EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr P Fangli	**v**	Alexander Dennis Limited

Heard at:	**Reading**	**On:** 16, 17, 18, 19 and 20 July 2018;
	and	and
	In chambers	21 August 2018

Before: Employment Judge George
Members: Mrs CM Carr and Mr J Appleton

Appearances
For the Claimant: In person
For the Respondent: Ms A Smith of Counsel

RESERVED JUDGMENT

1. The claim of direct race discrimination contrary to sections 13 and 39 of the Equality Act 2010 is not well founded and is dismissed.

2. The claim of victimisation contrary to sections 27 and 29 of the Equality Act 2010 is not well founded and is dismissed.

3. The claim of health & safety detriment contrary to section 44 of the Employment Rights Act 1996 is not well founded and is dismissed.

REASONS

1. The Claimant complains of direct discrimination on grounds of race, victimisation and detriment on health & safety grounds contrary to sections 44 of the Employment Rights Act 1996. He brought his claim by an ET1 presented on 6 June 2017. The Respondent defends the claims and entered its grounds of response on 6 July 2017.

Procedural history and the issues

2. The case came before Employment Judge Vowles on 23 August 2017 at a preliminary hearing at which the Claimant was asked to particularise the ten events upon which he wished to rely. In response to that, the Claimant

filed a Scott Schedule on 14 September 2017 and asked to add accusations of aggravated and exemplary damages, whistleblower victimisation and breach of contract contrary to the Health and Safety at Work Act 1974.

3. There then followed an exchange of correspondence in which the Respondent complained that the Scott Schedule had in excess of ten events. They also applied for an Unless Order in relation to the order for particularisation and objected to the application to amend. The Claimant responded to that and to an application for a deposit order. The case was listed for a preliminary hearing, but due to very heavy listing at the Employment Tribunal, a hearing date was not available until 29 June 2018, the claim already having been listed for a final hearing in July of 2018. At that June preliminary hearing, Employment Judge Gumbiti-Zimuto further defined the issues and they were recorded in an order which was prepared by Judge Gumbiti-Zimuto on 29 June 2018 but, unfortunately, was not sent to the parties until 12 July 2018.

4. At the outset of the hearing before us, Ms Smith explained that the fact that the order was not sent to the parties until two working days before the final hearing was due to start meant that it was only then that the Respondent realised that the order did not record all of the issues that it had been agreed between the parties should be decided by the Tribunal She had come to the Tribunal with a draft list of issues which she had given to the Claimant in advance. This list of issues was the subject of some discussion and went through some further revision over the course of the first three days of the hearing. A version of it was agreed between the parties on 18 July 2018 and the issues set out in that agreed list of issues are incorporated into this judgment. The alleged perpetrator is set out in italics after each allegation.

5. The issues which we have to decide are:-

Direct discrimination, contrary to sections 13 and 39 of the Equality Act 2010

1. Protected characteristic: non-British (Hungarian)

2. Allegations of less favourable treatment:

    a. 6th September 2016: the Claimant was criticised about his work and Mr Wilmot accepted the criticism without investigating (*Frank Wilmot*).

    b. 9th September 2016: para.3.1. of the Issues in the order of 29 June 2018 - the implementation of the first PIP (*Frank Wilmot*).

c. 14th September 2016: para.3.2. & 3.3. of the Issues in the order of 29 June 2018 - Mr Peter Richardson was biased during the grievance investigation (*Peter Richardson*).

d. 14th September 2016: the grievance investigation notes were deliberately incorrect (*Suzanne Leigh*).

e. 7th October 2016: para.3.4. of the Issues in the order of 29 June 2018 - the Claimant was held back from High Voltage training (comparators: Big Steve and Steve) (*Frank Wilmot*).

f. 12th October 2016: the grievance investigation outcome was secretly decided by HR (*Suzanne Leigh* – on the Claimant's case - and/or *Peter Richardson* – on the Respondent's).

g. 12th October 2016: the grievance investigation outcome (*Peter Richardson*).

h. 18th November 2016: para.3.8. of the order of 29 June 2018 - the Claimant was suspended regarding unfair allegations (comparators: Mr Wilmot's son and Andy) (*Peter Richardson* and *Suzanne Leigh*).

i. 13th December 2016: para.3.10 of the order of 29 June 2018 - the Claimant raised the above comparators (Mr Wilmot's son and Andy) in the disciplinary investigation meeting but they were not included in the investigation report (*Stuart Cottrell*).

j. 1st December 2016: the disciplinary investigation note taker was one-sided (*Akmal Sadiq*).

k. 16th January 2017: para.3.11 of the order of 29 June 2018 - Disciplinary officer prejudged the outcome: it was a sham (*Ram Gokal*).

l. 16th January 2017: Disciplinary outcome was too harsh (*Ram Gokal*).

Victimisation, contrary to sections 27 and 39 of the Equality Act 2010

3. Protected acts:

a. On 7th October 2016 the Claimant informed Suzanne Leigh that he was prevented from doing HV training and that this was an act of discrimination (para.3.5. of the Issues of the order of 29 June 2018).

b. Claimant contacted ACAS to commence early conciliation on 4th November 2016.

c. In November 2016 the Claimant said to Stuart Cottrell during the disciplinary investigation meeting that he was going to go to the Employment Tribunal.

4. Detriments:

a. 12th October 2016: the outcome of the grievance (*Peter Richardson*).

b. 16th November 2016: para.3.6. of the order of 29 June 2018 - the implementation of the second PIP (*Frank Wilmot*).

c. 18th November 2016: para.3.7. of order of 29 June 2018 - the Claimant was suspended regarding unfair allegations (*Peter Richardson* and *Suzanne Leigh*).

d. 18th November 2016: para.3.9. of order of 29 June 2018 - the Claimant was told not to contact colleagues during the disciplinary investigation (*Suzanne Leigh* and *Stuart Cottrell*).

e. 13th December 2016: para.3.10 of order of 29 June 2018 - the Claimant raised the comparators (Mr Wilmot's son and Andy) in the disciplinary investigation meeting but they were not included in the investigation report (*Stuart Cottrell*).

f. 1st December 2016: the disciplinary investigation note taker was one-sided (*Akmal Sadiq*).

g. 16th January 2017: para.3.11 of order of 29 June 2018 - Disciplinary officer prejudged the outcome: it was a sham (*Ram Gokal*).

h. 16th January 2017: Disciplinary outcome was too harsh (*Ram Gokal*).

Potential health and safety detriment, contrary to sections 44 and 48 of the Employment Rights Act 1996

5. C brought to R's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety:

a. 14th November 2016: by an email the Claimant told the health and safety officer that there were several health and safety concerns, including that a wire was exposed.

b. Unknown date: the Claimant verbally informed Mr Wilmot that there were metal sheets outside that could be blown in the wind.

6. Detriments:

a. 16th and 17th November 2016: Mr Wilmot raised concerns about the Claimant's conduct relating to health and safety (*Frank Wilmot*).

b. 18th November 2016: the Claimant was suspended (*Peter Richardson* and *Suzanne Leigh*).

c. 13th December 2016: the Claimant raised the comparators (Mr Wilmot's son and Andy) in the disciplinary investigation meeting but they were not included in the investigation report (*Stuart Cottrell*).

d. 1st December 2016: the disciplinary investigation note taker was one-sided (*Akmal Sadiq*).

e. 10th January 2017: Disciplinary officer prejudged the outcome: it was a sham (*Ram Gokal*).

Jurisdiction: time limits (section 123 of the Equality Act 2010 and sections 48 and 111 of the Employment Rights Act 1996)

7. Are the claim(s) out of time?

8. If so, is there a continuing act bringing the claim(s) in time?

9. If not, is it just and equitable to extend time? Or

10. For the health and safety detriment claim: was it reasonably practicable for the claim to have been presented in time? If not, was it presented in a reasonable time thereafter?

6. It can be seen that we have referenced at the appropriate point in those issues the paragraph numbers in the order of Employment Judge Gumbiti-Zimuto where the particulars of complaint are recorded. However, it is fair

to say that the Respondent accepts that, in addition to the allegations recorded by the employment judge on that occasion, the Claimant effectively was permitted to advance complaints that a number of the specific actions about which he complains had been done on unlawful grounds connected with a health and safety disclosure. This was apparently agreed to be a claim under sections 44 and 48 of the Employment Rights Act 1996 (referred to in these reasons as the ERA). It is implicit that the Claimant has had or should be regarded as having had leave to amend his claim if necessary in order to raise those claims that are set out in the List of Issues.

Preliminary matters

7. We had the benefit of a number of documents in this case and we heard from the following witnesses called by the Respondent:

- Mr Frank Wilmot, a Developmental Engineer and the Claimant's line manager at the relevant time;
- Mr Peter Richardson, Head of Chassis Test & Development, who investigated a complaint raised by the Claimant against Mr Wilmot;
- Mr James Rickaby, the Head of Test & Development and Homologation, who conducted the appeal in relation to that grievance;
- Ms Suzanne Leigh, Human Resources Manager at the relevant time;
- Mr Stuart Cottrell, the Head of Advanced Engineering, who carried out a disciplinary investigation into allegations against the Claimant;
- Mr Ram Gokal, who conducted the disciplinary hearing in respect of the Claimant and made the decision to dismiss;
- Ms Marianne Bailey, who at the time was the MPD Programmes Director for the Respondent who conducted the appeal against dismissal; and
- Mr Steven Beal, a Lead Test & Development Engineer with the Respondent.

8. The Claimant gave evidence in support of his claim. All parties and witnesses had prepared witness statements upon which they were cross-examined.

9. Where is it necessary to refer to any individuals from whom we have not heard they are identified by the initials of their first or given name and family name. For example, Mr Frank Wilmot would be referred to as FW.

10. There had been some difficulty in the parties agreeing the contents of a bundle for the final hearing. The Claimant explains in his written submissions – as he did orally – why he prepared his own version of the bundle. It did not seem to us to be proportionate to seek to allocate blame for the situation and we have not done so. The fact is that the Tribunal was presented with two competing bundles: the Respondent's bundle (page numbers in which are referred to in this judgment by RB page 1-

307); and the Claimant's bundle (page numbers in which are referred to in this judgment by CM page 1 onwards). For the most part we happen to have been working from the Respondent's bundle and therefore those are the page references which predominate in this judgement.

11. Although it appears that a digital copy of the Claimant's bundle may have been delivered to the Respondent in advance of the hearing, Counsel for the Respondent did not appear to have seen a final version of it.

12. The Claimant informed the Tribunal during the course of the hearing that a number of years ago he was diagnosed with obsessive compulsive disorder. He explained to us that, as a result of his condition, the Tribunal claim process had been very stressful for him and there were times when he was almost overwhelmed by a sense of anxiety about the process. The Tribunal therefore ensured that we had regular breaks during the sitting sessions and that they were of sufficient length to enable him to obtain benefit from them. The cross-examination was timetabled so far as possible giving the Claimant advance notice of the witness order so that he had opportunity to prepare.

13. We also agreed to accommodate the Claimant's clearly expressed need to work from his own bundle even though that put the Tribunal to considerable inconvenience. That was because we had to work from two versions of the same documents which were not in the same order and, in the case of one non-legal member's bundle, had not been fully paginated.

