EMPLOYMENT TRIBUNALS

Claimant: Mr H Abdul Hakim Sofiane

Respondent: London United Busways Limited

Heard at: London Central Employment Tribunal

On: **25, 26, 27, 30 September and 2 October 2019**

Before: Employment Judge Quill, Mr K Rose and Ms H Edwards

Appearances
For the Claimant: Mr Neckles (union representative)
For the respondent: Mr Nuttman, solicitor

JUDGMENT

(1) The claim alleging breach of section 146(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992 is well founded and succeeds.

(2) A remedy hearing will take place.

Oral reasons having been given, written reasons were requested at the hearing, and these appear below.

REASONS

Introduction

1. This is a claim in which the named respondent is a transferee [as defined in the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE")]. All of the alleged wrongdoing relates to periods prior to the transfer. It does not relate to acts or omissions of the named respondent.

2. The claim alleges breach of Section 146 of the Trade Union and Labour Relations Consolidation Act 1992 ("the 92 Act").

Procedural History

3. Case number 2200425/2017 was issued on 4 March 2017. We will call this "the new claim".

4. It was issued after a period of early conciliation which started 20 January 2017 and which continued to 20 February 2017. At the time of issue, the respondent was the Claimant's then employer Tower Transit Operations Ltd ("Tower").

5. The case had a lengthy procedural history and it is necessary to mention some, but not all, of it.

   5.1. It is common ground that the Claimant was employed by Tower as of 4 March 2017, and that there was subsequently a TUPE transfer to London United Busways Ltd.

   5.2. At a preliminary hearing on 11 July 2017, a list of issues was agreed, and it was also agreed that London United Busways Ltd would be joined as a respondent.

   5.3. The list of issues contained a list of detriments relied on by the Claimant, which were items (a) to (g) of paragraph 3.2 of the list.

   5.4. One of these, (e), referred to grievances and appeals being rejected.

   5.5. As required by the case management orders, by email dated 18 July 2017, the Claimant supplied further information of the alleged grievances and appeals referred to in alleged detriment (e). We will call the grievances mentioned in that email Grievances 1, 2, 3, 4, 5 respectively.

   5.6. The Claimant made an application to amend his claim, and this was refused at a further preliminary hearing.

   5.7. The First Respondent, Tower, sought a deposit order, and this was granted. The Claimant did not pay the deposit, and Tower was therefore dismissed from the proceedings.

6. Therefore, for the remainder of these reasons, we will refer to London United Busways Ltd as "the Respondent".

7. The final hearing was listed for 8 days starting from Monday 23 September 2019. The parties correctly understood that this listing would be before a full panel of three. The parties agreed that, prior to commencement of the full merits hearing, there should be a preliminary hearing to resolve a preliminary issue before a judge sitting alone.

Preliminary Hearing on 24 September 2019

8. On 24 September 2019, that preliminary hearing took place, and judgment was given orally on the day. Claims relating to detriments (a) to (d) and/or to Grievances 1 and 2 were dismissed as an abuse of process.

9. Claims relating to detriments (f) and (g) were allowed to continue. The claim relating to detriment (e) was allowed to continue in relations to Grievances 3, 4 and 5 only, to the extent that they were relevant to the claim before us.

The old claim

10. It is also necessary to mention what we will call "the old claim". This was 2200184/2016 and was brought by the Claimant against Tower. It was presented on 8 February 2016 and resolved at a full merits hearing on 10 May 2016. That claim alleged breach of section 146 of the 92 Act.

11. The claim was unsuccessful. It was the existence of, and timing of, the proceedings in the old claim which led to some preliminary issues being decided on 24 September 2019, as mentioned above.

12. The Respondent argues that the old claim is potentially relevant to the matters to be decided by the full merits hearing in the new claim, suggesting that certain findings are binding on us, and relevant to our decision.

13. We have not seen either the claim or the response forms from the old claim, or any case management orders or preliminary hearing orders from the old claim. Our information about it comes therefore from what is in the judgment itself – which was in the hearing bundle - and also what the witnesses told us in evidence.

Evidence

14. We had an agreed bundle of more than 300 pages, supplemented by some additional documents from the Claimant's side during the hearing.

15. We heard testimony from:
    15.1. For the Claimant: himself and Mr Joe Welch
    15.2. For the respondent: Mr Vince Dalzell, Mr Andrew Edwards, Mr Ronald Braidford, Ms Susan Bates and Mr Keith Rodgers.

16. In addition, we read statements from some witnesses for the Claimant who did not attend to give evidence. These were: Manuel de Graca de Sousa Viegas de Abreu (unsigned), Mr A Mohamed (signed), Mr Owais Omar (signed). We gave those statements such weight as we saw fit.

17. During our pre-reading, we had read two additional witness statements from the Respondent (Beaumont and Cox), but the Respondent decided that this evidence was not necessary (in light of the decision on the preliminary issue) and we therefore did not take those statements into account.

The Hearing

18. We heard evidence over 4 days (from 25 to 30 September) and then heard

submissions, finishing on 30 September.

19. The Claimant's evidence was completed on the first day. It appeared at the end of the first day that the Claimant was going to be the only live witness for the Claimant. The Respondent's witnesses started giving evidence from the start of the second day. The Claimant made an application that we should should allow him to call Mr Welch out of turn. We exercised our discretion to allow that, and he gave his evidence after Dalzell, Edwards and Braidford, and before the remaining witnesses for the Respondent.

20. The Respondent asked for permission for Mr Edwards to give evidence by means of a video call from Singapore. There was no objection from the Claimant, and we agreed to that.

The issues

Issue [3.1] fell away following the decision at a previous preliminary hearing, and the Claimant's subsequent failure to pay a deposit. *Issue [3.5] was dealt with as a preliminary issue.*

[3.2] whether the Claimant was subjected to the following detriments

(e) The Claimant's grievances - in respect of the move to the 70 route - and the appeals were rejected.

- Grievance 3 dated 13.03.16 and 10.04.16
- Grievance 4 dated 14.09.16
- Grievance 5 dated 18.12.16

(The dates of the outcomes and appeal outcomes are addressed in our findings of fact).

(f) The Claimant's transfer - under a mutual exchange with Omar Owais which had been approved on 5 June 2016 and under which the Claimant worked on the spare rota - was declared void by Sue Bates at the end of August 2016

(g) A subsequent exchange with Mr Mohamed (was initially approved on 5 September 2016 but) was retracted the following day.

[3.3] if the Claimant was subjected to any of the detriments at paragraph 3.2 above, whether the sole or main purpose was to prevent or deter him from taking part in trade union activities at an appropriate time or to penalise him for doing so by getting rid of him.

