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EMPLOYMENT TRIBUNALS

Claimant: **Mr J Asare-Kwofie**

Respondent: **London Underground Limited**

Heard at: **East London Hearing Centre**

On: **31 May – 2 June,**
24 & 28 July
25 August 2017, (tribunal only)

Before: **Employment Judge Prichard**

Members: **Mrs W Blake-Ranken**
Mrs A Berry

Representation

Claimant: Mr L Ogilvy (London, SE2) 31 May – 2 June
- then claimant in person assisted by Mr H Dankwa (colleague)

Respondent: Ms E Gordon-Walker (Counsel instructed by TfL solicitor, SW1)

RESERVED JUDGMENT

It is the unanimous judgment of the Employment Tribunal that the claimant's claims of unlawful race discrimination and deductions from pay fail and are dismissed.

REASONS

1. The claimant, Mr John Asare-Kwofie, is currently 51 years old. He comes from Greenwich. He worked (and still works today) on the rail network of London Underground through a succession of subcontractors. The claimant has been working on the network for 15 years since November 2002. His employer, at the time of the matters he complains of, was Cleshar. He transferred to Morson in May 2014, another large contractor in this work. (Morson was already large contractor who recently acquired another major subcontractor, Vital Rail). The claimant's colleague, Mr Henry

Dankwa, is a colleague from Morson.

2. The claimant's role was as a Possession Master ensuring that the track was safe for engineering work to be carried out both during traffic hours and when the tube is shut down at night, in engineering hours.

3. Initially, Cleshar was a respondent in these proceedings. There were 2 case management preliminary hearings, both before Employment Judge Goodrich. In September 2016 the Judge heard an open preliminary hearing on time points and an application for deposit order and strike out. On 6 February 2017, the case came back before him for a case management preliminary hearing. The claimant at that time (and for the first 3 days of this hearing) was represented by Mr Leonard Ogilvy who ceased to represent him before the last 2 days of the hearing.

4. By the second preliminary hearing the claimant had had some time to consider Judge Goodrich's indication that Cleshar Contract Services Limited was not properly joined to proceedings. Having had time to think about it, the claim was withdrawn.

5. The 3-way working relationship is complex. The contractors Cleshar and Morson are closest to their contracted workers in terms of communication and dealing with the regulation of their jobs but the whole system is overseen by LUL. Operators and their work are subject to detailed LUL rulebooks. Work is obviously safety critical. Voltages are high. The traction current is over 600 volts on the positive rail and 230v on the negative.

6. This case concerns removal of the claimant's disciplines following an investigation, and then a safety incident followed by an investigation. These were in April and November 2013 respectively.

7. A track operator will have a variety of different disciplines. The more disciplines, the more highly paid that operative will be. The claimant at various stages had protection master engineering hours, protection master traffic hours, train master, and possession master disciplines. He also was assessor in the following disciplines: protection master engineering hours, protection master traffic hours, and train master. Assessment involves assessing other operatives to confirm their continuing ability to work in a particular discipline.

8. To illustrate the difference disciplines can make to salary, judging from the claimant's schedule of loss in these proceedings, at the height of his earning power the claimant was earning nearly £42,000 per annum. After losing a number of disciplines he ended earning less than £17,000 per annum. There is, therefore, a considerable claim for differential loss over several years. From what we have seen, as a result of incidents/investigations, disciplines are usually barred indefinitely, but with a right of appeal, and also a separate right of review after 1 year.

Assessor bar

9. The account starts with the barring of the claimant's assessor discipline in April 2013. A fellow operative, Thomas Burke, was investigated and found to have submitted fraudulent assessment claims. These were claims for payment for assessments of fellow operatives which did not in fact take place. Mr Burke had his assessor's discipline barred as a result of these fraudulent claims. As a result of the

discovery of these claims London Underground decided to conduct a wider investigation into assessments in case Mr Burke's behaviour was not unique. The claimant's assessments were investigated. Ultimately, 24 assessors had their licenses removed.

