on racial grounds, it would be well advised to avoid deciding whether any actual person was a statutory comparator."

41. The logic of Lord Hoffmann's analysis is that if the Tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then again it is unnecessary to determine what are the characteristics of the statutory comparator? This chimes with Lord Nicholls' observations in **Shamoon** to the effect that the question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

> "employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was." (para 10)

This approach is also consistent with the proposition in point (5) above. The construction of the statutory comparator has to be identified at the first stage of the **Igen** principles. But it may not be necessary to engage with the first stage at all.

6.5 Section 136 Equality Act 2010 refers to the reverse burden of proof.

> **Section 136 - Burden of proof**
>
> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**
> **…**
>
> **(6) A reference to the court includes a reference to--**

> **(a) an employment tribunal;**
> **(b) …**

6.6 **In considering t**he burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37.** It is not necessary for us to set out the appendix in full, but we have considered the guidance it contains.

6.7 Section 23 Equality Act 2010 provides -

> **(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.**

Conclusions

7.1 The claimant brought a claim of unfair dismissal which was dismissed prior to the hearing because it was out of time.

7.2 The dismissal is said to be an act of direct discrimination. The claimant relies on the protected characteristics of age and race.

7.3 He describes his race as black British Caribbean. He compares himself to someone who is younger.

7.4 The submissions make it plain that he is relying on MA as an actual comparator, albeit there is reference to a number of comparators who appear to be advanced as evidential comparators.

7.5 The first question is whether the treatment occurred. It is accepted that the claimant was dismissed and it follows the treatment is established.

7.6 It is then necessary to consider the burden of proof. The claimant may point to any fact, whether established by himself, agreed, or established by the respondent. For the burden to shift, the fact, or accumulation of facts, must be such that the tribunal could decide, in the absence of any explanation, the relevant provision of the Equality Act 2010 was contravened. It is not enough to point to a difference in a protected characteristic and a difference in treatment. There must be something more.

7.7 It is rare to find clear direct evidence of discrimination. Much will depend on what could properly be inferred from the primary finding of fact. That is the process of drawing an inference.

7.8 It is not possible to infer primary findings of fact.

7.9 Whilst the claimant refers to MA as being a comparator, the claimant's submissions do not address the relevant material circumstances on which the comparison is based. When considering a comparator, there must be no material difference between the circumstances relating to each case. The circumstances which are material are those which are relevant to the treatment. It may be possible to avoid arid debates by concentrating on the reason for the treatment. There may be occasions when concentration on comparator may be misleading. When considering a comparator, it is necessary to have in mind what are the material circumstances. In this case, the claimant fails to set out in the submissions what are the relevant material circumstances.

7.10 Ms Duncan took the decision to dismiss. It is her mind we must look at, primarily. She does not have to consciously discriminate in order for there to be a finding. It is enough if we find that she subconsciously was materially influenced by a protected characteristic.

7.11 The claimant alleges Ms Duncan is a racist, and that racism led to her consciously discriminating. In his submissions, the claimant puts it as follows, "The claimant believes that she was and still is a racist, who was working under the direction of Tracey Moore." The claimant's submissions do not explore, in any meaningful way, why he believes that he was discriminated against on grounds of age. He relies on the fact that MA was younger.

7.12 On a reading of the claimant's claim form, witness statement, and submissions a number of themes emerge which are said to be relevant to turning the burden. We will first identify them, and then consider their factual basis and relevance individually. Finally, we will consider the entirety of the collective matters advanced on behalf of the claimant, when considering our conclusions on race and age.

