EMPLOYMENT TRIBUNALS

Claimant: Ms C Daley

Respondent: University of Wolverhampton

HELD AT: Birmingham **ON:** 19-21 and 24-26 July 2017
27 September 2017

BEFORE: Employment Judge Cocks
Miss L Clark
Mr J Wagstaffe

REPRESENTATION:

Claimant: Mr A Otor-Osagie, Solicitor
Respondent: Mr M Leach, Solicitor

REASONS

Judgment with oral reasons was given on 27 September 2017. The written judgment was sent to the parties on 29 September 2017. These written reasons are provided upon a request being made by the claimant for them.

1. The Tribunal had an updated Schedule of the claimant's allegations and a list of agreed issues. We do not reproduce either in this judgment. We have not strictly followed the list of issues in this judgment, but we have considered them in our analysis and conclusions. Where we have not determined an issue, we explain why we have not done so. We would like to thank both representatives for their full written submissions. The Tribunal has taken these into account in our deliberations and in reaching our decision.

2. There are a number of preliminary matters which we need to address before going on to make our findings of fact on the allegations.

Witnesses

3. Initially, the claimant was going to call two other witnesses (in addition to the ones from whom we did hear evidence). They are Mr Maurice Rose and Mr Christopher Stewart. There appeared to be problems with these two witnesses

attending. Mr Rose is in Jamaica. The respondent was not prepared to accept his evidence. The claimant had not been able to arrange video conferencing facilities for Mr Rose to give his evidence to us. Eventually she decided that she would not rely on his evidence, however we do need to set out the circumstances around this.

4. Although Mr Rose's witness statement does not give direct evidence about what the claimant alleges, he does make allegations about racist treatment of himself and generalised allegations about Mr Shaw and the Security Department. His evidence is strongly refuted by the respondent. Mr Otor-Osagie had not contacted the tribunal before the hearing so that arrangements could be made to enable Mr Rose to give his evidence and be cross examined by video-link.

5. On the first day we explained that Mr Rose would not be able to give his evidence by telephone; his evidence was being challenged and we would need to see him as well as hear him when being cross examined. We heard nothing further from the claimant about Mr Rose giving evidence to us until the fifth day when it was explained that Mr Rose would go to an internet café and give his evidence over the internet. After making enquiries of the Administration, it was explained to the claimant that Mr Rose would not be able to do it in that way, he would need to go to a venue with Polycom facilities for video-conferencing. We were told the next day that Mr Rose would go to a hotel that morning where they had these facilities. It was arranged that he would ring in at 3.00pm that day, bearing in mind the time difference. In anticipation, Mr Probert gave us, and was cross examined on, his second witness statement where he deals with Mr Rose's allegations. In the event, we have disregarded Mr Probert's additional evidence as Mr Rose did not ring in. We waited until 3.40pm to enable him to do so but after that decided we could not wait any longer. We have not heard his evidence for the following reasons.

6. The claimant and her representative had ample opportunity, both before and during the hearing, to make arrangements so that Mr Rose could give his evidence. This was not done until late into the hearing. The Tribunal has taken all reasonable steps it could to enable the claimant's witnesses to give evidence, such as assisting with Mr Rose and issuing a witness order for Mr Achi. And, as we have stated, Mr Rose's evidence was not directly about the allegations made by the claimant.

7. The respondent objected to any further delays. Mr Leach has conducted the hearing in a reasonable and cooperative fashion with the claimant's representative, even to the extent that he drafted the Scott Schedule from the claimant's further and better details. He is not a representative who has raised many objections when perhaps he could have done. For example, consenting to new allegations being heard when they were raised for the first time in the claimant's further and better particulars.

8. We now need to deal briefly with Mr Achi's situation. Mr Achi was the claimant's trade union representative. We were told that he was unwell and was off for three months on sick leave. Ms Daley told us that she disputed the respondent's notes of the disciplinary hearing and that Mr Achi had made his own notes. She did not have these notes herself. After phone calls it was established that Mr Achi was well enough to attend the hearing but was worried about the respondent stopping his sick pay if he did so. He had apparently attended a course the previous week and it was alleged that his sick pay was stopped as a result. Mr Otor-Osagie asked for a witness order for Mr Achi, it was granted, and Mr Achi gave his evidence to us.

9. Mr Stewart did not come to the Tribunal. He works for the respondent. We were told that he was afraid of losing his job if he came. We were given no details of why he might have such a fear, other than he had not been given overtime for a while and was now being offered it. The suggestion was being made that the respondent was attempting to stop Mr Stewart coming to give his evidence. The respondent told us that it had no problem with Mr Stewart attending and giving evidence for the claimant. We were also told that he was not working on either Monday or Tuesday mornings and could attend then. The tribunal told the claimant that the tribunal takes any allegation that a party might have tried to prevent a witness attending to give evidence very seriously but that we would need to hear evidence about such a complaint from Mr Stewart himself.

10. Mr Stewart has not attended. We have heard evidence from the claimant, Mr Timmins and Mr Achi for the claimant and from Mr Shaw, Mr Davies, Mr Probert, Mrs Wood and Mr Bourne for the respondent.

11. We had an agreed bundle of documents, which has been added to by documents being produced for the first time at the hearing (marked up as C1, R1 and R2).

Diary entries

12. In her cross examination the claimant referred to keeping a log of events, which she said Mr Achi had advised her to do after she complained to him about the respondent's conduct. We have now been provided with copies of extracts from her 2015 diary (pages 361-369 in the main bundle). We treat these entries with caution. They were only forthcoming after Mr Leach asked the claimant in cross examination if she had made complaints about Mr Shaw's and Mr Davies' actions at the time. The entries, purported to have been made at the time, precisely mirror the wording of the further details of the complaints the claimant makes to the tribunal. There are few other entries on surrounding days in the diary and those are of a mundane nature, such as visits by British Gas. The meetings with Mr Shaw on 26 November and 22 December were difficult meetings for Ms Daley, but there are no entries about them, other than she writes for 22 December: " contact AA for lessons. 5 x lessons to begin with will book more later if needs be."(361).

13. The claimant has not been clear about when she started making entries about incidents at work. We know from her evidence that she first contacted Mr Achi after an unsatisfactory meeting with Mr Davies in March 2016 to investigate her complaint about Mr Bourne. Mr Achi says he was first contacted when disciplinary action was being taken against the claimant. That was in February 2016 (152). Both dates are well after November and December 2015, and there are also entries for September 2015 (368-369). Although we recognise Mr Achi's recollection was not good, he is on sick leave and did not have an opportunity to check his paperwork, the time difference is a significant one. On having this discrepancy pointed out to her, Ms Daley's evidence became that she had contacted Mr Achi well before March 2016 and it was at an earlier date he had advised her to keep a log.

14. The conclusion of the tribunal is that we cannot rely on the diary entries as reliable. A diary is normally a self serving document but it can add weight to oral evidence if a note was made about an event on or about the date it occurred. We do not go as far as to say that all the entries are not genuine, as some of them clearly

are, such as the British Gas visits, but we do not place any reliance on the entries made in relation to the matters about which the claimant complains to us, for the reasons set out above. They are clearly duplications of what is in the further and better particulars, and we do not accept that they were written contemporaneously.

