



## THE EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Tesfaye

**Respondent:** Tower Transit Ltd

**Heard at:** London East London Hearing Centre

**On:** 30 – 31 January and 1, 2 & 3 February 2017

**Before:** Employment Judge C Hyde

**Members:** Mr S Dugmore  
Mrs S A Taylor

### Representation

**Claimant:** In Person

**Respondent:** Mr R Bailey, Counsel

## RESERVED JUDGMENT

The unanimous Judgment of the Employment Tribunal was that:

1. The complaints of whistleblowing detriments under section 47B of the Employment Rights Act 1996 are not well founded and are dismissed.
2. The complaint of automatically unfair whistleblowing dismissal under section 103A of the Employment Rights Act 1996 is not well founded and is dismissed.
3. The complaints of direct race discrimination, race harassment and victimisation under sections 13, 26 and 27 of the Equality Act 2010 are not well founded and are dismissed.

# REASONS

## *Preliminaries*

1. Reasons are provided in writing for the above judgment as it was reserved. Further they are provided only to the extent that it is necessary to do so in order for the parties to understand why they have won or lost; and only to the extent that it is proportionate to do so.
2. All facts were found on the balance of probabilities.
3. The Claimant was employed by Tower Transit Operations Limited (“the Respondent”) as an Engineering Supervisor at its Lea Interchange garage from 15 February 2016, until 23 June 2016 when he was dismissed for failing his probation.
4. By a claim form which was presented on 16 August 2016, Mr Tesfaye complained about the termination of his employment. In short, by the time of the full merits hearing, he alleged direct race discrimination, race harassment and victimisation under the Equality Act 2010, that he had been subjected to detriment and automatically unfairly dismissed following the making of protected interest disclosures in relation to health and safety. The Issues to be decided were set out in detail in an agreed List of Issues which was included in the trial bundle [pp33G – J]. The List of Issues is also set out in full below.
5. Case Management Orders were made by Employment Judge Gilbert (“the Gilbert Order”) without a hearing and sent to the parties on 10 October 2016. A closed preliminary hearing then took place before Employment Judge Jones on 17 October 2016 at which there was a discussion of the Issues, the Respondent having prepared a draft List in advance of the hearing, in accordance with the Gilbert Order. A document setting out a summary of the discussion and the Case Management Orders made was sent to the parties on 15 November 2016.

## *The Issues*

6. The numbering from the Agreed List of Issues used during the hearing is used in these Reasons for the purposes of consistency. It was not in dispute that the Claimant did not have the requisite period of service to entitle him to bring a claim for ‘ordinary’ unfair dismissal under s.94 ERA 1996.

### **Public interest disclosure detriment: S.47B ERA 1996**

1. Did C make qualifying disclosures to R on:

- a. 13 April 2016 by emailing Jeff Twining (Workshop Manager) about engineers disappearing from the workplace and taking excessive smoking breaks (which C says are health and safety matters);
  - b. 11 May 2016 by allegedly informing Jeff Twining that it would be wrong to release a defective bus on to the public highway;
  - c. 27 May 2016 by emailing Satnam Cheema (Engineering Director of The Impact Group Limited) about alleged bad practices, as detailed in that email?
2. In C's reasonable belief, were the disclosures made in the public interest and did they tend to show that the health and safety of any individual had been, or was likely to be endangered?
3. Was C subjected to any of the following alleged detriments by R and, if so, were they on the ground that C had made any of the contended protected disclosures as identified at paragraph 1 above:
- a. Excluding him from a meeting on 31 March 2016 held with the Polish workers, as well as another such meeting on 5 April 2016;
  - b. Being sworn at by Jeff Twining on 13 April 2016;
  - c. Being sworn at and threatened by Paul Lenihan on 14 April 2016;
  - d. Not being assessed by R on his return from a period of sickness absence on 3 May 2016 about his fitness for work;
  - e. Jeff Twining suspending C on 18 May 2016, telling him it was in relation to gross misconduct, but failing to give him details of the allegations until the investigation meeting on 23 May 2016;
  - f. Christine Gayle issuing C with a final written warning on 16 June 2016 regarding the defective bus?
4. Have the claims been brought within time and, if not, should time be extended?

**Direct race discrimination: S.13 EA 2010**

5. Was C, a black African, treated less favourably than a white or non-African person by reason of the following alleged matters:
- a. R's Polish engineers refusing to take instructions from him;

- b. Being excluded by R from the meeting with the Polish engineers on 31 March 2016, as well as another such meeting on 5 April 2016;
  - c. Being dismissed on 23 June 2016 on grounds of unsatisfactory probation?
6. In relation to 5(a) above, did R take all reasonable steps to prevent the Polish engineers from doing what is alleged or from doing anything of that description?
7. Have the claims been brought within time and, if not, should time be extended?

**Victimisation (race): S.27EA 2010**

8. Did C engage the following alleged protected acts on:
- a. 13 April 2016 when he emailed Jeff Twining allegedly complaining of direct race discrimination by making reference to "division and inequality";
  - b. 11 May 2016 at a probationary review meeting where he allegedly spoke to Malcom Venn about discrimination and/or segregation;
  - c. 1 June 2016 by mentioning "race discrimination" in a grievance?
9. Was C subjected by R to any of the following detriments and, if so, was he subjected to them because he had done any of the alleged protected acts identified in paragraph 8 above:
- a. Malcolm Venn allegedly 'prejudging' and rejecting C's grievance dated 21 April 2016;
  - b. Jeff Twining allegedly forcing C to release a defective bus into service on 11 May 2016;
  - c. Malcolm Venn stating on 11 May 2016 at the probation review that C 'must not harbour conspiracy theories';
  - d. Vince Dalzell allegedly prejudging the probation review on 27 May 2016 by writing in an email dated 27 May 2016 that '...this guy has raised grievances and it ties in with him being seen next week for unsatisfactory probation';

- e. Christine Gayle (Operations Manager) imposing a final written warning on 16 June 2016;
  - f. Being dismissed on 23 June 2016 on grounds of unsatisfactory probation?
10. Have the claims been brought within time and, if not, should time be extended?

**Harassment (race): S.26 EqA 2010**

11. Did R engage in unwanted conduct relating to C's race, which had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him by:
- a. Dariusz Felter allegedly subjecting C to aggressive behaviour on 23 and 24 March 2016;
  - b. Failing to take any or any adequate action following C's complaint against Dariusz Felter made by email on 29 March 2016;
  - c. Paul Lenihan allegedly swearing at and threatening C on 14 April 2016;
  - d. Jeff Twining allegedly shouting and swearing at, and insulting and blackmailing C on 11 May 2016;
  - e. Christine Gayle imposing a final written warning on 16 June 2016 relating to the defective bus;
  - f. Failing to take any or any adequate action following C's complaint about the events of 14 April 2016 made by C's emails dated 15 and 21 April 2016?
12. In relation to 11(a) and 11(c) above, did R take all reasonable steps to prevent them from doing what is alleged or from doing anything of that description?
13. Have the claims been brought in time and, if not, should time be extended?

**Automatic Unfair Dismissal – s.103A ERA 1996**

14. Was the reason or the principal reason for C's dismissal on 23 June 2016 the making of any of the protected disclosures identified at paragraphs 1 and 2 above?

***Evidence Adduced/Documents Produced***

7. The parties agreed on the contents of a single bundle of documents in a lever arch file, running to some 200 pages and marked [R1]. After the Tribunal had adjourned until 2pm to read the witness statements and the documents referred to in the bundle, the Claimant confirmed that he had had an opportunity to go through the bundle from the witness table and that he had all the relevant documents.

