Case No: 3323826/2016

EMPLOYMENT TRIBUNALS

Claimant:	**Mr L Harvey**	
Respondent:	**The City of Oxford Motor Services Limited t/a Oxford Bus Company**	
Heard at:	**Reading**	**On: 24, 25, 26 April 2017 and (Tribunal in chambers discussions) 17 May 2017**
Before:	**Employment Judge Gumbiti-Zimuto Members: Mrs P Breslin and Mr J Appleton**	

Representation:
Claimant: Mr A Allen (Counsel)
Respondent: Mr J Dawson (Counsel)

REASONS FOR RESERVED JUDGMENT

[SENT TO THE PARTIES ON THE 14 September 2017]

1. In a claim form presented on the 3 June 2016 the claimant made a complaint alleging that he had been discriminated against on the grounds of his religion and belief. The claimant's grounds of complaint were amended on the 7 December 2016 to include further complaints of victimisation and harassment. The respondent denies the claimant's complaints.

2. The claimant gave evidence in support of his own case and also relied on the evidence of his trade union representative Mr Michael (Mick) Trafford. The respondent relied on the evidence of Mr Philip Southall (Managing Director), Mr Paul Hennigan (Head of Operations), Mr Darren Colley (Delivery Operations Manager), Ms Tamika Hedges (HR Assistant/Interviewer) and Mrs Clare Child (Head of HR). All the witnesses provided witness statements which were taken as their evidence in chief. The Tribunal was also provided with a trial bundle of 360 pages of documents. From these sources, we made the following findings of fact.

3. The claimant is a practising Seventh Day Adventist. In accordance with his faith the claimant observes the Sabbath. This means that he does not work from sunset on a Friday to sunset on a Saturday.

4. The claimant applied for the job of a bus driver with the respondent in June 2015. In his application form the claimant did not specify his religion or any restrictions on his ability to work. The application form completed by the claimant did not call for such information to be provided.

5. The respondent has a document which is entitled “some answers to your questions” it contains frequently asked questions and answers (p182). The document includes the following:

   > *Q: When would I have days off?*
   > *A: Each line of the roster represents a week, from Sunday to Saturday, and you will work five days out of seven – including either the Sunday or the Saturday – and have two days off.*

   The claimant did not see this document at any time during the application and interview process.

6. In his application for employment the claimant stated: “I have excellent communication skills very polite and courteous and I am a people person… My reliability, dedication, flexibility and job commitment, as well as having a great sense of duty has always being recognised by my former employers.”

7. The claimant was interviewed 01 July 2015 by Tamika Hedges. During the interview, the claimant informed Tamika Hedges that he was a Seventh Day Adventist and his religion requires that he abstain from work from sunset on Friday to sunset on Saturday. The claimant’s account is that Tamika Hedges responded by telling him that it "will not be a problem as we do not discriminate in this company", and she went on to state that people of other religions worked for the respondent. In his witness statement the claimant states:

   > “Tamika Hedges' comments made me feel reassured and confident that my employer were (sic) aware of my religious practices and how important they are to me. I was led to believe that this could be accommodated by my employer. At the interview I was told that I would be required to work 5 days out of 7. My employer didn't specify that had to work on the Sabbath.”

While being questioned the claimant added: “I was clear as crystal to Ms Hedges in my interview.” The claimant’s version of events is that Tamika Hedges told him that it would not be a problem.

8. During the interview, Tamika Hedges went through an interview check list (p189) with the claimant. The check list has 20 bullet points. Tamika Hedges and the claimant went through each of the bullet points. The final bullet point reads: “Drivers’ hours, rotas and compliance, EU regulations where appropriate”. The claimant and Tamika Hedges signed the interview checklist to confirm that they had been through the check list. The claimant accepts that he and Tamika Hedges went through the checklist

9. Tamika Hedges’ said in evidence: “I pointed out that rotas were prepared in advance; working five days in seven; and that drivers work around the rotas”. Tamika Hedges agrees that the claimant being a seventh Day Adventist came up during the interview. She stated that she is aware of Seventh Day Adventists and their practises from her time living in Jamaica: “I knew what a Seventh Day Adventist was and that some Seventh Day Adventists choose to observe the Sabbath from sunset on Friday to sunset on Saturday”. Tamika Hedges says she asked the claimant whether he observed the Sabbath. While she cannot recall the response that he gave she says she was led to believe that he observed it sometimes but not in a strict sense and that for the opportunity to work for the respondent he would be prepared to work on the Sabbath. There is a conflict in the evidence in this regard, but we note that Tamika Hedges falls short of saying that the claimant explicitly told her he would work on the Sabbath.

10. In respect of the conflict between Tamika Hedges and the claimant about this interview we prefer the evidence given by Tamika Hedges. Firstly, we note that the claimant does not explicitly state that he was told that he would not have to work on the Sabbath. The closest he gets to it is a statement that he was reassured by what Tamika Hedges did say that his religious practices would be accommodated by the respondent.

11. Secondly, we note that the things that Tamika Hedges did say to the claimant about working the five days in seven and working the rota would conflict with the claimant’s requirement to abstain from work on the Sabbath. We are satisfied that from the accounts given by the claimant and Tamika Hedges that this issue, about work on the Sabbath, although mentioned was never pinned down by Tamika Hedges or the claimant. For example, the claimant did not say to Tamika Hedges “I will not work on the Sabbath” and Tamika Hedges did not say to the claimant that the respondent “is not able to accommodate you not working on the Sabbath”. In paragraph 7 of his witness statement the claimant talks about being “confident” and “reassured” that the respondent was aware of his religious

practises. He speaks of being led to believe that this could be accommodated by the respondent. In Tamika Hedges' witness statement, she states that the claimant led her to believe that he observed the Sabbath sometimes but not in the strict sense and that for the opportunity to work for Oxford Bus company he would be prepared to work on the Sabbath. We accept the evidence given by Tamika Hedges is reflecting what she believed to be the position. Had the position been different i.e. that the claimant said clearly he would not work on the Sabbath this would present as a problem Tamika Hedges would have had to overcome at the interview. However, a more equivocal approach to working on the Sabbath would not necessarily result in Tamika Hedges pinning this issue down with the claimant.