[3.4] whether the tribunal has jurisdiction to consider any complaints that were not presented within the primary time limit as extended to facilitate early conciliation.

Findings of fact

21. At all relevant times the Claimant has been a bus driver.

22. All of the allegations in the current claim relate to alleged acts and omissions during the period of his employment with Tower.

23. At the times relevant to this dispute, he has been a trade union member and was an elected shop steward.

24. Each of Tower and the Respondent are bus operators.

Contracts for Bus Routes

25. Transport for London (TfL) allocates bus routes to providers. Generally speaking, the contract for each route is for an initial 5 year period. This can be extended by up to 2 years (so a contract of 7 years in total) in some circumstances.

26. Prior to the ending of each contract (whether it was for 5 years or 7 years) there will be a re-tendering process. The route can either be re-awarded to the same provider or else allocated to a new provider.

27. When a route goes to a new provider, there may be a TUPE transfer. There were, at the relevant time, guidelines for such transfers, produced by TfL's agent, and dated January 2016. The document states that when an award is made to a new contractor, the incumbent should "lock-down" the rota for that route immediately, and only transfer staff to or from the route "where absolutely necessary". It says the "steps set out in paragraphs A, B, C below will then be followed". In other words, the sequence of events is "award of contract" then immediate lock down, then A, B, C. We rejected the Claimant's argument that lock-down need not take place until the time of step C (step C being provision of specified data to the incoming contractor).

28. The approximate timetable by which TfL plans to take the various steps as part of decision-making in relation to awarding routes is public information, and available a long time (at least a year or two) in advance of the proposed start date for the new contract. The published timetable for decision-making is an approximate one, and decisions can be made slightly sooner or slightly later than originally envisaged.

29. Furthermore, and in any event, an incumbent contractor will always know when its own contract for a particular route is due to end (give or take the possibility of the 2 year extension to an original 5 year contract).

30. Generally speaking, if – immediately before the change - a driver is assigned to a route for which the provider changes then the driver is likely to transfer by virtue of TUPE.

Bus Routes

31. Each bus route is designed by TfL. Each bus route has a number assigned to it by TfL and, of course, is a number used on the front of the bus, and in route timetables.

32. The bus operator has a regular timetable for each route. The operator sends a bus along the route, in each direction, several times each hour. The frequency of the journeys can vary depending on time of day. It is TfL which decides how many journeys there should be. Because of the large number of journeys each day, an operator needs to use a large number of bus drivers each day on each route.

Allocation of drivers

33. The operator plans in advance which drivers will do which bus journeys on which days. It is a complex task. Drivers typically do several journeys in one day. The plan for which journeys a single driver will do is called a rota line. There is a schedule for each week, with the pattern repeating every 10 weeks or so.

34. In order to fill these rota lines:

    34.1. The operator has some bus drivers who are permanently allocated to a particular route. In other words, these are drivers who, whenever they are on driving duties, always drive a single specific route.

    34.2. The operator also makes use of what are known as “spares”. These are drivers who do not have regular rota lines on a specific route. Instead, they are assigned duties on an as and when required basis. They are inevitably necessary to cover things such as annual leave and sickness absence amongst the regular route drivers. It is also necessary to rely on spares if a particular route does not have its full complement of regular route drivers.

    34.3. Amongst the drivers required to be spares, there are what is known as super spares. These are drivers who can be allocated to all, or almost all, of the routes operated by the employer. Not all drivers fall into this category because a driver can only drive a particular route if he or she has first been trained on it.

    34.4. The drivers used as spares fall into two categories: some who might be considered regular spares in that it is their normal everyday work to be used as a spare driver; some who might be called temporary spares (and this is our terminology, not what was used in evidence) who are drivers who for one reason or another cannot be allocated one of the rota lines on a particular route. The latter group includes, amongst others, people on a phased return to work following a sickness absence or people with other personal circumstances requiring them to be on reduced duties.

35. In Tower’s opinion, an operator should aim to have enough spare drivers so that spares can be used on about 20% of journeys.

35.1. Due to annual leave and sickness (etc) there is always going to be a number of the route drivers who are absent. If the absentees' shifts always had to be covered by other route drivers doing over-time, then that would cost more than using spares.

35.2. On the other hand, Tower considered it undesirable to have too many spares (and correspondingly too small a percentage of drivers allocated to particular routes). This was because if a route was lost to another operator, the spare drivers would not TUPE transfer, potentially leaving Tower with a surplus of drivers to cover the remaining routes.

36. It was suggested on behalf of the Claimant that the issues of:

- whether the driver is either assigned to a particular route, or else is a "spare"
- which route number (if any) the driver is assigned to.

form part of a driver's contractual terms and conditions.

37. The Respondent's position is that the contract is for "bus driver" and it is at the employer's discretion whether to allocate the employee to a particular route, and if so which route number, or else whether to use the driver as a spare.

38. We accept the Respondent's position because it is more consistent with the evidence, including the written contract. In making this particular finding, we are going no further than stating that there did not have to be a formal variation of contract in order for the employer to allocate a different route to a driver, or else to convert the driver from a spare driver to a route driver (or vice versa). We will discuss in more detail below, the Claimant's specific circumstances and changes (and requested changes) to his duties.

<u>The history leading up to the current dispute</u>

39. The Claimant first worked as a bus driver out of the Westbourne Park depot in 2003. Whether he has had continuity of employment since that date is not necessarily agreed between the parties and does not matter for present purposes. The contract in the bundle gives a start date for continuity as being December 2009. In the old claim, the judgment noted that that the Claimant had continuity back to at least 2010, and it is not necessary for us to make any finding in relation to periods prior to December 2009.

40. At one point in time, the Claimant was assigned to drive a particular route. However, his then employer lost that route and the Claimant did not transfer.

41. In August 2012, the Claimant was elected as shop steward. Due to arrangements with his then employer, that meant that the Claimant did not actually carry out any driving duties at all. Rather he was "stood down" from every shift in order to perform union duties.

42. The Claimant wanted to be allocated to a particular route. As just mentioned, he was not actually doing driving duties at this time. However, routes have waiting lists and he did not want to lose his spot on the waiting list. He therefore had a conversation with Paul Young, depot general manager, during which he, the Claimant, asked to go on "late 70".

43. "70" refers to bus route number 70. "Late" refers to the fact that shift would typically start around 2:30pm in the afternoon.