10. The tribunal accepts the respondent's evidence that these 24 were from a variety of racial and ethnic backgrounds. Overall, a large proportion of protection staff, (of whom there are 6,000-8,000), were from black African backgrounds at the relevant time. At this hearing, the claimant challenges his own barring as an assessor as an act of race discrimination. (He is of Black African heritage). It was certainly added into his witness statement. Mr Burke is white British.

11. Mr Burke's original assessment claim revealed that he claimed to have been booked for an assessment on the District Line but had also been booked as supplying protection services in another depot on the same shift. He was therefore booked into 2 different places at the same time.

12. The claimant's assessment records revealed first, that assessment paperwork had been filled in and presented for some protection staff who had not signed in to the stations where the assessments were being carried out. Secondly, his claims revealed that he might have assessed a group at one location where they were booked in to carry out duties at a different location. The claimant's response to this was to say that it was not his fault if the assessee failed to sign in. Signing in is carried out through the SPC ("site person in charge"). The respondent's response to the claimant's response, at this hearing, was to say it is an integral part of the assessment that the assessee does sign in. That itself is an important part of his duties, which itself is subject to assessment.

13. The claimant has still not had any of his assessor's disciplines renewed. They are still barred. The same for Mr Burke.

14. The tribunal has heard evidence from 4 witnesses:

14.1. The claimant;

14.2. Mr Sean Allison, who at the time was the Protection Competence Manager;

14.3. Mr Doug Hammersley, who is Mr Allison's manager within the Access Rules & Compliance department also based in Buckingham Palace Road. (He was not originally cast as a witness but has attended throughout, and was called upon by the tribunal when it was realised he could give evidence about one of the claimant's comparators).

14.4. Mr Gurdeep Grewal, who was the Standards Programme Manager, now the Protection Competence Manager in the Access department. (He and Mr Allison dealt with a later review of the claimant's November 2013 discipline bar).

15. In this complaint about the removal of the assessor bar, the claimant did not cite any comparators and therefore must be relying upon a hypothetical comparator. His witness statement states

> "This sort of treatment is unprecedented and unheard of as other employees of a different race or ethnicity have done worse and have not been barred permanently".

On reviewing the evidence at this hearing we find this is far from established.

16. At this hearing the respondent originally asserted that the claimant was no longer pursuing the assessor bar complaint. It has not been actively pursued in the course of this hearing. However, the tribunal cannot treat it as withdrawn. Nonetheless on the evidence we have heard we could not come near to upholding it, even theoretically. It is clear case where there is no *prima facie* case of race discrimination.

The 5 November High Barnet

17. There is more substance in the claimant's claim arising from his barring from other disciplines following an incident at High Barnet on 5 November 2013 at 8.30am. High Barnett is at the end of the Northern Line. A south bound train was delayed due to the claimant being on the track in front of the train. He was on live rail. The claimant's account of this differs considerably and is not self-consistent. In a statement he made to Mr Tristan Martens at Cleshar, apparently on the same day, the claimant said

> "I was then told to secure 7 point as additional protection (I now know that the controller meant 17 point)".

18. In his witness statement the claimant states:

> "8.…the line controller contrary to the possession plan requested me to secure a set of point[s] into (point 17) which was not in the possession plan and also not going to protect the possession.
>
> 9.I declined and secured it at point 7b rather than point 17 (as this was a safety critical issue) because the latter was entering into the red zone (possession) and after that the point failed and everything went to normal.
>
> 10.After that no point was effectively secured since the Line Controller realised his mistake and this conformed with what my position was which was that point 17 was not in the Possession Plan and was not going to protect the Possession if adhered to."

19. To the tribunal's mind the claimant's witness statement just quoted is self-contradictory; it says opposite things. Later on in a submission sent to this tribunal, the evening before the last attended day of the hearing (28 July), this was said:

> "We are always advised to seek help from the office when things of that nature happen to us on site. Following the advice from my office that led to 7b point secured [sic], Mr Tristan Martens was well aware of this fact but had his own agenda to punish me".