12. Finally, on this point, the claimant said in his evidence: "something can be said strongly or softly; I would rather use soft words, not "I am not going to do it"". It seems to us that this approach by the claimant may well have led the claimant to be not explicit and clear that he will not work on the Sabbath.

13. For these reasons, we prefer the account given by Tamika Hedges over that given by the claimant. To the extent that there is a conflict in respect of whether the claimant was explicit in his statement that he would not work on the Sabbath we prefer the account given by Tamika Hedges.

14. The claimant was employed by the Respondent as a bus driver from 7 September 2015. The respondent employs around 500 drivers. Around 350 drivers work on the respondent's City Service. Around 80-90 on the respondent's Express service.

15. Mick Trafford, a union representative, gave evidence that accommodating the claimant's needs would not have caused "too much disruption to other drivers… On the City Service, this works out roughly at the other drivers each covering one additional Friday night or Saturday day time shift every 10 years."

16. Mick Trafford agreed that he did not get involved in rostering. It was put to him that his evidence was incorrect. He was taken to a sample rota and it was put to him that his figures of "one additional Friday night or Saturday day time shift every 10 years" comes from taking account of all the respondent's drivers and that this is wrong. He should in fact have confined himself to the City Route drivers and only the drivers of the same route as the claimant which results in the claimant having to work 25 Saturdays and 31 Fridays shifts these would then have to be shared between 51 drivers. Mick Trafford insisted that his evidence was correct and did not accept the validity of the challenge to his evidence.

17. On 28 October 2015, the claimant was given a rota of shifts that required him to work Friday evening and Saturday daytime shifts, i.e. during the Sabbath. The claimant brought it to the attention of Paul Jennison, a senior instructor, who arranged a meeting for the claimant with Vince Dallimore, who is Assistant Operations Manager.

18. The claimant had two meetings with Vince Dallimore one on 4 November 2015 and the other on 5 November 2015 to discuss the issue. The claimant was told that there was nothing on his personal file that allowed him to change the shift rota. However, Vince Dallimore made arrangements so that on this occasion the claimant did not have to work on the Sabbath.

19. A meeting for the claimant with Paul Hennigan, Operations Manager, was arranged. The meeting took place on the 12 November 2015. During the meeting, the claimant explained his religious requirements not to work on the Sabbath and said that he had been told at his interview for the job that he would not have to work on the Sabbath. The claimant was told by Paul Hennigan that the respondent could not accommodate him on the rota to satisfy his religious requirements.

20. On 25 November 2015, the claimant wrote to Paul Hennigan (p203). The claimant stated that he would continue to carry out his duties except on the Sabbath. The claimant also stated that during the interview process he had made it quite clear that he was a Seventh-day Adventist Christian and the hours he worked. The claimant wrote: “there shouldn’t be no (sic) room for discrimination or being forced to resign”.

21. The claimant’s letter was passed to Peter Huddlestone to carry out an investigation. The claimant met with Peter Huddlestone as part of his investigation.

22. The claimant had not worked on the Sabbath from the commencement of his employment. When the claimant’s rota meant that he was required to work on the Sabbath the claimant had in some instances been able to arrange to swap his shift on other occasions when he had not been able to swap his shifts he did not attend work.

23. Peter Huddlestone’s investigation report included the conclusions that: “There is no evidence that Mr Harvey is suffering direct discrimination by having to work what for him are Sabbath hours.”

24. On 23 December 2015 Paul Hennigan met with the claimant. They discussed the investigation report and Paul Hennigan suggested that the claimant make a flexible working request stating his desired working pattern under the respondent’s flexible working policy. The claimant had not been employed by the respondent for 26 weeks and therefore was not

eligible to apply for flexible working. Paul Hennigan decided to make an exception for the claimant as the flexible working policy was the appropriate mechanism for drivers to raise specific requests about their working arrangements and applied to all drivers.

25. Following the meeting the claimant wrote to Mr Hennigan setting out that he would like to work: “Sunday to Thursday, any hours. On Fridays, early shift finishing before sunset, on Saturdays late shift starting after sunset, with the guarantee of minimum thirty five (35) hours per week.”

26. The claimant completed a flexible working request form on 6 January 2016. The claimant did not sign it and did not complete some of the boxes. The claimant explained his actions by saying that he did not want to change to a zero hours contract. The claimant’s flexible working request was not considered by Paul Hennigan, who explained that having already made the exception in allowing the claimant to make the application when he did not qualify he was not willing to make a further exception by considering an application that was not fully completed and signed by the claimant.

27. By a letter of 13 January 2016, the claimant was required to attend a meeting to discuss his probationary period and not being able to fulfil his contract of employment. The claimant was warned that a possible outcome was termination of his employment.

28. On 19 January 2016 accompanied by Paul Marsden, a Unite representative, the claimant met Paul Hennigan who was assisted by Sandra Jones as a note taker. They reviewed Mr Huddlestone’s investigation report.

29. The claimant was told that it was not sustainable for the respondent to arrange swapping duties for the claimant. The claimant was asked if he wished to take up an offer previously made to him of flexible working. Paul Hennigan told the claimant that he would put the claimant on a fixed line but it would be the claimant’s responsibility to arrange swapping shifts. The claimant was told that a failure to attend work could result in the termination of his employment.

30. Following this meeting, the claimant continued to be allocated shifts that required him to work on Friday evenings and Saturday day times. The claimant made efforts to swap shifts with other drivers but he was not always able to do so. The claimant found it difficult to arrange swapping shifts.