8. The Respondent prepared a chronology marked [R2]; and a cast list marked [R3] which also stated the race of the relevant people. During the hearing, further documents were produced by the Respondent to address issues raised by the Claimant or at the Tribunal's request. These were a bundle of new documents relating to Respondent's Counsel's bus maintenance spreadsheet marked [R8]; Respondent's Counsel's bus maintenance spreadsheet marked [R7]; an Audit Report marked [R9]; and an organigram marked [R10].

9. The Claimant gave evidence first, and relied on a witness statement for his evidence in chief marked [C1]. He also relied on a medical report dated 20 January 2017 which was marked [C2].

10. On behalf of the Respondent, the Tribunal heard from the following witnesses:

- a. Mr Dariusz Felter, Engineer, witness statement marked [R4];
- b. Mr Malcolm Venn, former Engineering Manager, [R5];
- c. Mr Darren Bull, Engineering Manager, [R6];
- d. Mr Vince Dalzell, Head of Operations, [R10];
- e. Ms Christine Gayle, Operations Manager, [R11]; and
- f. Mr Andrew Edwards, Operations Director [R13 & 14].

***Findings of Fact and Conclusions***

11. The Claimant is of Ethiopian racial origin.

Chronology

15 February 2016:

12. The Claimant commenced employment. He was responsible for supervising a team of Engineers on his shift, and working with other Engineering Supervisors at the Respondent's Lea Interchange bus depot. He worked under the direction of the Workshop Planning Manager, a role which was performed at the material times by Jeff Twining in an Acting capacity.

11 March 2016:

13. An incident occurred between the Claimant and Wayne Powell (Engineer - Black British/Caribbean). Jeff Twining (former Workshop Supervisor – White British)

investigated and was told by Mr Powell that at the start of his shift that day his name had not been put on the production board (a whiteboard allocating engineers to jobs). He could not locate the Claimant and so assisted another engineer. When he returned to the board, his name had been listed. He said the Claimant accused him of not coming forward at the start of his shift and did not give him a chance to explain. Mr Powell said that the Claimant allocated everyone else a task, but ignored him and they then exchanged words and Mr Powell went to speak to Malcolm Venn (Engineering Manager – White British).

14. Mr Twining also spoke to the Claimant, who told him that when he asked Mr Powell why he did not start his duty on time Mr Powell's approach had been '*very violent and aggressive*' and that he had called the Claimant an idiot. Mr Twining concluded that there had been a misunderstanding between the two men and the Claimant was given advice on how to deal with such situations.

29 March 2016:

15. The Claimant emailed Mr Twining to make a complaint about Dariusz Felter (Engineer - White Polish) in relation to his '*aggressive behaviour*' and '*his bad attitude*' on 23 and 24 March 2016.

16. Mr Twining spoke with Mr Felter, who told him that he had got annoyed with the Claimant because he had changed his job several times and had not listened to him. He added that the Claimant had not been clear in his instruction and that Mr Felter was only rude to him because the Claimant was rude.

30 March 2016:

17. Mr Twining met with the Claimant and gave him advice on how to deal with Mr Felter and any difficulties arising with engineers going forward. Mr Twining suggested that the Claimant should be clear in his instructions, especially with the Polish engineers where language may be a problem.

31 March 2016:

18. Mr Twining met with the Polish engineers and explained that their behaviour was not acceptable and they agreed to make an extra effort to assist the Claimant. The Claimant was not invited to attend this meeting.

19. Mr Twining's actions were fed back to the Claimant, who was also given advice on his communication skills. The Respondent believed that the Claimant did not take the advice well and disagreed with Mr Twining's comments.

7 April 2016:

20. Mr Twining coached the Claimant on signing off and closing down service sheets. He was concerned that the Claimant was signing off sheets that still showed outstanding defects on the vehicles. Examples were given. He was praised for keeping on top of inspection sheets.

8 April 2016:

21. The Claimant was reminded by HR that he needed to provide details of two referees as requested in his offer letter, his continued employment being conditional on receipt of satisfactory references.

13 April 2016:

22. The Claimant emailed Mr Twining raising an issue about the following:

- 22.1. engineers not following instructions from him and/or not complying with workplace rules;
- 22.2. engineers disappearing from the workplace and taking excessive smoking time;
- 22.3. the lack of speakers to call engineers when needed;
- 22.4. a division and inequality between the engineers; and
- 22.5. engineers being of one ethnic background and speaking their native language at work, which he claimed had a negative effect on communication and job performance.

14 - 21 April 2016:

23. An altercation took place between the Claimant and Paul Lenihan (Engineering Supervisor – White British) sometime between 1230 and 1300 about the handover at the end of the Claimant's shift to Mr Lenihan.

24. It was not made clear during the Tribunal hearing whether the Claimant was at work between 14 April and the date of his fit note, 19 April 2016.

25. By an email sent at 12.43 on 15 April 2016 (p74A), Mr Tesfaye informed Mr Twining that he wished to report the incident on 14 April with Mr Lenihan as an incident of bullying and harassment. He stated that the episode had caused a range of emotional/psychological symptoms including sleeplessness and panic attacks. He asked for confirmation of Mr Lenihan's name in order that he could report the matter formally.

26. Mr Lenihan then lodged a complaint about the Claimant by email at 6pm on 15 April (p75), addressed to Mr Twining. He reported '*...not one but many instances of incompetency and poor management skills and rude and unacceptable behaviour not just towards myself but many of the engineering staff.*' He added, '*I feel that many workshop staff members are unacceptably being treated unfairly by poor supervisory dissections...*' (sic) and, '*I must stress that I have had members of staff and contractors refusing to work with him saying that his attitude towards them was unacceptable over the last 6 weeks or so.*' He then set out his version of the incident on 14 April 2016.



27. Mr Lenihan made no reference in his one page detailed email to having knowledge of the Claimant's complaint about him in relation to the same incident.

28. An occurrence report dated 18 April 2016 (p76) from a member of the engineering staff was submitted to the Respondent. It stated that Mr Lenihan and the Claimant had argued on 14 April 2016, but that Mr Lenihan had not threatened the Claimant in any way.

29. The Claimant hand-delivered a medical certificate signing him off work due to stress for two weeks. The fit note was dated 19 April 2016 (p76A) and both parties agreed that it was handed by the Claimant to Mr Twining at the depot. It was unclear on which date the Claimant did this. The Respondent's initial case in the Grounds of Resistance was that it was handed in on 14 April 2016. This was probably based on an undated typed note of the conversation between Mr Twining and the Claimant when he handed in the fit note. The account apparently written by Mr Twining was headed 'Conversation with Solomon Tesfaye on 14 April 2016'. The note referred to the conversation having taken place at approximately 1630 (p74). Mr Twining did not give evidence to the Tribunal.

30. The Claimant's case [C1 para 14] was that he handed in the sick note dated 19 April on 21 April 2016. Given the date on which the fit note was signed, the Tribunal concluded that it must have been delivered either on or shortly after 19 April. On the balance of probabilities, the Tribunal accepted the Claimant's case that the fit note was handed in on 21 April 2016.

31. Mr Twining's note recorded that he had a long conversation with Mr Tesfaye, lasting approximately one hour and 20 minutes. On Mr Twining's account, the Claimant was unable to say why he felt he was struggling with the supervisor role, but said that he did not think he could do the job and referred to similar difficulties he had had in a previous role, although he did not elaborate. He was given encouragement by Mr Twining. In relation to Mr Lenihan, he said he was only after an apology. The Claimant said he was unsure why Mr Lenihan had argued with him, but commented that it might be because he was Black. The Claimant disputed the accuracy of this note.

21 April 2016:

32. The Claimant emailed his version of events about the incident with Mr Lenihan (p77) on 14 April 2016 to Mr Twining. He claimed the incident '*...looks like a systematic campaign of bullying me at work, because I complained about unacceptable behaviour, poor work relationship, divisions and improper workplace rules.*' He asked that the matter be investigated.