14. After the period of time that the Tribunal took for reading, the Respondent was able to confirm that the documents in the Claimant's bundle had all been disclosed to them in advance and although they were not in the same order as in the Respondent's bundle, there was a considerable degree of overlap. The exception was a series of photographs which were at the back of the Claimant's bundle which the Claimant accepted had not been referred to in his witness statement but upon which he wished to rely. He said: *"I decided to put the pictures in the bundle after the Respondent's statements and made a mistake by not informing the Respondent of this."* He said that he had sent the Respondent a lot of pictures on a DVD before and would like to use the pictures. The Respondent objected to that because they did not know what the pictures were intended to show and they were not able to take instructions upon it, Ms Smith arguing that there was no context and no explanation to those photographs and the Respondent would be prejudiced in having to respond to them, a prejudice which could only be mitigated by taking time to investigate it with the witnesses.

15. The Tribunal considered the Claimant's application to rely upon the additional documents which he wished to insert at CB pages 244-253. The Claimant said they were taken by him after he had been notified of the first performance improvement plan when he was still at work and he says that he disclosed them to the Claimant in August 2017 on a disk which contained all of his disclosure. However, he accepted that they had not been introduced in evidence through his witness statement or through a

supplemental witness statement and that he had not been intending to rely on them despite being aware of their potential relevance until after exchange of witness statements.

16. The exchange of witness statements took place prior to the preliminary hearing before Judge Gumbiti-Zimuto when the Claimant was expressly told to notify the Respondent of any documents that were not in the Respondent's bundle upon which he wished to rely. Indeed, the Employment Judge's directions on that occasion should have avoided the necessity for the Tribunal to work from two competing bundles. The Claimant did not take that opportunity to specify the documents. He has still not explained the date on which the photographs were taken, what they show, whose workmanship is shown, and why they showed work that is comparable to his own which was the subject of criticism. They were not produced in accordance with the case management orders and therefore there has not been sufficient opportunity for the Respondent to respond. That causes potential prejudice to the Respondent and impedes the efficient use of Tribunal time. For that reason, the Tribunal concluded that it was not in accordance with the overriding objective for those documents to be admitted in evidence.

17. The Claimant also wished to rely on a video recording and audio recording. However, he had provided at RB page 30D and 30E a description of what the video material upon which he wished to rely showed. Two video clips are referred to on RB page 30D and also a transcript of the audio file upon which he wished to rely. He said that those clips had been disclosed in the same way as the photographs. This was not disputed by the Respondent but Ms Smith herself had not listened to them. She took the opportunity to do so and then was able to confirm that the Respondent was not going to challenge either the Claimant's description of what was visible on the video recordings or the audio recordings or his desire to rely upon them. The transcripts were duly admitted into evidence and we took them into account as appears below.

18. The audio recording is of a conversation between the Claimant and Stuart Hibbert on 11 October 2016 and the video clips were, according to the Claimant, both taken at or shortly after 1.00 pm on 30 October 2016. The apparently show a meeting which was conducted by Mr Wilmot in the team meeting room. The videos are relied on by the Claimant as evidence of him being excluded from the team meetings. The Respondent in the end gave no objection to the Claimant relying on these matters and Mr Wilmot gave evidence and was cross-examined about them.

19. The claim had been listed for a five-day final hearing and there were a comparatively large number of witnesses to be heard in that time. EJ Gumbiti-Zimuto had timetabled the hearing. Due to shortage of judicial resource, the parties had been told that the Tribunal was not able to sit on the afternoon of the second day of the hearing. In the event, the Tribunal sat early on a couple of days and the oral evidence took the whole of the five-day listing. The parties agreed to the submissions being delivered in writing after the end of the hearing. Therefore, the parties were

accommodated and were given more than the time allocated for oral evidence, notwithstanding the pressures on judicial resource.

20. The Tribunal met in chambers on 21 August 2018, after delivery of the parties' written submissions, for deliberation and decision making. Unfortunately, due to competing professional obligations, writing up the judgment was delayed. EJ George apologises unreservedly to the parties for to this delay in sending them the reserved judgment.

Findings of Fact

21. The standard of proof that we apply when making our findings of fact is that of the balance of probabilities. We took into account all of the evidence presented to us, both documentary and oral. We do not record all of the evidence in these reasons but only our principle findings of fact, those necessary to enable us to reach conclusions on the issues which the parties have asked us to decide. Where it was necessary to resolve conflicting factual accounts, we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions compared with contemporaneous documents, where they exist.

22. The following is a chronology of events which has been drawn up by the Tribunal and is intended to be a neutral framework to our findings of fact. The events are cross-referred to relevant documents which we have read and taken into account.

DATE	**EVENT**	**RB page:**
16.11.15	C starts work as Test and Development technician	
July 2016	Approximate date when Frank Wilmot (FW) became C's line manager	
06.09.16	Incident between C and Steven Beal (SB) and Frank Wilmot (FW)	
9.9.16	1st informal PIP Meeting between C and FW (RB p.31G) as a result of which C brings grievance (FW temporarily steps down as line manager)	32
11.9.16	Letter from C to Suzanne Leigh (SL) about grievance	37
14.9.16	Grievance investigation meeting with Peter Richardson (PR)	R's notes 40 C's notes 41 and 48
4.10.16	FW interviewed by PR	
7.10.16	C discovers "held back" from HV Training. E-mails SL about that. Alleged protected act.	73
11.10.16	Conversation between C and work colleague (recorded by C)	30D

DATE	EVENT	RB page:
12.10.16	Grievance not upheld	83
12.10.16	Informal stage PiP renewed	
13.10.16	Team meeting to which C says FW failed to invite him	30D
14.10.16	Email from C to Suzanne Leigh (SL)	111
17.10.16	Email from SL to C	110
17.10.16	C starts sickness absence for depression.	165
24.10.16	GP certifies sickness absence	166
27.10.16	Grievance Appeal	119
4.11.16	Grievance appeal outcome	163
4.11.16	Day A for EC cert 1	13A
7.11.16	Return to Work meeting	166
8.11.16	Invite to informal review of performance (PiP 2)	168
14.11.16	C reports H & S problems to KH	283
15.11.16	Day B for EC cert 1	13A
15.11.16	PiP meeting stopped because C is unwell	138
16.11.16	2nd PiP	174A
16.11.16	Bus Incident	
	FW near miss report	189
17.11.16	Grinding incidents	
17.11.16	FW statement about grinding incidents	193
17.11.16	SP statement about grinding incident	201
17.11.16	Visit by KH of H & S to the development department	w/in 273
18.11.16	C suspended	184
19.11.16	C emails SL about the investigation	211
24.11.16	Interview by S Cottrell of FW	194
	C's statement to SC	212
1.12.16	C's investigation meeting with SC	216 (C's version of the notes at RB page 224)
13.12.16	Investigation report of SC	177
14.12.16	Invite to disciplinary	244
14.12.16	C asks R to rearrange disciplinary and tells HR that his H & S report is the reason for the action	279
15.12.16	SC interviews KH	287
5.1.17 to 9.1.17	Emails to set up the disciplinary hearing	272A to D
	Revised investigation report of SC	273
10.1.17	Disciplinary meeting conducted by R Gokal	
16.1.17	Outcome letter	294
17.1.17	Summary dismissal	
18.1.17	C appeals dismissal	301
14.2.17	Appeal hearing	291
		Notes @

DATE	EVENT	RB page:
		303A
28.2.17	Appeal outcome	304
10.4.17	Day A for EC cert 2	13B
15.5.17	Day B for EC cert 2	13B
6.6.17	ET1	
6.7.17	ET3	
23.8.17	PH (EJ Vowles)	
14.9.17	C files a Scott Schedule	
29.6.18	PH (EJ Gumbiti-Zimuto)	

23. The Claimant started work for the Respondent as a test and development technician on 16 November 2015. In approximately July 2016, Frank Wilmot became the Claimant's line manager in place of KM. The Claimant gave evidence that KM did not have any issues with his workmanship and this is supported by a statement by KM to the disciplinary hearing (CB page 226). Ms Leigh told us that KM was moved out of the department for performance issues but that was not an issue which was explored before us in any detail and therefore is not one about which we can make any findings.

24. After Mr Wilmot was appointed, he carried out an appraisal of the Claimant in which his only criticism was that he tended to rush his work (see FW para 3). We find that there was no significant criticism of the Claimant's work prior to the events of September 2016.

25. On Mr Wilmot's account, Mr Beale had drawn some concerns to his attention about the quality of the Claimant's work in a temporary harness on the E500 SuperLow bus. Mr Beale confirmed that he had raised specific concerns with Mr Wilmot (SB para 5). The Claimant detailed the problems he encountered in working on this bus in his grievance of 9 September 2016 (RB page 33). His complaint about the incident which took place between him, Mr Beale and Mr Wilmot on 6 September 2016 is that Mr Beale criticised a piece of the Claimant's work and Mr Wilmot accepted that criticism without investigating. This is one of the allegations of direct race discrimination against Mr Wilmot.

26. It was accepted by Mr Wilmot and Mr Beale that the Claimant had had problems carrying out the work because the drawing for the harness was wrong. It appears that there was some conflict between the Claimant and Mr Beale as a result which was resolved and that was not the reason for the Claimant's complaint about 6 September. It also seems to us that part of the reason that the problem arose was he had been told that the harness was temporary. This meant that there would be another harness fitted in due course but the E500 bus still needed an electrical harness which would enable it to be taken out of the depot onto the road.

27. However, having heard all three witnesses, our conclusion is that the inaccuracies of the drawing to which the Claimant was working was part of the background to Mr Beale taking the Claimant's work to Mr Wilmot and

complaining about it. Separate to that, there were issues with workmanship which were not wholly explained by the inaccuracy of the drawing. The Claimant accepted that Mr Beale had made the complaint about his workmanship. He also accepted in evidence that the only reasons why Mr Beale had raised the complaint to Mr Wilmot was that he had been concerned about the Claimant's workmanship: "*he was worried about the system and in his opinion my temporary harness was at fault*". However, he also gave evidence that Mr Beale had signed off on and been happy with his work overall.

28. This was flatly denied by Mr Beale. He criticised the Claimant's workmanship to Mr Wilmot in particular ways (see SB para.5 and FW para.8).

28.1. Referring to FW para. 8.1. Mr Beale said that the routing was very tight and likely to snap.

28.2. Referring to FW para 8.2 (see photo at RB p.149) he considered that the workmanship of the soldering to be "amateurish" based upon a visual inspection but there was nothing to say that the connection would not work in the short term. Looking a the photograph we can understand why Mr Beale might make that assessment.

28.3. In relation to paras. 8.3 and 8.4 the Claimant did not disagree with the criticisms of his workmanship but considered it to be a good solution for a temporary fix.

28.4. Para.8.5 was also evidenced by a photograph.

29. On the other hand, looking at the Claimant's written grievance as a whole, he appears to have struggled with a number of challenges to do with this particular job which, it seems to us, increased his frustration at being criticised for his work on it. He argued strongly that Mr Beale and Mr Wilmot had given inconsistent or unreliable evidence because they were confused about whether the bus left the workshop for testing. We have not found it necessary to resolve this question. That is because, in relation to the specific allegations of poor workmanship the Claimant did not dispute the facts about how he had gone about the job: he disputed that it was worthy of criticism. To the extent we are able to judge, we accept Mr Beale's evidence that the bus didn't go out on test and that that was not inconsistent with the fact that there were temperature sensors put on it. There seem to have been different plans at different times for this bus.

30. The Claimant also accepted that Mr Wilmot had shown him the harness and had explained the reasons why he – and Mr Beale – considered that it was not to an acceptable standard. Subsequently, as Mr Wilmot told us, the Claimant re-did the work to an acceptable standard.