31. On occasions when he was required to work on the Sabbath and had not been able to swap a shift the claimant would call the respondent’s

absence line and let them know that he was unable to work on the shift he had been allocated.

32. On 14 March 2016, the claimant wrote to the respondent setting out precisely the hours he would like to work each week.

33. On 11 April 2016, the claimant was invited to a disciplinary meeting to discuss his attendance record. The letter informed the claimant that: "The possible consequences arising from this meeting might be termination of employment." In a ten-month period the claimant had been absent for 22 shifts.

34. The disciplinary meeting was arranged for 14 April 2016. It was postponed following discussions between the claimant's union and the respondent concerning the claimant's intention to commence employment tribunal proceedings about working on the Sabbath.

35. On 15 April 2016, the claimant was running a bus service that left early. When the claimant realised that he was running the service early, he corrected it later during that same route.

36. On 18 April 2016, the claimant approached ACAS about Early Conciliation.

37. On 28 April 2016, the claimant was invited to a disciplinary meeting about running early. The claimant was informed that "the allegation made against you if proven may result in a Final Written Warning being placed on your record."

38. The claimant was aware of the document titled "The Importance of Not Running "Early" provided by the respondent in February 2016.

39. On the 29 April 2016 Paul Hennigan forwarded an email sent from the garage office which read as follows:

> Dvr Harvey who signed on at approx. 1600 has just walked into the garage office and said he will not complete his shift tonight as it is the start of his Sabbath at 2030. He was asked why he did not let us know this was happening when he signed on today but he said he was giving us 2 hours notice and that I needed to pay somebody overtime to come and relive him I advised I might not have anybody to relieve him and he said that was not his concern.
>
> We will lose mileage due to this.

> I need to know whether he is refusing to carry out his duty which is an act of gross misconduct or have we agreed that he can come and go as he pleases?
>
> I'm concerned that this will set a precedent to all the other drivers who I have to work weekends that I'm sure would love any opportunity not to.
> Where do we stand? (p304)

The claimant's evidence on this incident is that "*this incident did not happen. I agree I spoke with the controller that someone should relieve me at 8.30 because it is the Sabbath."* The claimant's account is that at the start of his shift at 4pm he informed the respondent that he would need to be relieved at 8.30pm because of the Sabbath. The claimant denies that he made comments about "pay somebody overtime" or "not his concern" as stated in the email.

40. Paul Hennigan in his witness statement says of this incident: "*The email report stated that the Company could lose service mileage due to this, which means that the service would not run from the point where the claimant abandoned the route. This could trigger customer complaints and be brought to the attention of the Traffic Commissioner. Fortunately, I think the Company did manage in the end to find cover for the rest of the Claimant's shift. I do not know if the Claimant brought the bus back to the garage or whether he just left it on the road but, if the latter, this would have posed a significant danger as anybody would have been able to board the unattended bus and drive it as there is a button system (as opposed to a 'key system') to start up the engine. If the Company had not been able to find a driver to cover the Claimant's shifts and/or if the Claimant had brought the bus back to the station before he left, then the customers who were left on the bus would have had to have got off the bus and wait for the service behind it and board that bus. The customers could have been elderly or vulnerable. Requiring them to get off at an unfamiliar stop at night. Which would also delay their journey which they had paid for, is completely unacceptable. Understandably, this would cause customers to be outraged at the driver abandoning the bus mid-way through the journey whilst they were still on board."*

41. It is to be noted that none of these scenarios imagined by Paul Hennigan in his statement actually occurred. This account is speculative and suggests that Paul Hennigan is looking for reasons to criticise the claimant's conduct and make it appear more serious than it was. It is of note that Paul Hennigan does not say that there was any further investigation into the events of the 29 April after receiving the email from the garage office, notwithstanding that the email made reference to gross misconduct. It is also of note that this incident was never the subject of an investigation by the respondent. If there was any real concern as to

"whether the claimant had brought the bus back" or *"the customers who were left on the bus would have to get off the bus"* or the claimant *"abandoning the bus mid-way thorough the journey",* we would have expected there to have been some investigation of this by the respondent.

42. We heard no evidence of what if any investigation was carried out into this incident. Referring to the incident on the 29 April Philip Southall said that he did not know if this was raised at the time. He confirmed that it was the only time that it occurred. Philip Southall accepted that if the claimant had been allowed the facility requested the claimant would not need to stop work midway through a shift.

43. On 3 May 2016, the claimant attended a disciplinary hearing for early running. He was accompanied by Mick Trafford. The claimant was given a final written warning, to stay on his file for 12 months. The claimant appealed the decision.

44. Under the respondent's disciplinary procedure, a final written warning "means that the conduct of an employee is such that the case must be considered as very serious, or that a previous award has not been heeded. The life of this award is normally twelve months but in exceptional circumstances and/or as an alternative to dismissal a longer or indefinite period may be given. A final written warning covers all aspects of an employee conduct."

45. On 4 May 2016, the claimant obtained an ACAS Early Conciliation certificate.

46. At the claimant's appeal on 16 May 2016 the claimant was accompanied by Mick Trafford. Paul Hennigan conducted the appeal with Sandra Jones as note taker. The meeting was adjourned to be reconvened on a later date.

47. On 3 June 2016, the claimant submitted an Employment Tribunal claim.

48. On 7 June 2016, the disciplinary appeal hearing was reconvened. On this occasion, the claimant was accompanied by Steve Morgan, a Unite representative. Paul Hennigan and Sandra Jones were also present. Following the appeal Paul Hennigan reduced the disciplinary sanction on appeal to a written warning for nine months.

49. The claimant accepts that the respondent considers early running to be a serious matter. The claimant however contends that the penalty even after it was reduced on appeal by Paul Hennigan was harsh. Mick Trafford the union representative considered that the punishment was harsh and stated that he was unaware of any other driver who had been given a written warning on their "*first occasion of running late" (sic)*. Mick Trafford

also considered that the reduced sanction following appeal was a harsh outcome.