25 April 2016:

33. Mr Lenihan was interviewed by Mr Venn about the 14 April incident and stated (p80) that he had arrived early for work on 14 April 2016 and the Claimant had immediately approached him and rather aggressively instructed him to do the handover. Mr Lenihan said he was unhappy about being spoken to in this way and told the Claimant so. He added that he was not ready to do the handover as he did not start

work for another 20 minutes. Mr Lenihan said he had been forceful in his response to the Claimant, but not aggressive. He was not aware of any malicious rumours being spread about the Claimant, nor any campaign of bullying.

34. Mr Venn also interviewed Mr Twining, who had observed the events on 14 April 2016 (p78). He confirmed that both Mr Lenihan and the Claimant had raised their voices. He denied the allegations made by the Claimant of a campaign of bullying and highlighted that he had tried to help the Claimant in his role.

35. Mr Mehmet Ahmed (Skilled Engineer/Chargehand – White British) was interviewed as part of the investigation by Mr Venn. The notes of the interview (p79) record that he stated that he had not heard what was said, but reported that the incident was not aggressive, although there was a disagreement. He denied the allegations made by the Claimant.

36. Although the Occurrence Report (p76) referred to above dated 18 April 2016 about the incident on 14 April was signed, the signature was difficult to decipher and there was a dispute about whose signature it was. The Claimant believed it was Mr Ahmed's and the Respondent contended that it was signed by Romaine Davidson. Both men were said by the Claimant in his email of complaint on 21 April 2016 (p77) to have been present during the incident, although on the Claimant's account, Mr Davidson was more closely involved. The Tribunal was unable to resolve that dispute as there was no corroborating evidence. When interviewed, Mr Ahmed made no reference to the Occurrence Report, and Mr Davidson was not interviewed as part of the investigation. As the Claimant accepted that both men were witnesses, it probably did not matter which one had written the Occurrence Report.

6 May 2016:

37. Mr Venn held a meeting with the Claimant and Mr Lenihan to try and find a way forward. Both reluctantly agreed to draw a line under the matter. Mr Venn considered the matter closed.

11 May 2016:

38. The Claimant who was on the early shift had been told by Mr Twining to release certain buses into service. Mr Tesfaye believed that they were still defective and therefore not fit to be in service and therefore refused to do this. This took place at about 07:10 [C1 para 18]. The Claimant's case, which the Tribunal was unable to uphold on the facts despite examining a considerable amount of documentation relating to the maintaining and servicing of the vehicles, was that Mr Twining had directed him to release defective buses on a number of occasions previously. This issue is also dealt with below in the context of the disclosures. The implication from the Claimant was that Mr Twining had ordered buses to go on the road knowing that they were unroadworthy.

39. A conversation which was heated in parts then took place sometime thereafter between the Claimant, Mr Twining and Mr Lenihan. Mr Tesfaye recorded part of it surreptitiously and the transcript was in the bundle (pp81B – C). The Claimant relied on this recording as evidence of one of the public interest disclosures. It was also relevant

to one of the harassment allegations (11d). The Tribunal also considered that the transcript of the recording gave the Tribunal a useful insight into the interpersonal relationships at the time. Blunt language was used by Mr Twining, but the Tribunal was satisfied from the contents of the transcript, that he directed this equally at Mr Tesfaye and Mr Paul Lenihan. The transcript began with Mr Twining expressing considerable exasperation about the performance of the Claimant and Mr Lenihan, which meant that Mr Twining, as he saw it, was having to put things right after them. Further into the recording however, Mr Twining apologised profusely to Mr Tesfaye for having wrongly accused him of taking incorrect action in relation to the procedure for marking that a vehicle was to be kept off the road.

40. At about midday on 11 May 2016 Mr Venn conducted a probationary review with the Claimant (pp82 – 83), who referred to his email dated 21 April 2016, which he termed a grievance. He was reminded that those matters had been concluded. The Claimant was argumentative towards Mr Venn (p84) during the review. The Tribunal accepted Mr Venn's evidence that he made the notes of the meeting contemporaneously.

41. The Claimant was informed that building a relationship with staff under his control was a fundamental part of his role and had to be addressed. He was advised that his style of management was aggressive and he needed to adopt softer skills, whilst managing a tight ship. Mr Venn advised the Claimant to work on these aspects, amongst others, and that the position would be reviewed on 25 May 2016.

17 May 2016:

42. Mr Venn wrote to the Claimant (p85) to confirm that the grievance dated 21 April 2016 had been investigated and concluded. Mr Venn explained that he could find no evidence to support the allegations made. Mr Tesfaye's case was that he had received this letter on 26 May, but that he had not received the document at p83A to the same effect until 8 August 2016 when a copy was sent to him by the Human Resources Department at Westbourne Park. The Tribunal considered that the document at p83A was merely an unsigned draft of the letter which Mr Tesfaye accepted he received on 26 May 2016. It did not take matters any further.

18 May 2016:

43. The Claimant was suspended by Mr Twining for permitting vehicle 36118 to go out in service on 6 May 2016 with category 'X' defects (serious defects rendering the vehicle un-roadworthy), having signed off the relevant engineering sheet to confirm it was 'approved, fit for service'. Amongst other things, the vehicle had a brake test outstanding.

19 May 2016:

44. The Claimant's suspension was upheld by Amir Shaikh (Staff Manager) at a suspension review meeting. Mooragosub Naidoo (Unite) accompanied the Claimant. The serious nature of the alleged offence was referred during the review meeting (pp 88 & 89)

23 May 2016:

45. At a fact-finding meeting to investigate the disciplinary charges (at which Mr Naidoo accompanied the Claimant once more), Scott O'Neil (Panel Staff Manager) found that there was a case to answer and referred the matter to Mr Venn. The Claimant objected to seeing Mr Venn due to what he referred to as 'an outstanding grievance'.

25 May 2016:

46. Mr Venn wrote to the Claimant confirming that the meeting had been moved from 25 May to 27 May 2016 due to the unavailability of the Claimant's Unite representative. Mr Venn also acknowledged that his letter of 17 May 2016 confirming the outcome of the grievance had not set out the right of appeal. He apologised and confirmed that the Claimant had seven days from 26 May 2016 to appeal, if he wanted to.

27 May 2016:

47. The Claimant emailed Mr Venn setting out a chronology of events. For the first time, he alleged that on 11 May 2016 Mr Twining had shouted at him, insulting him, '*called me an F word and said I am a disgraceful person*'. He claimed Mr Twining had organised certain engineers to set things up to get him out of the company because he had (a) complained about engineers' '*clock time cards*', (b) made reports on 13 April 2016 about unacceptable behaviour, and (c) submitted a grievance dated 21 April 2016. The Claimant further claimed that his grievance had been concluded by Mr Venn without proper investigation. This email was forwarded to Darren Bull (Engineering Manager) on 1 June 2016.

48. The Claimant also emailed Satnam Cheema (Engineering Director of The Impact Group Limited, a wholly owned subsidiary of the Respondent) to make him aware of what he termed '*bad practices*' at the depot. He referred to problems concerning '*clock cards*' (later said to be an isolated occurrence), shift patterns, inspection schedules, and made a serious allegation that buses with defects were being allowed out in service.

49. Mr Venn met with the Claimant, accompanied by Mr Naidoo, to conduct a probation review. Mr Naidoo explained that the Claimant would not proceed with the meeting as he had not been given 'the pack' to prepare his case. A pack was not normally prepared by the Respondent's managers ahead of probation review meetings as they were not disciplinary hearings. The meeting was adjourned whilst a pack was prepared and copied for the Claimant. His email of 27 May 2016 was discussed and Mr Venn informed him that Mr Bull would meet with him on 31 May 2016 and address the allegations made.

31 May 2016:

50. Mr Bull met with the Claimant (who was still suspended) and Mr Naidoo to discuss the email sent to Mr Cheema. Notes of the discussion were made (pp100 – 105). The notes suggested that the meeting was for the purpose of a probation review.