7.13 The following themes can be discerned.

7.14 First, there had been no previous dismissals for comparable incidents.

7.15 Second, the process of conducting the investigation and disciplinary hearing was flawed and unfair to include the following:

- 7.15.1 an initial delay;
- 7.15.2 continuing delay and the length of the procedure in total;
- 7.15.3 delay in the investigation;
- 7.15.4 the investigation failing to establish grounds for dismissal;
- 7.15.5 the use of CCTV during the investigation;
- 7.15.6 the failure of Ms Duncan to view the CCTV;
- 7.15.7 the use of Ms Natasha Vincer as a note taker, when she had been involved at MA's disciplinary, it being the claimant's case that she was aware of the sanction placed on MA;

7.15.8 it being Ms Emerton's first investigation;
7.15.9 it being Ms Duncan's first disciplinary hearing; and
7.15.10 the entirety of the investigation and dismissal process being orchestrated by, Ms Tracey Moore who it is alleged directed the relevant findings and decisions at all stages.

7.16 Third, a failure to respond to the discrimination questionnaire (albeit this was not pursued in evidence or in submissions).

7.17 Fourth, Ms Duncan using racist terms in a Facebook entry.

7.18 Fifth, the existence of the document "Abuse of disciplinary procedure, Birmingham New Street – network rail."

7.19 Sixth, inconsistent treatment of comparators-
7.19.1 MA is advanced as an actual comparator and it is implicit that her circumstances are said to be materially the same.

7.19.2 Others, particularly, JA, NB, JW, PM, and BD, are said to have "failed DfT training exercises without facing dismissal."[2]

7.20 Seventh, "falsification of DfT records … to pass untrained employees as being competent."[3]

7.21 Eighth, the alleged existence of a "hostile two-tier system in which black workers are targeted and disciplined for things their white colleagues are not."[4]

7.22 Ninth, a failure of training on the Equality Act 2010.

7.23 We first consider the allegation that there had been no previous dismissals for a comparable incident. It is first necessary to consider what is the nature of the incident that led to the claimant's dismissal before it is possible to consider whether there were previous comparable incidents.

7.24 In this case, we find that it is the totality of the circumstances which were relevant to Ms Duncan's decision to dismiss. The claimant was an experienced CSA. He had received training, and refresher training. His most recent training was on 28 September 2022, a matter of three weeks before the incident on 18 October 2022. He was familiar with the whiskey 3 area and what was required by way of inspection. The dummy device had been planted by the DfT operative at the time which coincided with the claimant's inspection. The claimant should have found it during his inspection. The claimant did not find it because he failed to check behind the post-box. The claimant knew he should check behind the post-box. The claimant did not approach the post-box. The claimant alleged that he had been distracted by a member of the public. The claimant had not

[2] From the claimant's submissions.
[3] From the claimant's submissions.
[4] The claimant's submissions under "Simon Porter" section.

reported an incident with a member of the public nor had he radioed in to seek assistance or confirm that his assisting the member of the public had prevented him from completing the relevant inspection. The claimant had initially admitted his failure to the DfT operator, but thereafter he had prevaricated. He had failed to admit his failure instead alleging that he completed the relevant inspection. He claimed that he had not received adequate training when there was no proper basis for his doing so. Finally, the claimant had radioed the operations room at 09:22, some eight minutes before the end of his allocated time, to confirm that the inspection has been completed and then, two minutes later, went on his break.

7.25 The evidence we have falls short of demonstrating that prior to the claimant's dismissal there are any examples of employees in the same material circumstances who had not been dismissed. However, we recognise that the evidence we have is incomplete. Mr Lucas, albeit his involvement in this case was with the appeal, was able to give some relevant evidence on this point.

7.26 In his witness statement, at paragraph 4.5, Mr Lucas states that his career spanned various organisations in the rail sector. He states "I have heard approximately ten appeals involving similar cases. In each instance where it was found that the employee had failed to carry out a required security to check and falsified the record suggest it had been completed as was the case here the outcome was summary dismissal." In his oral evidence, he referred to the respondent failing DfT inspections, but none of those employees involved being dismissed. He was unable to give numbers, or circumstances. He said it was more than one and could have been more than ten. If he had been the appeal officer in any of these, he did not make that clear. He was unable to give the details any specific incident. It follows that his evidence is less than satisfactory. It is unclear how the evidence given in his statement and the evidence given orally relate.