50. In early July 2016, the claimant was asked to meet with Paul Hennigan and Clare Child. The claimant was accompanied by Mick Trafford. The claimant was told that he might be able to move to the Express Service.

51. The claimant completed a Flexible Working Request. When the claimant gave the request to Clare Child he told her that he wanted guaranteed hours per week. Again, on this occasion the claimant did not complete the whole form or sign the part completed form. In contrast to the January request this request was considered by the respondent even though it was unsigned.

52. In the letter dated 11 July 2016 a summary of the meeting was set out by Clare Child. The claimant was told that: “Now that we have received your Flexible Working Request, we can formally look across the company to see if it is possible to accommodate your request without a detriment to the business.”

53. On 25 August 2016, the claimant accompanied by Mick Trafford met with Paul Hennigan, Clare Child and Simon Hammond, Rota Controller for Express. The claimant was offered a move to the Express Service. The Express Service did not require work Friday evening or Saturday daytime shifts. At this meeting, there was no mention of this being a temporary arrangement. The claimant was given a few days to make a decision and on 30 August 2016 accepted the offer.

54. There was nothing said in this meeting to alert the claimant to the fact that the arrangement was not permanent or what factors might result in the arrangement being brought to an end. The matters referred to by Clare Childs in her statement at paragraph 25 about how it became possible to enter into this arrangement with the claimant were not explained to him.

55. On 7 September 2016, Paul Hennigan asked the claimant if he was still carrying on with his employment tribunal claim.

56. The claimant started on the Express Service on 12 September 2016. The claimant signed an agreement to work on 14 September 2016 set out a probation agreement and de-selection policy for working on the Express Service (p338).

57. The Preliminary Hearing for the claimant’s employment tribunal case took place on 15 September 2016.

58. On 6 October 2016, Clare Child wrote to the claimant stating that the transfer to the Express Service was "temporary" until the conclusion of the

Tribunal hearing in April 2017. In her witness statement Clare Child states that the claimant "did not raise any objections to the letter and was happy to move on to the Express Service". It is to be noted that the claimant had already agreed and started work on the Express service at the point that the letter of 6 October 2016 was sent to him.

59. On 12 December 2016, the claimant accompanied by Mick Trafford met with Paul Hennigan and Clare Child. The claimant was told that he would be removed from the Express Service. He was told that the driver who had been asked to swap with the claimant did not want to continue with the arrangement.

60. The claimant was told that another colleague could swap with him to work Sabbath hours on the City Service. The claimant agreed to move.

61. Clare child wrote to the claimant on the 19 December 2016 confirming the agreement. The letter includes the following passage:

> You also stated that you felt the situation was not progressing and we were "not getting to the meat of the problem". Both myself and Paul Hennigan agreed with this … On reflection this disagreement as to whether progress has been made has raised concerns that the relationship between yourself and the Company is beginning to break down." (p343)

The hint of menace that emerges from the reference to relationship break down is absent in Clare child's statement at paragraph 32.

62. The respondent's position in respect of the claimant's request that he not be placed on work rotas that require him to work on the Sabbath was set out by Philip Southall.

63. Philip Southall stated that the company policy is that all bus drivers are required to be available to work shifts on any five days in a seven-day week. The company guarantees an average of 40 hours paid work per week with additional days worked above the base rota paid as overtime.

64. Individual drivers are allocated a line in a rota. Once allocated the drivers then have the flexibility to swap an allocated day within that rota with another driver.

65. Philip Southall said: *"The key objective of the policy is to ensure the fair and efficient running of bus services taking into account all the different variable that apply. Flexibility is built in for drivers because they have the ability to "swap" their shifts with others, should it be necessary to have time off on particular shifts days… And it is often the case that members of one religious group may swap with members of other religious groups to*

cover religious events or festivals. So, for example our Muslim drivers often swap with the Christian drivers and vice versa to cover periods like Christmas and Ramadan… The swap system works well and the claimant is the only driver that I know who struggles to make appropriate swaps."

66. This comment perhaps betrays a misunderstanding of the claimant's position. The claimant's religious observance in respect of the Sabbath is all year round, every week. Unlike Christmas and Ramadan, it is not an annual event or a month-long event once year. Arranging a swap in circumstances where this regular weekly commitment is required where the swap cannot be reciprocated would present, as the claimant experienced, much greater difficulty for the claimant than it would for someone wanting to swap on an annual or one-off occasion.

67. Philip Southall explained why the respondent could not meet the claimant's request: *"Unfortunately, accommodating the Claimant in this way causes significant problems for our business. It leads to problems with the allocation of duties but the critical issue is the impact on other drivers. Duty allocation is very sensitive and drivers and the union are very keen to ensure that everyone is treated fairly. The rotas are designed to share duties fairly and to give a fair balance of unpopular shifts to every driver. If any driver does not work their fair share it undermines that balance and some drivers have to work more of the unpopular shifts. This causes disharmony within the workforce causing drivers to leave and problems with industrial relations. The union would complain leading to a "failure to agree" notice and the disputes resolution procedure we have with the union being enacted. Ultimately this could lead to industrial action. In a recent ballot scheduling matter was one of the issues that led to industrial action being taken."*

68. The respondent has to operate services to set service levels including punctuality targets. "Having fixed shifts for individual drivers would make the task of planning and operating the shits almost impossible because of all the different permutations that need to be accommodated and all rest days being fixed." It is important not to lose sight of the fact that the claimant's case is not that every driver should decide his own shift. The respondent appears to be contending that could be one effect of allowing the claimant the facility he asks for.

69. The Respondent could in the claimant's case accommodate him with relative ease in terms of the creation of a schedule that allows the respondent to meet the required levels of service. If more drivers asked for the same facility as the respondent suggests at some unspecified point the position would be unsustainable.