This was apparently drafted by Mr Ogilvy. That is utterly confusing and self-contradictory.

20. After the incident that had occurred at 8.30am, Mr Grewal emailed Tristan Martens at Cleshar to say:

> "Tristan,

> I Have today placed a candidate bar (bar on all disciplines) on John ASARE-KWOFIE (IV 3623) for protection irregularity at High Barnet Deport. Please carry out your own investigation into the incident and submit a report to this office. The candidate will remain barred until corrective actions are agreed."

21. Mr Martens responded immediately:

> "Gurdeep
>
> Thank you. We are aware of the incident and have already commenced our investigation – report to follow.
>
> Regards."

22. The tribunal finds that what is more likely to have happened is this. The claimant had been asked to take possession of the sidings at High Barnet during traffic hours. There were 12 sidings immediately adjacent to platforms 2 and 3. It is an end stop of the Northern Line (in the north). It is a busy station. We understood after exhaustive evidence that points 7a and 7b are controlled in tandem and allow the train from platform 3 to turn to the right to cross over onto the main track that leads, straight, to platform 2. The sending points from Platform 3's line needs to be coordinated with the receiving points on Platform 2's line. Platforms 2 and 3 are a single wide platform with 2 sides enabling passengers to cross from one side of the platform to the other depending on which train is the first out. (Platform 1 is a separate platform with a separate entrance with which we have not been concerned).

23. Points 7a and 7b were on live track with the traction current switched on. Point 17 referred to was inside the possession area entering the sidings. The tribunal accept Mr Allison's evidence that the line controller might well have stated that point 17 was to be secured, even though it was inside the possession area. This would be a secondary safety precaution should a train by any chance not cross over from the platform 3 track (road 23) onto road 22, which is the one leading straight into platform 2. It was not strictly necessary but could have done no harm.

24. The crossover would be perfectly easy when there is no train there or when a train is stationary at platform 2. A train can leave from platform 3 and go onto the same south bound road. Points 7a and 7b have to work in tandem. If 7b was not working in tandem with 7a then a train that went over 7b could derail when it hit point 7a if 7a was not in correspondence. If a train had managed to leave the live rail and go any distance into the possession area, and if it did hit point 17, it would have been derailed, according to Mr Allison. We accept his evidence.

25. On this kind of modern line the -Transmission Based Track Control (TBTC) - the points are set electronically by the Signaller and that is sufficient safety. If points need to be manually secured the method is to scotch, clip and padlock. A scotch is a wooden block that is driven into the point mechanism to block it and physically stop it moving and then a clip is put over the rail and the wooden block and is locked in place with a padlock. What the claimant had done on this occasion was to go by himself onto live track (road 23) and drive a scotch block into the point at 7b. There was no corresponding scotch in 7a. When the signaller tried to move the points, as he would have had to do, the points were showing as out of correspondence and an alarm was automatically raised on the system. The signaller would have had to move the points because the next train would have to leave, straight, from platform 2

26. The claimant has sought to say that as he had a license for individual working alone (IWA) that he was able, on his own to go onto track where the traction current was live and not been discharged. He also said he could supervise others to do that too. This however, was not an answer to the respondent's concerns at what had happened, and did not make a dangerous situation better.

27. The respondent's evidence, i.e. the evidence of Mr Allison, who had detailed knowledge about the rules and the procedures, and also about the way trains work, stated that if the claimant genuinely heard the line controller to have said that he was to secure point 7b, he should have queried this as it was not within the possession and was currently then on track where the traction current was live.

28. Any instruction from the line controller to a member of the protection staff is voice recorded on LUL's internal system. The voice recording in this instance was never obtained by London Underground and it was not requested by Cleshar. It is not retrievable now after all this time. Because of the claimant's account given at the time, it was not considered it was necessary to retrieve the recording as there was not originally a dispute as to what had happened.