51. During the meeting the Claimant alleged that there was favouritism between black and white members of staff. He claimed that invoices were being sent to the Respondent by a company that was not genuine and where work was not being carried out, and further alleged that the Workshop Manager was allowing defective buses to go out in service. Mr Bull took a copy of the documents that the Claimant said supported this last allegation and confirmed he would investigate.

1 June 2016:

52. The Claimant emailed Christine Gayle (Operations Manager) attaching an appeal against Mr Venn's grievance outcome. He said the Respondent was not recognising its duties in respect of his health and safety at work and repeated his allegations against Mr Twining and Mr Lenihan, alleging bullying and harassment because of race. Vince Dalzell (Head of Operations) responded and advised that Mrs Gayle was responsible for the operational side of the business and so his email had been forwarded to Mr Bull.

9 June 2016:

53. A second request was made for the Claimant to urgently provide details of two referees and he was reminded that his employment was conditional on the Respondent obtaining satisfactory references.

13 June 2016:

54. Mr Bull wrote to the Claimant responding to the allegations made in his email to Mr Cheema on 27 May 2016 about engineering practices. Mr Bull did not find any evidence to support any of the allegations. In any event, given the seriousness of the allegations, the Respondent instructed an external contractor to undertake an independent audit of the allegations made.

55. Mr O'Neill wrote to the Claimant instructing him to attend a disciplinary hearing with Mrs Gayle on 16 June 2016, in relation to the incident on 6 May 2016, when the Respondent believed that the Claimant authorised a defective unroadworthy vehicle for use on the road. The charge he was warned he would have to answer was one of 'failure to observe rules/procedures affecting the safety of employees or the public' (an example of gross misconduct, set out in the Respondent's disciplinary procedure) (p122). He was advised of his right to be accompanied and that dismissal was a potential outcome of the hearing.

16 June 2016:

56. The Claimant attended the hearing accompanied by Mr Naidoo. At the commencement of the hearing Mrs Gayle (Black British/Caribbean) amended the wording of the charge to make it clear that she understood that the management needed to establish that Mr Tesfaye's actions or omissions constituted gross misconduct. Mrs Gayle found the charge proved. Despite the seriousness, she decided not to dismiss the Claimant, given assurances from the Claimant that incidents of this nature would not happen again. She awarded a final written warning to remain live for two years. He was advised of his right of appeal. This was confirmed in writing (pp 130 - 133).

57. By an email sent on the same day, the Claimant was informed by Mr Venn that his probation would be reviewed at a meeting at midday on 20 June 2016 (p122E). The Claimant wrote to Mr Venn seeking clarification, among other things, about why Mr Venn would be dealing with the probation review once again, having previously told the Claimant that this would be transferred to Mr Bull (p132B – C).

58. He also raised a number of concerns about the conduct of the forthcoming meeting and Mr Venn's involvement with it in that letter.

23 June 2016:

59. The Claimant emailed Mr Dalzell, chasing a grievance appeal hearing (p139). He clarified that his complaints related to harassment, discrimination because of race, breaches of health and safety obligations and detrimental treatment as a result of whistleblowing, and victimisation.

60. Mr Venn conducted the probation review with the Claimant, who was accompanied by Mr Naidoo.

61. Mr Venn's decision was that the Claimant had failed his probation. He referred to issues with staff and his managerial style, as well as a period of 14 days' sickness absence. He believed that the Claimant had demonstrated an aggressive manner and failed to listen to what was being said or asked of him. Mr Venn found that this attitude was evident in the review meeting itself. He advised the Claimant that he was dismissed, with payment in lieu of his notice period.

29 June 2016:

62. The Claimant emailed Sonia Gentles (HR Administrator) appealing against both the outcome of the disciplinary hearing (final written warning imposed by Mrs Gayle), and his dismissal following the probation review (pp143 – 145). His grounds of appeal against the dismissal mentioned discrimination and that he believed he had been singled out by individuals and groups within the workplace.

22 July 2016:

63. A letter (p151) was sent to the Claimant notifying him of an appeal hearing against the decision to dismiss.

8 August 2016:

64. The appeal hearing was conducted by Mr Andrew Edwards (Operations Director) and Mr Dalzell. The Claimant was accompanied by Joe Welch, the Unite Convenor. The Claimant's request to record the proceedings was refused.

65. The hearing was adjourned as Mr Welch had another appointment to attend. A resumed hearing date on 19 August was agreed at the time.

19 August 2016:

66. The appeal hearing was adjourned again. The Claimant did not feel he could take his own notes because of the state of his health and his second request to record the proceedings was refused. It was agreed that the hearing would reconvene when the Claimant was fit enough. It was proposed that the Claimant would make contact with the Respondent after 31 August 2016.

67. The appeal against dismissal was finally completed on 4 November 2016 when the Claimant was well enough to attend. Mr Edwards wrote to the Claimant to confirm the outcome in a letter dated 22 December 2016. The appeal was not upheld. In particular they found no unfairness in the dismissal and no evidence of discrimination.

General

68. The undisputed evidence before the Tribunal (p63) was that of 1045 drivers and engineers employed at the Lea Interchange depot, 337 were White, and 133 were African. The remaining 575 came from a range of racial backgrounds which fell into about 18 categories including British and Other White (95 under each of those categories), Caribbean (83), and a couple of categories reflecting Indian Sub-continental origins which together numbered about 159. In short the work force was very mixed racially.

69. The further document R3 which listed the approximately 20 engineers and managers who were relevant to this case, portrayed a similar picture of diversity in the workforce.

Public Interest Disclosures

70. The first matter said to constitute a public interest disclosure was as set out in 1(a) of the Agreed Issues as follows: 13 April 2016 by emailing Jeff Twining (Workshop Manager) about engineers disappearing from the workplace and taking excessive smoking breaks (which C says are health and safety matters).

71. As submitted by the Respondent on the basis of the case of **Kilraine v L B Wandsworth** [2016] IRLR 422, the Tribunal considered that this was merely an allegation and not the provision of information. The email provided no detail about the individuals involved or the dates or times of the alleged incidents. Further the email did not raise any health and safety issues. The Claimant struggled in evidence to demonstrate this and could only contend that if there were a fire during the working day it would be difficult to account for the engineers or, he argued, they could steal a bus during any time that was not accounted for. Finally, the Tribunal accepted that there was no basis for a reasonable belief by the Claimant that a disclosure about the issues covered in the email was in the public interest, as opposed to being a purely private matter: **Morgan v Royal Mencap Society** [2016] IRLR 428. It was apparent from the email read as a whole, that as Mr Tesfaye stated in the opening sentence of the email (p72), he was seeking help from Mr Twining with the discharge of his work duties, and in particular in relation to his management of the engineers.

72. The second matter said to constitute a protected disclosure was: 11 May 2016 by allegedly informing Jeff Twining that it would be wrong to release a defective bus on to the public highway (Issue 1(b)).

73. The Claimant's witness statement provided no further elaboration of his case on the alleged disclosure (C1, para 18). However, his position in relation to this matter changed somewhat in that he alleged there that he had been repeatedly told to release defective buses on to the road. He did not make this point at the suspension review meeting or indeed at the fact-finding meeting. Importantly, in relation to an employee who readily committed less serious matters to writing, Mr Tesfaye made no contemporaneous written complaint about this.

74. In respect of this alleged disclosure, the Tribunal also considered that this was not a disclosure of information, but a statement of opinion.

75. The third matter said to constitute a public interest disclosure was as set out in para 1(c) of the List of Issues: 27 May 2016 by emailing Satnam Cheema (Engineering Director of The Impact Group Limited) about alleged bad practices, as detailed in that email.