70. Speaking about vehicle scheduling Philip Southall said that there arise *"additional costs problems with fairness if we have to accommodate*

individual requirements."

71. Drivers are 70% of the company's costs base. Inefficient scheduling will undermine the operation pushing up these costs. Philip Southall does not give evidence to show the extent that meeting the claimant's requirement would undermine efficiency. He makes the point that a 1% change in efficiency levels equates to an addition cost of £150,000 a year for the respondent. How much the claimant's changes contribute to the1% is not expressed.

72. It is maintained by the respondent that it is critical for industrial relations that there is a fair distribution of shifts. *"If the business is required to accommodate individual requirements, a collective grievance will be filed with the possibility of industrial action if agreement cannot be reached."* A unique rota for the claimant would result in "*industrial unrest and open the floodgates to other groups to require unique rotas or accommodations;"* "*The company has lots of Muslim drivers, who if given the choice, would want every Friday off for prayers and would like time during the month of Ramadan;" "The universal 5 day shifts in any 7 day week requirement for our drivers is critical for our business".* These statements were all made by Philip Southall defending the respondent's position.

73. Philp Southall accepted that he did not know whether the respondent had considered whether the rota arrangements were compliant with the religion and belief regulations. Philip Southall stated that the Equality Act was covered in training. He was asked the question: "*[Have you] not considered diversity training to explain why acceding to one person's request?"* His response was: *"You could always do more. I understand that we do this in training."* Philip Southall stated that it was not fair to say that there was no consideration of what the respondent should do. He was then asked: *"In weighing up whether proportionate to allow request- no considered any specific training to defuse unrest among drivers?"* His response was: *"No."*

74. Philip Southall agreed that the software that the respondent used for scheduling could be set so that it accommodates the claimant's requirements in the same way as the software accommodates flexible working arrangements.

75. Philip Southall accepted that the respondent had never carried out any analysis of what gap in the service there would be if the claimant's request was granted. Philip Southall then went to say that allowing the request would lead to collective grievance. "*By just allowing the claimant's request there would be no problem with gaps in the service. There would be a problem with floodgates. We could allow the claimant alone but it is impact on the workforce as a whole."*

76. Philip Southall said that he had not worked out what the cost would be of accommodating the claimant's request. He stated that in the claimant's first year of employment in respect of the occasions the claimant had not come on to duty there had been a cost of £455.32. He went on to point out that while the respondent was accommodating the claimant's costs: *"cost is not the primary concern- it is impact. Costs is a consideration not the main one."* The Tribunal understands this cost to arise because no arrangement was in place for the claimant at the time and had there been an arrangement in place, while the arrangement may have a cost, this cost referred to would not have been incurred.

77. Accommodating the claimant would not make the respondent's business unviable but it may be unviable if others also made such requests. Philip Southall said he had not done an analysis of how many people making similar request would lead to the respondent reaching a tipping point.

78. Philip Southall said that since the claimant had been accommodated on the City Rota from December 2016 there had been a detrimental impact on the business. He also said: *"I do not know what the cost to the business is since December 2016. It is a minor cost."*

79. The current arrangement that the claimant is working has not resulted in problems scheduling drivers for an average of 40 hours as the respondent aims to do. The current arrangement for the claimant is not a mirroring arrangement so he is accommodated without making any specific arrangement dependant on another driver.

80. Philip Southall accepted as incorrect the last sentence of his witness statement at paragraph 49 which reads: "This is impossible to do unless the Company can organise rotas in the 5 days in any 7 days policy."

81. Philip Southall stated that in his experience where a person gets *"preferential treatment without justification there is disharmony"*. He pointed out that there had been no complaints about the arrangements that the claimant had worked since September 2016.

82. Philip Southall said that there were people awaiting the outcome of this case before they made a grievance. He referred to 30-40 people who would request time off for their religious beliefs. When probed, the evidence referred to a conversation Philip Southall had with a Muslim employee about getting time off for Eid. Philip Southall said he was aware people had asked for time off but accepted that nobody had ever asked him for time off for Friday prayers. He said that reason for this was because there is *"an understanding that you work 5 days in 7 days."* Philip Southall said that although there had been no complaints he was aware that there was resentment. *"Accommodating the claimant would open floodgates and will cause massive problems for the company."*

83. The claimant makes a complaint of direct discrimination. An employer must not discriminate against an employee by dismissing him or subjecting him to any other detriment. An employer discriminates against an employee if because of his religion or belief he treats the employee less favourably than he treats or would treat others. Where the employee seeks to compare his treatment with that of another employee there must be no material difference between the circumstances relating to each case.

84. If there are facts from which the employment tribunal could decide, in the absence of any other explanation that the employer contravened the provision concerned the employment tribunal must hold that the contravention occurred. However, this does not apply if the employer shows that it did not contravene the provision.

85. Respondent's submission on the claim made pursuant to section 13 Equality Act 2010 are set out in the respondent's closing submissions which we have taken into account. In addition, further submissions were made orally that the claimant has failed to show that he was treated less favourably than anyone else was treated. It is said that the evidence shows that this claim was not really pursued by the claimant. It is said that the claimant was treated in the same way as others. There is no evidence that a proper comparator would have been treated differently. It is further said that the claimant has failed to show that the treatment was on the grounds of his religion, the claimant was required to work on the Sabbath because the respondent's operational needs required this of full-time employees.

86. The claimant submission states that the respondent has agreed to alternative shift patterns for other employees for non-religious reasons. The refusal to grant the claimant's request is based on his religious requirement because of the respondent's groundless fear of floodgates opening.

87. A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. A provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if: A applies, or would apply, it to persons with whom B does not share the characteristic, it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, it puts, or would put, B at that disadvantage, and A cannot show it to be a proportionate means of achieving a legitimate aim.