7.27 Mr Lucas accepted that there had been previous DfT covert operations which the respondent had failed. He believed that some of those failures concerned the failure to find packages. However, he was not able to give any detail about the individual covert operations, why there was a failure, who was responsible for the failure, what investigation took place, what reasons were given by any CSA and what action was taken. We cannot infer primary findings of fact. We observe that the evidence surrounding previous failed DfT covert tests could have been put before the tribunal. However, neither the respondent nor the claimant presented the relevant evidence.

7.28 MA failed to complete inspection adequately by failing to check the end of a platform. The respondent accepts that her circumstances insofar as they led to the initiation of disciplinary proceedings were essentially the same. However, the circumstances relevant to the sanction were not the same. It had been around three years since she had training. It is accepted she failed to complete the inspection and she falsified the record

by claiming she had completed the inspection. She was not dismissed. She received a written warning on 3 March 2023. That warning was issued by Ms Natasha Vincer, who also acted as notetaker at the disciplinary hearing in the claimant's case.

7.29 Comparator NB, was involved in a similar failure to the claimant. Ultimately, he was dismissed albeit his dismissal was after the claimant's. For these purposes, it is accepted that his race is to be treated as the same as the claimant. It may be argued that this is evidence of people of the same race being treated similarly. It is also evidence of similar circumstances being treated similarly.

7.30 JA, who is described as black British African, was initially subject to disciplinary proceedings in April 2021, but was not dismissed. It is respondent's case that those allegations did not concern deliberate falsification of records. It follows that those circumstances would not be comparable. Further disciplinary proceedings occurred in April 2022 when he failed to complete a security check at the station, and on this occasion there was falsification alleged. His circumstances were therefore comparable. JA ultimately resigned before conclusion of the disciplinary process.

7.31 This is evidence of a person described as a black British African person being treated similarly to the claimant.

7.32 The evidence from Mr Lucas is less clear and lacks detail. His statement suggests that others had been dismissed when there were failed inspections. But the circumstances are unclear.

7.33 Mr Bailey's statement at paragraph 16 states " one person was dismissed around 2009 after being found to have not made any attempt to complete his patrols.."

7.34 It follows that there is some evidence that there were previous failures which did not lead to dismissal, but there is some evidence of dismissals. There is evidence of other black men being dismissed, albeit after the claimant. There is evidence of a white younger woman not being dismissed for comparable failures.

7.35 The claimant has repeatedly referred to the DFT covert operation as a training exercise, and his failure as a training failure. We find this is a mischaracterisation. On 18 October 2022 the claimant was performing his duties. Those duties involved completing a security inspection, in accordance with the training given, in the area whiskey 3. He materially failed to complete that check. Despite failing to complete the check, he radioed in to say it was completed and that led to a falsification of the record. It matters not whether he used words all appears in order, or similar words, the effect of his communication was to confirm that he completed the check, when he had not. During the time allotted to the

claimant to undertake his inspection, coincidently, a DfT operative was performing a covert inspection. It was because the claimant failed to find the dummy device planted by the operative that enquiries were made. In no sense whatsoever was the DfT operation a training exercise for the purposes of the claimant's employment. The claimant simply failed in his duty. It was discovered because of the DfT's covert operation.

7.36 It is the claimant's case that there is evidence that no previous similar incidents had led to a dismissal, and that is a matter of which turn the burden. In considering that, it is appropriate to have regard to whether the respondent should be expected to produce cogent evidence. There was some evidence from Mr Lucas that there were similar circumstances which would lead to dismissal. However, that evidence contained in his witness statement was lacking in detail and it is not possible to infer the primary findings of fact. It is unclear how, or if, the relevant circumstances were similar. Equally, the claimant has not put adequate evidence before the tribunal to demonstrate the circumstances of others, who are in similar circumstances, who were not dismissed.