Driving test pass certificates

15. The claimant's evidence, in relation to obtaining a full UK Driving Licence, was that she had taken two driving tests: on 7 January 2016 at Coventry, and on 20 January 2016 at Wolverhampton. This matter is of relevance to the tribunal, both in terms of what the claimant told the respondent at the time and the claimant's credibility. At page 137, we see the pass certificate from Wolverhampton. It has the number Y140731 3 on it. We understand this to be a unique number to that pass certificate. This document is important as it not only evidences that someone has passed their driving test but it allows them to drive on a provisional licence as though it was a full licence, until their full driving licence is received.

16. The claimant told us that she had taken her driving test twice because she says Mr Shaw did not accept that the course she had done in Coventry (which we understand to be an intensive driving course run by a provider independent to DVSA) was valid. The claimant confirmed in an email to Mr Shaw dated 20 January 2016 (135) that she had passed her test on both dates, giving details her faults in each. She supplied a copy of her pass certificate for 20 January but not one for 7 January.

17. The respondent doubted that she had passed a driving test on 7 January and cross examined Ms Daley about it. Ms Daley told us that she had the original pass certificate for 7 January and would adduce it as evidence that she had passed her test on 7 January as well as 20 January. The tribunal struggled with the idea that anyone would take their driving test again after passing it and that if Ms Daley had a pass certificate for 7 January, all she needed to do was produce it to Mr Shaw to show him it was from DVSA and nothing to do with an independent driving school.

18. Despite being questioned about this, the claimant was adamant she had taken and passed her driving test twice and would produce the pass certificate from Coventry for 7 January. She did not produce the original certificate for that date. In the supplementary bundle at page 392, is a copy of a pass certificate which the claimant told us, under oath, was a true copy of the original. We were told that she could not find the original certificate but that this copy had been scanned from the original and sent as an attachment to an email to Mr Tolcher (her solicitor earlier on in proceedings). Before questioning Ms Daley further about this copy certificate, Mr Leach gave her an opportunity to retract or change her evidence about it. She did not do so and confirmed that page 392 was a copy of the certificate she had been given on 7 January.

19. The respondent had made enquiries of DVSA and put what it had been told in cross examination to Ms Daley. No objection was made to this by the claimant's representative and we understood that the claimant would make her own enquiries of DVSA to establish what the respondent had been told was correct. The information obtained by the respondent was that once someone has passed their driving test, they cannot take it again. DVSA records prevent this happening, in the unlikely circumstances that someone would want to do the test again after passing it.

Significantly, for us, each pass certificate has its own unique number. It is not related to the driver number, or to any other number in the test application process. The numbers ar not replicated at different test centres.

20. The copy certificate at page 392, ostensibly dated 7 January 2016 and completed by Examiner Singh in Coventry, has the same number as the certificate dated 20 January 2016 from Wolverhampton and completed by Examiner Dakin (137).

21. The only credible explanation, if these facts are correct, is that the document at page 392 is a tampered version of the pass certificate (137), a copy of which was provided to the respondent on 20 January 2016. The respondent indicated that it would obtain written confirmation from DVSA about what it had been told. We have not seen this during our deliberations, but the information has not been challenged by the claimant, nor do we have reason to doubt it. If it is incorrect, the tribunal will reconsider its decision. We simply do not know why the claimant has continued to insist that she passed her driving test twice.

22. The tribunal has reminded itself that just because the claimant's evidence about this matter and the diary entries is unreliable, it does not follow that she is not being honest in other areas of her evidence. Unfortunately, as our findings of fact show, other evidence given by Ms Daley has not been credible. That said, we have accepted her evidence about a number of matters and have not concluded we should disbelieve her evidence in its entirety because of one falsified document, subsequently written diary entries and other less than credible evidence she has given.

Findings of Fact

We make our findings of fact on the basis of the material before us taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. We have resolved such conflicts of evidence as arose on balance of probabilities. We have taken into account our assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts.

23. The claimant was employed from 2 November 2014 to 13 May 2016 as a Security Officer. She is of Jamaican nationality with the right to live and work in the UK. She describes herself as black African Caribbean of Jamaican origin. She has worked in the UK since 2005 and driven on a full Jamaican driving licence for much of that time. We have heard a considerable amount of evidence about the driving licence position, we deal with it in these findings in relation to meetings the claimant had with her managers about her driving licence and what they knew about it at the time, rather than what we know about it now.

24. It is alleged by the claimant that on 23 September 2015 she was in Mr Shaw's office when he contacted HR to request her visa number and when he had obtained this, he rang the Home Office to enquire about her immigration status without her consent. She tells us that the Home Office would not speak to him but to go through HR. Ms Daley says there was no need for Mr Shaw to get her visa number as she herself obtained it when she completed the SIA form with Karl a few days later.

25. Mr Shaw denies raising the matter about the claimant's immigration status, obtaining the visa number or calling the Home Office. He told the tribunal that this simply did not happen. He told us that there were issues about the claimant's immigration status at the end of 2014 – beginning of 2015 (93-96) but these were dealt with by Ms Gooch in HR. We can appreciate why the claimant felt strongly about this matter as the respondent was initially attempting to make her contract conditional upon her Right to Remain in circumstances where it should not have done so. However, we find that this had nothing to do with Mr Shaw and accept his evidence, which was not effectively challenged, about 23 September. Furthermore, it was not his role to make such enquiries as that was the job of HR. We believe the claimant may have become confused about this and was referring back to her earlier communications with Ms Gooch.

26. Ms Daley alleges that on 24 September 2015, Mr Shaw told her that he was re-checking her passport and visa documents because he knows: " Jamaicans are always fraudulent and given to troublemaking". Mr Shaw denies re-checking the claimant's passport and visa or making the comment as alleged. Although this allegation is in the claimant's List of Allegations, it is not in her Claim Form (ET1). She explained this by telling us she had run out of space on the form. We do not accept this. Page 13, the details of claim, is a third full and page 14, where additional details can be provided, is blank. We also understand that the ET1 was completed by her then solicitor, Mr Tolcher.

27. Ms Daley says that Mr Shaw often made racist remarks in meetings about Jamaicans being illegal immigrants, working illegally in the UK, and being fraudsters and troublemakers. Other than the generalised allegations contained in paragraphs 50 -51 of her witness statement, the only actual example given by the claimant of such comments is her evidence about the meeting on 24 September. On the balance of probability, we do not accept that Mr Shaw did make such comments. We do so for the following reasons.

28. Mr Shaw's evidence that he made no such comments, either at a meeting or generally was not challenged. The claimant was inconsistent about what had been said and how often. Thirdly, she did not make a complaint at the time to HR. She says that she told HR and her union representative and that HR did not get back to her. We find this inherently implausible. If such a serious complaint had been made, we believe it would have been taken seriously by HR. Ms Daley also says that Mr Achi spoke to Mr Probert and Stephanie Harris in HR. Mr Achi cannot recall talking to HR about it in his cross examination, but accepted that if a manager had made such comments he would have dealt with the matter very seriously and would have raised it with HR. A complaint of racial abuse is not made in her formal grievance about Mr Shaw on 10 March 2016. Further, we do not place any reliance on the diary entry we have seen for that date at page 369, for the reasons we give earlier.