88. The claimant contends that the respondent operates a provision, criterion or practice (PCP) requiring all bus drivers to work a rota that includes

shifts any five days from all seven days of the week. The respondent concedes that the respondent applied a PCP that all full-time staff were required to be rostered in such a way that they would be given shifts on all seven days of the week over time, but were generally permitted to swap shifts with others.

89. The claimant contends that the PCP puts observant Seventh Day Adventists at a particular disadvantage when compared with person who are not observant Seventh day Adventists. Put this way the respondent does not concede that the Seventh Day Adventists are placed a particular disadvantage. The respondent states that outside the pool of Seventh Day Adventist's will be people of other religions who may well be equally disadvantaged by having to work on particular days.

90. The respondent contends that the correct pool must include all workers whom the PCP affects, which is all people whose religious beliefs make a particular day not suitable for work, whether because that day is a Sabbath or because they wish to attend an act of collective worship away from work. The respondent states that if the pool is set in those terms (all people whose religious beliefs make a particular day not suitable for work, whether because that day is a Sabbath or because they wish to attend an act of collective worship away from work) then it follows that religious people are at a disadvantage to non-religious people.

91. By different routes the claimant and respondent arrive at the point where they both say that the PCP puts Seventh Day Adventists at a particular disadvantage.

92. The claimant contends that he was put at a disadvantage. The respondent contends that the Claimant's evidence as to what he said at the interview was highly unsatisfactory; it changed over time and the evidence of Tamika Hedges is clearly to be preferred; if the Claimant was truly unwilling to work on his Sabbath then his application form was misleading; if the application form was true, then it is likely that he also gave Tamika Hedges the impression that he was content to work on Fridays and Saturdays and if that was a correct impression then he was not put at the disadvantage he now alleges.

93. In considering whether the PCP is a proportionate means of achieving a legitimate aim we are asked by the respondent to consider there is a two-stage test, firstly the consideration of a legitimate aim and secondly whether the man used were proportionate. The respondent says that in considering the question of proportion, it is necessary to ask whether the measure is both appropriate and reasonably necessary to achieve the aim. It is said that concrete evidence is not always necessary to establish justification *"Justification may be established in an appropriate case by reasoned and rational judgment"*[1] The respondent further contends that whilst costs alone will not permit justification, costs can be taken into

[1] Homer v CC West Yorkshire (EAT) [2009] IRLR 262

account. The respondent further contends that the employer need not show that the PCP was "necessary" in the sense of being the only course open to it. An employer's decision about how to allocate its resources, and specifically its financial resources, should constitute a "real need" or "legitimate aim" even if it is shown that it could afford to make a different allocation with a lesser impact on the class of employee in question. The respondent states that the balancing exercise required related to the justification of the rule, not the individual application of that rule.

94. Applying those principles to this case the respondent states: That the issue is not whether the respondent could have accommodated the claimant but whether the PCP was a proportionate means of achieving a legitimate aim. The aims of the respondent are efficiency, fairness to all staff/ a harmonious workforce, and recruitment and retention. All of which are legitimate aims for any business. The evidence given by Philip Southall sets out the aims of the respondent in requiring employees to work a flexible work rota and why the use of a flexible rota is the appropriate way of achieving such an aim. The respondent contends that there is evidence of potential industrial unrest. We are invited to take note that other faiths have days on which they do not wish to work (whether in whole or part) and that the respondent's concerns are not fanciful. The respondent has issues with driver retention and recruitment, and drivers do not like working at weekends. The respondent contends that this is a classic case for the application of the principle in *Homer* that *"Justification may be established in an appropriate case by reasoned and rational judgment".*

95. The respondent allows drivers to swap with one another and in offering to give guaranteed hours for those who do not require a full-time shift pattern. In the case of the claimant, the respondent had also moved him the fixed line set rota, to make changes easier and then moved to the Express Service and then the City Rota.

96. The claimant states that it is for the respondent to justify the PCP by producing evidence to support its assertion that it is justified. A measure is not proportionate unless a respondent has shown that it is both appropriate and necessary. The claimant contends that the respondent cannot outsource its responsibilities by relying on the ability of individual workers to swap shifts. The respondent has produced very little analysis of any actual costs to it of accommodating the claimant's religious requirement. The respondent's reliance on industrial unrest is mere assertion for which there is no evidence. The impact on the respondent's 500 drivers of accommodating the claimant is minimal. The claimant states that the respondent's reliance on the floodgates argument is based on a mere assertion and is a potentially discriminatory factor. If accommodating the claimant's request results in further request being made by others, then those too would need to be considered on an individual basis.

97. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether conduct has the effect referred to, the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect must be taken into account.

98. The claimant contends that the retracting of the permanent arrangement agreed in August 2016 with the claimant was unwanted conduct related to the claimant's religion and had the effect of violating the claimant's dignity.

99. The respondent says that it is difficult to see how the letter of 6 October was either conduct or was relevant to the Claimant's religion. It is further difficult to see how the letter violated the Claimant's dignity or created an intimidating, hostile, degrading humiliating or offensive environment. It could not do so, the Claimant may not have liked the Respondent's stance, but that is a long way from it being harassment.

100. A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. Bringing proceedings under the Equality Act 2010; giving evidence or information in connection with proceedings under the Equality Act 2010; doing any other thing for the purposes of or in connection with the Equality Act 2010; making an allegation (whether or not express) that A or another person has contravened the Equality Act 2010, are protected acts. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

101. The claimant and respondent agree that the claimant's complaint of 25 November 206 was protected act.

102. The claimant also relies on later matters as protected acts including the presentation of the ET1 and his decision to proceed with his case after the Preliminary Hearing on 15 April 2016.

103. The claimant contends that the respondent's actions in issuing a Final written warning on 3 May 2016; and retracting in October 2016 the permanent agreement entered into with the claimant were acts of victimisation.

104. The respondent accepts that in being given the claimant a final written warning for running late the claimant was subjected to a detriment.