76. The Claimant told Mr Cheema and others in that email (p98) that there were a number of ongoing bad practices at the garage, the most serious of which was that buses were being released onto the road with dangerous defects. The Tribunal did not accept the Respondent's assertion that these were mere generalised allegations. Further we were satisfied that if buses were indeed being released on to the roads into service in an unfit state, the health and safety ground and the public interest requirement were both sufficiently engaged.

77. The Claimant provided detail of the fleet numbers and the dates on which they were supposed to have been sent out with defects, on various specified occasions between 25 April and 12 May 2016. The Tribunal considered that the detail provided was sufficient. It was used by the Respondent's managers to assess the accuracy of the report.

78. Indeed, the list in the Claimant's email formed the basis of a good deal of the Tribunal's review of the records of maintenance and work done on the vehicles to assess whether there was any substance to the allegations, such that we could be satisfied that the Claimant had reasonable grounds for believing that the reports were likely to endanger the health and safety of others on the highway.

79. Mr Parry provided information to supplement the investigations carried out by Mr Bull into the instances referred to in the Claimant's email, by email to Darren Bull, Engineering Manager at Westbourne Park dated 9 June 2016 (pp118A – B). The summary spreadsheet setting out the position after it had been investigated by the Respondent was contained in [R7], prepared by Counsel for the Respondent. The Tribunal took into account when considering the paperwork, that the Claimant should have been extremely familiar with this documentation as he worked with it daily. The detailed examination of the paperwork in the Tribunal Hearing did not lead to the conclusion that the breaches of procedure alleged by the Claimant had taken place, or more importantly, that the Claimant could reasonably have believed that to be the case.



The Tribunal was persuaded by the point made that the documents which the Claimant provided in support of his contentions that work had not been carried out were photocopies of the Vehicle Inspection Sheets. These were a 'snapshot' of the position at a particular point in time. The entries had to be cross checked with other documents which recorded the movements of and maintenance of the buses in order for a true picture to emerge in relation to the allegations. This exercise was carried out by Mr Bull when the allegations were investigated. Further, information could have been added or changed on the original sheets after the Claimant photocopied them, or before the vehicles went out to service. The Tribunal accepted the Respondent's case that engineering activities are continuous and therefore the sheets were continually updated. This was apparent from consideration of the sheets.

80. The evidence before the Tribunal did not cast any doubt on Mr Bull's findings namely that there was no evidence to support the Claimant's allegations in the email of 27 May 2016. The Tribunal considered in all the circumstances therefore that the Claimant had insufficient grounds for believing that the bad practices he alleged were likely to endanger the health and safety of others.

81. The Tribunal also considered an engineering documentation audit report prepared in July 2016 for the Respondent [R9] at the request of the Engineering Director, Mr Cheema, to whom the email in May 2016 was sent. The audit report covered a different and subsequent time frame to the period the Claimant had reported on in his May 2017 email. The Tribunal considered that this was evidence which suggested that the senior manager, Mr Cheema was keen to ensure that the Respondent complied with the appropriate procedures. Even if the Tribunal were wrong about concluding that the Claimant did not have reasonable grounds for making the disclosure, the evidence of the audit tended to suggest that the Respondent was not likely to have victimised the Claimant for reporting issues of vehicle safety, but that they took the claims seriously and investigated them appropriately.

82. The Tribunal also considered the Respondent's case that this email of 27 May was sent by the Claimant as a counterattack to disciplinary charges being levelled against him (suspension 18 May 2016) for a serious offence of the same type as Mr Tesfaye claimed others had done. However the paperwork presented to the Tribunal substantiated the Respondent's belief that the Claimant had done the acts of misconduct alleged.

83. Those background circumstances of the suspension, and ongoing disciplinary investigation were also consistent with an absence of reasonable belief by the Claimant in the claims in his email to Mr Cheema.

84. The Tribunal concluded in all the circumstances that the three matters relied upon as whistle blowing disclosures did not meet the statutory definition for the reasons set out above. As the Claimant had not established that he had made any whistleblowing disclosures, the complaints alleging detriments and unfair dismissal by reason of having made whistleblowing disclosures could not succeed. Those complaints were therefore not well founded and were dismissed.

Discrimination and Victimisation Complaints

85. The first allegation of **direct race discrimination** (5a) was that the Respondent's Polish engineers refused to take instructions from the Claimant. This generalised allegation was never particularised. In his witness statement the Claimant described (at para 7) that he reported aggressive behaviour by one of the Polish engineers (Mr Felter) towards him (p67). The report was in an email dated 29 March 2016. The incident which involved the alleged use of bad language by Mr Felter to the Claimant was somewhat similar to the earlier incident involving Mr Powell. Both men used 'industrial language' to question the Claimant's competence at his job. Indeed when he was spoken to about the incident at the time, Mr Felter expressed his exasperation with the Claimant's method of allocating jobs. Further Mr Felter's uncontradicted evidence was that he had previously had a Black manager and had encountered no difficulties with him.

86. On the face of it there was nothing racial in the interaction, or in the criticism of the Claimant.

87. There were no particulars or evidence provided of episodes of other Polish engineers (of whom there were several) refusing to take instructions from the Claimant.

88. The evidence before the Tribunal did not establish the primary facts on the balance of probabilities. There was evidence of a generalised complaint about this by the Claimant in his email to Mr Twining dated 13 April 2016 (p72), but he did not suggest in the email that the issue related to engineers of one particular race or indeed that there was a racial element to that issue.

89. Further, the undisputed evidence was that the Claimant had encountered difficulties with other colleagues who were White British (Mr Lenihan and to a lesser extent Mr Twining) and with a colleague who was Black British/Caribbean (Mr Wayne Powell). The Probation review meetings highlighted the need for the Claimant to work better with his team.

90. The second **direct race discrimination** complaint was about the meeting which Mr Twining held (p69) with five of the Polish engineers on 31 March 2016 (Allegation 5b); and a further meeting on 5 April 2016, neither of which the Claimant was invited to attend. There were a number of other Polish Engineers working for the Respondent who were not called to the first meeting. The complaint was that the Claimant felt excluded by not being in attendance at the meeting.

91. Although Mr Twining did not give evidence to the Tribunal, his notes of the meetings were available. Further his actions in this respect were examined as part of the appeal process (p159AA).

92. The Tribunal was satisfied that Mr Twining as Workshop Supervisor simply decided to speak first to the Claimant on his own on 30 March 2016 to advise him about how to deal more effectively with Mr Felter, about whom complaint had been made, and, as Mr Twining described them, "difficult engineers". In the circumstances the Tribunal considered that the advice to the Claimant about being clear in his instructions

was a genuine attempt by a manager to improve communications within the team. Given the angry words which had been spoken already, the Tribunal did not consider the decision to speak to the five Polish engineers was unwise or inappropriate, or called for explanation. As the Appeal Panel found, it was Mr Twining's way of trying to get to the bottom of the 'conflict'.

93. The Tribunal noted that Mr Twining then met the Claimant after the meeting on 31 March and fed back to him what was said and gave Mr Tesfaye further advice in the light of what Mr Twining had heard from the engineers. Mr Twining noted that he reinforced his advice with examples of incidents he had personally observed. This very strongly suggested that there was some validity to the criticisms made by the engineers, and that their dissatisfaction with working with the Claimant was unrelated to his race.

94. There was no documentary record of the meeting which the Claimant said took place on 5 April 2016 (Allegation 5b). The Claimant complained of it in paragraph 10 of his witness statement. His description was very similar to a description of the meeting on 31 March 2016 except that he said that all seven Polish engineers were in attendance. As the Claimant did not attend the meeting the Tribunal was unable to reach any further conclusions about what had transpired. There was no actual comparator whose treatment could be compared to that of the Claimant. The circumstances of the engineers who attended were different from those of the Claimant who was a Supervisor.