7.37 It has been the respondent's case throughout that each case is considered on its merits and those who undertake disciplinary hearings do not consider previous similar incidents, or attempt ensure some form of consistency with previous sanctions. Moreover, there is no evidence that Ms Duncan was involved in any the previous incidents. There is clear evidence that the approach taken to such disciplinary hearings is individual. The respondent does not attempt to ensure its managers tailor any disciplinary action to ensure consistency with previous incidents.

7.38 In those circumstances, it would be inappropriate to criticise the respondent for failing to produce evidence about numerous previous disciplinary hearings that on its case they have no relevance. The claimant could have put that evidence before us, but the evidence presented by the claimant has been limited. The respondent has endeavoured to find evidence on the circumstances of all those advanced as comparators.

7.39 We do not accept that evidence that others may not have been dismissed in the past is sufficient to turn the burden in relation to the claimant. The strongest evidence is that which relates to MA, but we find there is no more than a difference in protected characteristics and a difference in treatment. That is not enough.

7.40 We will look at the comparators in a little more detail below.

7.41 The second matter relied on is the alleged unfairness of the procedure.

7.42 This is not an unfair dismissal case. It does not necessarily follow that if there were unfairness for the purpose of unfair dismissal that would be unreasonableness for the purposes of discrimination. We brought the

claimant's attention to the case of **Bahl v The Law Society** [2004] EWCA Civ 1070.[5] Where there is unreasonable conduct which is unexplained, the burden may shift, albeit is the failure of explanation that may the shift the burden. The explanation i does not need to be reasonable.

7.43 We considered the matters said to constitute unfairness.

7.44 We accept that the investigation and the disciplinary action could have been concluded more swiftly. However, the delay itself is not evidence of unreasonableness, in any event, the delays were sufficiently explained.

7.45 We do not accept that the investigation was unfair, either by reason of delay or otherwise. We do not accept that it failed to establish grounds for the dismissal. Ms Emerton undertook a careful, considered, and diligent investigation. She carefully identified the relevant facts. She gave the claimant ample opportunity to produce evidence, to state his case, and to set out his position. Her report was cogent and precise. It identified the key relevant facts and provided supporting evidence.

7.46 It is suggested that she was chosen by Ms Tracey Moore because it was her first investigation, and in some manner it would make her easy to manipulate, and that such circumstantial evidence should be sufficient to establish the fact of manipulation. reject those arguments. There is no evidence at all of manipulation. We are satisfied that Ms Emerton approached the investigation diligently and did so independently. She was not influenced by Ms Moore or anyone else.

7.47 It is alleged it was inappropriate to use CCTV. We acknowledge that the internal procedures provide that CCTV should not be used for disciplinary procedures. However, there is an exception for situations where there is a security risk. In this case, the claimant's conduct was arguably secondary to establishing the reason why the DfT's covert package was not found. The DfT procedure was to stress-test the respondent's procedures. The underlying reason for that is one of safety and security. It was appropriate to obtain the CCTV. The claimant was allowed to view it. In any event, even if this could be seen as a breach of the respondent's own policy and unfairness for the purpose of unfair dismissal, the reason for obtaining it is fully explained.

7.48 It was not necessary for Ms Duncan to view the CCTV. It was fully described. She gave the claimant an opportunity to view it, but he did not insist on her viewing it. In any event, the CCTV demonstrated the claimant did not go to the relevant area during the period he was meant to check. There was ample evidence to prove that failure in any event.

7.49 The claimant could have asked to view more CCTV to prove that he was distracted by the needs of a passenger. He chose not to. It would not have been reasonable for MS Duncan to view the CCTV more widely, in

[5] See, e.g. para 101.

the absence of a request from the claimant, as that would have been outside the policy. Ultimately, the claimant admitted that he did not check behind the post-box, albeit at the time his evidence was equivocal.

7.50 The claimant refers to Ms Natasha Vincer being the notetaker. It appears that he suggests that in some manner she should have reported the circumstances of MA. It appears that she was the decision-maker in MA's case. It would have been inappropriate for Ms Vincer to attempt to influence Ms Duncan. She was a notetaker. She was not involved in the decision process as it related to the claimant.. Ms Duncan was not challenged to the effect that she should have discussed the matter with a notetaker.

7.51 Ms Duncan undertook a thorough and careful disciplinary interview. The fact that it was her first time conducting a disciplinary is not relevant. We accept her evidence that in no way whatsoever was she influenced by Ms Moore, or that Ms Moore tried to influence her. Ms Moore's role was essentially administrative.

7.52 The procedure leading to dismissal is criticised as being unfair. If it were unreasonable, and if that unreasonableness were unexplained, the lack of explanation could turn the burden. However, the process was not unreasonable, and there is no failure of explanation.

7.53 We do not accept that there is any unexplained unreasonableness attached to the investigation or the disciplinary process which could cause the burden to shift.

7.54 The claimant served a discrimination questionnaire. The respondent provided careful answers. The claimant has not pursued this argument in submissions. This is not a matter from which we could draw an inference of discrimination.

7.55 The fourth point concerns Ms Duncan's Facebook entry. The claimant produced some entries from Ms Duncan's Facebook going back to 2010. It is unclear how those came into the claimant's possession. During evidence, the claimant made it plain, initially, that he refused to disclose his source, but thereafter said it was sent anonymously.

7.56 The entries on the Facebook page date from 2010 when Ms Duncan was fourteen. She denies being the author. It is her position that there was a game with her friends whereby each would make scurrilous entries on another's Facebook account.

7.57 There are references to "'Turban' groups are angin." Ms Duncan accepts the word "angin" was Manchester slang and was a pejorative word broadly meaning disgusting or horrible. There is also reference to "Polish terror in irlam these days, need to go back where they belong Cadishead " both Irlam and Cadishead are villages outside Manchester. The reference to "Polish" appears to be racist.

7.58 Ms Duncan says she was not the author. She accepts that some of the terminology was racist. The entries do not reference people of of the claimant's race. In any event, she says that the foolish actions of fourteen-year-old do not reflect her attitude now.

7.59 It cannot be assumed that an unguarded foolish comment from a fourteen year old accurately reflects the adult's views some twelve years later. The comments are not sufficient evidence to demonstrate a generalised dislike of other races.

7.60 During cross examination, when accused of being racist and of disliking black people, Ms Duncan indicated that her current partner was a black man with a Caribbean origin. Mr Fray pointed out that having a partner who is black man does not necessarily mean that a person is not racist. Ultimately, he has a point. However, the point is that the tribunal should be cautious about what conclusions can be reached from isolated matters of evidence. More recent posts, and posts when Ms Duncan was obviously adult would carry much more weight. The evidence falls short of showing a general attitude or hostility based on race. In this case we do not consider it strong enough to turn the burden.

7.61 The fifth point concerns the existence of the document "Abuse of disciplinary procedure, Birmingham New Street – network rail." The document – was an internal union document. Essentially it is a document seeking support of union members for industrial action. It has no relevance whatsoever to this case.

7.62 The sixth point concerns alleged inconsistent treatment of comparators.

7.63 MA is the comparator specifically relied on. We do not find that her circumstances are materially the same. The key point is that she had not received recent training. Training is important because if the standard is not made plain by training, as it was in the claimant's case, it may not be appropriate to dismiss. There is no doubt there is some overlap with the explanation here. However, it is a fact that the training was referred to when considering what sanction to impose. That is a fact to which we should have regard.

7.64 Comparator NB was dismissed. However, he was of the same race as the claimant. The fact he was of the same race as the claimant and his circumstances were the same does not in itself provide any fact for which we could infer another in the same circumstances, but of a different race, would have been treated more favourably. It arguably demonstrates a consistency of approach to similar circumstances. It is not sufficient to say we could infer discrimination from this fact.

7.65 The treatment of JA would suggest that the failure to complete inspections is taken very seriously and may lead to dismissal. Ultimately, following the second incident involving JA, he resigned.

7.66 The other comparators advanced – PM, BD, and JW - take the matter not further. Their circumstances are not the same. We have considered the circumstances above.

7.67 We have considered PK's circumstances above. He was a black man. The allegations against him were sufficiently similar to the claimant's for him to be useful evidential comparator. He failed to complete security check. He falsified the record. The facts of this case do not support finding an inference of discrimination in the claimant's case. This is an example of a black man who, ultimately, was not dismissed.

7.68 Mr Porter, at paragraph 35 of his statement, refers to WJ. He says this

> **…Daniel Lucas himself admitted that [WJ] CSA (whom was given the duty of assessing staff competent) was 'doing the assessing from his living room' for the past two years when it should be done in person. Clearly, management knew this fraudulent behaviour was occurring but did nothing to rectify it.**

7.69 Mr Lucas did not accept this. We do not accept Mr Porter's evidence on this point.

7.70 The seventh mater is the alleged "falsification of DfT records … to pass untrained employees as being competent." There is no evidence for this

7.71 The eighth matter relied on is an alleged "hostile two-tier system in which black workers are targeted and disciplined for things their white colleagues are not." Mr Porter's evidence supports this with a bare allegation. He may hold his opinion sincerely, but that is not evidence on which we can make any findings.

7.72 The ninth matter relied on concerns a failure of training on the Equality Act 2010. We do not accept that either Ms Emerton or Ms Duncan lacked training to the extent that it would form a fact form which the burden could shift. Both had a reasonable understanding of the relevant principles in the Equality Act 2010. There was evidence of continuing awareness training.

7.73 We must consider whether the burden shifts. Are there facts from which we could conclude that the relevant provision has been contravened?

7.74 The evidence in relation to race may be arguably slightly stronger than it is in relation to age.

7.75 There is nothing to suggest that the claimant was treated differently to people of different ages. JA was younger. MA was younger, but there is nothing to suggest that age was any part of the decision to dismiss the claimant.

7.76 We have very limited evidence on how others had been treated previously. It is not even possible to identify the exact numbers. It cannot be assumed that a failed DfT covert testing necessarily involved in individual failing to perform a relevant inspection or falsifying the record. We cannot infer those primary findings of fact.

7.77 We considered the material circumstance of a hypothetical relevant comparator, albeit this is a case where it it probably unnecessary to construct any form of compactor and our focus is on the reason for the treatment. The relevant comparator would be someone in the same material circumstances as the claimant. Those material circumstances would include failing to complete the relevant inspection, understanding what the inspection should be, and choosing to mislead the operations team by claiming that the inspection had been fully completed.

7.78 Having considered each of the matters said to constitute facts that may turn the burden, and having considered them individually and collectively, we reach the conclusion that there are no facts that turn the burden in this case.

7.79 Lest we be wrong about our conclusions on the burden, we will consider the explanation given by the respondent.

7.80 First, we accept that in no sense whatsoever was Ms Duncan influenced by Ms Moore or anyone else. Second, we accept that Ms Emerton undertook a rational and appropriate investigation which identified the relevant facts. In no sense whatsoever was she influenced by race, either consciously or subconsciously or by age. She was not influenced by Ms Moore or anyone else. It follows that her investigation was not tainted by discrimination and so there could be no inadvertent tainting of Ms Duncan's decision.