31. The Respondent initiated a performance improvement plan (or PIP) in respect of the Claimant on 9 September 2016. The formal process for the performance management is at RB page 31C and provides that once the reason for performance management has been identified, the line manager will initially hold an informal meeting with the employee to make them aware of the concerns. The Respondent's evidence which was ultimately accepted by the Claimant is that this was the stage that things had reached in relation to him: the formal stages - which can ultimately lead to a capability hearing and potential dismissal - had not been initiated in his case.

32. However, our conclusion is that whilst the 9 September 2016 meeting between Mr Wilmot and the Claimant was described as informal, it was the first informal stage of a formal process which could potentially culminate in dismissal. We can quite understand why the Claimant was concerned.

33. The performance improvement plan in relation to the Claimant is at RB page 31G and we note that it provides for the manager briefly to describe the reason for the meeting and then it provides for the employee to self-assess his current strengths and weaknesses. Then, a later box (RB page 31H) directs the employee to complete with his line manager the following plan for improving the performance and there are six columns which are intended to allow the employee and manager to agree specific targets and practical concrete examples of ways in which those targets might be achieved. However, what happened in this case was that the whole form, rather than being completed in part by the Claimant and in part by Mr Wilmot was completed by Mr Wilmot and presented to the Claimant. To that extent Mr Wilmot was not following what appears to be the intention of the performance improvement plan document.

34. Mr Wilmot's evidence was that the reasons that he had thought it necessary to go down this route were summarised on page 31J. There are four examples there:

    34.1. quality of work; examples said to be attached included badly crimped connectors, badly soldered joints and untidy finishing on routing of harnesses;

    34.2. finished job cards: this said that he did not write the results up, did not attach photographs and the job card was not written out to procedure;

    34.3. product knowledge: the line manager was said to have been asked to order the wrong part for a particular twin air dryer harness; and

    34.4. reluctance to communicate: the comment there is that rather than ask for support, the Claimant does what he thinks is right and tries to justify it later.

35. From this it can be seen that, although the E500 bus temporary harness and Mr Beale's report of poor workmanship was not the only example given, it did provide a number of examples from the same job and was the subject of a complaint by the Lead Test & Development Engineer. In all those circumstances we accept that Mr Wilmot had valid grounds to bring up his concerns about performance with the Claimant. In our view there were examples of work which the Respondent considered to be unsatisfactory and that caused them to start the informal stage of a formal PIP process.

36. The jobcard for the E500 Super Low bus is at RB pages 133 – 134. The criticism was that it had not been completed. We take into account in relation to this, Mr Wilmot's evidence at paragraphs 6 & 7 of his statement where he explained his need for calculations to be documented and for the Claimant to follow departmental procedure in relation to documentation to avoid the need for measurements to be retaken when the jobcard was picked up by others. The Claimant's response to criticism about the jobcard was that he accepted that it was not complete at the time Mr Wilmot first spoke to him about it and he didn't deny having been told to complete it. He didn't deny that he hadn't completed it but said that everyone else worked in a similar way.

37. This was a recurrent theme in the Claimant's case, in that he argues that his workmanship was no worse than his colleagues but he was put through a PIP and they were not. However, he has not put forward evidence of specific poor workmanship by comparable individuals and the burden is upon him to prove that there was comparable performance by colleagues which was ignored by management. He sought to put forward evidence that the missing detail from the jobcard had been provided to an engineer but Mr Wilmot, reasonably, considered that to be insufficient and it was contrary to departmental procedures.

38. The Claimant also gave evidence about what happened to the jobcard on the E500 Super Low bus when he was on leave and complained that someone working on the job in his absence did not complete the jobcard (see Claimant's statement page 9 of 20). He said that the jobcard was left lying around "*and not completed by the person that finished the job"*. He also said that he was told by SP that it was his duty to complete the card (we infer he means despite not having been the person who finished the job). Our conclusion on this is that the documents tend to support Mr Wilmot's evidence that the Claimant had not put the required detail on the jobcard; there are too many unresolved conflicts about whose responsibility it was to complete the jobcard and a mere assertion that there was other work which needed to have been annotated on the jobcard and wasn't. We reject the assertion that this was an omission by an unnamed technician which Mr Wilmot failed to address. Besides this was only one of a number of issues with the Claimant's work which Mr Wilmot wished to correct.

39. We have come to the view that, although the Claimant takes a different view from the Respondent about whether the criticisms of his workmanship

warranted him being put on a PIP, in a number of ways all of the witnesses concurred that parts of the workmanship were worthy of criticism. That is documented, not only in the PIP itself but in the comments on the jobcard (RB page 134) and, in respect of some issues, in the photographs. In our view, the Respondent are entitled to set the standard for workmanship that they expect and the Tribunal ought not to substituted its judgment for whether or not the problems justified a PIP. We accept that Mr Wilmot considered that it was the way to encourage the Claimant consistently to achieve the standards of workmanship which he was clearly capable of. Indeed it was accepted by the Respondent that the Claimant was the one who identified a problem with software configuration which caused it not to work which demonstrated that they valued his contribution in other ways.

40. With the benefit of hindsight it was a counterproductive way to deal with the Claimant. The poor workmanship in relation to the E500 SuperLow harness seems to have been as much to do with the Claimant's understanding of what was sufficient for a temporary harness but we accept Mr Beale's evidence that the bus could not have been allowed on the road for testing without correcting it. The Claimant clearly formed the view that he was being targeted by Mr Wilmot and brought a grievance about that on 9 September 2016 (see RB page 32). It is true that, in cross-examination, the Claimant conceded that he did not believe that that not being British was a reason for the criticism of his work or the 1st PIP. However, we consider that he was probably referring to his state of belief at the time; then he did consider that he was being targeted but did not know why.

41. Another example of a practice which Mr Wilmot considered to be unprofessional but which the Claimant considered to be satisfactory in the circumstances in which he used it was that of using a handspan to measure distance. The Claimant said that CC knew that he was measuring with a handspan. However Mr Wilmot explained when interviewed in connection with the grievance (RB page 61) that he had been told by CC that the measuring of the harness needed to be repeated in places. This was because the jobcard had not been completed in full (see para.36 above). However, it seems to us that the use of a handspan for measuring would add to the lack of precision in the Claimant's work. It is clear that Mr Wilmot had a more exacting concern about the Claimant's work than the Claimant thought reasonable but we conclude that it was a genuine concern based upon objective grounds.

42. It is also noteworthy that, when asked about his criticisms in the grievance investigation (RB page 61), Mr Wilmot said "*I never said that his work was useless – I said that it was not very professional"*. It is clear to us that the Claimant took this criticism very badly. He had nothing from which to think that the reasons for Mr Wilmot's actions were unlawful but it was unwelcome criticism and he cast around for a reason for it.

43. We have read the grievance letter with care (RB page 32) as well as the three different versions of the notes of the grievance investigation meeting. None of these contain an allegation by the Claimant that the reason for Mr

Wilmot's actions is that of race or that he considers himself to have been discriminated against. The closest the Claimant comes is where he says in his version of the notes (RB page 45) that he and PK, the Union representative, "*came to the conclusion that it is possible that Mr. Wilmot's action, against [the Claimant] is guided by a personal reason. Fact that you cannot explain.*"

44. The Claimant's grievance did not merely complain about being criticised for the work on the temporary harness or subjected to a PIP by Mr Wilmot. He also complained of a number of instances on which he had been made to feel undervalued and unfairly criticised by Mr Wilmot (for example number 6 on RB page 40A).

45. He alleges bias against Mr Richardson and that arises out of what he considers to be a misapplication of Art. 7.3 of the Respondent's Grievance Procedure which starts at RB page 31K. The procedure to be followed is contained in articles 5 to 8. The provision for the grievance hearing (which in the Claimant's case took place on 14 September 2016) includes the following:

> "7.2 after any follow-up investigations and careful consideration of all relevant information by the Line Manager conducting the hearing, the employee will normally be invited to a reconvened meeting and informed of the decision
>
> 7.3. It is not company policy to allow cross examination of witnesses at internal hearings. If there are questions to be put to witnesses the manager hearing the grievance will take written questions from the person with the grievance and put these to the witness. Written details of the responses will then be given to the employee making the grievance for comment before a decision is made."

46. The Claimant says that Mr Richardson should have used Article 7.3 to invite the Claimant to submit questions in writing to witnesses. This seems to us to be a misunderstanding by the Claimant about the way in which Article 7.3 should be used in a grievance investigation. In our view the effect of this article is that where there are witnesses who have been interviewed in relation to the subject matter of the grievance and the employee making the grievance wishes to ask them additional questions then company policy is that this should not be done by cross examination at the hearing but by the employee submitting written questions which will be put to the witness.

47. Mr Richardson interviewed Mr Wilmot. Another criticism by the Claimant is that he did not interview any other witnesses. The Claimant says that in his comment on the incident on 12 September he explained that he had been waiting to talk to 2 colleagues, DH and RL. We can see from the grievance outcome at RB page 90 that Mr Richardson did not interview those colleagues. He made a finding that because the Claimant didn't tell Mr Wilmot what he was doing when away from his workplace it was right for Mr Wilmot to tell him to return to it. It is common ground that the Claimant offered no explanation to Mr Wilmot. In those circumstances, RL and DH could not have any relevant information to add to Mr Richards's deliberations.

48. Mr Richardson's conclusion does suggest an approach that might be described as "pro-manager" in the sense that he took the view that it the manager told technician to return to work there is an obligation on the technician to volunteer an explanation or simply do as he was told. It doesn't address the substance of the Claimant's complaint which was about the allegedly offensive and humiliating term in which Mr Wilmot was said to have spoken. However, there is nothing for which we can infer that Mr Richardson would have reached a different conclusion had the complainant employee been a British worker who was apparently hanging around and offered no explanation to his line manager.

49. The Claimant did not expressly ask that RL and DH be interviewed. He seems to have presumed that they would be regarded as witnesses and that he would be invited to submit questions. This is based on a misreading of article 7.3. Our conclusion is that Mr Richardson did not fail to comply with that article. The co-workers were interviewed at the appeal stage by Mr Rickaby and were unable to recall anything relevant. The Claimant argues that this benefited Mr Wilmot because the delay meant that the witnesses were influenced by the way that the Respondent had dealt with the grievance and their inability to recollect was influenced by desire not to be involved. There is nothing from which we can conclude that the co-workers recollection wouldn't have differed had they been interviewed sooner.

50. Miss Leigh produced minutes of the grievance investigation meeting (RB page 40) which she described as "*not intended to be a verbatim record but should capture the main points of discussion"*. The Claimant did not agree that these were a true record of what had occurred and produced first the minutes at RB page 41 and then the further amended minutes at RB page 48. It is not possible either for him or for us now to distinguish between words that he has inserted into his versions of the minutes because they were said at the meeting-but were omitted from Miss Leigh's notes-and words that were not said at the time but which he wished to add to expand upon his grievance.

51. The Claimant alleges that Miss Leigh deliberately included inaccuracies. We accept that her notes are a fairly high level summary. Although she may have been selective about what she included the Claimant has failed to adduce evidence that she has done so deliberately. We accept the evidence of Miss Leigh and of Mr Richardson that they did take into account the later versions of the minutes. This supports our finding of a lack of animus on the part of Miss Leigh.