44. Following the meeting between the Claimant and Mr Young, Mr Young sent an email dated 15 August 2012 which stated:

> "*This is to confirm that when you have completed your union job as local representative at X/AS and you are due to return to driving duties you should return to a late 70 rota line, as agreed by yourself and me at the start of your spell as the local representative*."

45. The history of what happened next is set out in the findings of fact of the old claim. We do not need to repeat those findings in full, but for ease of reference, some of the important points are that:

    45.1. On 23 June 2013, the Claimant's employment transferred in accordance with TUPE to Tower. (As an aside, we interject here to say that the reason for transfer was not that he was assigned to a particular route, but rather that the whole operation at Westbourne Park depot transferred.)

    45.2. The Claimant remained as shop steward at Westbourne Park. A new garage, in Atlas Road, was operated by Tower and the shop steward there was a Mr Salah.

    45.3. Tower decided that it did not want to continue with the agreement that some union officials, including the Claimant, would be stood down for all 5 days of the week. Tower instead wanted to introduce an arrangement whereby each union official would have stand down preapproved for each Friday, but if any time off for union duties was required on other days it had to be requested on a case-by-case basis.

    45.4. The reasons in the old claim record that this was the subject of an agreement negotiated via ACAS on 15 January 2015.

    45.5. As per paragraph 6.10 of the reasons in the old claim, which we will quote in full.

    > *The Claimant was not immediately affected because he was on restricted duties, not driving buses, from January 2015 until 22 June 2015. He may have returned to driving for a few days, but from 3 July 2015 until 10 October 2015, he was away from work on sick and annual leave*.

46. In the old claim, the Claimant alleged that he was being treated differently than other union representatives. The tribunal decided that that was not the case for the reasons set out in paragraph 6.15 of the judgment. It also made a finding in paragraph 6.24 that all the shop stewards had been treated the same.

47. The tribunal decided, at paragraph 7.5, that the Claimant had not been put on a rolling 5-day rota in order to prevent or deter him from carrying out trade union activities. The respondent's explanation that it had done so in order to make financial savings (by reducing the money spent paying others to do overtime) was the genuine reason. The tribunal also decided that the Claimant had not been prevented from attending meetings in his capacity as a representative of employees, and that the respondent would have allowed him to change his rest days in order to attend meetings.

April 2015

48. As previously mentioned, the judgment was issued 10 May 2016 and it is now necessary in these findings of fact to go back in time to April 2015.

49. The then operations manager (Helen Aska) supplied a letter to the Claimant to say that he would be working late 295 rota starting from Saturday, 25 April 2015. "295" being the number of a bus route and "late" meaning the shift would start in the afternoon. Furthermore, it said that Ms Aska was the person to whom standdown requests should be made.

50. The Claimant replied the same day by email. Amongst other things, he forwarded to Ms Aska (and Daniel Corbin) a copy of the Paul Young email from 15 August 2012 quoted above. He said that he had been on the waiting list for late 70 before he became a representative and that that was supposed to be his rota line. He referred to the fact that, for health reasons, he was currently on adjusted duties (not driving buses).

51. In other communications sent in 2015, the Claimant repeated the assertion that he was supposed to be allocated to Route 70.

    51.1. For example, he said it in Grievance 1, on 27 April 2015.

    51.2. In an email to Ms Aska dated 8 June 2015, he said "*As you know for a fact I'm on the late 70 rota I have an email confirming that from Paul Young*".

    51.3. In Grievance 2, a letter to Andrew Edwards dated 3 November 2015, he said, "*Prior to the attempt to place me on the 295 I was Monday to Friday late 70 rota, this is what I had expected to be restored*" and "*I require Tower Transit to cease all attempts to change my rota and allow me to continue as a Monday to Friday late 70 rota driver*".

52. Tower's initial response to the Claimant's 15 April 2015 email was to attempt to interpret Mr Young's email in a way which we find was unreasonable and inappropriate.

53. In particular, on 16 April 2015, Daniel Corbin's email asserted that the Claimant could go onto the late 70 rota if and when he stopped being a union representative, but, until that occurred, the agreement reached with Mr Young was not relevant and the Claimant could be assigned to any route in the meantime.

54. The Claimant's reply dated 17 April 2015 stated that Mr Young's email had been worded that way because, at the time, the Claimant was stood down for 5 days a week (in other words, he did no driving duties at all because of his union position). The Claimant's 17 April 2015 email asserted that the purpose of the discussion with Mr Young had been to ensure that his union duties did not mean that he lost his slot on the late 70 rota. (We note that this email implies that the Claimant had actually been driving on Route 70 before becoming a steward - rather than simply being on the waiting list - but that does not matter to the point at hand.) The email went on to say "*And if the stand downs at that time was one day a week as it is at present time, I would be driving the 70 on a late rota*".

55. What the Claimant says in that 17 April 2015 email is also our interpretation of what Mr Young meant in his 15 August 2012 email. In other words, Mr Young and the Claimant had effectively agreed that the Claimant was deemed to be assigned to Route 70, and the he would have been driving Route 70 but for the fact that he was stood down from driving Route 70 so that he could carry out union activities.

56. Mr Dalzell intervened in the 295 dispute and countermanded the instruction that the Claimant be assigned to Route 295. Mr Dalzell agreed that the Claimant was allocated to the late 70 rota. The fact that this decision had already been made is referred to in an email sent on 27 April 2015 by Mr Edwards to the regional officer of the union. The decision was communicated to the Claimant on 28 April 2015 by Daniel Corbin.

Loss of 295

57. On 29 April 2015, TfL publicly announced that Tower had lost Route 295, and that 295 would go to a different operator with effect from 31 October 2015. The evidence from the Respondent's witnesses (and also what was said in 2015 in response to the Claimant's grievances) is that Tower was not informed of the loss of this route any earlier than 28 April. That is the date on which - as part of the authorised process - an official call was made to the losing contractor giving them the information, in confidence, about what the public announcement would be on the following working day.

58. To the extent that the Claimant has invited us to make a finding that Tower might have been told unofficially that it had lost the contract on a date earlier than 28 April 2015, we have seen no evidence to support that assertion, and we have no reason to doubt what the witnesses told us.

59. We do acknowledge that Tower knew full well (as of 15 April 2015) that one possible outcome was that it would lose Route 295. The closing date for tenders had been 1 December 2014. Tower knew that if its tender was not successful then a new operator would take over the route from 31 October 2015. There was no evidence before us which led us to conclude that Tower thought that it was likely to lose 295.

60. The Claimant's unchallenged evidence was that, as of 2015, Tower operated 6 or 7 routes from Westbourne Park. It was not far-fetched that the Claimant could have been allocated to Route 295 simply by random chance. Our finding is that before Ms Aska placed the Claimant on Route 295, she was unaware that the Claimant had an agreement that he was assigned to Route 70 and that, if she had known, she would have told him that he was due to commence Route 70 driving duties by way of her 15 April 2015 letter.