29. The tribunal accepts that there is a distinction in incident reporting between Cleshar and London Underground. London Underground completed an incident report. It was carried out by Tubelines / JNP (who manage the Jubilee/Northern/Piccadilly lines). They are a division of LUL. This report investigated the delay and the service outage. The outage was for a very few minutes.

30. Anything to do with protection irregularities has to be investigated by the contractor, Cleshar. They had the power to request any evidence they needed from London Underground in order to carry out an investigation into the incident of the securing of 7b point. This had resulted in the claimant being present on live track in front of a train that was ready to leave but could not leave because the points would not work. They were out of correspondence and there was an alarm on the system which remained there until the scotch block was removed.

31. It appears someone may well have spoken to the Line Controller in question. We have not been told at this hearing even what the Line Controller's name was. The report was compiled by Tristan Martens for Cleshar. On the information they had to hand he stated as follows:

> "…the Possession Master was informed by the Northern Line Controller, that in addition to the protection arrangements set out in the possession plan, points P17 also needed to be scotch & clipped in the normal position. Whether it was due to a misunderstanding or lack of concentration, Mr Asare-Kwofie accessed the mainline and scotch & clipped P7 instead of P17, resulting in a signal failure indication. The [Line Controller] immediately contacted Mr Asare-Kwofie and the scotch & clip was removed resulting in a minor delay to service (there was a train in Platform 3). The [Line Controller] reported that the Possession Master appeared confused and a decision was taken by AP / JNP management to replace the POM. This was done and the works proceeded uninterrupted, being completed on time."

32. There was a slight discrepancy there in as much as point 7B had been scotched but not clipped or padlocked and the claimant agreed that that was what had happened at that stage. The report concluded the following points were established against the claimant:

"• He started taking the possession without support staff being present
• He did not contact the Works Controller to inform her of the absence of support staff
• He did not have on his person, a copy of the relevant track diagrams
• He accessed 23 Road, mainline, without the permission of the Line Controller, which is a requirement on TBTC controlled tracks
• He placed himself in dangerous situation as there was no Look-Out/PMTH to assist him when accessing the mainline.
. He failed to carry out the correct instruction from the Line Controller."

33. It seems to the tribunal that the claimant must at least have been squatting down in order to insert the scotch block physically into the point which might have made him less visible to a train driver regardless of which way he was facing, in order to see the train, and also regardless of whether the driver's attention would be on his in-cab monitor screen as it often can be in this automatic line rather than on the track ahead (there was controversy on this). The claimant never contested that. All he says in general terms is that he did not put himself into danger, and that he had IWA authorisation, something the tribunal has struggled, and ultimately failed, to accept. The tribunal finds it impossible to see that how the claimant was not in danger in an environment of this sort which is safety critical.

34. Cleshar's report recommendations were as follows:

> "Mr Asare-Kwofie has been barred by Access Improvements (C&L) in all three disciplines held – Possession Master (Main Line), [Possession Master Traffic Hours and [Possession Master Engineering Hours].
>
> **1.** Indefinite bar to be placed on Mr Asare-Kwofie undertaking or retraining to either PMTH or Possession Master disciplines.
> **2.** Mr Asare-Kwofie to attend and successfully complete a PWT EH training course and be assessed twice in a Line Clear and a Line Safe area."

35. According to the process, once the employer, Cleshar, has made recommendations it is up to LUL to agree or disagree.

36. On 7 November 2013 Tristan Martens at Cleshar forwarded his full report to Mr Gurdeep Grewal at LUL. Over a week later he chased that up and Mr Grewal responded on 15 November as follows:

> "Your recommended corrective actions are agreed as:

[And then he pastes in the corrective actions just cited from the report.]

> … When Mr Asare-Kwofie has done his training for PWTEH, he will need to make an appointment with this office to obtain a temporary IV [Internal Verification] number and then follow the usual process of assessment.
>
> Regards…."

37. Sometime in January 2014 the claimant's PWTEH license was restored after the training but he still needed to undergo the assessment process.