52. Another of the Claimant's specific allegations is that he had been held back from HV training. After he had put in his original grievance the Claimant emailed Miss Leigh (RB page 73) with the following concern
    52.1. He had been scheduled a few times for HV training which have been moved or cancelled

52.2. He had been told by Mr Wilmot that he was scheduled for HV training in August 2016 but when he had returned from holiday he was told by Mr Wilmot that he had missed it and the next one would be in October

52.3. He returned from seven days holiday on 26 September and asked his temporary line manager, Mr Hay about his HV training and the latter had consulted Mr Wilmot.

52.4. Mr Hay then told the Claimant that he had missed the HV training because he had been on holiday.

52.5. On 7 October 2016 he had discovered from the trainer that there had not been any HV training in September which the Claimant considered to be confusing, given what he had been told by Mr Hay.

52.6. Both of his new electrician colleagues had already had HV training and he felt disadvantaged by the way Mr Wilmot was handling the training. He concluded by saying "*is not my intention, with this email to complain. I hope that this problem will be sorted and such discrimination will be avoided in the future"*.

53. We find that, contrary to the Claimant's perception, Miss Leigh added this issue to the grievance which was being investigated by Mr Richardson (see RB page 85 and 94 where Mr Richardson's investigation and conclusion about this issue is found). By the grievance outcome, the Claimant was told that there had been a miscommunication because "*PF had not spoken directly to FW about this and therefore he was not taking the information from source*". The details of training received by the Claimant and his colleagues are at RB page 76 where we can see that SP, SH and RH had received HV training level 1 in June or July 2016. The latter date was when the Claimant had missed that training due to holiday. It appears that a different training would have been undertaken by the Claimant during his September holiday but his place was taken by AS. All of these other colleagues are British. It is clear that there are a lot of people in a long queue for the HV training.

54. We concur with Mr Richardson's conclusion that this was a misunderstanding. Mr Hay may well have told the Claimant that he had missed training during his holiday but it is clear from RB page 76 that the information provided to Mr Hay either referred to different training or to a different holiday. It was very unfortunate because this added significantly to the Claimant's perception that he was being subjected to a difference of treatment. The Claimant emailed Miss Leigh on 14th of October (RB page 111) and appeared to complain that there has been a lack of investigation of this issue. Alternatively, he may have been complaining that the issue was added to his grievance and then used as an excuse for it any delay in the outcome. His conclusion seems to be that "*my Grievance is not been taken seriously*".

55. In our view, this is an example of a situation where the Claimant misunderstands what has happened and, because he starts with the perception of less favourable treatment, pursues his version of events despite there being evidence that he had not been less favourably treated and no evidence that his treatment was in any way related to his race.

56. One of the other criticisms of the investigation was that it had been the decision of Miss Leigh rather than of Mr Richardson. The basis for that allegation was that Mr Richardson had "*got stuck many times asking Suzanne Leigh for advice*" when reading the outcome letter. The Claimant now accepts that his conclusion that the report was not written by Mr Richardson was mistaken and that the reason for this hesitation in reading the outcome letter was that Mr Richardson has dyslexia. He apologised to Mr Richardson saying that he had known the underlying facts. At this point we wish to record that the Claimant was unfailingly polite, courteous and respectful in the way in which he conducted himself at the Tribunal. We would like to thank him for that.

57. Although the Claimant raises the grievance outcome as an allegedly unlawful act of direct discrimination, this was substantially based on his view that there had been a failure to comply with article 7.3 (see paragraph 19 of the Claimant's written submissions), which we find not to be made out on the facts. The Claimant's argument was that by failing to recognise and stop Mr Wilmot's discrimination, Mr Richardson had permitted it to continue. The Claimant also argued that Mr Rickaby, by covering Mr Richardson's mistake contributed to a "coordinated action to discriminate the Claimant, but Mr Wilmot in advantage and set an example to letter the workmates know what is going to happen to all non-British people if they dare to make a complaint against a British worker".

58. In our view Mr Rickaby was more thorough than Mr Richardson because he spoke to RL and DH. When he did so, RL said that Mr Wilmot has been "*firm in turn but not in anyway rude"* (RB page 142) and DH said that "*there was some urgency in FW tone but not aggressive* ". In some places Mr Richardson's report is poorly reasoned, such as where he states that he finds no evidence to substantiate the allegation without evaluating competing factual account. The allegation about the HV training was investigated thoroughly. Overall we consider Mr Richardson's grievance investigation outcome to be reasonably thorough but not beyond criticism.

59. As we set out in paragraph 52 above, when making his complaint about HV training, the Claimant does appear by the last paragraph to describe the failure to schedule him for training as discrimination (RB page 73). However in none of the versions of the notes of the grievance investigation meeting does the Claimant referred to discrimination. It is clear from the findings about the HV training on RB page 94 that Mr Richardson knew about this protected act because he says "*I found no evidence to substantive* [sic] *PF complaint of unfair treatment nor did I find any evidence of discrimination in this example*." However there is no reason to think that the nature of the complaint caused the outcome of the grievance.

The evidence in relation to the HV training points clearly to a miscommunication.

60. One of the outcomes of the grievance was a recommendation by Mr Richardson that *"The informal PIP process must continue to proceed, leaving these concerns unaddressed is counter-productive."* Mr Wilmot certainly knew that the Claimant had complained to Miss Leigh about the scheduling of HV training and he may well have known that it was alleged to be discrimination. However we are quite satisfied that his decision to implement the second PIP was motivated by his original concerns, which predate the complaint of discrimination, and this recommendation of Mr Richardson.

61. The second PIP is found at RB Page 174A to 174 D. If one compares RB Page 174D with RB Page 31 J (the Summary of Issues Raised regarding Performance) we can see that Mr Wilmot has removed some issues but added different examples.

62. Between the rejection of his grievance and the resumed informal stage PIP the Claimant had unsuccessfully appealed the grievance outcome and had a period of sickness absence for depression.

63. The audio file that had been transcribed was of a conversation between the Claimant and SU which the Claimant relies upon as being "*proof that Mr Wilmot tried to use my workmates for his plan and encouraging them to give me a hard time"*-see page 18 of 20 of the Claimant's witness statement. The conversation refers back to a conversation the previous day when, according to the Claimant, SH had told him that he had left the door open. SH tells the Claimant that Mr Hay, then his temporary line manager because of the outstanding grievance, was looking for him because the door had been left open. When Mr Wilmot gave oral evidence about this he said that his recollection was that on the day in question when the Claimant had finished working on a vehicle and it had been driven out of the workshop he had not secured it. Mr Wilmot said that he considers himself to be responsible for the security of the workshop but that, since Mr Hay was then the line manager of the Claimant, he had asked Mr Hay to find the Claimant rather than go looking for him himself. The Claimant said it was not unusual for the doors to be left open, although his account it was only about one hour before the end of the working day. The Claimant complains (See page 19 of 20 of his witness statement) that the Respondent should rather have used the loudspeakers or shout his name in order to attract his attention. He regards it has as having encouraged his workmates to behave badly with him for Mr Wilmot to have asked his line manager to go looking for him. We accept Mr Wilmot's evidence that the door of the workshop was open, that he thought it needed to be secured, and it was the Claimant who had been working there. In those circumstances it seems wholly unremarkable for Mr Wilmot to have asked Mr Hay to find the Claimant.

64. On 13 October there was the team meeting from which the Claimant says Mr Wilmot excluded him. RB page 30 D, and in particular the accepted description of the team meeting which Mr Wilmot conducted, apparently show that, at exactly 1 p.m., there was a team meeting at which the Claimant was not present. His essential complaint is that he was not told about this meeting, that relevant information was communicated at it and the fact that he was not told about it is evidence of exclusion. We have considered this matter very carefully because it is something the Claimant clearly feel sincerely about. Furthermore in our experience it is the sort of incident which can commonly result from unexplained antipathy. Thus it is the sort of thing that any tribunal considering a discrimination claim needs to scrutinise.

65. Mr Wilmot gave supplemental evidence about the video which he had seen for the first time at tribunal. His recollection was that it was an impromptu meeting called because Mr Richardson needed a driver to take a vehicle to Milford. His evidence was that the relevant people were meeting namely those of the licence to drive buses on the public road- something the Claimant does not have. He said that there were other colleagues not present who also did not have the relevant licence. He rejected the accusation that there were other occasions when the Claimant not been invited and said that there was a start-up meeting every morning at 7.30 am which every technician was present including the Claimant. If he had a meeting after the tea break or after lunchtime it was sometimes necessary to send people to find technicians including the Claimant to gather them together. He gave categorical evidence that this was what he would do to ensure everybody relevant was at the meeting. In general, Mr Wilmot's evidence was more consistent that the Claimant's who struggled at times to remember the detail of events. For that reason we prefer th evidence of Mr Wilmot in relation to this meeting.

66. Although the Respondent did not lead evidence on this point, the Claimant accepted in cross-examination that because he was a smoker he would take his breaks outside in his car. He rejected the suggestion that this might make it difficult to find him on the basis that this was a known practice of his. It is clear to us that by 13 October the Claimant was firmly of the view that Mr Wilmot was targeting him. He would therefore see a meeting to which he had not been invited as another example of this when self evidently doesn't know what was discussed at the meeting is not in a position to challenge Mr Wilmot says about.

67. It seems to us that Mr Wilmot had more exacting standards than the Claimant was used to. There is a comment by Miss Leigh in her witness statement (at paragraph 33) to the effect that she Mr Richardson were partly able to understand why the Claimant had felt that his work was sufficient because the details that Mr Wilmot had identified did not affect functionality. Our observation of Mr Wilmot's demeanour in evidence is that he has a somewhat abrupt manner. This contrasts with the Claimant's courteous bearing. However, there is no positive evidence that Mr Wilmot treated others in the Claimant's position differently.

68. Another matter of background that the Claimant drew to the Tribunal's attention concerned the taking of photographs. He considered that he had been treated differently compared with his colleagues when criticised for taking photographs on his phone.

69. One of Mr Wilmot's criticisms of the way in which the Claimant documented his work was that he had not attached photographs of what he had done to the job card (see point 2h on RB page 174D). Mr Wilmot's notes on the second PIP show him recording that the photos were "*on Pal's phone. But he didn't ask to download them, why?"*. Mr Wilmot's evidence to the tribunal was that photographs should be taken on works camera and not on individual technician's phones.

70. The Claimant seems to us to have thought that he was being criticised for taking photographs on his phone, and it seems likely to us that Mr Wilmot at some point told him that he shouldn't do so, given what he regards as standard practice. We find it hard to believe that other technicians did not take photographs of their work on their own phones. However, in our view, the Claimant has focused on the wrong part of this criticism. He clearly feels it to be unfair that he was told not take photographs on his phone when others were taking photographs on theirs.

71. The criticism that is in the second PIP is not that the photographs were on his phone rather than the work's camera but that they hadn't been downloaded and attached to a job card. We do not think that any failure on the part of Mr Wilmot to take other technicians to task for using their phones to record their work is a matter of significance to us in reaching our conclusions on allegations of discrimination and victimisation. The issue, as Mr Wilmot saw it, was that of lack of thoroughness in recording details of the work carried out in the job card in order that others might see what had been done. In respect of that concern it seems to us to be reasonable for Mr Wilmot to seek to achieve that level of thoroughness and we have not been shown evidence to back up the Claimant's assertion that Mr Wilmot ignored other technicians' failure to record details of work done.

72. On 4 November 2016 the Claimant contacted ACAS who contacted the Respondent. Miss Leigh was their point of contact and the early conciliation certificate was issued on 15 November 2016. We accept Miss Leigh's evidence that the only person she discussed the ACAS certificate with was RO'B. She said, and we accept, that she did not understand that the complaint was a discrimination claim and asked for further details about it.