Grievances 1 and 2

61. It is not necessary for us to comment in great detail on Grievances 1 or 2 due to the judgment on the preliminary issue. The Claimant asserted (amongst other things) that there had been an attempt to make sure that he TUPE transferred out with Route 295; Tower rejected that assertion.

62. In submissions to this tribunal, the Claimant asserted that he did not actually want to be on Route 70 at all and had only started working it (with effect from around October 2015) under duress. Our finding is that that is not the case and that, in 2015, the Claimant was happy to be on Route 70, and he believed that it was appropriate for him to be on Route 70. He was not placed on it under duress (save for the fact that his first preference would have been to retain the previous 5 day a week stand down arrangement).

63. In his evidence, the Claimant sought to allege that Mr Edwards in his 10 June 2015 letter (outcome of Grievance 1) and/ or Paul Cox in his 14 October 2015 letter (appeal in relation to Grievance 1) had asserted that the Claimant should not be assigned to Route 70 while he was still a shop steward.

64. That is not what those letters say.

    64.1. Mr Edwards simply refers to the fact that Mr Dalzell had over-ruled Aska/Corbin.

    64.2. Mr Cox does make some attempt to defend the views expressed in Mr Corbin's email of 16 April, but Mr Cox's passing comment about that email is in the context of asserting that what happened in April was not an attempt to "get rid of" the Claimant. Mr Cox was not commenting on an assertion that, as of 2015, the Claimant should be a "spare" driver (rather than a Route 70 driver), because the Claimant himself had not yet raised that argument, and because Mr Cox knew that Mr Corbin's email had been superseded by Mr Dalzell's decision. The Claimant is wrong to suggest that Mr Cox was reversing Mr Dalzell's decision.

65. In both Grievance 2 (3 November 2015) and the hearing of it (11 December 2015), the Claimant continued to assert that he should be on Route 70 (and that he had been on it in 2012). The first time (based on the evidence which we have seen) that it was suggested that there was something wrong with the Claimant's being on Route 70 – and that he preferred to be a spare - was in the hearing of the appeal in relation to Grievance 2 (3 March 2016). The appeal officer (Charlie Beaumont) said that he would not be addressing that issue in that hearing. His

outcome letter (8 March 2016) asserted that the Claimant's stated reason for wanting to come off Route 70 and go on spare was to avoid TUPE transferring if Route 70 was lost.

Grievance 3

66. Grievance 3 was two emails: one sent on 13 March 2016 and one sent on 10 April 2016, in each case to Debbie Lambshead of HR.

67. It is not possible to interpret the email of 13 March 2016 as a specific request to come off Route 70 and go on to a spare. Knowing how the case has been put in this tribunal, it is possible to see some suggestion (in the final paragraph) that the Claimant was saying that he would rather be on a spare than on any bus route, and that he thinks management should agree to that. However, that was not the main focus of his email. It was not unreasonable for Ms Lambshead to reply (by email dated 24 March 2016) to say that she thought the matters in the 13 March email were simply repeats of what had been resolved already.

68. The 10 April 2016 email was accepted as a grievance. The only matter raised that is relevant to what we need to decide is that the Claimant suggested that, in April 2015, he ought to have gone onto the waiting list for Route 70, not directly onto the Route. He claimed that there was a waiting list.

69. He also said "*If any driver request to be put on any rota, he will have to do so in writing formally to the forward allocator*".

70. The grievance was considered at a hearing on 24 May 2016 before Mr Dalzell. At this hearing, the Claimant in effect adopted the interpretation of Mr Young's August 2012 email that had been advanced by Mr Corbin in his 16 April 2015 email. [Various other matters were also discussed in that meeting, but they are not relevant to the issues which we had to decide.]

71. In his 9 June 2016 outcome letter, Mr Dalzell did not purport to make any fresh decision about whether the Claimant should be on Route 70 or not. He simply asserted that it was a matter which had previously been dealt with at hearings with senior managers.

72. The Claimant appealed on 16 June 2016 by email. That email implied disagreement with what Mr Dalzell had said about the Route 70 matter having been resolved by senior managers at previous meetings, but the Claimant's reasoning went no further than saying that Mr Dalzell had not shown him documents to prove it at the hearing. For various reasons, the appeal hearing did not take place until 27 January 2017 before Mr Edwards (followed by outcome letter dated 23 February 2017). By 27 January 2017, the Claimant had dropped the part of his Grievance 3 appeal that referred to being put on Route 70 in 2015.

The Omar Swap

73. On 18 May 2016, the Claimant and Mr Omar submitted a written request to permanently swap positions. This document is not in the bundle. We infer the date from an interview, dated 9 August 2016, in which Sue Bates (Operations Manager) put questions to Samantha Phillips (Forward Allocations Manager).

74. Ms Phillips was not called as a witness. According to the interview notes, the Claimant spoke to her a few days before submitting the memo, and asked about how to do a swap, and she informed him that both drivers would have to sign a memo and give it to her. When she saw the memo, she noted that the other driver, Mr Omar, had recently been working a 4 day week. She spoke to Mr Omar and the Claimant and stated that Mr Omar could not stick with the temporary 4 day a week arrangement if he took the Claimant's late 70 rota slot. Mr Omar confirmed to her that he was content to resume 5 day working.

75. It is not clear when Ms Phillips first knew that Mr Omar was a "spare". But, at the latest, she knew it at the time of her conversation with them both after receiving the memo, and before she approved the swap.

76. She did approve the swap, and the parties seem to agree that it took effect from 5 June 2016. Our finding is that the actual decision to approve it was on or soon after 18 May 2016.

77. According to the notes of the interview, Ms Phillips seemed to believe that the swap was good for Tower, as it enabled Mr Omar to resume full-time driving. No new rota line had had to be created for the Claimant as a spare, as there was already an open late spare rota line (not Mr Omar's) which he could be slotted into.

78. Ms Phillips was not the regular Forward Allocations Manager for Westbourne Park. She usually worked at Atlas Road. The usual Westbourne Park allocator was Ms Val Kaye who was, at the time, seconded to work in Singapore.

79. The Forward Allocations Managers report to the Operations Manager and, at this this time, that was Sue Bates. Ms Bates' evidence was that Val Kaye returned from Singapore in early August and noted that Mr Omar had been allocated to the late spare, and she raised this with Ms Bates as a problem.

80. We did not hear from Ms Kaye. We did not see any contemporaneous documents to show that Ms Kaye raised it as a problem or what she said about it or when. Nor did we see any documents to indicate how long Ms Kaye had been back from Singapore prior to the reversal of the Omar Swap.

81. Ms Bates wrote to the Claimant by letter dated 18 August 2016. The letter stated that he would revert back to the late 70 rota. The letter asserted that it had been a mistake to approve the swap. It asserted that there were two reasons that this was a mistake:

81.1. Firstly, that it was impossible to swap a 4 day worker with a 5 day worker;

81.2. Secondly, that "*we do not want to be putting additional people on the spare rotas, in fact, when lines become available we will not be replacing them.* "

82. The letter did not assert that there was a policy which had been introduced prior to May 2016.

The Mohamed Swap

83. Mr Braidford gave evidence that, on 25 August 2016, he was covering for Ms Kaye. She was in Singapore on that date according to his statement. He approved a swap (to take effect on 1 October) between the Claimant and a late spare driver, Mr Mohamed. The swap request was in writing and a copy was in the bundle.

84. Mr Mohamed was working a full 5 days per week on the spare rota. Prior to approving the swap, Mr Braidford asked Mr Edwards if he, Mr Braidford, was authorised to approve swaps and he was told "yes". We accept his oral and written evidence that he did not point out to Mr Edwards that one of the drivers was a spare. Mr Braidford did not think it relevant to mention that fact, and Mr Edwards did not think it necessary to ask if either driver was a spare.

85. In his written statement, it implies that he told Mr Edwards the names of the drivers who wanted to swap. In his oral evidence, he said that he does not think he mentioned the names. He seemed reasonably sure that he did not mention the names, and our finding is that he did not do so. He only wanted to find out if he was authorised – as a stand-in – to approve swaps; he was not asking Mr Edwards to make the decision, and there was no reason for him to mention the names of the drivers to Mr Edwards.

86. Mr Braidford's evidence was that he had worked for a number of bus companies, and most had a similar organisational structure. In his opinion, most have an employee in the Forward Allocator position, and it is usually part of the Forward Allocator's role to approve swaps. He had not previously come across an operator having a ban on swapping drivers where one was a spare. Mr Braidford said that he would expect a Forward Allocator to check that the swap was suitable before approving it. For example, a driver would not be permitted to swap into a role for which he or she was untrained.

87. Our finding is that it was normal practice at Tower that swaps would be approved by the Forward Allocator and did not have to be referred to the Operations Manager or above. This is consistent with what the Claimant says, and with Mr Braidford's evidence, and with the note of the interview with Phillips, and is also consistent with Ms Bates' position that Val Kaye usually handled such matters.

88. This did not just apply to swaps. Whenever a driver wanted to go onto a specific route, even where he or she had not found someone to swap off it, it was the

Forward Allocator to whom a request would be made.

89. In either case, for a swap or a request to join a route or waiting list, the allocator would require the request to be in writing (usually on a pro forma "Staff Memo").

90. By letter dated 12 September 2016, Ms Bates wrote to the Claimant to say that she was countermanding Mr Braidford's authorisation of the swap. Amongst other things, the letter stated:

> "*I have recently been reviewing all rota lines at Westbourne Park due to the current level of inefficiency, but unfortunately Ron Braidford was unaware of my decision to review and reduce spare rota lines*"

91. The letter said that there were open rota lines (by implication on specific routes) and that these would be filled by putting spares onto them. The letter does not expressly state that the Claimant had the option of applying to take one of these open rota lines. In fact, the letter implies that he might be refused if he did apply on the basis that he was not a "spare". However, we are satisfied that the Claimant knew that he could apply if he wanted to. The Claimant had described the exact process for applying to go onto a route in various earlier emails to managers and we are satisfied that he knew that he could make a written request to go onto a specific route if he wanted to do so.

Industrial action in 2016 and Tower's interactions with Unite

92. On 26 August 2016, there was some strike action at Westbourne Park. We did not see evidence about when the dispute arose, or when Tower were first told that there was potentially going to be a strike, but we are satisfied that this would have been before 9 August 2016.

93. By letter dated 26 August 2016, Mr Edwards informed the union that Tower was ceasing pre-approved stand down time, and that requests for stand down time would be considered on a case by case basis. Tower also ceased its check off arrangement.

94. In August 2016, Tower decided that all requests by union representatives to change their duties had to be directed to Helen Aska. This was not an instruction which affected employees who were not union representatives.

Grievance 4

95. The Claimant submitted Grievance 4 by an email to HR dated 14 September 2016. In it, he complained that it was wrong to cancel his swap in relation to Mr Omar. However, the main thrust of his argument was that the swap with Mr Mohammed, due to take effect from 1 October 2016, should go ahead.

96. Mr Dalzell replied by letter dated 21 September 2016. Mr Dalzell did not follow the formal process for responding to a grievance. In relation to the swap with Mr

Omar, Mr Dalzell incorrectly asserted that the swap had caused the creation of an additional late spare rota line (which was contrary to what Ms Phillips told Ms Bates on 9 August 2016).

97. Mr Dalzell stated in the letter that the Claimant had been told that he could move to a new rota line provided it was on a specific route. The Claimant had not been expressly informed of this (but - as mentioned above - the Claimant knew that he could do this.) Mr Dalzell's letter asserted that the Claimant had declined to swap to a specific route, but our finding is that he had not specifically declined; he had not been expressly invited to apply to go on any other route.

98. By email dated 3 October 2016, the Claimant said that he wished to appeal against the 21 September 2016 letter (and also another letter on a different topic which is not relevant to this case). The Claimant's email also asserted that the grievance policy had not been followed in that he had not had the opportunity of the hearing.

Events of November and December 2016

99. In or around November 2016, a driver whom we will call "E" sought to come off Route 70. The Claimant assisted E with this request. Our finding is that Ms Bates agreed for E to go onto Route 31 and that she did so with effect from 19 November 2016.

100. The Claimant makes three assertions in relation to E. Firstly, he says that E did not submit a written request for a new route. Secondly, he says that E's move was approved after 2 December 2016. Thirdly, he says that E did not go onto Route 31, but went on to a spare instead.

100.1. We do not think that the issue of whether E did or did not submit a written request is important to our decision on this claim. The Claimant's side invited us to make a finding that there was no written request because no such document was in the bundle. We declined to make such an inference. No application was made by the Claimant for either Tower or the Respondent to disclose documents in relation to E.

100.2. Given that Ms Bates was working from documents when she wrote in her statement that the decision was made with effect from 19 November 2016, we prefer her version to the Claimant's given that the Claimant appears to be going just from memory. In any event, even if the approval was given after 2 December 2016 that would not make any difference to our decision, given that we think that E's circumstances were significantly different to the Claimant's. We accept what Ms Bates says, in paragraph 12 of her witness statement, in relation to E's circumstances. The Claimant's own account of E's circumstances is only slightly different.

100.3. We would potentially think that it was important and relevant if E had been placed on a spare rota rather than a route rota. However, we accept Ms Bates clear and specific testimony that he was definitely placed on Route 31 at the time, and this is corroborated by Tower's records (at pages 313-314 of the bundle).

101. On 2 December 2016. The public announcement was made at Tower had lost. Route 70. Tower would have known this on 1 December 2016, but not earlier.

Grievance 5 and Mr Edwards' decisions

102. The Claimant submitted Grievance 5 by email dated 18 December 2016. This said (amongst other things) that the Claimant should be able to come off Route 70 by swapping with either Mr Omar or Mr Mohammed.

103. At a hearing on 27 January 2017, Mr Edwards considered the outstanding appeal from Grievance 3 (which is not relevant for our purposes) and also dealt with Grievances 4 and 5 as first instance decisions.

104. During the course of the meeting, Mr Edwards said to the Claimant that he wanted to clarify why the Claimant wished to avoid transferring with Route 70. Mr Welch, who was representing the Claimant at the meeting, said that in terms of bringing a further grievance (to suggest that there would be substantial change to the Claimant's material detriment if the Claimant were to transfer to the Respondent), if the Claimant was successful in getting a transfer to a spare based on the existing grievances, such a further grievance would be unnecessary.

105. The outcome letter was dated 23 February 2017. In relation to Grievance 4 and Grievance 5 the heading used by Mr Edwards in his outcome letter was "victimisation for not being allowed to be taken off the late 70 rota".

106. In terms of the Claimant having been put on Route 70 in the first place, Mr Edwards made no fresh decision, but rather he referred back to the decisions made previously in 2015.

107. In terms of the Claimant being allowed to go onto the spare rota (in place of Omar or Mohamed or at all), Mr Edwards did make a fresh decision. He noted that the matter before him included that the Claimant felt he "*had been treated differently to others and left on route 70 for a very long time with no-one trying to assist [him] with options to transfer elsewhere*."

108. In relation to the fact that the Claimant had swapped with Mr Omar:

    108.1. Mr Edwards asserted that this had only been for a short time ("about 3 months").

    108.2. Mr Edwards said the swap should have been disallowed at the beginning because Mr Omar was a part-time driver.

    108.3. He said that "*replacing a part-time spare driver with a full-time spare does not work*".

    108.4. He said that getting part-time drivers back to full-time was important.

    108.5. The letter referred to what Mr Omar had been doing after August. It related that Mr Omar had, in fact, gone onto Route 70. This had been onto the "main" rota, rather than the "late" rota. Subsequently, Mr Omar had left

Route 70 and gone to a "different" rota. [From the context, it is clear that Mr Edwards knows that Mr Omar returned to the spare rota, although the letter avoids saying that outright. Furthermore, for Mr Omar to go onto the spare, he either swapped with somebody in order to return to the spare, or he became an additional person on the spare, though the letter does not address that.]

109. The letter said that the Claimant was aware of the situation at Westbourne Park with open rota lines on routes and the "*unacceptable amount of part-time drivers / drivers with special arrangements*".

110. Mr Edwards said that the process and communication with the Claimant had not been dealt with as well as it could have been. He said that there had been an assumption by Tower that the Claimant was aware that employees who came off the spare rotas were not being replaced. Mr Edwards letter noted that the Claimant had not been informed that no one was allowed to swap onto a spare rota.

Events of 1 to 4 March 2017

111. On 1 March 2017, there was a discussion between Ms Bates and the Claimant. The Claimant asserted that Ms Bates had told him (the previous August/September) that he could not move on to any open rota line. She said that that is not what she had said at the time, and that at the time he could have requested a move to a rota line on a specific bus route (but not to a spare).

112. Also on 1 March 2017, the union wrote to Tower to say that the company taking over Route 70 (the respondent in the current proceedings) had no objection if Tower wished to keep a significant number of the Route 70 drivers.

113. The claim in these proceedings was issued on 4 March 2017 and events which happened after that are not formally part of the claims which we need to decide. We can take later events into account if we believe that they help us decide what any person's motivations had been for acts prior to 4 March 2017.

Events after 4 March 2017

114. The Claimant made an application on 8 March 2017 to go on a new route, 13, which Tower had recently been awarded. This new route was due to commence in April. By email dated 10 March 2017, Ms Bates said that the Claimant could no longer make a normal application for a change of route. Rather the employer would now only approve such a change if the employee could show that a transfer to the new provider would lead to a substantial change in the employee's working conditions to his material detriment. She referred to TUPE in her email.

115. Mr Rogers dealt with the Claimant's appeal in relation to Grievances 4 and 5 at a meeting which took place on 18 April 2017. He gave his response by letter dated 8 May 2017. The appeal was not upheld. It was asserted in the outcome letter

that there had been an examination of five examples (put forward by Claimant) of drivers doing mutual exchanges. Mr Rogers stated that none of these were a driver going onto a spare.

The submission of the claim

116. There were no particular difficulties for the Claimant which affected his ability to submit a claim or to contact ACAS during the latter part of 2016. By "latter part", we mean from August onwards.

117. The Claimant did not submit a claim (or contact ACAS) during the latter part of 2016 because he had submitted grievances and was awaiting the outcome of those. He contacted ACAS in January 2017 because he decided that it might be necessary to do so within 3 months of the commencement of the lock down of Route 70.

118. The Claimant was aware, as a previous tribunal Claimant and as a Trade Union official that time limits exist for Employment Tribunal claims.

The Claimant's union activities

119. He was an active shop steward through a period of disputes and unrest in connection with schedules and stand down arrangements. This including strike action.

Law

Legislation

146.— Detriment on grounds related to union membership or activities.

(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—

(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so,

(5) A worker or former worker may present a complaint to an employment tribunal on the ground that he has been subjected to a detriment by his employer in contravention of this section.

147. Time limit for proceedings.

(1) An employment tribunal shall not consider a complaint under section 146 unless it is presented—
(a) before the end of the period of three months beginning with the date of the act or failure to which the complaint relates or, where that act or failure is part of a series of similar acts or failures (or both) the last of them, or

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

(2) For the purposes of subsection (1)—

(a) where an act extends over a period, the reference to the date of the act is a reference to the last day of that period;

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

(4) Section 292A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (1)(a).

148.— Consideration of complaint.

(1) On a complaint under section 146 it shall be for the employer to show what was the sole or main purpose for which he acted or failed to act.

120. Section 292A gives the same formulation as other statutes for the effect which early conciliation has on time limits. In this case, given that the claim was issued within one month of Day B, and given that Day A was 20 January 2017, we can note that an act or failure that occurred on or after 21 October 2016 is in time. However, for acts or failures occurring before then, we have to look first at sections 147(1)(a) (is there a series of acts?) and 147(2)(a) (is there a continuing act?) and secondly – if necessary – at 147(1)(b) (the possibility of extending the time limit).

121. Yewdall v Secretary of State for Work and Pensions [2005] 7 WLUK 557 gives useful guidance on the approach a tribunal should take when considering the sections mentioned above. It states that a sensible approach would be for the tribunal to ask itself:

121.1. whether there had been acts or deliberate failures to act by an employer;

121.2. whether those acts or deliberate failures to act had caused detriment to the employee;

121.3. whether those acts were in time;

121.4. in relation to those acts that were in time, where detriment had been caused, whether the Claimant could establish a prima facie case that the acts or deliberate failures to act were committed with the purpose of preventing, deterring or penalising him for taking part in trade union activities. The onus of proof, as per section 148(1) should only pass to the employer once the Claimant had established a prima facie case of unfavourable treatment on prohibited grounds which required an explanation.

Time Limit

122. In considering whether there is an act which extends over a period of time, it is vital to identify the act complained of. There is an important distinction between a continuing *act* and the continuing *consequences* of an act.

123. The existence of a policy or regime can be a continuing act. There may be a policy or regime for this purpose even though it is not of a formal nature or expressed in writing; and it may be confined to a particular post or role. In any event, even in the absence of a so-called policy a decision may be a detriment whether or not it is made on the same facts as before, providing it results from a further consideration of the matter and is not merely a reference back to an earlier decision. See for example Cast v Croydon College in the Court of Appeal.

124. We do take account, of course of the clarification in Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA, that it is not appropriate for employment tribunals to take too literal an approach to the question of what amounts to continuing acts by focusing on the concepts of "policy" or "regime" etc. Those concepts and labels are merely examples of when an act extends over a period and should not be treated as restricting the interpretation of the words of the statute.

125. There is also a provision that if the act or failure upon which the complaint is based is part of a series of similar acts or failures then the three month period runs from the last act or failure. This provision is separate from, and additional to, the provisions relating to an act which "extends over a period".

126. In principle, a decision on a grievance, which upholds an earlier decision to deny a particular benefit, can, in itself, be a detriment.

Detriment

127. "Detriment" connotes some element of disadvantage to the employee.

128. It is not necessary for the employee to actually suffer economic or physical damage in order to establish a detriment. The test is whether a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment (see Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] IRLR 285, [2003] ICR 337).

129. Denying the employee a benefit or advantage can also amount to subjecting the employee to a detriment where that benefit or advantage is accorded to others and where the employee might reasonably have expected it to be accorded to them too.

Trade Union activities

130. We must never lose sight of the words of the statute. Even if we are satisfied that there has been a detriment, there is no breach of section 146(1)(b) unless the sole or main purpose of the employer was preventing or deterring the Claimant from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so.

Analysis

whether there had been acts or deliberate failures to act by Tower

131. Our answer is that there had been acts or deliberate failures to act by Tower, which were:
    131.1. The reversal of the Omar Swap / (re)allocation to Route 70 (18 August 2016)
    131.2. The refusal to allow the Mohamed Swap (confirmed by letter of 12 September 2016, the decision having been made the previous week).
    131.3. The outcome of Grievances 4 and 5 (letter dated 23 Feb 2017, following hearing 27 Jan 2017).

whether those acts or deliberate failures to act had caused detriment to the employee

132. We start our analysis by considering whether it could it potentially be a disadvantage to a driver to be allocated to a particular route, rather than being a "spare"? Our answer is that allocation to a route could be a disadvantage to the driver if he or she preferred to be a spare.

133. When the Claimant was told that he had to do driving duties on Route 70, in 2015, at that time he did want to be on Route 70. His being assigned to Route 70 (when his driving duties resumed) is what the Claimant asked for in 2012. In 2015, he told Tower that he had a longstanding agreement to be on Route 70.

134. The Claimant was actually driving Route 70, as a designated Route 70 driver, from, at the latest, October 2015. The allocation of the Claimant to Route 70 in 2015 (or earlier) is not before us as a detriment due to the judgment at the preliminary hearing dismissing detriments (c) and (d). However, if it had been before us, we would have decided that it was not a detriment.

135. We also reject any argument that the Claimant – in 2015 – only agreed to Route 70 under duress. His first preference was to do no driving duties at all, and to be stood down every day. However, at the time, he did not say that his second preference was to be a spare. At the time, he repeatedly emphasised that his second preference was to do late 70s.

136. We next consider whether it could potentially be a disadvantage to an employee to be refused approval to come off a particular route (Route 70 in this case) and go onto a different particular route. Our decision is that this has the potential to be a disadvantage to an employee.

137. Such requests had to be put in writing, regardless of whether the driver was seeking a swap with another driver, or was seeking to fill an existing vacancy, or else seeking to join a waiting list for a route which had no vacancies. Nothing that we heard in relation to E caused us to doubt that that was the procedure. Ms Bates accepted that it was not necessarily something which Tower had put into a

written policy, but she said she regarded it as a requirement. Mr Braidford, whom we found to be a particularly credible witness, said that his industry experience was that bus operators always expected these requests to be in writing. Furthermore, the Claimant's own emails make clear that submitting a written was (as he knew) the correct procedure.

138. It is common ground that the only request (made in writing) for the Claimant to go onto a specific route was for Route 13. That request was made and refused after the claim was issued and no successful amendment request was made to add the refusal of this request as a detriment. It is not in the list of issues.

139. We are, in any event, satisfied that the Claimant was not treated differently to other employees in relation to this issue. The Claimant accepted that, as far as he knew, any Route 70 drivers who requested – after lockdown – to stay with Tower had those applications refused. We also accept the evidence of Dalzell, Bates, Edwards and Rodgers to the effect that Tower had a firm policy of seeking to insist, where possible, that allocated route drivers TUPE transferred out with the route. Tower did not readily approve any requests to come off a route where the request was made after the announcement of the loss of the route.