38. Curiously, it was not until 23 May 2014 that the claimant texted Tristan Martens at Cleshar. This text was then pasted into the body of an email from Tristan Martens of the same date to Doug Hammersley. In fact the claimant had also emailed Doug Hammersley directly a few hours later. On 28 May Gurdeep Grewal at LUL to whom it

was then sent informed Mr Martens that the claimant's bar had been reviewed and it was decided to maintain the bar for all except for PWTEH (Protection of Workers on Track - Engineering Hours) which was the same as PMEH.

39. On 3 June Lee Walker, Operations Manager at the claimant's new employer Morson, sought additional information from Mr Grewal regarding the reasons for the bar but Mr Grewal declined to release the detailed information for data protection reasons. He confirmed that the claimant had a full IV in PWTEH only. This was something which concerned the claimant but need not have done because it was within his power simply to authorise the release of that information to his employer. He is the person whose data is sought to be protected, and he can waive that protection. This was a non-problem.

40. In or around September 2014, the claimant requested a meeting with Mr Hammersley to discuss the restrictions on his disciplines. It is agreed that a meeting took place between the claimant, Mr Allison and Mr Grewal on 1 October 2014. It is the claimant's recollection that, at the meeting, he was told all bars would be lifted. However, Mr Allison and Mr Grewal are both certain that only the bar on PWTTH (aka PMTH) was lifted. This was confirmed by a subsequent email from Mr Grewal to Lee Walker at Morson cc. Doug Hammersley, Sean Allison, Stuart Spires and others as follows: "we are prepared to allow him undertake the PWT-TH activity but NOT the Train Master or the Possession Master". This was confirmed by Mr Walker in an email dated 17 October 2014 so the claimant's recollection of the meeting had been wrong, and the tribunal so find. This email leaves no doubt.

41. Further, there is no evidence that the claimant raised his race as an issue in the meeting on 1 October, no evidence at all. It is asserted now, but is far from being established, even *prima facie*. If it had been mentioned, it would surely have made an impression and have been remembered and HR or legal departments might have been alerted.

42. On 6 January the claimant emailed the Access Improvement Department at LUL, asserting that the punishment meted out to him (the ongoing discipline bars) was not proportionate to the offence committed. He gave examples of staff he considered were treated more leniently, but he made no mention there of his race being a factor in such distinctions in treatment. That email was cc'd to Lee Walker and Henry Dankwa. Henry Dankwa subsequently sent it on to Paul Jackson who is the RMT branch secretary for LU Engineering.

43. Following that Mr Jackson referred the whole email thread to Sean Allison with a succinct enquiry on 16 January:

> "Hi Sean
>
> Did you know about this case. His name is John Asare-Kwofie and he is indefinitely barred! I didn't think we did that??"

Mr Allison replied promptly on the same date, sending the sent item for information to Gurdeep Grewal and Doug Hammersley to Paul Jackson as follows:

- "In 2013, he was restricted from all disciplines except PWT-EH for which he was to retrain (currently hold full IV status). As with all decisions of this nature, this can be

reviewed upon request after a period of one year.

- He made a request to review his case in October 2014. After a considered review it was decided to allow him to undertake training in the PWT-TH discipline as well, for which he now holds a temporary IV as the full training process has not been completed.

At this meeting in October 2014 and previously, it has been made absolutely clear to Mr Asare-Kwofie and his employing company that the review period is set at one year. Accordingly he is entitled to request another review in October 2015…"

44. On 18 February 2015 Victory Law the claimant's solicitors, who now appeared for the first time, wrote a letter to Mr Doug Hammersley at the Access, Rules and Compliance Department at Buckingham Palace Road. They raised concerns about the respondent's actions. This was the first time it was asserted that the respondent's actions could amount to discrimination on the grounds of race. The solicitors requested various documents and a review of the decision to place an indefinite ban on the claimant's licence. Within 20 minutes of receiving this, Mr Hammersley forwarded it to LUL's legal department.

45. Communications between Victory Law and the respondent's legal adviser Julie Spicer (who attended here at the start of the hearing) is restricted to emails in July 2015 and a letter dated 17 February 2016 in which Victory Law requests further documents and Julie Spicer responded on 17 March sending the documents requested.

46. The claimant's employment tribunal claim was presented to the tribunal on 3 June 2016, that is more than 3 years after the Assessor licence bar was imposed, and some 2½ years after the other disciplines were barred.

47. Reference for a compulsory conciliation was extremely short. The first contact was on 26 May 2016 and the certificate was issued 31 May 2016. There cannot have been much negotiation.

48. As of the date of the claim the claimant remained barred from all disciplines apart from PWTEH and PWT-TH/PMTH, this remains the position today. So those are the main findings of fact.

Comparators and conclusions

49. The way the claimant has eventually put his case is by citing certain named comparators. These were initially the subject of a supplementary witness statement from Sean Allison but Mr Allison's statement did not go into such detail as his oral evidence did.

50. Tom Burke, it will be recalled, was the assessor whose investigation had triggered all the other investigations into assessors. He was not more favourably treated at all. He remained barred as an assessor despite asking for a review. His treatment as a white British person was identical, in that respect, to the claimant's treatment. Perhaps that was why the claimant did not appear to pursue the assessor bar aspect of his claim at this hearing.

51. Mr Allison simply could not find some of the named comparators anywhere on the LUL records, having searched the respondent's database, and made other

enquiries on the basis of the information provided by the claimant. There was somebody called "Vin". It did not ring a bell with Mr Allison and it did not show in any way on the records. The claimant subsequently identified the surname possibly as Naith. However that was on the last day of this tribunal hearing. It was too late by then.

52. The claimant named somebody call Paul Visil also white European as well Vin. His name could not be found on the system anywhere. The claimant had also referred to Gullen Kolarov. He mentioned another person called Shareez, again he was nowhere on the respondent's database. Wayne Blake, white British, did not appear on the database at all. For safety reasons this database has to be strictly maintained. Once names are written on it by any of the managers they cannot be unwritten subsequently as the tribunal was reliably informed. The managers did not have administrator rights within the system. We accept the respondent's evidence.

53. Of more substance was the one comparator of whom we heard far more - Bogden Kovalysin. He is white European. He was barred from protection activities following an incident on 29 November 2016. It had occurred on what was known as the B2F project because it was a track replacement project between Baker Street and Finchley Road on the Metropolitan and Bakerloo lines. Mr Allison gave evidence to the tribunal twice. He was recalled later because the tribunal and all parties needed more clarity on the Bogden incident than we already had.

54. For the duration of the B2F project LUL imposed early closing times for the Bakerloo and Metropolitan lines in order to have a longer night working on the project, to get it completed sooner. This was at the start of one of the nightshifts.

55. What had happened in outline was that Bogden had allowed the work to be started about 3 or 4 minutes prematurely. However, in contrast to the claimant's incident of 5 November 2013 three years earlier, there was a minor and momentary breach of safety procedures, and no-one was placed in danger. All trains had ceased service on those lines at the time of the incident. Traction current had been discharged on the lines too. The controller had requested the current was off, and it was off.

56. There are a number of further devices to ensure safety, removal of the fuse and the tripcock, and then the lamp and detonators have to be set. Detonators are what they sound like. they are designed to make a loud explosion to alert drivers or those on the track to danger. The lamp is a familiar flashing lamp. Bogden had allowed workers to enter the area before the lamps and the detonators had been put in place, but, at the time, no-one was put in danger.

57. Nonetheless Bogden was subject to a 6 month bar. He appealed (as distinct from an annual review). An appeal can be made immediately after a sanction is imposed. On appeal (as it happens to Doug Hammersley, Mr Hammersley looked at Bogden's personal history and overall he considered that 6 months was too severe for this incident as no-one was in danger.

58. The claimant disagreed with that analysis. But it appeared to us that that Mr Hammersley had a genuine belief based upon apparently good evidence, and it was by no means an unreasonable determination. The incident only serves to underline to the panel how seriously even minor breaches of safety procedures are treated by LUL.