73. The day after the Claimant returned to work (RB page 166) he was invited to an informal review of his performance which was to take place on 11 November (RB page 168). He had been referred to occupational health because of the work-related stress and was recommended to contact his GP and the employee assistance program. The meeting was postponed orally because of work-related commitments to 15 November 2016 but the Claimant mistook the time and so was taken by surprise. He began to feel

unwell when Mr Wilmot started to talk about the second PIP (see RB page 138 and 139). The meeting was therefore adjourned to the following day when Mr Wilmot went through the PIP document with the Claimant.

74. The version of the PIP at RB page 174A is annotated to show that the Claimant disagreed with a number of the points put to him by Mr Wilmot in a meeting on 16 November. The examples of work shown to the Claimant (and detailed on RB page 174 D) included at point 1A to C the same examples used from the E 500 Super Low bus that we have discussed at paragraphs 28 above. It had been part of Mr Richardson's outcome (and confirmed by Mr Rickaby - see RB page 163 at point 1) that the Claimant had not used the correct methods for measuring and recording his data with the result that work had to be repeated. We would like to emphasis, however, that none of the examples used by Mr Wilmot seem to us to be of major causes of concern which is consistent with Mr Wilmot's evidence that he fully expected the Claimant to be able to take on board the criticisms and adjust his practices successfully.

75. Later that same day KW was reversing a bus into Bay 2. The Claimant walked between the bus and a device called a WEMA (or weemer), which has large concrete feet that stick out into the bay. Mr Wilmot shouted at him to stop.

76. The Claimant's account given to Mr Cottrell on one December (RB page 229-230) was all "*the bus was still rolling in his final position as I passed in front of him to come on the passenger side. Then the engine was still running but the bus was stopped. The pit was open and I saw the best way, to get through, between the bus and the weemer."* He argued that there was a lot more that was dangerous about the manoeuvre than what he was doing. He stated that the bus was stopped and therefore he would not have been hurt and that the best way would have been to "*step back, wait. Continue walking when it's safe"*.

77. This contrasts with Mr Wilmot's account in his near miss report (RB page 189 dated 16 November 2016) where he said that the Claimant walked between the side of the vehicle and the WEMA unit while the vehicle was being reversed. He said that he had shouted that the Claimant should stop and asked him what did he think he was doing walking down the side of a moving vehicle. According to Mr Wilmot the Claimant had stopped waited until the vehicle had stopped in a safe position and then walked out of the workshop without saying a word. When challenged about later the Claimant had apparently said that he was not concentrating and that Mr Wilmot had been right to pull him up on it.

78. On 17 November there were a series of interactions involving the Claimant which we have collectively referred to as the grinding incidents. It appears that the Claimant was grinding a cover using a linisher. Mr Wilmot saw him and told him to stop what he was doing because he was not wearing full

PPE (personal protection equipment). About 15 minutes later, Mr Wilmot spoke to the Claimant again about what he was wearing and where he was carrying out the task. In his statement that he made on 17 November Mr Wilmot said that he had first asked the Claimant where his PPE was, why he was grinding in a fire exit doorway and then had told him to get the appropriate equipment. He had also advised the Claimant to come inside the department to find a vice and the correct vice jaws in order to hold the cover safely while grinding it. Then, in what he refers to as incident 2, Mr Wilmot says that the Claimant was wearing safety glasses and had the colleague, KR from the engineering Electrical section, holding the cover for him while he worked. Mr Wilmot said that he again reminded the Claimant use of voice to hold the component correctly.ll

79. His account to Mr Cottrell for was slightly different (see RB page 195) but in broadly similar terms and he explained that the dust from grinding can be harmful so that glasses and a face mask as well as gloves should be worn. Furthermore, the employee should not use the grinder close to others as they could get sprayed with debris.

80. The Claimant asked Miss Leigh for KR to be interviewed in connection with the grinding incident (RB page 211). He was seen on 1 December (RB page 209). Mr Cottrell also interviewed RH (RB page 198), SP (RB page 201 and following) and SH (RB page 205 and following).

81. In relation to the bus incident, it is implicit in RH's account that his observation was that the bus was moving when the Claimant squeezed through the gap beside it. The others were witnesses to the grinding incidents. It appears that SH initially observed the Claimant using the linisher and reported him to Mr Wilmot because he thought the location was unsafe (see RB page 205). SP had seen the Claimant working on the cover by the workbench next to the pit with the workpiece against his chest and the linisher in his other hand (RB page 202). In other words he was still not using a vice and did not have full PPE after Mr Wilmot had spoken to him twice.

82. In the investigatory interview on 1 December 2016, the Claimant said (RB page 224 and following) that others had cleaned the axle parts outside the workshop which blew brake dust into the yard, the implication being that it was unreasonable to criticise him for grinding in the open doorway which he considered was more likely to avoid dust being released workshop. On his account, Mr Wilmot had said "*do it properly"* and "*do inside wearing goggles"* and the second time he had said "*put it in a vice as the linisher could slip"*. Then later SP had told him he should wear a mask. He said that Mr Wilmot had been right to stop him because he had no PPE. Essentially his explanation was that he had responded appropriately to each occasion that he had been advised what to wear. Our conclusion is that, even if the Claimant is right and Mr Wilmot was less specific, he should have realised what was expected of him by way of PPE and accepted that he was told to use a vice but had not initially done so.

83. it is accepted by the Respondent that the Claimant told Mr Cottrell that he was going to make a claim to the Employment Tribunal and this is accepted by the Respondent to have been a protected act under s.27(2) EqA (see RB page 221 where, in Mr Cottrell's and Miss Leigh's presence the Claimant says "*I have spoken to my lawyer about this and may start a tribunal process* "). It should be noted that in his corrected version of the minutes (RB page 231) the Claimant denies that he said that he might start a tribunal claim but says that the calculation of lawyer was that his deadline for making a tribunal claim was the 27 February 2017.

84. However, in the same meeting the Claimant also made the following statement

"There was a problem & I was forced to stand up for myself. In June/July I felt victimised. Two of my colleagues joked, some kind of hate joke-end of June. I intended to join the conversation one of them said no they were not sharing the joke with me is I was hungry. I don't want this investigated. I will not tell you their names. I want you to know this."

85. The Claimant revised the notes of investigation meeting (which were taken by AS) and his corrected version is at RB page 224. In that version the Claimant additionally says this

"*this investigation is an act of victimisation and is part of a victimisation campaign that started at 9th of September 2016. I insist that the Equality Act 2010 should be respected. I do not wish that this hate incident should be investigated.*"

86. The Claimant appears to accept that Miss Leigh told him that the Respondent takes all complaints seriously but they could not investigate if he would not share details of her. In response the Claimant then said it was his right not to share them with her.

87. At the end of the investigatory interview, Mr Cottrell left and Miss Leigh trying to explore the allegations of race discrimination further (see RB page 222 and 232). The Claimant he repeated that he did not wish to have the allegations investigated, as is recorded in both his notes and those of AS. Since these notes were in the disciplinary pack it is clear to us that both Mr Gokal and Ms Bailey were aware of these allegations.

88. Mr Cottrell upheld the factual allegations against the Claimant. It is true that in the letter of suspension (RB page 184) the Claimant was requested not to make contact with his colleagues in relation to the investigation. We accept that this is standard practice and find that the one colleague whom he asked to be interviewed was seen by the investigator. As the procedure was explained to us, Mr Cotterell having made a judgement that the incidents had happened it would be for Mr Gokal to decide what the consequences to the Claimant should be.

89. We accept that the reason that the Claimant was suspended on full pay was stated to be in order that a full investigation should take place. However there was concern that several incidents over the course of two days suggested that the Claimant was not concentrating on health and safety in the way that he should have which meant that he potentially was a risk to himself. In respect of the suspension the Claimant contrasted his treatment with that of KW and AnSm who had been cleaning the axle and blowing brake dust outside. We do not consider them to be suitable actual comparators. The Claimant was not holding the workpiece in a vice and was not wearing suitable PPE. These were not factors that applied in the case of KW and AnSm. We therefore do not consider that it is a valid criticism of the investigation report that it did not include reference to them.

90. As to the notes of AS, we have considered his version of the notes at RB page 216 and the Claimant's version RB page 224. There is nothing in the Claimant's amendments to suggest that the original version is particularly one-sided. There are just the differences which one would expect from a set of notes that are a summary of what was discussed. The Claimant wasn't taking notes during the interview itself and we conclude that this allegation that the notes were one-sided is not made out.

91. On 14 November 2016 the Claimant emailed KH (RB page 286) who is the health and safety manager at the respondent. He wrote to express a few health and safety concerns "*walkways are obstructed, trip hazards, extinguisher blocked, to much parts/staff in the workshop that make working struggle … pit unsecured, heavy metal plates not stored properly can fall …".* He attached a few pictures and made other reports including about uncovered sockets and damaged cables.

92. KH made an unannounced visit to the Department on 17 November 2016 and reported her findings back to the Claimant (RB page 284). In her response she says that the internal process was that he should first raiase any health and safety issues with his immediate line manager and asked whether he had done so. A number of points she made concerned advice that all team members were responsible for keeping areas clear of obstruction although she did say though some areas of housekeeping that sometimes can result in trip hazards.

93. The Claimant made an allegation on 14 December 2016 (see RB page 279) that the reason for the disciplinary action against him was the cause of his suspension and drew attention to the fact that the grinding incident had taken place on 17 November but his suspension had come after he had replied to KH's email (by his response at the top of RB page 284).

94. Consequently, Mr Cottrell made further enquiries and interviewed KH on 15 December 2016 (RB page 287). She said that her impression was that Mr Wilmot, who she described as being "*on the ball*", dealt with health and safety issues promptly. She said that she had done a full audit not just looked at the issues raised by the Claimant. Following the interview, Mr Cottrell produced an addendum to his report (RB page 273) about this

allegation that the 14 December email to KH had been a cause of the disciplinary action. Mr Cottrell said in section 8 that he found no evidence to support the claim that the allegations against the Claimant were prompted by his report to the Health & Safety Manager. His conclusion was that KH had not made anyone in the team aware that the audit of the department had been triggered by the Claimant's email. There is no evidence to contradict KH's report to Mr Cottrell that she did not inform Mr Wilmot that the Claimant made the report to her. We have taken into account that we have not heard directly from KH and that her email is therefore hearsay. Nonetheless, we accept that evidence. Mr Wilmot denied knowing that the Claimant had made the complaint and that is our conclusion on this point.

95. In addition, the Claimant says that he verbally informed Mr Wilmot that there were metal sheets outside that could be blown in the wind. However, the Claimant's evidence on this was vague and his recollection poor. Mr Wilmot could not remember any such conversation. In the light of the lack of clear evidence supporting this allegation we do not find that the Claimant made that statement, which he says was another instance of him bringing to his employer's attention circumstances connected with his work which he believed were harmful or potentially harmful to health and safety.

96. The disciplinary hearing was chaired by Mr Gokal on 10 January 2017 (see RB page 297). He impressed us as giving his evidence in a straightforward way and we considered him to be, in general, reliable as a witness of truth. He was not aware of the existence of the ACAS certificate or of the early conciliation process. Like the others of the Respondent's witnesses, he explained that he had received discrimination awareness training but also said that he had been an ambassador for discrimination awareness at the Respondent company.