29. It is alleged on the same date, 24 September 2015, Mr Shaw called the Jamaican High Commission to enquire if the claimant had a criminal conviction in Jamaica. Mr Shaw denies doing so. However, Mr Shaw did contact the Jamaican High Commission after seeing the claimant on 22 December 2015. This was not to enquire about the claimant personally, but to check whether they could assist with information in respect of Jamaicans driving in the UK. He wanted to know what advice they would give a Jamaican citizen who contacted them about doing so. This phone call was three months later than the claimant alleges and was not about her

having a criminal record. Again we accept Mr Shaw's evidence, it is consistent with enquiries he was making at that time, but find that the claimant was simply confused about when Mr Shaw made the call in her recollection of events. There was a call by him to the Jamaican High Commission but not when the claimant says and not about what she alleges.

30. In the autumn of 2015 the respondent was restructuring its security services. Instead of being based on one site, security officers were going to be mobile and required to travel between sites. This could involve using the respondent's pool vehicle to do so. It was recognised that whilst it had not been a requirement to have a full driving licence previously, security officers would now be required to have them.

31. The claimant attended a "match and slot" meeting on 28 September 2015 for a new role as a security officer. We see at page 97, Mr Probert recorded that she had a driving licence. It does not say "full UK driving licence" and he cannot be sure, despite what Mr Shaw says, that she was asked about having a full UK driving licence. On the same day, she had completed an SIA application with Carl (105) and stated in that that she did not hold a full UK driving licence.

32. There has been much confusion around what the claimant had told the respondent about her driving licence and what she believed to be the situation at the time, but we accept that at that point when she said she had a driving licence she was referring to her full Jamaican driving licence. In September 2015, the claimant believed that she could drive on her Jamaican driving licence in the UK. When she answered questions about having a driving licence she was referring to that licence. If she was asked, as she was on the SIA form, whether she had a UK driving licence she replied "no" (106). We found her evidence about this to be credible. Again, on her job application for the post, she stated that she had a full driving licence but had meant her Jamaican driving licence. The claimant told us that she did have a UK provisional licence then but had not relied on it for driving, as she believed she did not need to do so, but for ID purposes.

33. Following the "match and slot" exercise, all security employees who now needed full UK driving licences were asked to produce their driving licences to Mr Davies. The claimant did not do so immediately. We know that a number of employees did not hold a full driving licence. Mr Kempson, another security officer, held a provisional licence only. The claimant tells us that he was driving cars unaccompanied but the respondent was only aware of him riding a motorcycle. We have seen a copy of his driving status at page 1 of R2. We understand that he drove a small motorcycle which he was entitled to do on a provisional licence. Mr Kempson was required to get a full UK driving licence to continue in his role, and despite health issues making it hard for him to pass the theory test he eventually did so. There were two other security officers without full driving licences: Mr Rose, who was given £250 to help him obtain his by the respondent, and Mr Summers.

34. Mr Summers had started work at the same time as the claimant, had told the respondent he had a provisional licence and was given 12 months to get his full UK driving licence. The claimant was not given that period or helped with passing her test, but then she had not told the respondent that she only had a provisional licence. Her position was that she had a full driving licence and was entitled to drive in the UK. It is clear to us that if the claimant had said early on that she only held a

provisional licence, as the other security officers had done, she would also have been given time and, if she had needed it, financial help to obtain a full UK driving licence.

35. We deal with Mr Summers as the comparator in relation to another allegation. He is white British. The claimant says that at the start of their employment (and this I think is allegation 22 in the amended list), that she was treated less favourably than Mr Summers in respect of the training she received from Mr Wharton. The respondent denies this. It agrees that the two were treated differently but this was because Mr Summers had been an agency worker and already working there when he became a permanent employee. As a result, he needed different training to the claimant who had to go through induction and more basic training. The respondent says that Mr Summers is not an appropriate comparator as he was not in similar circumstances to the claimant. We accept that and further note that the reason the claimant was treated differently related to her new employee status and experience with the respondent rather than her nationality or race.

36. In any event this complaint is well out of time and is unrelated to later events around the driving licence issue and the claimant's dismissal. We have seen some training records for the claimant (at pages 328-330 and 334-348) of probationary meetings and feedback. The claimant cast doubt on the authenticity of these but they have her signature on them. We have no reason to believe that she did not have the same training as Mr Summers, perhaps just at a different time to him. Furthermore, we have not been told by the claimant precisely what it was that Mr Summers was given by way of training which she was denied.

37. Which brings us on now to the issues around the production of the driving licence. Between being told she had to produce her driving licence and the meeting with Mr Shaw on 26 November, two months elapsed. The claimant was asked on several occasions to produce her driving licence. Mr Shaw set out the attempts to obtain a copy of the driving licence in his report to the disciplinary panel at pages 323-327, which he went through at the disciplinary hearing (208-209). The claimant had been sent a copy of the documents for the disciplinary hearing on 12 February 2016 (152-153). Mr Shaw also set out the reasons given by Ms Daley for not doing producing her licence; namely that her driving licence was in storage and not available; she was too unwell to find it; or that her husband needed to help her find it and he was in Jamaica. Deadlines on which the claimant said she would find it by had been missed.

38. A very strange reason given, which we do not fully understand even now, was that the claimant had said her driving licence had been suspended because of an eye condition. What we do know is that the claimant had an appointment at the Eye Hospital on 6 November 2015 and would not be able to drive that afternoon after having had eye drops put in. We do not see where the idea came from that she was suspended from driving, other than from the claimant herself, as an excuse for not producing her driving licence. She denies saying this and says all she told Mr Davies was that she could not drive for a short period. However, the respondent clearly held the view that the claimant's driving licence had been suspended.

39. The claimant's case is that Mr Shaw rang the Eye Hospital to find out about her condition. On her own case, why would he have done so if the managers had been told she was unable to drive for a short period only? We do not accept this

evidence. Mr Shaw denies having done so and it is improbable that he would have done so. The fact is the respondent believed the claimant was saying her driving licence was suspended in order to explain why she was unable to produce it.

40. The respondent, by 26 November, had a number of excuses as to why it had not seen the claimant's driving licence. Mr Shaw decided the situation could not continue and held a meeting with Ms Daley on her return from sick leave. Whilst we do not consider his record to be an entirely accurate one in relation to what the claimant was saying about her driving licence, namely she was representing that she had a full UK driving licence. In fact she had not been asked about a UK driving licence directly and believed her Jamaican driving licence was the equivalent to having a dull UK driving licence. Irrespective of this, the fact is she had not produced any driving licence by 26 November, whether UK or Jamaican, and had given a number of reasons which Mr Shaw felt were not reliable excuses.

41. At the meeting on 26 November, Mr Shaw and Ms Daley went online to the DVLA website. They did a status check and it was established that the claimant's UK licence was a provisional one. There can have been no doubt that the claimant at this meeting knew what her UK driving licence status was. It was at this meeting the claimant told Mr Shaw that her Jamaican driving licence would be converted into a full UK driving licence on 7 December 2015.

42. After the meeting Mr Shaw made further general enquiries of DVLA. He found out that Jamaican residents had a 12 months' grace period after arrival in the UK to drive on their Jamaican driving licence, but after that they must take a UK test and obtain a full UK driving licence. If the test is not passed after 12 months, a Jamaican citizen had the equivalent of a provisional licence and would be restricted to the conditions of such: driving with "L" plates and having to be accompanied. When this was put to Ms Daley, she said that she had been back to Jamaica, so the 12 month period would be reset. Mr Shaw checked the 12 month reset point with DVLA and was told that this was not the case. He believed that the claimant had been driving unaccompanied.