105. The respondent contends that there are not facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent subject the Claimant to a detriment because he did a protected act.

106. The respondent states that the claimant was running 5 minutes early on the day in question and that he should not have been. The claimant had been clearly warned of the significance of the issue. The respondent says

that the highest that the Claimant can put his claim is that others who ran early were not given the same sanction as him. It is said that the claimant cannot show that the circumstances were the same as his case. The claimant was running significantly early and doing so on a school run. The Claimant's argument amounts to no more than an assertion of a difference in status and a difference in treatment. In his appeal letter and at the appeal hearing the Claimant did not suggest that he thought the warning that he was given was because he had done a protected act and in evidence the Claimant conceded that he thought the issue of the early running was different to the Sabbath issue.

107. The respondent was only motivated by the claimant's actions on the day in question. The respondent has been extremely accommodating in respect of the claimant's legal claim, to the extent of stopping the disciplinary process pending the outcome of the claim and assisting him with working the hours which he wants to. Far from victimising the claimant because he has done a protected act, the respondent has gone out of its way to protect and accommodate him.

108. In respect of the claimant's complaint of victimisation in respect of the retraction of the role the respondent contends that the claimant was not told that the role was permanent, and he had no reason to think that it was. The claimant was part way through a disciplinary process relating to his absence, that had been suspended pending the outcome of these proceedings. The claimant had no reason to think that if his Employment Tribunal claim was dismissed he would be permitted to continue to refuse working on Fridays evening and Saturdays. There was no suggestion that the claimant's contract of employment was being amended and the claimant expressly took the new role on a 6-month probationary period. The claimant continued to work on the Express Service and did so for as long as there was a "mirror" driver. It was not the letter of the 6 October that caused the claimant to stop working on the Express Service; it was the lack of a mirror driver. When the Express Service opportunity came to an end, the claimant was employed on the City Rota, again he avoided working on Friday nights and Saturdays, there was no detriment. The respondent states that in any event there are no facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent subjected the claimant to a detriment because he had done a protected act. In any event the respondent says that the letter was sent to record the position which the parties were in, it was not sent because of the proceedings.

Conclusions

Direct discrimination

109. The claimant has not been able to show that there was a less favourable treatment of him. The evidence shows that the claimant was refused a facility which meant that he did not have to work on the Sabbath. There

was evidence that one other driver was given a facility that meant he did not have to work certain hours. This was an informal arrangement between the driver and the rota supervisor. The situation was not sanctioned by the respondent. Arrangements sanctioned by the respondent were by way of a flexible working arrangement.

110. Under the respondent's Flexible Working Policy, the respondent states that it cannot guarantee minimum daily working hours. The claimant considered that this amounted to working on a zero-hour contract and was something the claimant was unwilling to accept. The respondent in granting flexible working request did so in circumstances which had primary regard to the respondent's operational needs of the business and the potential detrimental impact on fellow employees.

111. The situation referred to where there were informal arrangements made between a driver and a rota supervisor in a particular employee being able to have his shifts changed to meet his personal needs was brought to an end once the situation came to the attention of the respondent's management.

112. In those circumstances where there was an agreement to alternative working patterns by the respondent the employee concerned had entered into an arrangement considered under the respondent's flexible working policy. The circumstances of each are individual and in considering them regard has been had to the needs of the business and the impact on the other employees. This was materially different to the claimant's situation which was not considered under the respondent's flexible working policy by Paul Hennigan. When the claimant presented a flexible working request to Claire Child he again failed to complete all relevant sections of the form and did not sign it, however on this occasion he was assigned to the Express Service.

113. It has not been shown that the claimant was treated less favourably by the respondent. The evidence shows that the claimant was treated either in the same way as his colleagues or possibly more advantageously than colleagues in having his incomplete flexible working application considered by the respondent.

Indirect discrimination

114. It is in issue between the parties whether the claimant was put at a disadvantage by the PCP. The conclusions of the Tribunal set out above were that we prefer the account of the interview given by Tamika Hedges. However, we have not been able to conclude that the claimant ever said that he was willing to work on the Sabbath. We are satisfied that the claimant's expressed desire to observe the Sabbath is a genuine expression of his religious belief. The evidence has shown that the

claimant does observe the Sabbath. Before the respondent made arrangement that meant the claimant did not work the Sabbath the claimant on every relevant occasion either arranged not to work by swapping or did not report for work, by his actions he demonstrated that he observes the Sabbath.

115. The conclusion of the Tribunal is that while the claimant may not have been clear to Tamika Hedges that he would not work on the Sabbath we are satisfied that he genuinely cannot work on the Sabbath because of his religious belief. The claimant is in our view put at a disadvantage by the PCP.

116. The main dispute between the parties in this case has concerned justification. The respondent has to prove that the PCP is justified. The claimant has not contested the respondent's stated aims of efficiency, fairness to all staff/ a harmonious workforce, and recruitment and retention.

117. The Tribunal has to weigh the real needs of the respondent, against the discriminatory effects of the PCP.

118. The respondent says that in the case of the claimant, it has moved him to the fixed line set rota to make changes easier, and then moved him to the Express Service, and then the City Rota. What these actions show is that there are effective steps that the respondent would take to meet the claimant's needs. They have not resulted in any inefficiency, unfairness to staff or disharmony. However, the respondent has made it clear that all these actions were a temporary measure pending the resolution of this case.

119. There have been clear explanations given in these proceedings for why the Express Service came to an end due to the loss of an available mirror driver. The respondent has not given any reason specific to the City Rota why the current arrangements on the City Rota cannot continue. The respondent has not given any evidence as to the cost relating to the continuation of this arrangement save that there is a cost. We note that while Philip Southall said that since the claimant had been accommodated on the City Rota from December 2016 there had been a detrimental impact on the business he did not quantify it: *"I do not know what the cost to the business is since December 2016. It is a minor cost."* A minor cost in our view would not be justification for the PCP.