97. He made a decision to dismiss for "wilful disregard of safety precautions placing yourself and others at risk" and "failure to follow reasonable management instructions to wear PPE". He wrote the outcome to the Claimant on 16 January 2017 (RB page 294). Our conclusion is that Mr Gokal would have dismissed anyone about whom the conclusions in Mr Cottrell's report had been made. We say that because, when asked why he had, as he put it, considered the misconduct that Mr Cottrell had found the Claimant to have committed to be so serious that dismissal was the right sanction he said "*in the bus industry there can be serious injury or death resulting from buses moving in garages. The mitigation was not so robust as to say that* [the Claimant thought] *he had followed correct behaviour* [in relation to PPE] *and the failure to follow instruction added up to a dismissable offence*." Furthermore we accept that Mr Gokal genuinely believed (even though he largely accepted the Claimant's account of what had happened) that he had put himself and people around him at risk.

98. The Claimant argues that where he was conducting the grinding did give better ventilation. That sounds, on the face of it, reasonable but by focussing on that, the Claimant overlooks the real reason why his conduct

was criticised through use of the disciplinary process which was failure, repeatedly, to wear PPE. His point was in relation to the PPE was that each time he was spoken to he was by doing precisely what he was asked. He rejected the suggestion that he had known what PPE to wear and therefore should not have needed take three times. There was a difference between his evidence and that about Mr Wilmot about precisely what the latter had told him. The account of SP suggests that, after the second conversation, despite the Claimant accepting that he had been told to use a vice (see paragraph 82 above) he had moved elsewhere to do the grinding but not used a vice (see paragraph 81 above). We can understand why Mr Wilmot, Mr Cottrell, Mr Gokal and Ms Bailey concluded that there had been several failures to respond to management instruction on use of safety equipment. We also accept that Mr Gokal's reasonable view was that, had the Claimant been unsure about what PPE was necessary, he should have worn the maximum amount. It is clear to us that Mr Gokal considered that by the Claimant's actions, KR, the engineer, had been put at risk.

99. Although Mr Gokal accepted that there were times when full PPE would limit access and impede work, for example when working on a chassis, otherwise he would expect any technician to wear the appropriate PPE whether they were doing a short job or a long job.

100. It was suggested to him by the Claimant that he had failed to investigate the allegation that, in the past, the Claimant had pushed a bus (in company with others). He raised this to support his argument that he was being unfairly targeted for behaviour which was commonplace. Mr Gohal accepted that he had not taken that statement by the Claimant into account, but we accept that he did not do so because the Claimant had not told him who else had been involved so Mr Gohal had been unable to investigate further. We also conclude that Mr Gohal had accepted that the bus had come to a halt before the Claimant had started to walk beside it but had concluded, following a discussion with the Claimant about the sounds of different brakes, that the handbrake had not yet been applied. He seems to have accepted the Claimant's evidence on this. We regard this as evidence that Mr Gokal did not have merely taken Mr Cottrell's conclusion on the facts as binding upon him if his conversation with the Claimant caused him to take a different view.

101. Mr Gokal also said that, had the Claimant provided him with names of others who had not used appropriate PPE then he could have investigated. It seems to us to be right that Mr Gohal should wish to investigate the circumstances of an allegedly comparable event before deciding whether or not to take it into account in reaching his decision.

102. Mr Gohal had been aware of, and took into account, the tension between the Claimant and Mr Wilmot, when considering the Claimant's actions and what the appropriate response to them should be although his evidence to us was that he had not understood the nature of the Claimant's complaints but had inferred that there had been some disagreement. Although, as we

find, Mr Gohal clearly had in front of him minutes of a meeting at which the Claimant complains that he had suffered discrimination from Mr Wilmot (see paragraphs 83 to 85 above) Mr Gohal did not, when giving evidence to us, remember whether he had been conscious of that allegation. This suggests to us that, despite his protestations, he was not as attuned to allegations of discrimination as, perhaps, he should have been.

103. He accepted that he had a monthly management meeting with KH about Health & Safety but his evidence, which we accept, was that she would never tell him the identify of anyone who had raised anything specific and therefore denied knowing that the Claimant had raised a health & safety complaint. We found his evidence to be credible on this point.

104. The Claimant expressly said that he does not make a complaint about the incident where he was told that colleagues would "not share secrets with Hungary". Consequently, the Respondent did not investigate it to see whether it had any bearing on the allegations against the Claimant. Even accepting the Claimant's evidence about that incident, there is insufficient evidence to conclude that there is a general anti-immigrant feeling in the Respondent company as a whole.

105. We have considered whether anything can be inferred from that comment and the Claimant's report of it. Our conclusion is that we cannot infer that the decision makers in Claimant's case were motivated by race or by this statement. Miss Leigh did seem to us to make reasonable attempts to find out more details from the Claimant and was very clear that she would be impeded in investigating it without more information. In those circumstances we canned infer that the Respondent wanted to sweep that matter under the carpet or failed to deal appropriately with this complaint of discrimination such that we can infer that they did not take allegations of this kind seriously.

106. Some other employers might have taken the view that to dismiss for incidents of this kind which had taken place on two days, against the backdrop of the tension between the Claimant and Mr Wilmot and the former's recent return from sickness absence would be harsh but we accept that it was the genuine view of Mr Gokal that the incidents merited dismissal. By contrast with Mr Gokal, Ms Bailey thought that the decision in relation to the bus was too harsh. Mr Gokal held that *"all of the incidents on the 16th and 17th November show wilful disregard of safe precautions.*

107. The appeal hearing to place on 14 February 2017 (the Respondent's note RB page 303 A) and the outcome letters is dated 8 February 2017 (RB page 304). Ms Bailey's decision, which is in the penultimate paragraph on page 304, is that "*if presented in isolation [the bus incident] would be insufficient to warrant a sanction of summary dismissal*". We also found Ms Bailey to be someone who gave her evidence in a straightforward and considered way and was, therefore, generally, reliable as a witness of truth.

108. She considered the grinding incidents to be three separate incidents and found that allegation to be proven against the Claimant. Again, this suggests that she did not regard herself as bound by the findings of Mr Cottrell, if she did not agree with them and this operated to the Claimant's advantage. She recognised that at each intervention the Claimant had taken some action to improve the safe working system. However she regarded his explanations as to why he had failed to respond to Mr Wilmot in a reasonable manner unacceptable (see the bottom RB page 305). She considered that his safety was of paramount importance and that his distrust of Mr Wilmot and underlying feeling of being unfairly treated had not been valid reasons for him not to comply with the request to use for PPE. For her, it was the fact that it had required three separate interventions before the Claimant was properly equipped and grinding the workpiece in a safe manner and his lack of response to Mr Wilmot that meant that he had displayed insubordination that amounted to gross misconduct. She regarded the Claimant as a competent engineer and was therefore surprised that it had taken that number of interventions before he was using safe practices.

109. Ms Bailey therefore upheld the decision to dismiss.

The Law applicable to the Claim

110. The Claimant complains of a number of breaches of the Equality Act 2010 (referred to in these reasons as the EqA). Section 136 of the 2010 Act reads (so far as material):

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

111. That section applies to all claims brought before the Employment Tribunal under the EqA. By s.39(2) and (4) EqA an employer must not discriminate against an employee or victimise them by dismissing them or subjecting them to any other detriment.

112. Direct discrimination is defined in section 13 (1) of the EqA which reads:

> "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

The Claimant complains that he has suffered direct discrimination on grounds of race which is a protected characteristic: he is non-British, being of Hungarian national origin. He compares his treatment with that which

he argues was or would have been meted out to a comparable British employee.

113. The application of s.136 of the EqA has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. In that case, the Court was considering the previously applicable provisions of s.63A of the Sex Discrimination Act 1975 but the guidance is still applicable to the equivalent provision of the EqA.

114. When deciding whether or not the Claimant has been the victim of direct discrimination, the employment tribunal must consider whether he has satisfied us, on the balance of probabilities, of facts from which we could decide, in the absence of any other explanation, that the incidents occurred as alleged, that they amounted to less favourable treatment than an actual or hypothetical comparator did or would have received and that the reason for the treatment was race. Here the initial burden is on the Claimant. That burden will not be satisfied simply by showing that the Claimant has suffered a detriment and that he has a protected characteristic: Madarassy v Nomura International plc [2007] ICR 867 CA. If we are so satisfied, we must find that discrimination has occurred unless the Respondent proves that the reason for their action was not that of race. In order to identify the reason for the act complained there should be intense focus on the mental processes of the decision maker, it is the reasons for their actions, rather than the actions of another upon whose information they innocently act with which we should be concerned: CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439 CA.

115. We bear in mind that there is rarely evidence of overt or deliberate discrimination. We may need to look at the context to the events to see whether there are appropriate inferences that can be made from the primary facts. We also bear in mind that discrimination can be unconscious but that for us to be able to infer that the alleged discriminator's actions were subconsciously motivated by race we must have a sound evidential basis for that inference.

116. The provisions of s.136 have been considered more recently by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC. Where the employment tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. Furthermore, although the law anticipates a two-stage test, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the reason for the treatment is unclear following those findings then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue.

117. Although the structure of the Equality Act 2010 invites us to consider whether there was less favourable treatment of the Claimant compared

with another employee in materially identical circumstances (within the meaning of s.23(1) of the EqA), and also whether that treatment was because of the protected characteristic concerned, those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the Claimant relies upon a hypothetical comparator. If we find that the reason for the treatment complained of was not that of race, but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to.

118. Further guidance was given comparatively recently by Singh LJ in Ayodele v Citilink Ltd [2018] I.C.R 748 CA where he said in paragraphs 62 and 63,

> "62….., there may be cases in which there are at least the following three issues which arise in respect of any specific complaint of discrimination: (1) Did the alleged act occur at all? (2) If it did occur, did it amount to less favourable treatment of the Claimant when compared with others? (3) If there was less favourable treatment, what was the reason for it? In particular, was that reason discriminatory?
>
> 63. Accordingly, there may be cases in which the tribunal never has to address question (3), because it is not satisfied that it has been proved on the evidence that the alleged act took place at all; or it may not be satisfied that there was less favourable treatment."

119. Victimisation is defined in section 27 of the EqA which provides, so far as material, that

> " (1) 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 that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
> (a) bringing proceedings under this Act;
> (b) giving evidence or information in connection with proceedings under this Act;
> (c) doing any other thing for the purposes of or in connection with this Act;
> (d) making an allegation (whether or not express) that A or another person has contravened this Act."

120. There is no need for the Claimant to compare his treatment with that of a comparator in a victimization claim. The question is whether the protected act was an effective cause of the detrimental treatment. This is a subjective test: Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48 HL. As with direct discrimination, it is the reasons for the actions of the decision maker which should be considered and therefore the extent of knowledge of the decision maker of the protected act can be an important consideration.

121. Neither in the case of direct race discrimination nor in the case of victimisation, is it necessary for race (or the protected act as the case may be) to be the only or even principle reason for the act complained of. It is enough if race or the protected act contributed significantly to the alleged discriminator's thought processes: in this context, significant means more than trivial. The statutory burden of proof set out in s.136 EqA applies equally in victimization cases as it does in direct discrimination cases.

122. The tribunal may not consider a complaint under s.39 or 40 of the EqA which was presented more than 3 months after the act complained of unless it considers that it is just and equitable to do so, subject to the effect of early conciliation. Conduct extending over a period is to be treated as done at the end of the period. A failure to act is to be treated as occurring when the person in question decided upon the inaction and that date is assumed to occur, unless the contrary is proved, when the alleged discriminator does an act inconsistent with the action which it is argued should have been taken or when time has passed within which the act might reasonably have been done.

123. The tribunal may extend time for presentation of complaints if it considers it just and equitable to do so. The discretion in s.123 to extend time is a broad one but it should be remembered that time limits are strict and are meant to be adhered to. There is no restriction on the matters which may be taken into account by the tribunal in the exercise of that discretion and relevant considerations can include the reason why proceedings may not have been brought in time and whether a fair trial is still possible. The tribunal should also consider the balance of hardship, in other words, what prejudice would be suffered by the parties respectively should the extension be granted or refused?

124. The test of detriment, both in relation to direct discrimination and victimisation, is whether a reasonable employee would take the view that they had suffered a detriment; this objective element means that an unjustified sense of grievance cannot amount to a detriment: Shamoon.

125. The Claimant also alleges that he has been subjected to a detriment on health & safety grounds. Section 44 of the Employment Rights Act 1996 (referred to in these reasons as the ERA) reads as follows,

> "(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

> (a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,
> (b) being a representative of workers on matters of health and safety at work or member of a safety committee—
> (i) in accordance with arrangements established under or by virtue of any enactment, or
> (ii) by reason of being acknowledged as such by the employer,
> the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,
> [
> (ba) the employee took part (or proposed to take part) in consultation with the employer pursuant to the Health and Safety (Consultation with Employees) Regulations 1996 or in an election of representatives of employee safety within the meaning of those Regulations (whether as a candidate or otherwise),
>]
> (c) being an employee at a place where—
> (i) there was no such representative or safety committee, or
> (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
> he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,"

126. The Respondent accepts that the email from the Claimant to KH of 14 November 2016 was a qualifying disclosure under s.44(1)(c) of the ERA (see Ms Smith's written submissions at para.44). We are surprised at that, given that the subsection only applies where there was no health and safety representative and KH herself was the health and safety representative. However, it would be wrong for us to go behind that concession.

127. The question for us in respect of this claim is therefore whether the allegedly unlawful acts (issues 6.a to e. in paragraph 4 above) were done on the ground that the Claimant had sent that e-mail. We have found that the Claimant did not, as a matter of fact, complain to Mr Wilmot about the allegedly unsafe metal sheets or doors.

128. On a complaint under s.48(1) of the ERA of a breach of s.44(1) it is for the employer to show the ground on which any act, or deliberate failure to act, was done (s.48(2)). Furthermore, by s.48(3),

> "the employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer [,…] shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done."

129. Time limits for claims under the EqA and the ERA are affected by the requirement that the Claimant undergo early conciliation by reason of s.140B of the EqA and s.207B of the ERA which are in materially identical terms. Taking s.140B of the EqA, it provides that

" (1) This section applies where a time limit is set by section 123(1)(a) or 129(3) or (4).

…

(2) In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section."

130. The obligation on the Claimant to contact ACAS is imposed by s.18A of the Employment Tribunals Act 1996. That provides that,

"(1) Before a person ("the prospective Claimant") presents an application to institute relevant proceedings relating to any matter, the prospective Claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.

…

(3) The conciliation officer shall, during the prescribed period, endeavour to promote a settlement between the persons who would be parties to the proceedings.

(4) If -

(a) during the prescribed period the conciliation officer concludes that a settlement is not possible, or

(b) the prescribed period expires without a settlement having been reached,

the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective Claimant.

…

(8) A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).

…

(10) In subsections (1) to (7) "prescribed" means prescribed in employment tribunal procedure regulations."

…

(12) Employment tribunal procedure regulations may (in particular) make provision -

(a) authorising the Secretary of State to prescribe, or prescribe requirements in relation to, any form which is required by such regulations to be used for the purpose of providing information to ACAS under subsection (1) or issuing a certificate under subsection (4);

(b) requiring ACAS to give a person any necessary assistance to comply with the requirement in subsection (1);

(c) for the extension of the period prescribed for the purposes of subsection (3);

(d) treating the requirement in subsection (1) as complied with, for the purposes of any provision extending the time limit for instituting

relevant proceedings, by a person who is relieved of that requirement by virtue of subsection (7)(a)."

131. Details of the process to be followed are found in the Early Conciliation Rules of Procedure in Schedule 1 to SI 2014/254. The Claimant in Compass Group UK and Ireland Ltd v Morgan [2016] IRLR 924 EAT had contacted ACAS to conciliate because she alleged that, following a TUPE transfer, she had been instructed to work in a different location and in a less senior capacity. She resigned, after that early conciliation but the EAT held that she did not need to conciliate a second time prior to issuing proceedings even though the resignation, and therefore the constructive dismissal, had not happened at the time of the EC certificate. In reaching that conclusion, the President of the EAT held at paragraphs 18 to 20,

> "We, like the Appeal Tribunal in the *Science* and *Drake* cases, consider it significant that Parliament used the word 'matter' in s.18A(1) rather than 'cause of action' or 'claim' and that the prescribed information required to be provided by a prospective Claimant to ACAS to fulfil the obligations under the scheme is so very limited. The word 'matter' is broad and, as Langstaff J observed, may encompass not just the precise facts of a claim that bring it within a cause of action but also other events at different times and/or dates and/or involving different people. There is no obligation, as we have already indicated, when notifying ACAS to identify the matter itself nor the nature of any actual or prospective dispute, still less to provide the factual details or any background to that dispute. The only information required to be provided by a prospective Claimant consists of names and addresses of the prospective parties.
>
> 19.It is also significant, in our judgment, that the process of conciliation is an entirely voluntary and confidential one. Once the prospective Claimant has provided ACAS with the prescribed information, there is no requirement whatever for him or her to identify to ACAS, or indeed the prospective respondent, the subject-matter or issues in dispute and no obligation whatever to enter into any discussions, still less meaningful ones, with the prospective respondent. Although it is hoped that this will follow, there is no obligation to do so. The prescribed information need not even be complete and correct. What the process does (as HHJ Eady QC explained) is to build in a structured opportunity for parties to take advantage of ACAS conciliation if they choose to do so before a matter reaches litigation.
>
> 20. Against that background, the question of construction raised by Mr Milsom is whether there is any temporal or other limit on the applicability of an EC certificate in the context of 'relevant proceedings relating to any matter' that are commenced in relation to a cause of action that only crystallises after the EC process is complete. The question, accordingly, is: what is meant by 'relating

> to any matter'? In our judgment, these are ordinary English words that have their ordinary meaning. Parliament has deliberately used flexible language capable of a broad meaning both by reference to the necessary link between the proceedings and the matter and by reference to the word 'matter' itself. We do not consider it useful to provide synonyms for the words used by Parliament. Provided that there are or were matters between the parties whose names and addresses were notified in the prescribed manner and they are related to the proceedings instituted, that is sufficient to fulfil the requirements of s.18A(1)."

132. In HM Revenue & Customs v Garau [2017] ICR 1121 EAT the Claimant was given notice of termination of employment and carried out early conciliation before the end of the notice period. Then, one day before the end of the period of three months beginning with the date of dismissal, he contacted ACAS a second time and purported to carry out a second conciliation. He presented a claim for unfair dismissal and disability discrimination within a month of Day B on the second certificate. The EAT held that,

> "the scheme of the legislation is that only one certificate is required for "proceedings relating to any matter" (in section 18A(1)). A second certificate is unnecessary and does not impact on the prohibition against bringing a claim that has already been lifted." (paragraph 20)

133. Consequently the second certificate was not a certificate falling within s.18A(4) of the Employment Tribunals Act 1996 and, further – according to Kerr J in paragraph 24,

> "I am satisfied that the definition of "Day A" in [section 140B(2)(a) of the EqA] refers to a mandatory notification under section 18A(1) . It does not refer to a purely voluntary second notification which is not a notification falling within section 18A(1) . Similarly, I am satisfied that the definition of "Day B" in [section 140B(2)(b) of the EqA] refers to a mandatory certificate obtained under section 18A(4) of the Employment Tribunals Act 1996 . [Section 140B(2)(b)] says as much. It does not refer to a purely voluntary second certificate not falling within section 18A(4) ."

134. Consequently, the first early conciliation by Mr Garau did not affect the time limit because time had not yet started to run in relation to the dismissal. The second early conciliation did not affect the time limit because it was not mandatory early conciliation. Garau was followed in Treska v Master and Fellows of University College, Oxford (UKEAT/0298/16), another case in which the Claimant had been dismissed and then conciliated twice in relation to his dismissal: in respect of one Day A was approximately 3 weeks before the end of the primary limitation period and in respect of the other Day A was the last day of the

primary limitation period. He sought to rely upon the later conciliation certificate. This argument was rejected by HHJ Eady QC who said at paragraph 27,

> "For the reasons explained by Kerr J in Serra Garau (see above), that position was not - and could not be - changed by any later application for EC made by the Claimant in respect of the same matter."

Conclusions on the Issues

135. We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment but we have them all in mind in reaching these conclusions.

Does the Employment Tribunal have jurisdiction to hear any of the claims?

136. Ms Smith argues on behalf of the Respondent that the second ACAS certificate, that issued on 15 May 2017 "does not exist" (paragraph 24 of her written submissions). On that basis, she argues that the various claims are out of time by different amounts which she has set out in a tabe in paragraph 31 of her written submissions. The latest act, in her submission, is the dismissal on 16 January 2017 and a claim should have been presented no later than 15 April 2017. In making that submission she relies upon the conclusion of Kerr J in Garau, which was followed in Treska , that a second certificate did not amount to a certificate within the meaning of s.18A(4) of the Employment Tribunal Act 1996 and therefore did not trigger s.140B of the EqA (or the equivalent s.207B of the ERA) and had no effect upon the time limits. As she put it "the Claimant's second ACAS certificate does not exist for the purposes of calculating time".

137. The full chronology is set out in paragraph 20 above. For the purposes of this issue, allegations 2.a. to g. and 4.a. pre-dated the first early conciliation which took place between 4 November 2016 and 15 November 2016. Broadly speaking, both those the Claimant complains about the first PIP (and the alleged poor workmanship referred to in it), the grievance and the HV training. The implementation of the second PIP (on 16 November 2016), imposition of the disciplinary process and dismissal all arose after the issuing of the first early conciliation certificate. The health & safety disclosure itself was on 14 November 2016, all the alleged detriments post-date that email.

138. The primary limitation period for any claim based upon dismissal would expire on 16 April 2017. The second early conciliation was between 10 April 2017 and 15 May 2017 which suggests that it was extended slightly.

139. In our view there is a factual difference between the Garau and Treska cases and the present one. In those cases, either the second EC certificate was issued in respect of a prospective claim arising from

precisely the same act as the first EC certificate (Treska) or a constructive dismissal where the allegedly repudiatory breach was the same act as that which had caused the Claimant to contact ACAS (Garau). In the present case the Claimant was dismissed for reasons of gross misconduct said to arise from an incident which was wholly unrelated to the capability matters which had led to the PIPs which were the subject of his first EC certificate.

140. It seems to us that the question we need to consider, given that factual difference, is whether the present Claimant was under an obligation to conciliate in relation to the disciplinary action and dismissal which could not even have been in contemplation at the time of the first EC certificate because the Claimant had not done the acts for which he was disciplined. That involves consideration of what is meant by "relating to any matter" within s.18A of the Employment Tribunals Act 1996 as explained in Compass Group v Morgan. In both that case and the earlier decision of HHJ EAdy QC in Science Warehouse Ltd v Mills [2016] IRLR 96 - in which she held that there was no obligation to conciliate before applying to amend to add a new claim to an existing set of proceedings - it was emphasized that "any matter" and "that matter" within s.18A were broad concepts. They were emphasized in Morgan to be ordinary English words which have their ordinary meaning.

141. Had the first early conciliation been successful, or had the present Claimant decided not to bring proceedings in relation to the earlier acts but only to proceed with a claim based upon the disciplinary and dismissal proceedings he would not have been able to argue that they "related to the proceedings instituted" (as it was put by Simler J in Morgan at paragraph 20). Had he commenced proceedings in November or December 2016 based upon the first PIP and the grievance then he would, on the strength of Science Warehouse Ltd v Mills, have been able to amend that claim to include a dismissal claim despite that having arisen after the first early conciliation period.

142. In our view, looking at the ordinary meaning of the words in s.18A and interpreting that section broadly, the information provided to ACAS when the Claimant contacted them on 4 November 2016 could not in any meaningful sense be said to have been about events underpinning the allegedly unlawful acts set out in 2.i. to l, 4.c to h and 6.a. to e.. The first EC certificate could be said to have related to the imposition of the 2nd PIP (issues 2.h. and 4.b.), although predating it, because the outcome of the grievance recommended that the 1st PIP be re-introduced. We are reinforced in that view by the words of HHJ Eady QC in paragraph 27 of Treska where she said that the fact that there had been a valid certificate within s.18A(4) of the Employment Tribunal Act 1996 could not be "changed by any later application for EC made by the Claimant *in respect of the same matter*" (our emphasis).

143. The consequence of our conclusion is that the Claimant was under an obligation to contact ACAS in respect of the new matters which post-dated the first early conciliation because he had not presented a claim in respect of the matters which were covered by the first EC certificate. Therefore,

claims based upon the dismissal, at least, are on the face of it in time. Claims based upon events prior to 11 January 2017 (one month prior to Day A for the second early conciliation certificate) are, potentially out of time, subject to any successful arguments based upon a continuing act. That being the case, we go on to consider whether any of the acts relied upon were unlawful before returning to the issue of time in the light of those conclusions.

Direct discrimination on grounds of race

144. In relation to issue 2.a. we accept that the Claimant was criticised about his work but our conclusion is that Mr Wilmot did investigate the work and that the criticisms were reasonable (see paragraphs 39 to 42 above). We do not agree with Ms Smith that a genuine criticism of an employee's work cannot amount to less favourable treatment. The Claimant's allegation was that any shortcomings in his work were picked up on whereas comparable shortcomings in colleagues' work were not criticised. This would be both a detriment and less favourable treatment, even if the work was, objectively, worthy of criticism.

145. Nonetheless the Claimant has not substantiated that allegation and we find that there is nothing from which we could conclude that he was treated less favourably than other comparable employees in relation to criticism of his work or the imposition of the PIP. Furthermore, we are quite satisfied that the reason for the criticism was that the work was, objectively, not up to the standard of professionalism which Mr Wilmot reasonably wanted. This allegation fails.

146. In relation to 2.b., as with 2.a., the Claimant has not shown anything from which we could infer that the reason for the first PIP was that of race and we are persuaded that Mr Wilmot implemented the first PIP because he had noticed specific instances of work not being carried out to the standard which he expected. This allegation fails.

147. In relation to issue 2.c. we reject this allegation. Mr Richardson was not biased during the grievance investigation and there is no basis to infer that his conclusions in it were in any way influenced by race (see paragraphs 45 to 49 above).

148. In relation to issue 2.d. we have found as a fact that Miss Leigh did not deliberately write incorrect notes (see paragraphs 50 and 51 above). This allegation has not been made out on the facts.

149. In relation to issue 2.e. we have found as a fact that the Claimant was not held back from HV Training and this was a misunderstanding on his part (see paragraphs 52 to 55). He missed one HV Training due to his July/August holiday and there was no HV training in September 2016. This allegation fails.

150. Issue 2.f. was withdrawn.

151. Our conclusion on issue 2.g. (the imposition of the 2nd PIP) is the same as our conclusion on issue 2.c.. The reason for that action was that it was a recommendation of the grievance and the original concerns remained unaddressed (see paragraph 60 above). This allegation fails.

152. In relation to issue 2.h., we do not consider that the allegations against the Claimant were unfair and to that extent the allegation is not made out. The Claimant was suspended but the Respondent has shown that the reasons for suspension were so that investigations could take place but also their concern that the incidents suggested that the Claimant was not concentrating on health and safety and therefore potentially was a risk to himself (see paragraph 89 above). This allegation fails.

153. In relation to issue 2.i., it is true that Mr Cottrell found that the Claimant thought he was doing the right thing by grinding into the walkway and that the Claimant contrasted this with it apparently being acceptable for colleagues to clean break dust outside (see his notes RB page 229). However, even on his version of the notes, the Claimant does not name KW and AnSm. Furthermore, for reasons we set out in paragraph 89, we do not consider that they were suitable comparators. We therefore have concluded that it was not a valid criticism of the investigation report that it did not include a reference to them and this allegation is not made out on the facts. Alternatively the reason why they were not included was that they were not relevant comparators and the Claimant had not given their names. This allegation fails.

154. Issue 2.j.. For the reasons set out in paragraph 90 above, we do not consider that AS's notes were one sided. Nor do we think that the reasonable employee would consider themselves to be disadvantaged by the abbreviations in the notes. This is particularly so given that the Claimant's expanded notes were before the decision maker. Therefore, to the extent that AS's notes do not reflect the exact words spoken, they do not amount to a detriment and the claim based upon them fails for this reason.

155. Issue 2.k. and l. For the reasons which we set out in paragraph 97, in particular, we are persuaded that Mr Gokal took the decision to dismiss after considering whether the mitigation put forward by the Claimant was "robust" enough to mean that the failure to follow correct procedure was excusable and we accept that he genuinely considered the explanations put forward by the Claimant when reaching his decision. He took into account the tension in the relationship between the Claimant and Mr Wilmot. We reject the allegation that the decision was a sham or prejudged. Although some might not have dismissed, and Ms Bailey clearly regarded it to be harsh to dismiss for the bus incident, the Claimant's allegation is, in effect, that Mr Gokal would not have dismissed a British employee for like offences.

156. We find no evidence from which we can infer that Mr Gokal would have dealt differently with any other employee in like circumstances. He was, in our view, genuinely concerned about the risk to personal safety in relation

to the bus incident, despite accepting the Claimant's version of events. He was also concerned by the risk posed in relation to the grinding incident and the failure to follow instructions in relation to PPE. These allegations fail.

Victimisation

157. It is accepted by the Respondent that the three protected acts relied upon occurred and were protected acts within the meaning of section 27(2) of the EqA. Our conclusions are that the only person who knew about the contact to ACAS to commence early conciliation was Miss Leigh and therefore no other decision maker could have been motivated by that protected act. Mr Richardson knew about the allegation that the Claimant had been discriminated against in relation to the HV Training and that is the only protected act about which he was aware which predates his grievance outcome and the suspension. Those are the alleged detriments which involve him. We are satisfied that Mr Wilmot knew about the allegations of discrimination made against him. All involved in the disciplinary process would have known about the statement made to Mr Cottrell, in the presence of Miss Leigh, that the Claimant was going to go to the Employment Tribunal and regarded himself as having been discriminated against on grounds of race, although did not intend to complain about it (paragraphs 83 to 86 above).

158. To some extent our conclusions on the victimisation allegations mirror those on the direct discrimination claim. Therefore, in relation to issue 4.a., there is no evidence that Mr Richardson was biased during the grievance investigation (see paragraph 147 above) and we do not think that any lack of thoroughness on Mr Richardson's part (such as not interviewing RL or DH) is something from which we can infer that the reason why he rejected the grievance was the discrimination allegation about the HV Training, which was the only allegation of discrimination of which he was aware. This allegation is rejected.

159. In relation to issue 4.b., our conclusions from paragraph 151 above are repeated here. The 2nd PIP was not implemented for any reason connected with the allegation of discrimination in relation to HV Training. This allegation is rejected.

160. In relation to issue 4.c., our conclusions from paragraph 152 above are repeated here. This allegation is rejected.

161. In relation to issue 4.d., we are satisfied that the reason why the Claimant was told not to contact colleagues was that it was standard practice and he was not in fact disadvantaged by it for reasons we set out in paragraph 88. We do consider that the reasonable employee would consider themselves to be disadvantaged or potentially disadvantaged by being forbidden to contact colleagues and therefore accept that this was a detriment but since it was standard practice there is no evidence that the Claimant was treated less favourably than any other employee in relation to this matter.

162. In relation to issue 4.e. we repeat paragraph 153 above and this allegation is rejected for reasons set out there.

163. We have considered whether the fact that the Claimant complained about discrimination in the investigation meeting, and the Respondent did not investigate it, is something from which we can infer that they wanted to avoid dealing with allegations of race discrimination or were influenced in any way by such a consideration. However, overall the investigation was sufficiently thorough. This is the only substantial criticism that is made of it and the gist of the comparison with colleagues who were blowing breakdust was included in the notes put forward to the disciplinary officer. We therefore do not think that there is evidence from which we can infer that the discrimination complaint caused Mr Cotrell to fail to treat the investigation thoroughly or fairly.

164. In relation to issue 4.f., we repeat our conclusions in paragraph 154 above. This allegation is rejected.

165. In relation to issues 4.g. and h. we repeat our conclusions in paragraphs 155 and 156. This allegation is rejected.

Health and Safety Detriment

166. In relation to the claims under ss.44 & 48 of the ERA, we remind ourselves of our findings of fact set out in paragraphs 91 to 95 above. We reject the allegation that the Claimant made a health and safety report to Mr Wilmot which falls within s.44(1)(c).

167. We have found that Mr Wilmot was unaware that the Claimant had sent the email to KH and therefore he could not have been motivated by that email when he raised concerns about the Claimant's safety. Issue 6.a. is rejected. It is true that KH had carried out an inspection on 17 November as a result of the Claimant's email but there is no reason to infer that, contrary to his denials, Mr Wilmot presumed that her visit was in some way connected with a report by the Claimant, particularly since what she found were principally housekeeping matters rather than matters of real concern.

168. The Claimant first informed the Respondent that he considered this email exchange with KH to be the reason for his suspension when he informed Miss Leigh of this on 14 December 2016. Mr Cottrell was therefore aware of this health & safety report when he made his grievance report. However it was he who investigated the allegation and there is no criticism of the way in which he did so. It seems so improbable as to hardly be worthy of consideration that Mr Cottrell should have failed to include the names of KW and AS in his investigation report because of the email sent by the Claimant to KH given that he in fact investigated the allegation that Mr Wilmot was motivated by that email appropriately and made it the subject of a supplementary report. We also refer to our conclusion at paragraph 153. Allegation 6.c. is rejected.

169. In relation to issue 6.d. we repeat our conclusions from paragraph 154 above. This allegation is rejected.

170. In relation to issue 6.e. we repeat out conclusions from paragraph 155 and 156 above. The report that the Claimant made to KH in the email of 14 November 2016 was not in any sense the reason why Mr Gokal decided to dismiss the Claimant. This allegation is rejected.

171. In the light of our conclusions that all of the allegations made by the Claimant fail on their merits, there is no need to go on to consider whether there was an act ending over a period such that the claim was presented within 3 months of the act complained of.

172. The claims of direct race discrimination, victimisation and health & safety detriment are dismissed.

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Employment Judge George

Date: 15 November 2018 ……..

Sent to the parties on: 15 November 2018

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For the Tribunals Office