43. By the time of the meeting on 22 December, the claimant's driving licence had still not been produced, nor had the Jamaican driving licence been converted to a full UK licence on 7 December. Prior to this meeting, the claimant said that she was attending a driving course. Mr Shaw doubted this course, but in fact it was an intensive driving course prior to taking the driving test. This is perhaps where the claimant formed the view that Mr Shaw would not accept her Coventry driving test result as she thought he would link it to this course.

44. At the meeting on 22 December, they rang DVLA on speakerphone. DVLA repeated the advice that Mr Shaw had already received: that the claimant had a year from arrival in the UK, after which she had to get a full UK driving licence or drive under the conditions of a provisional licence. When Ms Daley told DVLA that she regularly returned to Jamaica, she was informed she was not legal to drive under the grace period now and could only drive as restricted under UK regulations, effectively as a learner driver on a provisional licence.

45. There is no doubt that by the end of this meeting, if there had been any doubts prior to this, Ms Daley knew she should not be driving unaccompanied and without "L" plates. Despite this, the claimant says that after the meeting she visited

Steelhouse Lane Police Station and was told she could carry on driving, but to get her licence sorted out to be on the safe side. We found this evidence unbelievable, in the light of what the DVLA had told her when Mr Shaw and she had jointly rung them.

46. On 2 January 2016 the claimant, driving to work on her own (see page 216), had an accident. We deal with the actual disciplinary hearing later, but the minutes of it tie in with the allegation that employees gave false statements (allegation 16) so we deal with issues arising from the minutes now. The claimant says that the minutes of the disciplinary hearing are not accurate and that Mr Achi's own notes would show this to be the case. They have not been shown to us. We see that the minutes were taken by a note taker from HR, not someone directly involved in the conduct of the meeting. They are detailed notes, including recording Mr Shaw's somewhat intemperate remarks on occasion (pages 206-207). If the notes had been doctored, we would have expected those comments not to be there. In the absence of evidence casting doubt on the accuracy of the notes, we accept them as a record of what was discussed at the hearing. In the disciplinary hearing the claimant maintained two inconsistent arguments. One is that she did know she should not have been driving and had got her uncle to drive the car, but then stated that she thought she could drive here. She also said that she took her test on 7 January.

47. In cross examination, the Tribunal warned the claimant about being careful with her answers so as to not to incriminate herself. In fact, it is not relevant to us whether she was driving alone on 2 January 2016, or illegally, it was what was in the minds of the respondents' managers who heard the disciplinary hearing and made the decision to dismiss which matters.

48. The claimant alleges that employees gave false statements about her in early January 2016. We have seen emails from Mr Czerepaninec, Mr Kempson and Mr Wharton at pages 131, 132 and 133. They were asked for by Mr Davies in order to establish what had occurred that weekend. We cannot see how these are false statements. They simply set out that the claimant drove her car herself that day (Mr Kempson) and Mr Wharton describes the events after the claimant drove in on 2 January. Mr Czerepaninec's statement is about what he saw on 3 January when the claimant was unwell and went home. The claimant says that Mr Wharton got the details of the damage to her car wrong but she did not challenge Mr Kempson's very relevant evidence that she had driven herself that day. We do not need to go into further details about the accident. However, we note from the disciplinary hearing notes that the claimant says Mr Wharton's evidence was incorrect as she was on the passenger side of the car and was injured (212), but in the disciplinary hearing the claimant accepted that she was driving that day (216). The Tribunal has struggled with the claimant's evidence about this, as it changes. It appears that that was the situation at the disciplinary hearing itself.

49. On pages 144-146 the claimant sent a statement to Mr Shaw and Mr Davies about events on 16 - 17 January 2016. We do not need to explore the circumstances around these complaints as it is not relevant for us to do so, but the claimant was essentially complaining about colleagues and their conduct towards her. On page 145 she states:

> "I strongly believe that Mr Amarjit Kaur and David Bourne do not accept the fact that a woman can do the job they are doing or better, hence their best efforts to tarnish my excellent reputation and work ethics."

Mr Bourne's evidence about the incident on 16 January is that whilst the claimant did overhear them talking about her across the intercom, it arose because Mr Kaul found Ms Daley difficult to manage and wanted advice. Mr Kaul was struggling to supervise her because of what he saw as her lack of respect for him and behaviour. Mr Bourne says it was a mistake that the 'on' switch had been left on while they discussed the matter and there was no intention to make a spectacle of the claimant. He denies that there was a suggestion made to fabricate evidence to stop her becoming a supervisor. In view of our findings on the claimant's credibility, the fact that his evidence was not successfully challenged and he accepts the incident occurred, other than in relation to the fabrication of evidence allegation, we accept his evidence about this. The reason for talking about the claimant was Mr Kaul's request for advice in managing challenging behaviours from the claimant. These are reflected in emails at pages 139-140, 142 and 147. A further complaint from the claimant is that she later asked Mr Shaw to preserve CCTV of this incident (180) and this was not done. Mr Shaw's evidence to us was that even if it had been kept, it would not have helped as it did not record sound and this was a conversation which is accepted as having taken place.

50. Events had occurred about which the claimant was upset. In fact Mr Davies did deal with them, out of which it became clear, in his view, that the claimant was not blameless (as we see on pages 139-140). There had been an earlier incident with Mr Bourne (page 124) about which the claimant had made a complaint to Mr Shaw. It was not a formal grievance. He referred it to Mr Davies. The complaint Ms Daley makes about this is that this complaint was never investigated and that she was told by Mr Shaw to withdraw her complaint or he would make her life hell. In fact due to holidays and illness absences it had been difficult for Mr Davies to deal with the complaint (151). There had been a meeting with him initially but as the claimant felt Mr Bourne was in the same room, she had no confidence in it being dealt with by Mr Davies and wanted trade union representation. There has been some confusion before us as Mr Davies deals with the matter in his witness statement and refers to pages 139-140. In fact those pages do not deal with the complaint about Mr Bourne and he accepted this.

51. Mr Shaw denies telling the claimant that if she did not withdraw her complaint about Mr Bourne he would make her life hell. A later allegation made by Ms Daley is that he told her that if she did so, she would get the supervisor's job. This is denied by the respondent. We accept Mr Shaw's evidence about this. By now, the claimant was facing disciplinary action. Furthermore, it was not within his gift to promote. The respondent follows its recruitment procedures, with people having to apply for roles and going through a competitive interview process. The claimant says her concern was that Mr Davies did not investigate her complaint due to Mr Shaw's discriminatory attitude towards her and his influence on Mr Davies. She then told us that Mr Shaw had told her to drop it because Mr Shaw owed Mr Bourne for something and, as she put it: "if you complained about Mr Bourne, Mr Shaw came back at you". If that is the claimant's case, it is hard to see how this was discriminatory as the reason for her treatment would then be that Mr Bourne was being protected by Mr Shaw for another reason. Mr Bourne himself is black and of Caribbean origin.

52. After the events leading up to January over the driving licence and the accident on 2 January 2016, a decision was taken by the respondent to carry out a disciplinary investigation. Mr Shaw carried out the investigation but the decision to take it to the disciplinary stage was not made by him but by the director of the department, in accordance with the respondent's procedures, Mrs Wood. She and Mr Probert progressed it to disciplinary action. It was not the decision of Mr Shaw to do so.