120. The respondent has also relied on recruitment and retention pressures as being a matter which justifies the application of the PCP. The Tribunal reject this on the evidence presented. The application of the PCP does not impact on the recruitment of staff and there is no evidence that it has an impact on the retention of staff. We do not accept that the PCP has any

impact on recruitment and retention.

121. Philip Southall stated that there is a potential for industrial unrest. He stated that there were "Chinese whispers", he referred to people awaiting the outcome of this case, he referred to conversations with other staff. We also had evidence from Mike Trafford, a union representative, who was unaware of any possible industrial action arising from the application of the PCP or non-application of the PCP in the claimant's case or another case. We agree with the claimant's contention that this is merely an assertion by Philip Southall.

122. Philip Southall set out in his evidence a number of matters which justified the application of the PCP. The number of services being operated by the respondent fluctuates throughout the week and throughout the year. The respondent has in place computer systems and a scheduling team which allowed the respondent to react to these changes as they arose and maintain an efficient service and comply with the obligations set by the Traffic Commissioner. The general effect of the respondent's evidence was an acceptance that notwithstanding the complexity involved in making at least ten changes to the schedules during the year, meeting the claimant's requirements could have been accommodated. We do not consider that, in fact, the complexity involved was any issue at all in the considerations for justification.

123. Likewise accommodating the claimant's needs in our view would not have hampered the respondent's need to ensure the appropriate level of cover at all times required by an adaptable rota system. Any real problems to the respondent arise not from granting the request but from granting many such requests.

124. There was no explanation as to why accommodating the claimant's request would impact on the need to take into account recovery time when scheduling. This is a feature of scheduling with or without the claimant's request being accommodated. There is no evidence as to the impact accommodating the claimant in fact would have.

125. Allowing the claimant's request would not encumber the respondent's ability to require drivers to otherwise work flexibly (including the claimant) to permit the respondent to provide cover for "no shows", sickness absence and holidays. Allowing the claimant to do so does not create a tipping point in this regard.

126. The 5 in 7 shift pattern enables the respondent to average out longer and shorter shifts (due to different route lengths) over the week and thereby get drivers as close to 40 hours a week as possible. There has been no illustration of what if any effect allowing the claimant's requested accommodation would have on the ability to achieve this. The obvious

statement that unrest is caused where some drivers end up with longer shifts compared to others has not been shown to be a real threat from allowing the claimant's accommodation.

127. While we accept that there is also a real issue of fairness and a need to promote a harmonious workforce we do not consider that there is a basis for saying that allowing the claimant this accommodation would result in disharmony.

128. The real reason, or the operative reason, for the respondent not meeting the claimant's request is the fear that there are many employees who would wish not to work on their holy day or feast. The fear is that if the respondent allows the Claimant to avoid being rostered for his holy day then it has to do the same for all those who are religious. The respondent while relying on this concern has failed to produce evidence to support it so that it goes beyond the assertion.

129. The respondent says that failure to grant the request to another employee if the claimant's request was granted would amount to direct discrimination. The heart of the respondent's case is that accommodating requests such as the one made by the claimant would be detrimental to the operation of their business. We consider that there would be no direct discrimination if in each case these were the considerations which determined whether a request was granted or refused.

130. In so far as the respondent expresses concern about the risk of employees making request for non-religious reasons the respondent would in each case have to consider the request on its merits. It is not necessarily unfair to treat legitimate but different requests differently nor will a reasonable workforce consider it resulting in employees being treated unequally and or unfairly by doing so.

131. The respondent's assertion of the cost of making changes has not been explained or quantified. No information enabling a judgment to be taken on the real cost implications of accommodating the claimant has been provided.

132. The respondent contends that this is a classic case for the application of the principle in *Homer* that *"Justification may be established in an appropriate case by reasoned and rational judgment".* We disagree. The respondent in our view has failed to adduce evidence where evidence should have been produced and relies on assertion and speculative fears.

133. A decision made in the circumstances which prevail on a particular day may be judged differently if made on another day in different circumstances. The respondent has to address issues as they arise. The decision to be made when one person wants a facility is not necessarily

the same decision to be made where, for example 10 people ask for the same facility. One may be accommodated without difficulty but ten may have a detrimental effect on the business. The prevailing circumstances might result in a proportionate response being to refuse the claimant's request. However, in this case we have not been satisfied that the prevailing circumstances of this case are such that refusing the claimant's request was proportionate. Claire Child stated, in answer to questions from the claimant, that the respondent has not done the work to ascertain how many people are willing to work Friday and Saturday to cover the Sabbath.

Harassment

134. The claimant was not told that the arrangement for him to work on the Express Service was contingent on the position of someone else. The claimant was informed in the letter of the 6 October 2016 that this was a temporary arrangement. The letter was not, and its contents were not, related to the claimant's religion. The letter was the written confirmation of what the respondent was agreeing to.

Victimisation

135. The claimant's complaints of victimisation are not well founded. In the course of his evidence the claimant accepted that there was no connection between his request not to work the Sabbath and the disciplinary action for late running.

136. The claimant was not told that the role in the Express Service was permanent. The claimant may have thought it was but this was not because of the actions of the respondent. The claimant worked on the Express Service for as long as there was a "mirror" driver. The lack of a mirror driver brought it to an end. At that point the claimant was moved to the City Rota again avoiding working on a Sabbath. There are no facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent subjected the claimant to a detriment because he had done a protected act.

Judgment

137. The claimant's complaint of indirect discrimination is well founded and succeeds. The claimant's complaints of direct discrimination, harassment and victimisation are not well founded and are dismissed.

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Employment Judge Gumbiti-Zimuto
Dated: 25 September 2017

JUDGMENT SENT TO THE PARTIES ON

28 September 2017
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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS