EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Cameron	v	**East Coast Main Line Company Ltd**

FINAL HEARING

Heard at: **Watford** **On:** **7, 8, 9 & 10 August 2017**

Before: Employment Judge Bartlett

Appearances:

For the Claimant: **Mr Green, of Counsel**
For the Respondent: **Mr Williams, of Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The tribunal finds that the claimant was not unfairly dismissed. It finds that the respondent dismissed the claimant for the reason of conduct and that this is a potentially fair reason for dismissal. It finds that the respondent has discharged the burden of proof to establish that in the circumstances the dismissal was fair. In particular the tribunal finds that the respondent satisfies the steps set out in **British Homes Stores Limited v Burchell [1978] IRLR 379.** and that the respondent acted reasonably in all the circumstances. As the claimant's unfair dismissal claim fails and as a result of our findings in this respect the claimant's claim for wrongful dismissal must also fail.

2. The claimant brought claims that the respondent had acted against him in a manner which constituted age discrimination and race discrimination. The tribunal finds that these claims fail for the reasons set out below.

3. Therefore the claimant's claim is dismissed on all counts.

REASONS

The issues

4. The claimant was employed by the respondent as a shunter at Ferme Green depot and Bounds Green depot. The claimant had carried out this role since 1990 and had been employed by the respondent since 1981. The claimant was dismissed on 11 April 2016 for gross misconduct as a result of an incident occurring on 26 November 2015.

5. It is not in dispute that the claimant was dismissed by the respondent. The claimant claims that the dismissal was unfair.

6. The issues to be determined at the final hearing were set out in the case Management summary conducted on 3 October 2016. These are as follows:

7. **Unfair Dismissal**:

   7.1 What was the reason for the claimant's dismissal – section 98(1) of the Employment Rights Act 1996?

   The respondent's case is that the dismissal was by reason of misconduct, namely failing to follow safe systems of work on 26 November 2015;

   The claimant's case is that the dismissal was because of race and/or age.

   7.2 Was this reason potentially fair – section 98(2) of the ERA?

   7.3 Was the dismissal procedurally fair?

   7.4 Was the dismissal within the range of reasonable responses open to the employer?

   7.5 Specifically, the claimant raises issues of procedural irregularities; in equitable treatment; failure to take account of the claimant's very long service and good disciplinary record and the severity of the sanction.

8. **British Homes Stores Limited v Burchell [1978] IRLR 379** sets out a three limbed test which must be applied to misconduct dismissals:

   8.1 Did the employer believe the employee to be guilty of misconduct at the time of dismissal?

   8.2 Did the employer have in mind reasonable grounds on which to sustain that belief?

   8.3 When the employer formed that belief had it carried out a reasonable investigation in the circumstances?

Direct age and race discrimination

9. The claimant is 65 years of age and is black.

10. Has the respondent subjected the claimant to the following treatment falling within section 13 and section 39 of the equality act 2010, namely:

    10.1 taking no action against Chris Munro, the driver of one of the trains involved (Mr Munro is white) as a result of things which occur during the same incident on 26 November 2015 (race discrimination);

    10.2 Mr Allen making references to the claimant's age and how long he would remain working for the respondent on 7 April 2016 (age discrimination)

11. Has the respondent treated the claimant as alleged the less favourably than it treated or would have treated the comparators (Mr Munro and a hypothetical comparator)?

12. If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment is because of one of the protected characteristics relied upon?

13. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

14. If the less favoured treatment was because of age, does the respondent show that the treatment was a proportionate means of achieving a legitimate aim?

15. If the claimant succeeds, what is the appropriate remedy, including consideration of injury to feelings?

Background

16. On 26 November 2015 the Claimant was working a night shift at Ferme Park depot. Near the end of this shift, around 5:40 AM, an incident occurred. The facts about what actually occurred is disputed however a brief objective summary can be made as follows:

    16.1 the claimant was working in the panel office;

    16.2 a train driver, Chris Monro, entered the office and took a DOO slip either with or without the claimant's actual or imputed knowledge;

    16.3 Chris Munro went to the vicinity of the train he was to prepare, the "VTEC" train;

16.4 a Grand Central train was stopped on the adjacent track to the VTEC train;

16.5 following a request by the driver of the Grand Central train, Mr Roberts, the claimant let the Grand Central train move off;

16.6 Chris Munro claimed that he was prepping his train on the road between the two trains at the time the Grand Central train was let off;

16.7 Chris Munro claimed that he had been brushed by the Grand Central train. He initially made this allegation to the claimant immediately after the incident. Chris Munro shouted at the claimant and walked out of the depot;

16.8 Chris Munro telephoned York shortly after the event and reported that he had been brushed by the Grand Central train.

16.9 a brush by a train is a significant safety incident.

17. The claimant had been an extremely long serving employee of the respondent. The tribunal has compassion for the claimant. It recognises that the claimant was very upset by the respondent not investigating Mr Munro or subjecting him to a drugs and alcohol test. This came across strongly in the claimant's evidence. However this is of limited relevance to the questions that the tribunal must decide today as a result of the law which we must apply. It is understandable that after such long service it was distressing for his career to end in the way it did. However compassion is not enough we must assess the facts against the law.