53. The claimant was invited to a disciplinary hearing as we see on pages 152-153. This sets out the allegations around her driving licence and driving in contravention of health and safety rules. It is dated 12 February 2016. It enclosed all the evidence to which we have been taken. The hearing did not take place until 13 May. In the meantime on 10 March the claimant raised a formal grievance about Mr Shaw, which we see at page 166. She complains of discrimination, victimisation, unfair conduct and not making any investigation into her complaint of bullying by Mr Bourne. She complains about Mr Shaw using the disciplinary procedures against her in order to prevent her progressing in the department. She complains about other applicants getting help from Mr Bourne, we understand that initially referred to Lucy Stanyer (166), to better prepare for a supervisory position. Subsequently, the contention became that it was Mr Dhillon who was assisted. In the course of this hearing, we were told that Mr Shaw offered her the job if she dropped her complaint about Mr Bourne.

54. An allegation is made that this grievance has not been dealt with by the respondent (allegations 11 and 21). In fact, Jennifer Wood did deal with it as we see at pages 171-172. She had investigated and explained that Mr Shaw had passed the earlier complaint about Mr Bourne on to Mr Davies. In respect of Mr Shaw using the disciplinary procedure against the claimant, Mrs Wood says that this could be dealt with at the disciplinary hearing. She did not fully understand the complaint in relation to the supervisor's position and suggested that the claimant obtain feedback as to why she had not progressed in the recruitment process. The claimant says that she did not get the letter sent on 24 March. She did not chase up to see if Mrs Wood had dealt with her grievance. It appears it may simply have been lost in the post. It was sent to the Great Barr address and not the Newtown one.

55. The disciplinary hearing took place on 13 May. We see the notes at pages 200-218. It was conducted by Mr Twine and Mrs Wood. The claimant made a number of admissions during the disciplinary hearing after Mr Shaw had presented the management case. Whilst he made a number of statements which might be seen as him not being impartial, his frustration with the claimant over the driving licence issue was apparent. However, he was not the decision maker at this hearing. At one point Mr Twine had to remind Mr Shaw that it was the panel's job to make decisions (207).

56. The outcome of the disciplinary hearing was to uphold the allegation that the claimant had deliberately misled Mr Shaw and Mr Davies about her driving licence. The managers based their decision on the evidence of Mr Shaw that the claimant had been repeatedly asked for her driving licence and given various and inconsistent explanations for not doing so. They concluded that she had been attempting to mislead the university with regard to her driving licence status. They decided that this was serious as she was a security officer and had to be trustworthy and honest in

that role. They did not find that the claimant had deliberately falsified records and did not uphold that allegation.

57. In respect of the infringement of health and safety rules they found that the claimant had been clearly told on 22 December by DVLA that she was driving on a provisional licence. They had evidence that she had driven herself on 2 January from two witnesses, and the claimant herself had admitted doing so at the disciplinary hearing. They concluded on the evidence before them that the claimant had been driving illegally and had come to work on 2 January driving on her own. As her role now required her to drive as part of her duties, they considered this to be serious. They were also concerned that she had not disclosed her dealings with the police and the court, which she had told them about during the disciplinary hearing. They felt it was important for a security officer to give full disclosure of such matters to her employer. They were also aware that if Mr Shaw had allowed the claimant to drive when she was not qualified to do so, it could have had serious repercussions for him and the respondent had there been an accident. They decided to dismiss the claimant summarily for gross misconduct. She was given a right of appeal. The letter setting out the findings and the conclusions is at pages 219-221.

58. The claimant did appeal the decision as we see at pages 222-223. Although initial steps were taken to progress the appeal (pages 224-227) the respondent considered it needed clarification from Ms Daley as to which grounds she was appealing under. On page 228 we see a letter from Ms Towns written to the claimant setting out what the grounds for an appeal were, and asking her if there was any new evidence, which was to be sent to the respondent by 11 July, after which the respondent would consider the matter closed. At page 229 we see it recorded that the claimant had not responded to Ms Towns' letter and the appeal would not continue and a replacement was to be found for the claimant's position.

59. The claimant says that she did not receive this letter and she believes it was never sent. Her reason for saying this is that it did not have the University 'header' on it. It was pointed out to the claimant that being a copy of the letter sent could explain that. However, the letter was sent to the claimant's Newtown address (the address HR had been given on her job application form (95)), and not the Great Barr address which the claimant had confirmed as her correct address at the disciplinary hearing. The respondent accepts that it was incorrectly addressed. Her letter of appeal gave no address as it was emailed. It is therefore highly likely that the claimant did not get this letter from Ms Towns. The respondent had sent the dismissal outcome letter on 13 May to the Great Barr address, but the letter seeking more information about the appeal went to the Newtown address. It seems that using this address was a mistake by Ms Towns, relying on HR records. We note that as late as the end of February the respondent was using the New Town address and there is also an Erdington address for her (168). What we are looking at is the respondent's motivation. There is simply no evidence that this was a deliberate attempt to refuse her an appeal because of her race or nationality. The reasons were that it either went to the wrong address, the claimant was not made aware of it having arrived (she still had a link to the house – only having moved out on a temporary basis (175)), or it was not delivered at all by the Post Office. None of these reasons relate to the claimant's race or nationality.

60. The tribunal has heard considerably more evidence than we have made findings of fact about, particularly in relation to the driving licence. It is also the case

that the claimant introduced new matters in her cross examination, which Mr Leach has had to deal with. In order to control this hearing, we have confined ourselves to making findings of fact relevant to the agreed issues and the claimant's List of Allegations, as updated.

The Law

61. We did not reproduce the law or the full and detailed submissions we took into account, in our oral judgment. Nor are we listing the cases each party referred us to in their submissions. We make reference to them where appropriate to do so. The statutory provisions applicable in this case are:

Direct Discrimination

61.1. Section 13 Equality Act 2010 provides that a person (A) discriminates against a person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. The provisions protecting those in employment are contained in section 39 in the Act.

61.2 The identified protective characteristic here is race/nationality.

61.3 Section 136 contains the burden of proof provisions namely that if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the tribunal must hold that the contravention occurred.

61.4 In Igen Ltd V Wong 2005 EWCA Civ 142 the Court of Appeal considered and amended the guidance contained in Barton v Henderson Crosthwaite Securities Ltd 2003 IRLR 332 on how to apply the previous provisions concerning the burden of proof. These cases set out the principles to be applied by tribunal and became known as the shifting of the burden of proof test. In Igen, the Court of Appeal held that s.63A of the Sex Discrimination Act 1975 demanded a 2-stage test to prove direct discrimination -

1. It was for a claimant to establish facts from which the tribunal could conclude that an act of unlawful discrimination had taken place, in the absence of an explanation by the respondent;
2. Once those facts were established it was for the respondent to prove that discrimination did not take place.

It was for the claimant to establish a prima facie case and only once this was done must the respondent prove that there was no unlawful discrimination. It had been thought that the Equality Act 2010 also applied this test to all direct discrimination claims.

61.5 However, the current position in relation to the burden of proof under the Equality Act is to be found in the recent case of Efobi v Royal Mail Group Ltd UKEAT/023/16/DA. This establishes that the two stage approach set out above, requiring the claimant to establish a prima facie case, was incorrect. The wording of section 136 of the Equality Act 2010 is, in the EAT's view, significantly different to that of antecedent discrimination legislation. It held there was no requirement on a

claimant under s. 136 to establish a prima facie case of discrimination. The tribunal has to consider whether there are "*facts from which the court could decide, in the absence of any other explanation, that a person (A) has contravened the provision concerned…*" (para 78). S136(2) Equality Act 2010 refers only to the need for there to "***be facts***"- not to which party must prove those facts.

61.6 Bearing in mind this change in how tribunals should approach a discrimination claim, The tribunal has applied the guidance offered by the Court of Appeal in Madarassy v Normura 2007 IRLR 246 CA., in the light of the Efobi judgment. We do not consider that Efobi alters the position that a difference in treatment and a difference in race, without more, is sufficient to support an inference of unlawful discrimination. We also consider that our focus must be on the respondent's reason for the treatment whether conscious or subconscious.

Victimisation

61.7. Section 27 Equality Act 2010 provides that a person (A) victimises another person (B) if A subjects B to a detriment because

(a) B does a protected act or
(b) A believes B has done or may do a protected act

61.8. The Supreme Court (then the House of Lords) in Derbyshire and ors v St Helen's MBC and ors (2007) ICR 841 HL had articulated a 3 stage test under the pre-Equality Act legislation which included the element of less favourable treatment. That element does not appear in the Equality Act. The test can accordingly be adapted by posing the following questions:

(i) did the alleged victimisation arise in any of the prohibited circumstances covered by the Act
(ii) If so, did the employer subject the employee to a detriment?
(iii) If so, was the employee subjected to a detriment because he had done a protected act?

The question to be answered is whether the protected act materially (in the sense of more than trivially) influenced the actions of the employer.

Harassment

61.9 Section 26 Equality Act 2010 provides

(1) A person (A) harasses another (B) if-
(a) A engages in unwanted conduct related to the relevant protected characteristics and
(b) the conduct has the purpose or effect of -
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B

(2) A also harasses B if-
(a) A engages in unwanted behaviour of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1) (b).

(4) In deciding whether conduct has the effect referred to in subsection (1) (b) each of the following must be taken into account-

(a) the perception of B
(b) the other circumstances of the case
(c) whether it is reasonable for the conduct to have that effect.

……

61.10 The concept of harassment under the previous equality legislation was the subject of judicial interpretation and guidance by Mr Justice Underhill (as he then was) in Richmond Pharmacology and Dhaliwal 2009 IRLR 336. The tribunal has applied that guidance, namely:

"There are three elements of liability (i) whether the employer engaged in unwanted conduct; (ii) whether the conduct either had (a) the purpose or (b) the effect of either violating the claimant's dignity or creating an adverse environment for her; and (iii) whether the conduct was on the grounds of the claimant's race (or ethnic or national origins)."

The judgment goes into some detail as to the interpretation of each element. We have considered that guidance in reaching our decision in this Claim.

Conclusions

62. We decided to follow the updated list of allegations that had been agreed as the ones for the Tribunal to consider, in line with our findings of fact. The problem for the Tribunal is that this case has not been put to us in a chronological sequence in the list of allegations, and on occasions the Tribunal has struggled to understand precisely what those allegations are. The claimant has also sought, when giving evidence, to alter the allegations or to bring new ones to those set out in her original list. However, the Tribunal has confined itself to the list as agreed and amended between the parties and marked 'List of Claimant's Allegations – Updated'.

63. First, we deal with allegations 1, 2, 3 and 4. The first 3 relate to the actions Mr Shaw is alleged to have taken (on 23 and 24 September 2015) in relation to the visa number, passport and the comment about Jamaicans being "always fraudulent and given to troublemaking". The 4th allegation is a generalised one about racist treatment by Mr Shaw and his collaborators, other white male employees, referring to her as illegally working and living in the UK. The claimant submits that these allegations are of direct discrimination and harassment. If such overt racially derogatory comments had been made, they would certainly amount to harassment and this is recognised by the respondent. As our findings of fact show, we do not find that Mr Shaw did make such comments. There was no evidence about who else was alleged to have referred to the claimant as being illegally living and working in the UK; no evidence was given to us about what precisely had been said and when. When questioned about this, the claimant said this was more about a lack of confidentiality, rather than people talking about her living her and working illegally. As we have already found in respect of Mr Shaw's actions in September, we simply do not accept that events occurred as the claimant has alleged.

64. In respect of allegation 5, this is about Mr Shaw and Mr Davies not investigating Ms Daly's complaint of 4 October 2015 about Mr Bourne. Mr Shaw passed it on to Mr Davies to deal with. A combination of holidays, sickness absence and Ms Daley wanting union representation meant it did not get taken further. The claimant says this was an act of direct discrimination and harassment. There is no evidence at all that Mr Davies failed to deal with it because of the claimant's race or nationality. The reasons why it was not dealt with are, in part, down to the claimant discontinuing the process Mr Davies started at the meeting with her. There has been no evidence that the claimant, having obtained union representation, went back to Mr Davies about reconvening their meeting. The Tribunal notes that the matter might have been better handled by him but there is simply no evidence that his motivation not to investigate was because of Ms Daley's race or nationality, or facts from which we could infer that this was the case.

65. In relation to allegation 6, this is out of chronological order. However, it is about comments allegedly made by Mr Shaw in March 2016; that Mr Shaw demanded she drop the complaint against Mr Bourne or he would make her life hell and, added later, she could have the supervisor's job if she did so. As our findings of fact show, we accept Mr Shaw's evidence that neither comment was made. Further, it is simply not credible that in March 2016, when the claimant was facing disciplinary action, he would have considered her outside the recruitment process for a supervisor's job. We deal with this matter further on as well as it comes up in a later allegation.

66. In respect of allegation 7, as our findings of fact show, we do not accept that Mr Shaw did telephone the Eye Hospital to enquire about the claimant's eye condition.

67. Allegation 8 relates to a false statement obtained from Stefan. In evidence, this was widened to include other employees' statements. All they had done was to provide evidence about what they had seen in early January after being asked to do so by Mr Davies. As a result of Mr Davies wanting to know whether the claimant had driven when not qualified to do so and how injured she had been. This was the reason for asking for the statements. It was to find out what had happened on 2 January following the claimant's car accident. There is no evidence that they were false statements or that Mr Shaw and Mr Davies had asked for untrue information. The statements recorded events as witnessed by other employees at the time.

68. In relation to allegation 9, this relates to the conversation overheard by the claimant between Mr Bourne and Mr Kaul. The claimant initially made an allegation of sex discrimination, not race discrimination, as we see at page 145. Mr Bourne's evidence about this incident is that whilst the claimant did overhear them talking it arose because Mr Kaul found Ms Daley difficult to manage and wanted advice. There is sufficient evidence to support that that was the reason why they had been talking about her. It was not because of her race or nationality. We have not accepted the claimant's evidence that they were pleading with team members to make statements to prevent her becoming a superviser.

69. Allegation 10 goes back to the investigation by Mr Davies, and what we have concluded at allegation 5. The first meeting was effectively cut short by the claimant, then holidays and sick leave intervened. In relation to her complaint about the overheard conversation between Mr Bourne and Mr Kaul, the emails at pages 180-

191 show that Mr Shaw and Mr Davies made attempts to deal with it. However, this is not in the list of allegations and we go no further.