95. The Tribunal did not consider that the Claimant had thus established the primary facts on which his complaint was based, or even if the meeting took place, that it was likely that he was treated less favourably on racial grounds by not being called to it. There was nothing other than some differences in race, to support an inference of race discrimination. It is now well established that that is insufficient: **Madarassy**

96. The third complaint of **direct race discrimination**, (Allegation 5c) was about the Claimant being dismissed on 23 June 2016 on the grounds of unsatisfactory probation. The Tribunal's finding above that there was ample evidence to support the Respondent's belief that the Claimant was guilty of serious misconduct when he was suspended and thereafter, completely undermine this allegation. Further, when the Claimant appealed against the Final Written Warning imposed by Mrs Gayle, he did not allege racial grounds.

97. Indeed the appeal outcome letter records that the Claimant did not challenge the allegation that he had signed off a bus as fit for duty when it was not and had a major defect. The letter records that he could not explain this actions, but sought to blame someone else for 'tricking' him into doing it (p159AA). The Appeal Panel considered that the Final Written Warning awarded by Mrs Gale had been lenient given the nature of the conduct and the Claimant's role as Supervisor.

98. Against the background of the outcome to the disciplinary proceedings, and the background of well-founded concerns about the Claimant's management style and communication skills, the decision to terminate his employment on the ground of unsatisfactory probation was hardly surprising.

99. Having concluded that none of the direct race discrimination complaints was well founded, the Tribunal next dealt with the **race harassment** allegations under section 26 of the 2010 Act (Allegations 11a – f).

100. Allegation 11a was about Mr Felter subjecting the Claimant to aggressive behaviour on 23 and 24 March 2016. In his witness statement at para 7, the Claimant described the use of rude gestures and 'industrial language' by Mr Felter on 23 March 2016, as was also complained about above in Allegation 5a (direct race discrimination). The language used by Mr Felter ("bullshit") was coarse but not racial. Further the transcript of the conversation recorded by the Claimant between himself, Mr Twining and Mr Lenihan on 11 May 2016 confirmed that the use of 'industrial language' was not unusual in this workplace. The Tribunal found that on 11 May, Mr Twining directed the language at both the Claimant and Mr Lenihan. Mr Twining's language was similarly coarse but not racial (p81B).

101. Finally the Tribunal did not consider that Mr Felter's epithet was aggressive, albeit it was somewhat disrespectful.

102. As to 24 March 2016, the facts alleged by the Claimant (para 7 of [C1]) did not constitute aggressive behaviour as alleged. At the very highest, Mr Tesfaye alleged that Mr Felter dragged his feet about completing the allocated work and absented himself from duty for a while on 24 March 2016. There was no supportive evidence of this allegation in any event.

103. The Tribunal considered therefore that the primary facts alleging aggressive behaviour by Mr Felter were not made out, and the complaint (Allegation 11a) was therefore not well-founded.

104. The next complaint of race harassment was that Mr Twining failed to take any or any adequate action following the Claimant's complaint against Mr Felter in the email sent on 29 March 2016 (p67). The Tribunal's findings above about the appropriateness of the action taken by Mr Twining following receipt of the email sufficiently deal with this complaint. The Claimant certainly failed to establish that Mr Twining took no action, and the Tribunal was satisfied that the action he took, some of which the Claimant agreed with and indeed complained about, was more than adequate and appropriate.

105. Finally there was no basis whatsoever for concluding that Mr Twining's actions were in any way affected by the Claimant's race. The burden of proof would in any event not have shifted to the Respondent.

106. This allegation also was not well-founded and was dismissed.

107. Next the Claimant alleged that Paul Lenihan swore at and threatened the Claimant on 14 April 2016 (Allegation 11c). This complaint arises out of the occasion when the Claimant and Mr Lenihan 'had words' due to a disagreement about the timing of a handover conversation between the two men.

108. There was a dispute on the facts as to where the fault lay. However the preponderance of the contemporaneous documentary evidence pointed to the Claimant being at fault. In any event, the dispute was about Mr Lenihan's start time. This was not in any way related to race.

109. On that later ground alone, even if the Claimant established the primary facts, the complaint of race harassment in this respect could not succeed. Allegation 11c was not well founded and was dismissed.

110. The fourth complaint of race harassment (allegation 11d) was about Mr Twining shouting and swearing at and insulting and blackmailing the Claimant on 11 May 2016. The Claimant had surreptitiously recorded the exchange and the Tribunal had the benefit of the Claimant's transcript (pp81B – C).

111. The transcript did not corroborate this allegation. It was apparent from the outset of the transcript that Mr Twining was directing his wrath at both the Claimant and Mr Lenihan. Thus, for example he stated: "*Let me get one fucking thing straight here, and I am talking to the fucking pair of you now because I have fucking well had enough here*". He made other strong remarks in a similar vein, expressly directed at both men. Once again, strong language was used, but none of it was racial. Further, although the transcript was not completely clear, it was agreed during the Claimant's evidence, that when Mr Twining realised he had incorrectly criticised the Claimant for something, he promptly apologised for having done so.

112. Towards the end of the transcript, there was an exchange about Mr Twining accusing the Claimant of 'playing games' with him and telling the Claimant that he would take him on in that respect. This appeared to be the basis for the Claimant's allegation that he was blackmailed by Mr Twining. The Tribunal did not consider that this was a fair inference to draw from the text of the transcript. However most importantly, in relation to this allegation also, there was absolutely no material from which the Tribunal could infer that Mr Twining's actions were in any way related to race.

113. Allegation 11d was therefore not well-founded and was dismissed.

114. The fifth allegation of race harassment was that Mrs Christine Gayle had imposed a final written warning on 16 June 2016 relating to the Claimant signing off as fit for duty a defective bus. Mrs Gayle's race has already been noted above. Whilst this did not render a successful race complaint against her impossible, it tended to make it unlikely. The Tribunal also had regard to the findings of the Appeal Panel that her decision to impose a final written warning was in the circumstances lenient. The Tribunal agreed with the Appeal Panel's reasoning, not least because of the gravity of the potential consequences of the Claimant's action, and his role as Supervisor. The note of the disciplinary hearing (p127) recorded the closing remarks of both the Claimant and his Trade Union representative. Their observations about the circumstances of the misconduct justify the finding of guilt and the sanction imposed by Mrs Gayle.

115. On the facts found by the Tribunal, no actual comparator having in any event been identified by the Claimant, the Claimant had failed to establish that he had been subjected to less favourable treatment than a hypothetical comparator.

116. Allegation 11e was therefore not well founded and was dismissed.

117. The final race harassment complaint was (Allegation 11f) that the Respondent failed to take any or any adequate action following the Claimant's complaint about the events of 14 April 2016 made by the Claimant in emails dated 15 and 21 April 2016.

118. In his witness statement, Mr Tesfaye characterised Mr Lenihan's actions on 14 April as acts of bullying and harassment as a result of the Claimant having made a whistle blowing disclosure [C1, para 12].

119. The contemporaneous documentation confirms that action was indeed taken by the Respondent following the Claimant's complaints. An investigation was undertaken which tended to attribute blame to the Claimant (pp74A – 76, 77 – 81, 83A – 85). The contemporaneous documents also established on the balance of probabilities, although the Claimant subsequently disputed their accuracy, that it was agreed that he and Mr Lenihan would move on, and to confirm this, they shook hands at a meeting in Mr Venn's office on 6 May 2016 (pp83A, 85). The Tribunal accepted the Respondent's case that this was how matters were resolved because that was the more credible account in the light of the contemporaneous documents.

120. In the Tribunal hearing, the Claimant explained that his complaint here was about the handling of the appeal and that Mrs Gayle should have dealt with it. There appeared to have been a misunderstanding on the Respondent's part when the Claimant lodged his appeal about what his letter dated 1 June 2016 headed "Grievance Letter Appeal" and addressed to Mrs Gayle (pp109 – 114) was intended to be. The letter was sent by email to Mrs Gayle, but was also copied to Mr Dalzell, Mr Cheema and the Unite representative, Naidoo Mooragosub (pp116 – 117).