18. We have set out above a brief explanation of the legal test the tribunal must apply and the law is set out in more detail below. The tribunal does not have a general power to assess the fairness of all of an employer's behaviour. The tribunal has limited powers which are given to it by law. The tribunal can only operate in this sphere. The relevant legal tests means that the employment tribunal must not substitute its judgement for that of the employer. The tribunal is not permitted to find that it would not have dismissed Mr Cameron and therefore his dismissal was unfair under the law. The tribunal is not permitted to find that another employer would not have dismissed Mr Cameron and therefore his dismissal was unfair under the law. What the tribunal must do is consider whether the respondent's decision was within the band of reasonable responses which a reasonable employer could have made acting reasonably. This gives employers a margin in which they can make decisions and the tribunal cannot interfere with a decision falling within that margin. It also means that the tribunal must assess how the respondent acted at the time of the dismissal. It is often the case that more information and facts come out at tribunal hearings and that people give a more fulsome account then they did previously. The tribunal cannot take these things into account if the employer carried out a reasonable investigation. This may seem unfair to employees but this is the way in which the law operates.

Evidence

19. Two witnesses appeared for the respondent, Mr Allen and Mr Cooling. Both witnesses adopted their witness statement, were asked questions in examination in chief and cross-examination and answered questions from the tribunal panel.

20. Mr Allen's evidence was that the claimant had stated on some occasions that he did not know the VTEC driver had taken the DOO slip and on others that he knew somebody had taken it. In addition his witness statement set out that

> *"Even if the notes [of the meeting between Mr Cameron and Mr Starkey] were inaccurate, Mr Cameron had admitted to me that he knew that the slip for the VTEC train, which is paperwork for drivers, had been taken. He therefore knew that it may have been the VTEC driver who had taken it and, in this case, he would be in the depot, preparing the train alongside the Grand Central train. Knowing that there was a good chance that the driver could be in the depot, preparing his chain, I considered that Mr Cameron had a duty to ensure that he knew where the driver was before he could safely dispatch the Grand Central train. However, he had admitted to me that he had not known the whereabouts of the driver but it still authorised the departure of the train and I considered this to be reckless and very dangerous."*

21. In cross-examination Mr Allen accepted that he was not aware that Grand Central train drivers did not use the DOO slip procedure. Questions were put to Mr Allen that was it sufficient for a shunter to walk around the train. Mr Allen maintained that it was not sufficient and a shunter needed to know where a driver was. He relied on the "local safety work instruction document number LSW1 049" as the basis for his belief and the statement at paragraph 3.9.3 that "*The panel operator must ensure no movements are made on adjacent roads whilst the driver is carrying out train preparation duties*." The tribunal did not consider this part of the evidence was material to the claimant's situation because it was undisputed that as part of the investigation and at the tribunal hearing the claimant had said that he had not walked around the tracks.

22. In cross-examination Mr Allen was asked whether he had believed the claimant or Mr Munro's version about whether there had been a conversation in the panel room before Mr Munro took the DOO slip. Mr Allen's evidence was that the evidence before him said that the DOO slip had been taken and the claimant knew it was taken therefore it did not matter if the conversation happened or not.

23. Mr Allen's evidence when asked what he would have done if the stop board issues had not formed part of the disciplinary charge responded that he believed he would have dismissed the claimant because the charge was a serious breach of health and safety.

24. Mr Cooling's witness statement set out

"The decision to allow the Grand Central train to depart without confirming the location of Mr Munro was a most serious error and certainly amounted to an act of gross misconduct and/or gross negligence. There was no dispute for Mr Cameron that he was aware of the responsibilities of his role in what was required of him. However, he had failed to fulfil his role safely and such reckless errors cannot be tolerated on the railway due to the potential consequences."

25. Mr Cooling stated in response to cross-examination that there was no evidence that the claimant undertook a detailed search for Mr Munro. This required the claimant to walk around the set and to verify if the driver was in the cab. Mr Cooling emphasised that his process in the appeal was checking whether Mr Allen had misconstrued the evidence not revisiting the investigation.

26. Mr Cooling recognise that Mr Munro should have been tested under the drugs and alcohol testing policy and he could not explain why Mr Munro had not been investigated.

27. Mr Cooling drew a distinction between the incident on 26 November 2015 and another incident in 2015 which he said arose because an individual was not briefed that engineering works had commenced which had resulted in various changes and the individual took steps so there was no risk of injury.

28. The claimant and Mrs Hanson appeared as witnesses for the claimant. The respondent indicated that it had no cross examination for Mrs Hanson therefore she was not called as a witness. I record that she was available and willing to appear as a witness.

29. The claimant's evidence was that he had not walked down the sides of the train and this was because he had checked by looking at the sides of the train and he thought this was sufficient in light of his belief that Mr Munro had not spoken to him when taking the DOO slip.

30. The claimant's evidence was that the local safety work instruction LWS1 049 was a new document to him; it was not the document that operated at firm Park and it related to S exams, which were not relevant to what happened in the incident on 26 November 2015. However the claimant was taken through the principles of the policy and in general he agreed with them.

31. The claimant's evidence was that maintenance had not signed off the train and therefore he did not know that the driver had taken the DOO slip and it was reasonable for him to think that maintenance had taken it.

32. Mr Williams invited the tribunal to find that the claimant was not a reliable witness. The tribunal found that the claimant was generally a reliable witness. The tribunal has great experience in hearing from a varied range of witnesses and simply because a witness is not articulate does not mean that they are not reliable. The tribunal found that the claimant was not evasive and that he

genuinely tried to answer the questions put to him in a truthful manner as he believed the truth to be. The tribunal finds that it is credible that the Claimant would not be able to recall the details of what was said in the meeting on 26 November 2015. This interview took place shortly after a traumatic event had happened, the claimant claims in the tribunal accepts that the claimant has suffered from some mental ill-health as a result of the incidents on 26 November 2015 and it is reasonable that this would have affected his recall and what the claimant said during that meeting.

33. The claimant also relied on a witness statement from Mr Innahid Sadik. Mr Sadik was not available to appear as a witness and therefore limited weight could be attached to his evidence. Mr Sadik's evidence provides some background about what happens at Ferme Park depot and his views on the procedures at Ferme Park. Mr Sadik was not a witness to the events and therefore limited weight can be attached to his evidence.

The facts

34. Immediately after the incident on 26 November 2015, an incident report was completed. Sections were completed by the claimant, Mr Munro, Mr Johnston (the driver who replaced Mr Munro), Mr Robson (the driver of the Grand Central train), Mr Lester White and Mr Benn Child. The latter 2 were maintenance men working at Ferme Park Depot at the time of the incident. The respondent therefore took statements very shortly after the incident from all those present.

35. The section of the incident report completed by the claimant sets out the following:

"I looked to see where the driver was did not see him I there [sic] let the Grand Central train dropped down slowly to K93 signal on next the driver came from the loco saying I let the train out while he was prepping 5N08 on no 2 road."

36. The section of the incident report completed by Mr Munro sets out the following:

"I collected the DOO slip and told the shunter that I would call him when I had completed my training preparation… As I was checking my train… I felt something touch me I turned around and was shocked to see the GC HST moving! I looked towards the front of the train and could see the shunter (Mr Cameron) starting to walk away, I shouted to him but he did not hear me."

37. The section of the incident report completed by Mr Johnston sets out the following:

"[the claimant] stated he had let the GC train departed when a driver was prepping no8. He stated he had looked for the driver, couldn't see him and let the GC train depart."

38. The section of the incident report completed by Mr White sets out the following:

"the shunter stated to me that when he released the Grand Central train there was no driver prepping the loco next to it."

39. Later on during the morning of 26 November 2015 at approximately 9 AM a meeting took place with the claimant, Mr Starkey and Mr Bray. The typed notes set out the following:

"PS: Did you have a conversation with the VTEC driver when he took the slip?

JC: no

PS: would a conversation with the driver normally take place?

JC: drivers do sometimes take the steps without telling me, I could be in the toilet or something.

PS: so you are saying the driver came in, took the DOO slip and left without any conversation taking place with you as the DP? You did not tell the driver it was safe for him to prep his train?

JC: as far as I know he went to prep the train, 30 minutes later GC driver rang me asking to be released, I went to look at number 2 road for VTEC driver and didn't see him so thought he may be in DVT so I let the GC train depart, the train dropped down very slowly."

40. Throughout the disciplinary process and at the tribunal the claimant maintained that he had not said those answers in the meeting with Mr Starkey on 26 November 2015 and that he could not recall what was said during the interview. At the hearing maintained that he had not said the above statements.

41. The Claimant was suspended from work in a letter dated 27 November 2015.

42. On 30 November 2015 Mr Starkey under took investigatory interviews with Lester White and Mr Benn Child. The typed notes of the interview with Mr Lester White set out the following:

"*PS: Prior to this incident did you see the driver turn up when he started his prep?*

LW: I don't remember seeing the driver at all and didn't see him doing a prep. Usually they sit in their own room at the back but when they come out they usually come out past where we sit and we'd see them."

43. The typed notes of the interview with Mr Benn Child set out the following:

"PS: Did you see the driver before this at all or hear any conversation with the driver and Cameron?

BC: no as we had just arrived back into the office area."

44. We were provided with two versions of a letter sent from the claimant or Ms Hanson. One is dated 2 December 2015 and signed by the claimant and another is dated 2 December 2015 and signed by Ms Hanson. The letter signed by Ms Hanson was faxed to the respondent on 4 December 2015. The tribunal does not consider anything turns on the exact date on which the letters were received by

the respondent and in addition whilst it recognises that there are some minor differences between the letters we consider that the parts that are pertinent to the investigation remained the same. Therefore we find that nothing turns on the different letters.

45. Both letters dated 2 December 2015 set out the following statements:

"On the morning of 20th November, a driver, Chris Munro, came into the panel at about 05:10 roughly and took a slip [5N08]. This driver did not attempt to communicate with me and left as fast as he had entered. I had my back to the door reading pension papers that were sent to me by your department. I only realised it must have been him as the slip had disappeared…

At about 05:30 a.m. or thereabouts, the driver for 5N90 train phoned me to tell me that he would like to depart… I then carried out my usual safety check to see if anyone was near the Grand Central train, looking up and down, right and left. There was no sign of Chris Munro or anyone else in an unsafe area near the soon-to-be departing train. After these tracks and confident that it was safe to release the train…"

46. On 4 December 2015 Mr Starkey carried out an investigatory interview with Mr Munro. The notes of this meeting is set out the following:

"PS: can you confirm that you did have a conversation with the shunter that day?

CM: yeah! I went into the office and I had been in there a couple of times before and had a brief conversation with Cameron. I picked up the paperwork and told him I will call in when I am ready and he said 'yeah that is fine'. After that I find myself in between that moving train I looked down the road and I could see Cameron standing between 2 and 1"

47. The claimant sent the respondent a letter dated 18 December 2015 which stated:

"it seems that Paul Starkey has already decided that I'm guilty of something that I did not do. His behaviour is the same as before, he clearly does not want to hear my version of events…"

48. The claimant submitted various medical records and fit notes. The tribunal finds that these notes identify that the Claimant was suffering from some anxiety and flashbacks.