70. In relation to allegation 11, Mrs Wood did understand what the complaint was about, except for the reference to the superviser position. It is clear that whilst Ms Daley may not have been happy with what Mrs Wood did, there is no doubt that Mrs Wood dealt with the grievance and told the claimant she would take no further action. The claimant says that she did not get the response. She did not chase up to see if Mrs Wood had dealt with it. Furthermore, even if she had not received the letter it is hard to see how this is a complaint of race discrimination. There was no detriment to the claimant, let alone because of her race or nationality.

71. In relation to allegation 12, Mr Probert's evidence was that he sent everything as listed on pages 152-153. There is simply no evidence that he ignored any request. The disciplinary hearing was put back as it seemed there had been problems with the claimant receiving the letter and documents, again linked to her address (192). In any event, this specific allegation was not found proven by the disciplinary panel, it played no part in the decision to dismiss and there was no detriment to the claimant.

72. Turning now to allegation 13, this relates to the failure to preserve the CCTV footage. As our findings show, it would have been no use. There was no detriment to the claimant from this failure. Further, we have had no explanation as to how this amounted to direct discrimination or harassment.

73. Allegation 14 relates to the claimant's belief that Mr Shaw was not progressing her complaint about Mr Bourne and he was focussed on her disciplinary investigation. This part of the complaint is really about Mr Davies, to whom Mr Shaw had delegated looking into the complaint. At the risk of repeating ourselves, Mr Davies had made efforts to meet with the claimant. In any event the Tribunal struggles to see how the claimant says this was an act of direct discrimination or harassment. There is simply no evidence that this amounted to an act of harassment or less favourable treatment, or that Mr Davies' motivation for acting as he did was because the claimant is Jamaican or black. Mr Davies did not do a great deal and there was confusion about this matter, but as the correspondence shows efforts were being made to meet with Ms Daley and resolve her complaints, as we see at pages 180 - 191.

74. We understand that allegation 15 to be about Mr Shaw's alleged attempt to force the claimant to withdraw her allegation about Mr Bourne. It is a reiteration of the complaints already dealt with under allegations 5, 6, and 10. However, no further evidence has been given about what this bullying and the hostile tactics referred to were, other than the allegation that Mr Shaw put her under pressure to withdraw her claim against Mr Bourne or he would make her life hell. In response to a question about what she meant by this allegation, Ms Daley told us that Mr Shaw had taken her into his office and told her he would drop the disciplinary action against her if she withdrew the complaints about Mr Bourne. This was a completely new allegation, and not one the tribunal found credible. We formed the view, having heard and seen the claimant give evidence that, on occasion, she says what comes into her head at that moment rather than recounting a genuine recollection.

75. Turning now to allegation 16, the claimant confirms that this is a reference to the statements obtained prior to the disciplinary investigation from Stefan, Mr Kempson and Mr Wharton. What Mr Shaw did as an investigatory officer was looked at by the disciplinary panel which, as we know, when they felt Mr Shaw was out of order, corrected him. Whilst he might have expressed his frustrations about the driving licence matter, the panel was impartial and independent of Mr Shaw, as the notes indicate. Mr Shaw did not obtain false statements. In effect, what the statements did was to confirm what the claimant had admitted and the panel found proven. She had driven into work on her own that day. No complaint can continue about that matter. The statements were not false.

76. In relation to allegation 17, this relates to our findings that these were matters dealt with early on by Ms Gooch earlier in the year and not Mr Shaw. The facts do not support what the claimant alleges.

77. In relation to allegation 18, in cross examination the claimant accepted that she had been put on light duties so no complaint can continue about that. This therefore relates only to the allegation she was being monitored on the CCTV. The respondent does not accept that it did monitor the claimant but Mr Davies says that if she had been occasionally watched on the CCTV, it was simply to find out where she was as she had a habit of not answering her calls. We have seen evidence about her being reprimanded for this by Mr Davies (pages 140 and 147). There has been no other evidence of the claimant being unjustifiably monitored.

78. Which brings us on to allegation 19 – the funeral of Mr Gill. We have not dealt with this in our findings of fact, but do so here. When cross examined, Ms Daley did not disagree with much Mr Leach put to her about this, other than she was not given the same opportunity as Mr Khelly had been and other employees got paid when they attended the funeral. She was unable to tell us who, apart from Mr Khelly, they were. Mr Davies gave us cogent evidence about that day. Four employees attended. Two were not on work days. Mr A Khelly was very close to Mr Gill. It was described as akin to a father/son relationship. He had been given the day off on compassionate grounds. The claimant had not booked time off. She went to the funeral in the morning and was due to start work at 1.30pm. Her comparator must be Mr Khelly, but he was not in similar circumstances. She accepted in her cross examination that Mr Khelly was like a son to Mr Gill. She knew Mr Gill but was not close to him. He had been a caretaker so they had not worked directly together. The reason for the claimant's treatment was that she had not booked time off. She went to the funeral in the morning and was expected to turn up for work in the afternoon. Looking at the reason for the different treatment; it was because Mr Khelly had been granted time off on compassionate grounds due to his close relationship to Mr Gill. It is a reason untainted by discrimination.

79. In relation to allegation 20, as our findings show, the claimant was not dismissed for driving on a provisional licence. She was disciplined and dismissed for giving unacceptable reasons for the delay in producing her driving licence, misleading the respondent about her driving licence status, and for breaching health and safety by driving illegally. Her named comparators are not suitable or appropriate as they were not in the same situation, nor had behaved in a similar way to how Ms Daley had done. The allegation is very much one where the Tribunal, following cases such as **Madarassy**, asked ourselves: “what was the reason for the dismissal?”. The reasons were patently unrelated to the claimant's race or

nationality. She was a security officer in a trusted position whom, it was found, had misled her managers about her driving licence status, not produced a valid driving licence within what had been a reasonable period to do so, and had put the respondent at risk by driving illegally, as found to have occurred on 2 January. This had been admitted by the claimant at the disciplinary hearing. Further, the decision to take the claimant down the disciplinary route to a disciplinary hearing was not Mr Shaw's but Mrs Wood's.

80. In relation to allegation 21, this is about what Mrs Wood had told the claimant in respect of her complaints relating to the disciplinary action. Namely that the matter would be dealt with as part of the disciplinary hearing. We had oral evidence from Mrs Wood and Mr Probert that this was dealt with at the start of the disciplinary hearing. The notes, which are full ones and which we accept as accurate, do not reflect that. Furthermore, Mr Achi raises dealing with the grievance at page 211 and he is told that this has been dealt with. In fact that element of Ms Daley's complaint had not been dealt with as it was to be considered at the disciplinary hearing. Mr Twine made it clear that the disciplinary hearing would stick to the allegations only (page 211). On the balance of probabilities, we accept the claimant's case about this. The disciplinary hearing did not deal with that element of her grievance when Mrs Wood had said it would. However, this finding does not take the claimant much further. The disciplinary panel upheld most of the allegations of misconduct. It did not conclude the allegations to be unsubstantiated or based on false information. If they had, the grievance would have become important and relevant. The disciplinary action being taken, and the investigation by Mr Shaw, were justified on the basis of what the claimant had done in terms of proven misconduct. In effect, the reason for the investigation and the disciplinary action was not Mr Shaw's determination to treat the claimant detrimentally because of her nationality or race but because of her own misconduct, which was in part admitted by her at the disciplinary hearing and was evidenced by other employees' statements. The reason was untainted by discriminatory factors.