121. Mr Dalzell, Head of Operations, treated it (p116) as part of the Claimant's grievance to Mr Satnam Cheema, Group Engineering Director which was being dealt with by Darren Bull. Mr Dalzell informed the Claimant of this at the time (p116). At the Tribunal hearing the Respondent acknowledged that the Claimant had probably intended it to be an appeal against what he contended was an unresolved grievance heard by Malcolm Venn, former Engineering Manager – a reference to the disputed handshake (pp83A, 85).

122. In the event this issue was dealt with by consent at the appeal hearing against the final written warning (imposed by Mrs Gayle) and against the decision to dismiss (pp159P-R). The Appeal Panel did not uphold the appeal.

123. In relation to this allegation also, the Claimant failed to establish the primary facts on the balance of probabilities. It was in any event apparent from the facts that there was no racial element to the Respondent's actions, even if the burden of proof had shifted.

124. Allegation 11f was thus not well-founded and was dismissed.

125. The Tribunal then considered the **victimisation complaints**. The first issue for determination was whether the matters put forward as protected acts (Paras 8a – c of List of Issues) were established. The Respondent did not accept that the first of the three matters relied upon was a protected act.

126. The definition of a protected act is set out in section 27(2) of the Equality Act 2010 and is very wide. In particular it includes under section 27(2)(c), “*doing any other thing for the purposes of or in connection with ..*” the 2010 Act, and under section 27(2)(d), making an allegation, which can be implied, that another person has contravened the 2010 Act. A protected act also occurs when someone believes that the claimant has done, or may do one, even if they have not. There is a limitation to exclude certain acts that would otherwise be protected, if they were done in bad faith: section 27(3). That issue did not arise in this case.

127. In para 8a of the List of Issues, the Claimant relied on the act of emailing Jeff Twining on 13 April 2016 (p73) allegedly complaining of race discrimination by making reference to “division and inequality”. The Tribunal rejected the Respondent’s submissions to the effect that this email did not constitute the doing of a protected act. Mr Bailey argued that the allegation of division and inequality was not made on a specific basis. Alternatively, he submitted that it related to a group of workers speaking their mother tongue to one another which was not a claim of discrimination.

128. The Tribunal considered that the Claimant raised a context of racial difference in referring his concerns to Mr Twining in the email. He referred to the majority of the engineers being from one ethnic background and his concern that most of them spoke their non-English “*native language*” at work was having a detrimental effect on workplace communication and job performance. He also complained that English speaking colleagues did not therefore understand the conversations and were upset and felt excluded.

129. The Tribunal considered that there was sufficient reference to concerns about the actions of one particular ethnic group in the workforce for it to fall within the definition 27 section of the 2010 Act. It was not necessary for the Claimant’s email to have asserted a valid claim under the 2010 Act – the definition was wide enough in the Tribunal’s view to cover the raising of concerns which arose out of racial or ethnic differences.

130. The second matter said to be a protected act was that at a probationary meeting on 11 May 2016, the Claimant spoke to Malcolm Venn about and/or segregation (Para 8b of List of Issues). Mr Venn made brief notes during the meeting (p84), and afterwards he wrote up a note of the meeting to be given to the Claimant. Only the Claimant and Mr Venn were present at the meeting. It included notification of a further review of the Claimant’s probationary period to be held on 25 May.

131. This was the second of two discussions of note on 11 May 2016. The first was the earlier dressing down by Mr Twining of the Claimant and Mr Lenihan referred to above. In the probationary review meeting the Claimant raised the issue of his

grievance to Mr Twining of 21 April about the disagreement with Mr Lenihan on 14 April about the timing of their handover discussion. As the Claimant raised this issue during the probation review meeting on 11 May, Mr Venn wrote a letter/note to him confirming the position (pp83A and 85).

132. In Mr Venn's contemporaneous notes of the meeting, but not in the later minute, he recorded "*Black or White – There is racism*". The Tribunal considered that this was compelling evidence that the Claimant had done the second protected act alleged. The Respondent conceded that the Claimant had done a protected act here.

133. The third matter relied upon as a protected act, which the Respondent also accepted, was that in a grievance dated 1 June 2016, the Claimant had mentioned "*race discrimination*". This is a reference to the grievance addressed to Mrs Gayle and copied to others described above (at p110).

134. The first **victimisation detriment** complained about was that Malcolm Venn allegedly prejudged and rejected the Claimant's grievance dated 21 April 2016 (Para 9a of List of Issues).

135. The Tribunal has already made findings above about the way the Respondent dealt with the issue of the altercation between the Claimant and Mr Lenihan on 14 April, and about the amicable solution of shaking hands on 6 May 2016. The conclusions Mr Venn reached were based on the available evidence after an investigation.

136. The Claimant had not satisfied the Tribunal that Mr Venn had prejudged the grievance or inappropriately rejected his grievance about Mr Lenihan. The claim failed on that ground.

137. Further, in any event, there was no basis for inferring a connection with the first protected act of 13 April 2016. That was an issue relating to an ethnic group (the Polish workers) which did not include or have any connection with Mr Lenihan, or Mr Twining or Mr Venn, all three of whom were White British. Further there was no evidence that Mr Venn was aware of the 13 April email which was sent to Mr Twining. There was no evidential basis put forward on which the Tribunal could rely to infer causation resulting from the first protected act.

138. The second and third protected acts occurred after the detriment complained of, so were not material.

139. In the circumstances this victimisation complaint was not well founded and was dismissed on the basis that the Claimant had failed to establish the primary facts alleged.

140. The second victimisation complaint was that Jeff Twining forced the Claimant to release a defective bus into service on 11 May 2016. Only the first protected act had taken place by the time of the conversation with Mr Twining on 11 May 2016 (transcript p81B).



141. The Claimant had failed to establish that a defective bus was released into service. The relevant contemporaneous evidence which was the transcript of the dressing down conversation on 11 May 2016 recorded by the Claimant without the knowledge of the other parties, suggested that Mr Twining backed down and apologised once he realised that he was in error about the repair status of the bus. There was no other explanation given. The error by Mr Twining was credible given the confusion recorded about whether the bus was VOR. The error was also completely unrelated to the doing of the protected act by the Claimant.

142. This complaint was also not well founded because the Claimant had failed to establish the primary facts on the balance of probabilities. If the Tribunal had needed to address the reason why, the evidence pointed overwhelmingly in the direction of an innocent error by Mr Twining unrelated to the doing of the first protected act.

143. The third victimisation complaint was that Mr Venn told him during the probation review meeting on 11 May 2016 that the Claimant must not "*harbour conspiracy theories*". The fact of those words having been used was not in dispute and appeared in Mr Venn's minute of the meeting (p82) which was addressed to the Claimant. The context, as set out in the minute, was that Mr Venn understood the Claimant to be alleging that Mr Twining had sent Mr Lenihan to provoke him in a systematic campaign of harassment. This latter phrase and the description of Mr Twining's alleged motives were also captured in Mr Venn's contemporaneous note (p84). It was noted in both documents as having been discussed towards the end of the conversation. The Claimant did not dispute that he had made the allegation about Mr Twining's motives that was noted. Mr Venn's note was therefore accurate.

144. When he was questioned about what was objectionable about the comment, the Claimant explained in his oral evidence that he believed that the reference to a conspiracy implied that Mr Venn was saying that he was a terrorist. The Tribunal accepted the Respondent's submission that the Claimant appeared to have reached an erroneous conclusion about the effect of Mr Venn's words. The Tribunal did not consider that the expression Mr Venn used referred to anything other than the circumstances that the Claimant had just described to him. Further, it was clear from the minute sent to the Claimant subsequently, that Mr Venn's motive in referring to this issue was to urge the Claimant to approach the remainder of his probation constructively and not to become distracted by imputations of malevolent motives on the part of his first line manager, Mr Twining. Mr Venn described in his note of the meeting (at p83), that he had discussed with the Claimant if he had experienced similar difficulties in other employment. It appeared to the Tribunal that this was yet further evidence of his attempt to discuss the Claimant's concerns and to encourage him to complete his probation successfully.

145. The Tribunal did not consider that there was any proper basis for concluding that by using the phraseology which Mr Venn did, he thereby subjected the Claimant to a detriment, in the circumstances.

146. The third victimisation complaint was therefore not well founded and was dismissed.

147. The fourth victimisation complaint was that Vince Dalzell had prejudged the probation review on 27 May 2016 by writing in an email on that date (pp96 – 97) that '*...this guy has raised grievances and it ties in with him being seen next week for unsatisfactory probation*'. The email from Mr Dalzell followed Mr Tesfaye's email to Mr Cheema at 11.02 on 27 May in which he made allegations about poor standards of work in the engineering Department, and bad practices. Mr Dalzell was copied in to that email. Mr Dalzell's comments were in an email he wrote to Mr Edwards and copied to Mr Cheema. Apart from giving the background referred to above about the Claimant's probation, he went on in the brief email to suggest that Mr Edwards may want to consider bringing someone in to audit the issues raised by the Claimant in his email to Mr Cheema, as he anticipated that the Claimant may well make a claim. The Tribunal accepted Mr Dalzell's evidence about what he meant by these remarks (para 6 of his witness statement [R10]).

148. These events pre-dated the third protected act. There was no direct evidence that Mr Dalzell was aware of the detail of the first two protected acts, but he referred in the email to the fact that the Claimant had by 27 May raised grievances. His evidence was that he learnt this from Mr Venn who he had spoken to briefly in the seventeen minutes between the time of the Claimant's email and his email to Mr Edwards. There was no evidence that there was any reference to the grievances being about race or other protected characteristics under the Equality Act.

149. First, Mr Dalzell did not deal with the probation review. That was dealt with by Mr Venn. Indeed, Mr Dalzell was not involved in any internal processes which related to the Claimant. Mr Dalzell's reference to the Claimant's probationary review meeting was clearly made as it was relevant to his view that the bad practices email from the Claimant may well have been in response to his own job being under possible threat by reason of unsatisfactory performance in his probation period.

150. Thus, it appeared to the Tribunal that even if Mr Dalzell had prejudged the probation review, of which there was no evidence, he did not subject the Claimant to any detriment as a result. Further, there was no adequate evidential basis for a conclusion that his view about the Claimant was related to the fact that the Claimant had done protected acts under the Equality Act 2010.

151. The fourth victimisation complaint therefore failed on the basis that the Claimant had not been subjected to a detriment by Mr Dalzell. The complaint was not well-founded therefore, and was dismissed.

152. The fifth victimisation complaint was that Mrs Gayle (Operations Manager) imposed a final written warning on the Claimant on 16 June 2016. This sanction was imposed in relation to the serious disciplinary offence of failing to observe the Respondent's rules/procedures affecting the safety of employees or the public in relation to the incident on 6 May 2016 when the Claimant signed the log confirming the bus as fit for service when in fact it was carrying a major defect. The Tribunal has made findings above about Mrs Gayle's sanction. Here the Tribunal merely records that the Claimant agreed that he had done what he was accused of doing, and that he had failed to check for himself whether the bus was indeed fit for service, as he was required to do.

153. Further, in relation to the allegation of race victimisation, there was no evidence before the Tribunal that Mrs Gayle knew about the first two protected acts. The third was in the text of a long letter attached to an email addressed to her and copied to three others as described above (p116). It was sent on 1 June 2016. Mrs Gayle's evidence was that she did not take much note of the email as she was not dealing with the grievance matters and Mr Dalzell said he would deal with it. She did not take the issue any further with the Claimant.

154. The manager who responded to the email from the Claimant was indeed Mr Dalzell on 6 June 2016 (p116). He explained to the Claimant that (1) Mrs Gayle was dealing with the operational side of the depot and not the engineering department; (2) he understood that the matters in Mr Tesfaye's email were being investigated by Mr Darren Bull, Engineering Manager; and (3) therefore Mr Dalzell would therefore be forwarding the correspondence to Mr Bull. He concluding by suggesting that the Claimant should address any future correspondence to Mr Bull. In all the circumstances, there was no good reason to reject Mrs Gayle's evidence about the attention she gave to the letter of 1 June 2016 containing the third protected act, on the balance of probabilities.

155. The Tribunal concluded that whilst the primary facts alleged were established in relation to the fifth victimisation complaint, there was no reason to consider that the penalty imposed was unjustified or too severe. The tribunal found above that it was indeed lenient. In those circumstances, there was no proper basis for an inference that the reason for the final written warning being imposed was because of the Claimant having done a protected act.

156. The sixth and final alleged act of victimisation was the act of being dismissed on 23 June 2016 on the grounds of unsatisfactory probation. The Tribunal has already made findings above in relation to the dismissal in the context of the direct race discrimination complaints above.

157. In relation to the protected acts, all three had taken place before the decision to dismiss. The first involved Mr Twining, and there was no evidence that Mr Venn was aware of it. The second protected act occurred at a meeting with Mr Venn on 11 May to review the probation. There was no evidence he saw the letter of 1 June to Mrs Gayle or was aware of its contents.

158. The Tribunal concluded that the Claimant was dismissed because he failed his probation for the reasons set out in the probation review outcome letter (pp136 – 137). The evidence of interpersonal conflicts with a range of colleagues supported the Respondent's finding that he lacked interpersonal and communication skills. Further, the contemporaneous documentary records confirmed the Respondent's impression that he was unable or unwilling to accept any shortcomings on his part. This meant that there was no realistic prospect of improvement. The evidence confirmed that these matters had been raised with the Claimant in the initial probation review in May (pp82 – 83). Further, as the Claimant had been the subject of an adverse disciplinary finding which was not only serious but also reflected poorly on his communication skills in his role, the decision to terminate the employment was fully explained.

159. In all the circumstances the Tribunal concluded that the sixth victimisation complaint was not well founded and was dismissed.

Employment Judge C Hyde

20 July 2017

Spare text – ignore!

**[Preliminary Issues**

160. **At the start of the hearing the Respondent requested that the Claimant identify each and every act of race discrimination, together with the alleged protected act(s) and protected disclosure(s) relied on in respect of his various claims. The Respondent reserved the right to amend the Grounds of Resistance on receipt of the same.**

161. **The Respondent reserves its position in relation to any time points that may arise following clarification of the race discrimination claims. The Respondent contends that the allegations set out do not amount to conduct extending over a period within the meaning of s.123(3)(a) Equality Act 2010 and it would not be just and equitable to extend time for any complaints that have been brought out of time.]**

**Time Limits**

162. Although time limits put some of the Equality Act 2010 detriment complaints in issue, as identified in the List of Issues at paras 7, 10 and 13, it was unnecessary to consider this issue in the light of the Tribunal's findings on the merits. The same applied in relation to the whistleblowing detriment complaints under the 1996 Act, as stated in para 4 of the List of Issues.

163. It was important to record however that on the face of it, the Tribunal would not have had power to determine any complaints about events which took place before 14 August 2016, having regard to the time frames in the early conciliation process (from 16 June to 16 July 2016) and to the date on which the claim form was presented (16

August 2016).

164. No grounds for treating any acts as continuing were put forward, nor were any grounds for extending time. On the other hand, while time was running out, the Claimant was presenting grievances to his employer.

165. It was unlikely therefore that there would have been adequate grounds on which the Tribunal could have jurisdiction to determine the complaints about events which occurred prior to 14 August

166.

167.