49. On 6 January 2016 the first investigatory interview with the claimant took place. The interviewer was John Hooper and the typed notes of the meeting include the following:

"JH: can you tell me in your own words what happened that morning when the driver came into the bunk?

JC: I was in the bunk and heard someone coming. I didn't look round to see who it was because I just thought it was one of the maintenance guys who are

always coming in and out. When I did look round after they had gone, I noticed that the slip was gone so thought it must have been a driver, but I didn't know for sure…

JH: you mentioned that when you saw the slip was gone, you thought it was a driver?

JC: yes, when I saw the slip had gone I knew it would have been a driver but didn't know which driver it was...

I called KX to tell them they would be dropping down to K93 and went outside to do my check. I looked down the GC set and there was no one there."

50. A further meeting took place with the Claimant with Ms Hanson in attendance on 8 January 2016. This meeting was also attended by Mr Ferguson, Mr Lyon and Mr Starkey. Some handwritten notes of that meeting are available. In a letter dated 11 January 2015 the claimant sets out that Mr Ferguson and Mr Lyon made a suggestion:

"*that the events of 26th November can be resolved internally, if I thought about changing my statement regarding the state of Chris Munro, otherwise it would be passed to the outside authorities and would be non-negotiable."*

51. The Claimant also submitted a written statement setting out his additional version of events of 26 November and this included the statement statement *"it was only after the person did not speak, that I looked around realise that the slip had gone, that it must be a driver."*

52. A letter dated 24 March 2016 was sent by the respondent to the claimant inviting him to a disciplinary meeting on 30 March 2016 to be held by Mr Paul Allen. This letter sets out that the allegation against the claimant was as follows:

"on 26th of November 2015 you were the lead shunter at Ferme Park, during your shift you were responsible for the movement of 5N08 and Grand Central train 5N90. You wilfully failed to follow the safe systems of work regarding the movement of trains which resulted in a serious incident which could have led to serious or fatal injury to a another member of staff. This is considered to be gross misconduct."

53. The letter also set out:

"Due to the serious nature of these matters it has been decided to progress the matter under the summary disciplinary procedure. You should be aware that one of the potential outcomes of summary discipline is dismissal."

54. The claimant was invited to attend a meeting at Peterborough on 7 April 2016 to review CCTV footage with Mr Allen. This meeting took place. It is undisputed that at this meeting Mr Allen told the claimant that there was a possible option that he could accept a downgrade.

55. On 11 April 2016 a meeting which the respondent called a disciplinary summary hearing took place with the claimant. Mr Allen chaired the meeting and Ms Hanson was in attendance.

56. At this meeting the claimant read out a statement which includes the following statement:

"I then made my way outside, look down the right side of 5N08 checking, making my way and looking down the left side as well to see if there was anyone or anything near to the soon to be departed 5N90. There was sufficient light for me to see up and down the side of the train. There was no one around. I made a decision to release the train, knowing that I had made all safety checks."

57. At the meeting on 11 April 2016 numerous questions were put to the Claimant including the following question

"PA: Despatching the GC train without knowing where the driver was is the issue.

JC: I checked around the trains to see if there was anyone around and I didn't see anyone so I dispatch the train."

58. The notes also record the following:

"PA: how did you know [Mr Munro] was doing his train prep:

JC: I didn't know

PA: you said in your statement you knew the driver was there.

JC: no, I knew someone had taken the slip so that was the reason I checked to see if the area was clear…

PA: on 06/01/16 with John Hooper you said it must have been a driver as the slip was gone but you couldn't know for sure.

JC: that's right I couldn't know, it could have been anyone, could have been the maintenance staff. That's why there are rules for him to come and ask me for it for me to say it is safe. There is nothing in the rules for me to go and chase to see what happens I waited to be contacted.

PA: so you knew someone had taken the slip but you didn't know who that person was.

JC: I still looked around just in case anyone was there. If I had seen him there I wouldn't have let the train out."

59. Later in the meeting Mr Allen went on to set out the following:

"I will summarise the events of that day;

it is established that on that day, at the time of dispatch did not know where the driver was;

the driver may have been anywhere; therefore the dispatch of the train at that point compromised driver safety;

it is also established that you did not place the padlock on the stop board at the north end of the Grand Central train; and you failed to erect the stop board at the south end of the train.

In this event you have failed to follow the relevant depot procedure for train movements."

60. At the end of the meeting, after having taken a number of breaks, Mr Allen decided to terminate the Claimant's contract of employment on the grounds of gross misconduct. The outcome of the meeting was confirmed to the claimant in a letter dated 20 April 2016.

61. The Claimant appealed this decision and his appeal was heard by Mr Cooling on 19 May 2016. The typed notes of that meeting include the following:

"PC: you say it was safe, but what I have read you have said that you did look around for the driver?

JC: yes I looked round the sets and down the roads.

LH: not specifically for the driver, just as part of his usual checks he would do.

PC: the CCTV footage shows that you only look Northern that you don't look south between the trains."

62. In a letter dated 27 May 2016 Mr Allen set out the written outcome of the appeal meeting and dismissed the claimant's appeal. This includes the following statement from Mr Cooling:

"With regards to the driver taking the DOO slip from the panel room - if you knew that this DOO slip been taken without your consent, as the designated person, you had responsibility to determine the whereabouts of the slip and if you assumed that the driver had taken the slip, to determine exactly where he was and then ensure the protection arrangements were in place. This you failed to do."

Submissions

63. Mr Green and Mr Williams relied on a written submissions which they supplemented with oral submissions.

The law

64. I have set out above the test established in **Burchell**. In addition I note that a tribunal must consider whether the employer has acted in a manner a reasonable employer might have acted as set out in **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, EAT**.

65. It is not the role of the tribunal to put itself in the position of the reasonable employer as is set out in **London Ambulance Service NHS Trust v Small [2009] IRLR 563**.

66. I remind myself that the range of reasonable responses test applies to the investigation as it does to the decision to dismiss the misconduct as set out in **Sainsbury's Supermarkets Limited v Hitt [2003] ICR 111, CA**.

67. I have given due weight to **Shrestha v Genesis Housing Association Ltd [2015] EWCA** and its guidance that:

"the investigation should be looked at as a whole when assessing the question of reasonableness."

68. In relation to this disparity I note the case of **Paul v East Surrey District Health Authority [1005] IRLR 305**, and the statement of Beldam LJ at paragraph 35 to 36:

"I would endorse the guidance that ultimately the question for the employer is whether in the particular case dismissal is a reasonable response to the misconduct proved. If the employer has an established policy applied for similar misconduct, it would not be fair to change the policy without warning. If the employer has no established policy but has on other occasions dealt differently with misconduct properly regarded as similar, fairness demands that he should consider whether in all the circumstances, including the degree of misconduct proved, more serious disciplinary action is justified.

An employer is entitled to take into account not only the nature of the conduct and the surrounding facts but also any mitigating personal circumstances affecting the employee concerned. The attitude of the employee to his conduct may be a relevant factor in deciding whether a repetition is likely. Thus an employee who admits that conduct proved is unacceptable and accepts advice and help to avoid a repetition may be regarded differently from one who refuses to accept responsibility for his actions, argues with management or makes unfounded suggestions that his fellow employees have conspired to accuse him falsely."

69. I have also considered **B v A [2010] ILR 400** and its statement that:

"the fact that the employer's behaviour calls for explanation does not automatically get the claimant past age 1 of the Igen test. There still has to be a reason to believe that the explanation could be that the behaviour was attributable (at least to a significant extent) to the claimant's gender."

Decision

Race Discrimination

70. As set out above the claimant's case is that the respondent's failure to take action against Chris Munro was direct race discrimination. The tribunal finds that

the respondent's failure to investigate Mr Munro is inexplicable and regrettable but ultimately it is incidental to Claimant's situation. Further, it finds that it was made clear to the claimant in the disciplinary meeting that the respondent was focused on the claimant's actions.

71. As part of the disciplinary investigation against the claimant the respondent did not make findings preferring the Claimant's evidence over Mr Monro's or vice versa. The tribunal finds that Mr Allen and Mr Cooling's decisions were based on the possibility of Mr Munro being in the vicinity of the VTEC trade and that, through his actions, the Claimant had failed to conclude that he was not and this was a breach of safety procedures.

72. The tribunal does not accept that Mr Munro is a comparator for the purposes of race discrimination. Even if the claimant's allegations against Mr Munro were true any possible basis for disciplinary action is very different to those against the claimant. The tribunal finds that Mr Munro does not have the necessary similar characteristics to be a comparator.

73. Further, the tribunal finds that all the claimant has identified is bare facts that the claimant, who was in a different situation to Mr Munro, was treated differently. This is insufficient to discharge the burden of proof for the claimant to establish a prima facie case of discrimination. The claimant has not established a reason to believe that an explanation for the difference in treatment was attributable to the claimant's race.

74. In relation to a hypothetical comparator there is simply no evidence on which the claimant can rely to discharge the burden of proof to establish on a prima facie the basis that a comparator would have been treated differently.

75. We recognise that the claimant feels aggrieved about the respondent's treatment of Mr Munro. However, it is not relevant to the issues before us to determine whether the claimant's claims about Mr Monro are true or not. We recognise that these events are deeply distressing for the claimant but it would be an error of law for us to make findings in this area and factor this into our decision. Mr Cooling accepted that Mr Munro should have been tested under the drug and alcohol policy and he accepted that he could not explain why Mr Munro had not been investigated. On the claimant's evidence Mr Munro was supported by the union and he may have received protection from the union.

Age discrimination

76. The claimant relies on Mr Allen's questioning of the claimant about his age and when he was thinking of retiring as the basis of his claim for age discrimination. It is undisputed that Mr Allen made those comments. However the tribunal concludes that this is not direct discrimination because they were comments which do not establish there was less favourable treatment. They were made in the context of Mr Allen offering the possibility of a demotion rather than face the potential of dismissal for gross misconduct.

77. Further, the tribunal does not accept that Mr Allen would not have made such an offer to a younger employee. The transcript of the meeting presents Mr Allen as a personable character who was trying to find a way to persuade the claimant to take a demotion.

78. The tribunal also find that there was no detriment to the Claimant. For the reasons set out below it finds that Mr Allen did not predetermine the claimant's claim.

Reason for Dismissal and the respondent's belief that the claimant was guilty of misconduct at the time of dismissal

79. The claimant's claim is that his dismissal was because of his race or age and not because of his conduct. The claimant also made claims that the respondent took the actions that it did because he had made complaints about Mr Munro.

80. The tribunal finds that the respondent has established that the reason for the claimant's dismissal was conduct. A brief summary of the undisputed facts about the incident of 26 November 2015 is set out above. It is undisputed that an incident happened. The environment in which it occurred is safety critical. The Claimant had important safety responsibilities entrusted to him as part of his duties. The tribunal accepted the evidence of Mr Allen and Mr Cooling that they considered on the basis of the information before them that the appellant had committed misconduct was credible and in light of all the other evidence is accept the conduct was the reason for dismissal. The tribunal finds that the claimant has not discharged the prima facie burden of proof to establish that there was any race or age discrimination in the respondent relying on the events of 26 November 2016 as a reason to dismiss him.

81. The tribunal has set out below its detailed findings in relation the investigation and the respondent's decision. These are also relevant to the tribunal's finding that the respondent held a genuine belief in the claimant's misconduct. The tribunal does not accept that the claimant's dismissal was because the respondent wanted him out of the company after the allegations he had made against Mr Munro. The tribunal finds that The allegations against the claimant were serious misconduct and they were assessed following a reasonable investigation.

When the employer formed that belief had it carried out a reasonable investigation in the circumstances?

82. The tribunal finds that the respondent carried out a reasonable investigation in respect of the concerns identified in terms of the claimant's conduct for the following reasons:

82.1 the claimant was interviewed immediately after the incident on 26 November 2015 and an incident report was completed. The incident report also contained information from all other individuals present at the depot;

82.2 later on the morning of 26 November 2015 the claimant was interviewed by Mr Starkey. The tribunal recognises that the claimant disputes what he is recorded as saying at that meeting or alternatively he cannot recall what he said. It is not disputed that this meeting took place;

82.3 statements were taken from all individuals present at the depot at the time of the incident shortly after it occurred. This included statements from the two maintenance workers, the driver of the Grand Central train, Mr Roberts, the claimant Mr Munro;

82.4 The claimant was interviewed by Mr Hooper on 6 January 2015;

82.5 CCTV footage was reviewed by the respondent as part of its investigation and as part of the reasons for coming to its conclusions about the claimant's behaviour. We note that CCTV footage is only from the one angle and covers a limited period of time. It is not a comprehensive overview of any incident and employers must be careful not to give undue weight to CCTV footage. We find that the respondent did not fall into this error. We find that Mr Allen and Mr Cooling's evidence was that the CCTV footage demonstrated that the claimant did not walk around the VTEC train. They also relied on it, in part, to form their belief that he did not look down the train sides. The tribunal does not accept that the CCTV footage is conclusive evidence that the Claimant did not look down the train sides. For example, the claimant could have looked from the back of the train rather than the front and this would not have been visible on the CCTV footage. Therefore the tribunal finds that it was reasonable of the respondent to rely on the CCTV footage to demonstrate that the claimant had not walked around the VTEC train but it does not accept that it is reasonable to rely on it to evidence that the claimant did not look down the sides of the VTEC train. The tribunal concludes that this does not damage the respondent's findings or make them unreasonable. This is because by the time the claimant had the meetings with Mr Allen and Mr Cooling his evidence was that he looked down the sides of the VTEC train but that he had not walked around it. The respondent held the view that merely looking down the VTEC train was not an adequate safety check. For the reasons set out below we find that this was a reasonable position for the respondent to take.

82.6 Much was made by the claimant about CCTV footage from the panel room or lack of it. The claimant claims that Mr Starkey had reviewed such footage as he discussed footage he had seen during Mr Munro's altercation with the claimant. It is not disputed that the panel room CCTV footage was not made available to the Claimant, Mr Allen or Mr Cooling. The tribunal accepts Mr Cooling's evidence that he had enquired about it as part of his investigation and was informed that the panel room CCTV

was not working at the date of the incident. As a result of issues raised by the claimant in the weeks leading up to the hearing Mr Cooling made further enquiries and was informed that the CCTV had been working but it had been erased after 7 days and as such it was not available. We do not criticise Mr Allen or Mr Cooling for not reviewing the panel room CCTV footage in these circumstances. The tribunal finds that the panel room CCTV footage would not have been of assistance to the claimant in any event because his position was that he did not walk around the VTEC train and in the claimant's evidence he accepted that at the time of the incident Mr Munro was in the vicinity of the VTEC train. The tribunal does not accept that the respondent's failure to provide this footage as part of the investigation is unreasonable. The respondent had taken steps to ensure that it had many other forms of evidence including the other CCTV footage and interview records. However, the respondent may wish to consider longer retention of CCTV footage so that it can be used in future investigations;

82.7 the Claimant submitted various written letters as part of the investigation which were reviewed by Mr Allen and Mr Cooling.

82.8 A interview took place with Mr Munro on 4/12/2015 which was carried out by Mr Starkey. In this interview Mr Munro gave his version of events which contradicted the claimant's account.

82.9 On 7 April 2016 Mr Allen held a meeting with the Claimant and Ms Hanson to review CCTV footage. It is not disputed that at this meeting Mr Allen said that he had not lost a tribunal yet. The tribunal concludes that in light of all the evidence, the context in which it was said and the claimant's admission that it was not aggressive does not establish that Mr Allen had predetermined the Claimant's case or was threatening;

82.10 In the 7 April 2016 meeting it is not disputed that Mr Allen raised the possible option of the claimant accepting a downgraded position. The tribunal finds that this does not demonstrate to the required standard of proof that he had predetermined the outcome of the disciplinary. This is because Mr Allen recognises that the claimant protested because in the because at the meeting Mr Allen recognises that the claimant maintains his innocence, has raised new issues which he needs to look in to and which he goes away and looks into.

82.11 We reject the submission that Mr Allen and Mr Cooling were inappropriate individuals to hear the investigation and appeal respectively. They both have long service in the railway industry and as a result have some awareness of the health and safety environment. We find that it is important that individuals are chosen to who run and decide disciplinary processes who have no association with the claimant and this would inherently limit who could be part of investigation.

82.12 We find the criticism that Mr Cooling did not reinvestigate to be misplaced as that is not the role of the appeal hearing. In any event the tribunal concludes that Mr Cooling carried out a thorough review, including visiting the depot and reviewing the papers.

83. The tribunal finds that when the respondent's investigation is considered in the round it was more than adequate to satisfy the requirement of a reasonable investigation in the circumstances.

Did the employer have in mind reasonable grounds on which to sustain that belief?

84. The tribunal finds that the respondent had in mind reasonable grounds on which to sustain its belief that the claimant was guilty of gross conduct for the following reasons:

84.1 By the time of the claimant's meetings with Mr Allen and Mr Cooling he had accepted that he had not walked around the VTEC train;

84.2 The respondent was reasonable to rely on the DOO slip being removed as a basis for believing that the claimant did or should have known a VTEC driver could have taken it. There were only two trains in the depot at the time of the incident. One train was the Grand Central train and we accept the claimant's evidence that Grand Central did not operate a DOO slip procedure at the depot and therefore there would not have been a DOO slip in respect of that train. Therefore the Claimant knew that the DOO slip that had been on his desk was in respect of the VTEC train. On the claimant's own account he consistently recognised that he knew that the slip had been taken. His evidence, as it was available to the disciplinary process, varied as to whether he assumed at the time it was the driver or he did not know who had taken it. The tribunal finds that the evidence from Mr Allen and Mr Cooling make it clear that they believed that at the very least the claimant was on notice that the VTEC driver may have been around the train and it was his responsibility to carry out adequate safety checks and he failed to do;

84.3 The tribunal finds that Mr Allen and Mr Cooling had sufficient evidence to entitle them to make that conclusion. On a plain reading of the letters submitted by the claimant as part of the disciplinary process and his various interview they are a reasonable basis to conclude that the claimant had some notice or a reasonable basis on which he should have believed that the drive had taken the DOO slip in order to prepare the train. The notes from the interview with Mr Starkey on 26 November 2015 also support this view. The tribunal recognises that the claimant consistently refuted that he said those answers or that he could not recall the interview. However, he did not provide an alternate version of the minutes despite being offered the opportunity by Ms Hinges and Mr Allen. He preferred to refute them in their entirety. The tribunal considers that even disregarding the content of this interview the respondent had

reasonable grounds on which to come to its conclusion. In the alternative, the tribunal concludes that the respondent was entitled to prefer the version of the notes provided by Mr Starkey. Mr Cooling spoke to Mr Starkey and he maintained the notes were accurate. Employers are often faced with two conflicting accounts and it is reasonable to prefer one of the other. Further, on both Mr Munro's account and the claimant's account Mr Munro the claimant immediately after the Grand Central train had moved off and these accounts are reasonable basis on which to form the view that Mr Munro was in the vicinity of the Grand Central train when it moved off.

84.4 The tribunal finds that it was reasonable for the respondent, in such circumstances, to expect that the claimant would establish who took the DOO slip and check that they were not in the vicinity of the train or where they were before allowing the Grand Central train to move. We accept this is not specifically covered by a policy but we consider it reasonable for the respondent to expect the claimant to have carried out these actions as a result of his experience and knowledge of potential risks. Mr Green made submissions that the respondent did not have a policy that covered the events surrounding the incident and therefore it was unfair to hold the claimant to that standard. As a result of which the dismissal was unfair because the claimant was not aware and could not have been aware that his conduct could lead to dismissal. The tribunal does not accept this argument. The tribunal finds that a policy did not govern the incident on 26 November 2015. What was required of the Claimant was for him to exercise his judgement in the circumstances and carry out adequate safety checks. The tribunal considers that such a responsibility is inherent in the claimant's role as a shunter who has ultimate responsibility for not permitting trains to unless it is safe for them to do so. It is unarguable that the claimant would not have been aware of his responsibility;

84.5 The respondent was reasonable to find that the claimant had not carried out an adequate safety check for the following reasons:

84.5.1 The claimant's evidence to the disciplinary proceedings varied slightly but by the time of the meetings of Mr Allen and Mr Cooling he had said he looked down the VTEC train. He said that he would have seen somebody if they were there and he did not claim to have walked around the VTEC train.

84.5.2 CCTV footage showed the same.

84.6 The respondent was reasonable to require the claimant to carry out a thorough check which included walking around the VTEC train in these circumstances. We note that this incident occurred at approximately 5:30am on a November morning. It was before dawn, the CCTV footage shows it is dark and poorly lit. In addition the VTEC train is 224 yards long. We recognise that the Grand Central train was several carriages shorter. We consider that it was reasonable of the respondent to conclude

that a visual check of simply looking down the sides was insufficient in light of the above. The claimant's evidence to the tribunal was that if he had thought somebody was around the VTEC train he would have walked down the sides of it. The reason the Claimant gave for not doing so is because he did not think an individual was around the train. Therefore as we have found that it was reasonable of the respondent to find that the claimant should have been on notice that a driver was in the vicinity of the VTEC train and/or taken steps to find out who had taken the DOO slip and ensure that they were not around the VTEC train, we conclude that it was reasonable for the respondent to conclude that adequate safety checks had not been taken. On the claimant's own evidence he failed to do that.

Does the decision to dismiss fall within the band of reasonable responses?

85. The tribunal finds that the respondent's decision to dismiss the claimant for gross misconduct falls within the band of reasonable responses that a reasonable employer acting reasonably could make for the following reasons:

85.1 The respondent operates in a safety critical environment. We have given this due consideration in assessing the situation;

85.2 In relation to the stop boards, the allegations against the claimant were two-fold. Firstly that he did not put a stop board at the south end of the Grand Central train which was contrary to policy and secondly that he did not secure the stop board at the north end with a padlock again contrary to policy. At the meetings with Mr Allen and Mr Cooling the claimant stated that he could not remember if he put the padlock on but he thought he had. At the tribunal hearing having seen the CCTV footage he accepted he had not. The tribunal had sympathy with the claimant's inability to recall a routine action which he carried out multiple times per shift and was first asked about 4 months after the event. His lack of accurate recall of this event is understandable. The tribunal considers this to be a relatively minor infraction. The tribunal finds that Mr Allen and Mr Cooling's evidence established that it was not a significant part of the decision to dismiss. The tribunal notes that it heard some evidence that erecting stop boards at the south end was relatively new and the claimant may not have been trained on such and that it was common practice not put stop boards in this place at the Ferme Park depot. The tribunal considers that the issue of the stop boards was not sufficient to justify dismissal of itself and that the respondent did not rely on the Claimant's failures in this regard to a material extending its decision to dismiss the claimant.

85.3 The letter notifying the claimant of the disciplinary allegations against him, the dismissal letter and appeal outcome letter set out that the claimant "wilfully" failed to follow safe systems of work. The tribunal did not consider that the claimant's conduct could reasonable be termed wilful as it had all the appearance of negligence or inattention. However, it finds that the wilful element did not material affect the respondent's decision as whatever the motivation for the claimant's conduct it was reasonable to

treat the conduct as falling below the required standard and as a reason to justify a dismissal for gross misconduct. This is because of the safety critical environment, the responsibilities the claimant's role entailed (which was effectively the person responsible for the depot and all persons in it) and his failure to carry out adequate checks.

85.4 The claimant had 35 years of service with the respondent. The respondent treated this as an aggravating factor on the basis that this experience should have meant that the claimant knew what to do in these circumstances. Another employer may have treated the claimant's service as a mitigating factor. However the tribunal finds that the respondent's behaviour falls within the band of reasonable responses of a reasonable employer acting reasonably and on that basis the tribunal cannot interfere with it. The tribunal finds that it is reasonable to expect that individuals who have carried out a role for a substantial period of time will have sufficient experience and expertise to carry out that role to the required standard.

85.5 The respondent took into account what it called the claimant's "lack of accountability" in respect of the incident. This situation seems to have arisen from the claimant maintaining that Mr Munro was lying about events and was under the influence; the claimant was aggrieved by such matters in light of the respondent's failure to test or discipline Mr Munro and he continued to put across this point. These events seem to have impeded the claimant from considering his role in events which in turn led the respondent to have concerns that the claimant did not recognise his key role in maintaining site safety. One interpretation of the meetings is that the claimant was distracted by his concerns about the treatment of Mr Munro as compared with himself that he failed to adequately explain his case. The tribunal finds that the respondent's conduct falls within the band of reasonable responses of a reasonable employer because the claimant was carrying out an important safety role and as the claimant had failed to accept that he had done something wrong and would or could do it better in the future, the tribunal accepts that the respondent had legitimate concerns at the claimant would not act differently in the future and therefore he may pose a safety risk. On that basis the tribunal cannot interfere with the respondent's decision.

85.6 In relation to the severity of the sanction the tribunal finds that the respondent's decision to dismiss for gross misconduct is within the band of reasonable responses. Whilst another employer may have chosen a lesser sanction this is not sufficient to establish that the dismissal was outside the band of reasonable responses. Given the safety critical environment and the factors identified above, the respondent's decision was one that was open to a reasonable employer acting reasonably.

85.7 Mr Green for the claimant submitted that the fact that recommendations for drivers and shunters to be issued with radios to help communication between them and re-briefing of shunters about what to do following this incident are evidence that it was unfair to dismiss the claimant. The

tribunal does not accept this argument. It is good practice for an employer to consider how things be done better in the future following an incident; the tribunal finds that this is all the re-briefing and the radio recommendations are. They are not evidence that it was not reasonable to expect the claimant to take the steps that it required of him in a situation in which he found himself.

Disparity

86. Mr Green for the claimant submitted that the claimant's dismissal was unfair because of the differences between his treatment and that of Mr Munro and/or that of an individual involved in an incident in 2015.

87. The tribunal finds that Mr Munro's situation was not truly comparable with that of the claimant. The tribunal recognises that the claimant considers that his treatment as compared with that of Mr Munro is unfair. However the tribunal can only consider disparate treatment if it is established that Mr Munro was comparable to the claimant. The tribunal finds that Mr Munro held a very different role to the claimant. Mr Munro was a driver and this entailed various safety behaviours on his part but these are of a different type to those lying on the claimant by virtue of his role as the person responsible for the depot. The nature of the allegations that the claimant made against Mr Munro were that he was under the influence and that he had lied, and as such he had not followed the procedure in relation to DOO slips. These are serious allegations but they are not comparable to those against the claimant.

88. In relation to the other incident in 2015, the tribunal notes that it has been provided with limited evidence about it. Mr Cooling's evidence was that this was a breach which arose from a change of circumstances which had not been communicated to the individual involved and involved no real risk to an individual. The tribunal considers that all of these factors mean that that situation is not truly comparable to that of the claimant.

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Employment Judge Bartlett

11 August 2017

Sent to the parties on:

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For the Tribunal:

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