81. Turning to allegation 22, as our findings of fact show, we do not find Ms Daley's training was less favourable treatment. The two security officers were not in similar circumstances. Mr Summers was given different training early on, not because he is white but because he had prior experience with the respondent and there are no other facts from which we could conclude otherwise.

82. Allegation 23 we found to be not credible and contradictory. The Tribunal struggled to ascertain precisely what this was about. There is an overlap with allegation 6. The claimant alleges that having been told the job was for her, Mr Dhillon was then given preferential coaching by Mr Davies and got the job. She later says that Mr Shaw told her to go through the motions and put in an expression of interest. The claimant is inconsistent about who had the help and who gave it. At page 166, she says that Mr Bourne gave Lucy Stanyer help. In cross examination, she said that it was Mr Davies helping Mr Dhillon. We simply did not find her evidence about this point consistent, cogent or believable. Further, by this time it is highly unlikely that Mr Shaw would have told her that she was a 'shoe-in' for the job, as he was investigating the driving licence issue and events on 2 January. Further, the claimant's own contention is contradictory. Why would Mr Shaw pressurise her to apply on the basis the job was made for her, and then mock and ridicule her before the interview, saying someone shines better than her? Mr Shaw firmly refuted this

allegation and was not challenged successfully about his denial this had been said. This is another example of the difficulties the Tribunal has had with the claimant's explanations about what her complaints are about and her evidence. She has been inconsistent and, on occasion, contradictory and unbelievable in her contentions.

83. Allegation 24 has been dealt with in our findings of fact. It is the case the appeal was not heard but this was due to an administrative error and the claimant not receiving Ms Towns' letter requesting further details, rather than any ulterior motive on the respondent's part to deny her an appeal because of her race or nationality.

84. The Tribunal has not dealt with the out of time issues. The reason why we have not done so is that our findings on the incidents themselves are so clear; they either did not happen as the claimant alleges, or the reasons for the respondent's actions are patently non-discriminatory ones. Irrespective of out of time point, they still needed to be considered by the Tribunal because they could be relied on by way of background facts from which we could draw inferences, even if the allegations themselves cannot be freestanding claims.

85. Further, whilst we have had the list of agreed issues in mind we have not, as Tribunals frequently do, gone through them in the order in which they have been set out to us. Again this is in part because the facts we have found have not gone beyond the first stage in the Tribunal's analysis: namely can we conclude, from the facts as found by us, that discrimination has occurred. Put colloquially, the complaints have failed to get past first base in the legal analysis which we have applied. In many of the allegations it has been so apparent what the reason for the treatment was that we have taken the respondent's explanations into account at the first stage, before the burden of proof shifts to the respondent, as a number of cases such as **Madarassy** enable us so to do. In respect of the discrimination claims, as our findings of fact and our conclusions on the allegations show, we have found that many of them are simply not factually correct, with few exceptions. We have explained in relation to each allegation why we conclude that most of the allegations are either not found to have occurred as the claimant alleges, or have explanations and reasons for them which are in no way because of her race or nationality.

86. This was not an unfair dismissal claim. We were not concerned with the reasonableness of the respondent's actions, or any procedural errors. The real issue for the Tribunal was whether the claimant was treated as she was because of her race and nationality and whether this amounted to harassment and direct discrimination because of race and/or nationality. There was no credible evidence to support those contentions. Perhaps, as the original ET1 shows, the claimant's original complaint and which she felt aggrieved about was the disciplinary action and the dismissal. The allegations finally agreed went much further than what was in the ET1, but the respondent accepted them and called evidence to deal with them all. The nub of Ms Daley's claim really comes down to her belief that Mr Shaw had it in for her and instigated an investigation, disciplinary action, the disciplinary hearing and eventually engineered her dismissal because of her race and nationality.

87. The Tribunal does not accept this. Mr Shaw, in commencing the disciplinary investigation had good reasons to do so. He did not make the decision to progress it to disciplinary action, Mrs Wood did. Nor did he take the decision to dismiss. That was the decision of Mr Twine and Mrs Wood. Their decision was that the claimant

was guilty of gross misconduct in relation to her misleading and delaying behaviour in respect of the driving licence, and driving in breach of health and safety when she drove illegally. It is an indication of their independence that they did not uphold the allegation she had falsified documents.

88. This is not a case where false allegations are made and then upheld by managers with the motivation, whether conscious or not, to discriminate against an employee. We have been taken in great detail through the disciplinary procedure and the decision making, and it is clear that the reason for dismissal was the claimant's conduct. This was fully supported by properly obtained evidence, and the claimant's own evidence and admissions to the disciplinary hearing. There are no facts from which we could conclude she was harassed, and directly discriminated against. In our list of updated allegations, the victimisation claim is no longer pursued. However, even if this had not been the case, the disciplinary action had already commenced before she made her complaint about Mr Shaw (which the respondent conceded would amount to a protected act); it cannot have been causally linked to the protected act.

89. Turning now to the wrongful dismissal claim, the claimant makes a claim for her notice pay. The respondent had dismissed her summarily for gross misconduct. Gross misconduct entitles an employer to dismiss without notice as it amounts to a fundamental breach of contract by the employee. It becomes a question for the Tribunal itself, on the basis of the evidence before the respondent, whether we find the conduct alleged amounted to gross misconduct justifying summary dismissal.

90. The claimant had not been open with her employer about her driving licence status. By 22 December 2015, she was fully aware that she should not be driving on her Jamaican driving licence and should be driving on a provisional UK licence with restrictions. We give her the benefit of the doubt for the period prior to this. However, she had come up with some creative reasons about why she was unable to produce any driving licence to them (whether Jamaican or UK), despite numerous attempts by Mr Shaw and Mr Davies to obtain it. In fact, as we have found, some of her explanations were implausible, such as having the driving licence suspended because of an eye condition. That matter in itself is serious and we can understand the respondent's view about it, in light of the claimant's position. But, on its own, we do not consider it to amount to gross misconduct.

91. That said , what the Tribunal views as serious misconduct going to the root of the contract is that the claimant, and she admitted doing so in the disciplinary hearing, continued to drive alone and without "L" plates, after she had been made fully aware that she should not be driving in that way. This included doing so on the respondent's premises. She misled the respondent about taking her test on 7 January as well as the 20 January. The driving illegally by itself, and certainly in conjunction with the misleading information, was serious enough to amount to gross misconduct. The claimant is not entitled to her notice pay in these circumstances.

92. We now deal with the holiday pay claim, there has been some debate over whether the claimant had in fact made a claim for holiday pay as it is not in her ET1. However, we understand that it has been agreed that such a claim was being made. We were taken in evidence to page 230 by Mr Probert who says that it shows the claimant received all the holiday pay due to her and this email explains how that holiday pay had accrued. The claimant has not explained, in her evidence, the basis

on which she contends she is owed any further holiday pay. Accordingly, in the absence of such evidence and it being for the claimant to establish that monies are still owed, the Tribunal does not uphold that claim. We accept Mr Probert's evidence and the contents of the letter that the claimant had received all holiday pay owing to her for the relevant period.

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Employment Judge Cocks

Dated: 24 November 2017

REASONS SENT TO THE PARTIES ON 29/11/2017

FOR THE TRIBUNAL OFFICE