7.81 We accept Ms Duncan reached a decision to dismiss having regard to all the facts. She concluded the claimant had training. She concluded the claimant understood the nature of the inspection required by whiskey 3. She concluded that the claimant knew he should look behind the post-box. She concluded that he chose not to look behind the post-box in circumstances when he had time to do so. She concluded that regardless of whether he did or did not assist a member of the public, he had time to either radio for assistance, or to complete the inspection himself. She concluded that he misled the operations team by stating that the inspection had been completed. It was irrelevant whether he used the terms "all appears to be in order," or used another term. The purpose of the call was to say that the inspection had been completed, but it had not. She reasonably ignored the suggestion that no harm had occurred. The inspection was not a test. The claimant was simply doing his job and the safety of the public relied upon him completing the inspection. The reality is he did not complete that inspection; it was the failure to complete it which put the public at risk and that failure was a breach of his obligation. The reason why the failure came to light was because there was a covert

operation. She concluded, reasonably, the claimant was prevaricating and seeking to deflect blame. She concluded reasonably that he had not shown he understood the seriousness of the situation.

7.82 The explanation must be established on the balance of probabilities. We accept that the respondent has produced clear, cogent evidence in support of Ms Duncan's decision. We have to considered whether the respondent has failed to produce content evidence relevant to its explanation. In particular we have asked whether the respondent should be expected to produce cogent evidence on all the alleged failures of DfT inspections and the consequences for individuals. For the reasons given, we do not believe that the respondent should be required to produce the details of all previous incidents. Those previous incidents were not before Ms Duncan. There was no need for them to be before Ms Duncan. The relevant explanation for which there must be cogent evidence, is the explanation advanced by Ms Duncan. She did not consider the prior history . She was focussed on the claimant circumstance and on the culpability of his behaviour. She was focused on whether the claimant had undermined the necessary trust and confidence. In relation to the explanation there is clear and cogent evidence. The explanation must be established on the balance of probabilities. It is in our view established. It is an answer to the claim of direct discrimination.

7.83 The explanation is an answer to both the claim of race and age discrimination. It follows that we do not need to consider further any justification defences that might be relevant and age discrimination claim.

7.84 Finally, we need to consider the claim for wages.

7.85 Mr Turner gave evidence on this. There is no real dispute on the relevant background. At the time, there were ongoing pay disputes. On 6 March 2023, Network Rail made a revised offer. Part of that offered included a pay rise and Sunday working backpay. The backpay did not represent a concession that there had been any form of miscalculation. It did not retrospectively vary the contract of any worker and increase their original contractual right to receive wages. It was an ex-gratia payment to be paid as future wages by way of compromise of a specific dispute about historical pay. I was not an admission that the sum was always due or a retrospective variation of any contract.

7.86 The unions agreed that eligible current employees would receive that payment. There was discussion about the position of those who had left before the deal was reached. The position of those who had left was set out in the agreement and evidence by letter dated 4 August 2023. That letter contained the following words:

> **Back Pay will only be paid to 'good leavers' – so we will exclude any employee who was dismissed or those who resigned prior to a disciplinary.**

7.87 It follows that the deal with the union recognised that any payment to a former worker was discretionary and did not vary that workers old contract.

7.88 There was a failure to identify what was meant by good leavers, and the evidence we have received suggests there is no specific document on which it could be based, albeit the term is sometimes used. The definition of the term good leaver was not agreed with the unions. However it was expressly agreed that those who were dismissed or resigned would not receive the payment. That was an express term, it may be arguable that it was an illustration of someone who was not a good leaver, or that it is relevant to interpreting what is meant by a good leaver. In our view it matters not. There was an express agreement that those who were dismissed would be excluded.

7.89 The claimant was dismissed. He was expressly excluded by the agreement. Even if it could be argued that a good leaver should include someone who was dismissed without reasonable cause, that would not apply in these circumstances. There were proper grounds to dismiss the claimant. Even if argued that the sanction was too harsh, or that another manager may not have dismissed, that does not undermine the contractual position. He was dismissed for cause.

7.90 The claimant never obtained a contractual right to the payment therefore it could not be a deduction of wages or a breach of contract.

7.91 It follows for all these reasons, we find the claimant has no contractual right to receive the payment. His claim for wages and/or breach of contract fails.

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Employment Judge Hodgson

Dated: 28 July 2025

Sent to the parties on:

31 July 2025
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For the Tribunal Office