59. The tribunal considers that, for the purposes of section 23 of the Equality Act headed "Comparison by reference to circumstances", there was indeed a substantial material difference between the circumstances of the claimant's incident on 5 November 2013 and those of Bogden Kovalysin's on 29 November 2016.

60. During the hearing Mr Ogilvy understandably examined on the basis that Bogden's record showed there were further protection into the incidents but actually that turns out to be a misreading of the LUL records. The tribunal itself took some time to get the hang of this. If a discipline is simply time-expired it would not only expire and put a bar on but there will also be what is known as a "dependency bar". If one discipline is barred or lapses several other disciplines which may depend on it will become barred, depending on where the discipline sits in the discipline hierarchy.

61. If a licence runs out a bar automatically goes on and shows and cannot be removed even though the bar might only be there for the day it takes to renew the licence. The word "bar" can imply a sense of misconduct, but that is not necessarily so in this context we found. If a discipline is time-expired or otherwise lapsed, there is a bar.

62. In evidence to the tribunal the claimant did not seek to say that it was not true that Gullen Kolarov the Bulgarian individual had no incidents recorded against him. That unchallenged evidence therefore remains and therefore Mr Kolarov is not a suitable comparator for the purposes of sections 13 or 23 of the EQA.

63. This tribunal, as part of its determination, often has to consider statutory time limits under section 123 of the Equality Act 2010, subject to the usual tests for a just and equitable extension of time and/or a finding as to whether or not there is a continuing act. It was seen that even Paul Jackson at the RMT struggled to understand the concept of an indefinite bar and did not think that it happened. The word "indefinite" is used by the respondent, but it is always subject to an annual review. A review is carried out if and only if it is requested .

64. There was some debate during the hearing as to whether this might be viewed as a continuing consequences of a one off act as opposed to being a continuing act. We can see this could be argued both ways. The word "indefinite" perhaps overstates the situation when the right of annual review is frequently exercised by protection staff. With no disrespect to the parties' arguments, whichever way this is argued, it is clear that the claimant's claims are bound to fail on the merits for the reasons and findings given above. Therefore we have not decided the "continuing act point.

65. In summary, on the assessor bar the claimant was not treated less favourably than Mr Burke. He was treated exactly the same way, and has been to this day. 24 assessors were barred as a result of LUL investigations. The 24 were of varying race and ethnicity.

66. In the second and more substantial allegation about the 5 November incident in High Barnet, the claims are only for direct discrimination, for the purposes of sections 13 and 23 of the Equality Act 2010. Under section 13, the test is "less favourable treatment" rather than detriment. There was a detriment but the wording under section 13 is "less favourable" treatment. There would have been no detriment if the claimant had been put back in the position he was before he lost all these disciplines. He is not in that position now, but no-one in similarly comparable circumstances is any better off

than he is, regardless of race.

67. On a proper analysis, Bogden was not an appropriate comparator for the purposes of section 23. The incident was less serious. There is a definite objectively justifiable distinction to be made. No-one was placed at risk. 2 supplementary safety precautions were not in place at the time that Bogden opened the site for work 3-4 minutes early.

68. The claimant was treated as he was for nothing at all related to his race but due to a serious conduct issue placing himself at risk by scotching points inconsistently on live track in traffic hours when a train was actually in Barnett station on platform 3, about to leave.

69. The claimant never asserted race discrimination in respect of this incident until 15 months later in February 2015 when Victory Law wrote to Doug Hammersley. Under section 136 of the Equality Act 2010 the tribunal can find no *prima facie* evidence from which a tribunal could decide, in the absence of any other explanation, that the respondent had contravened the Equality Act 2010.

70. The tribunal file is coded as a claim for unlawful deductions from pay, but it was accepted early on that this claim is not a free-standing money claim but reflects the claimant's loss of income from the barring of his protection disciplines. The money claim was dependent upon the race discrimination claims succeeding. That is why it must be dismissed.

Employment Judge Prichard

15 September 2017