140. It would not have been a breach of TUPE, or a breach of Tower's contract with TfL, to agree to a particular driver coming off Route 70. However, that does not assist the Claimant. The evidence does not support an argument that, by refusing his Route 13 request, Tower was treating him differently to others. The reply which Ms Bates sent on 10 March 2017 was the same reply she would have sent to any other Route 70 driver who was seeking to go onto Route 13 at that time.

141. We had to decide:

    141.1. Could it potentially be a disadvantage to the employee to be refused approval to come off a particular route and go onto a "spare".

    141.2. Could it potentially be a disadvantage to the employee for a grievance relating to a move onto spare to be refused.

142. In each case, our answer was that these things potentially could be a disadvantage if other employees would have had them granted in similar circumstances.

<u>whether those acts were in time</u>

143. Mr Edwards did not give his decision on the appeal until the 23 February 2017 letter. It was not given to the Claimant at the end of the hearing 27 January 2017. Mr Edwards' decision is an act which is in time.

144. Items (f) and (g) from the list of issues are from dates before 21 October 2016. We therefore have to consider whether they are part of a continuing act, and/or whether either or both form part of a series of similar acts or failures of which the 23 February decision is a part. That part of our analysis can only be completed

after we have first considered the employer's reasons for each action, and so we will return to it later.

145. However, for the time being, we say that we considered whether there was some secret agreement reached between the respondent's senior employees – in August 2016, say - that the Claimant had to be kept on Route 70 come what may. We have decided that there was not. This would be inconsistent with Mr Dalzell's letter dated 21 September 2016, which says that the Claimant could in principle transfer to a different route. [The letter also says that once on that different route, the Claimant would need to stay on it, even if that different route went out to tender.] As of September 2016, we accept that was Tower's genuine position. The Claimant could have applied to go to a different specific route. He did not make any such specific application.

<u>whether the Claimant could establish a prima facie case that the acts or deliberate failures to act were committed with the purpose of preventing, deterring or penalising him for taking part in trade union activities.</u>

146. There is a prima facie case that each of the decisions (see paragraph 131 above) might have been linked to the Claimant's trade union activities. The timing of the reversal of the Omar Swap coincided with industrial action. Furthermore, in August 2016 Tower introduced a policy on exchange of duties which applied only to union reps, namely that requests had to go through Helen Aska.

<u>The Omar Swap</u>

147. The Respondent argues that there were two reasons for reversing the swap between the Claimant and Mr Omar.

147.1. <u>First Reason: that the swap had to be reversed because Mr Omar was only working 4 days per week</u>. We do not accept that was genuinely part of the reason.

147.2. <u>Second reason: that the swap had to be reversed because drivers were not allowed to swap onto "spares" rota lines</u>. Our decision is that this was not genuinely part of the reason for reversing the Omar Swap.

148. We reject the first reason because nine days before Ms Bates sent her 18 August letter, Ms Phillips had told Ms Bates that she had spotted this potential problem circa 18 May 2016, and had spoken to both employees and resolved it.

149. Some of our reasons for rejecting the second reason overlap with those for rejecting reasons re Mohamed Swap

149.1. It was not alleged by the Respondent or any of the witnesses that the unions or employees had been informed about this policy.

149.2. It was not alleged that the policy was contained in any written document. Ms Bates said that a target of reducing the spares had been given to her by more senior managers. Mr Edwards and Mr Rogers each confirmed that

reducing the spares would be an efficiency measure and that they were aware that Ms Bates would have been given such a target.

149.3. The earliest document (that we saw) to mention that Tower "did not want" existing drivers going onto spares this was the letter to the Claimant dated 18 August 2016, approximately 3 months after the swap had been authorised by Ms Phillips.

149.4. We accept that, in general terms, Ms Bates did believe, and/or had been told, that reducing the number of drivers on spares was desirable. However, that general aim is not the same thing as having a specific "rule" or "policy" that no driver who was currently on a route could swap with someone who was currently on a spare.

149.5. In itself, of course, such a swap would be neutral as to the number of spare drivers. In saying this, we are not overlooking Ms Bates' comment that if swaps were banned, then the spare driver might still be able to go onto a route and ***that*** would indeed reduce the spares. However, that comment does not, in itself, answer the question as to whether Tower did have a ban in existence prior to May 2016 (or prior to 18 August 2016).

149.6. The Forward Allocations Managers were the people who usually approved swaps (and who also approved drivers going onto specific routes, even if not part of a swap).

149.7. Tower's position amounts to assertions that:

- Ms Bates and (what she described as her "usual" Forward Allocator) Ms Kaye knew there was a ban on people swapping onto the spare rota.
- Ms Bates did not tell Ms Kaye's first stand in, Ms Phillips about this ban (while Ms Phillips was covering both Westbourne Park and Atlas Road) during May 2016.
- Ms Kaye returned from Singapore and alerted Ms Bates ("in early August 2016") to a swap made several weeks earlier, which Ms Bates reversed in mid-August 2016.
- After Ms Kaye had returned to Singapore, the next stand-in for Ms Kaye was also not told about the rule banning people swapping onto spares, and so he approved, in late August 2016, a swap with the Claimant and Mr Mohamed.

149.8. The letters written by Ms Bates on 18 August 2016 and 12 September 2016 do not assert the existence of a policy which had been in place since before May 2016. The letter of 12 September 2016 implies that Ms Bates had only recently come to a decision.

150. Our decision is that no such firm rule – preventing people swapping onto the spare rota – existed in May 2016. Furthermore, our inference is that the rule did not exist, for example, as early as 9 August when Ms Bates was asking Ms Phillips about why she had approved the swap with Mr Omar. The rule did not seem to exist (or at least was not universally enforced) after August 2016 either. Mr Omar was allowed to go (back) onto the spare rota after having become a designated Route 70 driver.

151. In relation to the Omar Swap specifically, our decision is that Tower's purporting

to cancel an arrangement that had been in place for between 2 and 3 months was surprising and suspicious, and it calls for an explanation.

151.1. We reject the argument that there had been a policy in place before 18 May of which Ms Phillips was unaware. Our judgment is that the swap was properly authorised, on behalf of Tower, by Ms Phillips, and we do not accept that there would have been such an attempt to reverse it for another employee.

151.2. We also regard it as inherently implausible that a reasonable employer would purport to reverse a swap which had been in place for 3 months even if it were true that the authorisation had been given as the result of mistakes and miscommunications by management.

151.3. We reject the argument that the decision to reverse the swap was based on genuine efficiency considerations.

152. Therefore, our finding is that relation to detriment (f) is that the Claimant was treated differently than another employee would have been treated, and that the reason for this is not the reason advanced by the respondent. On the contrary, our finding is that the reason for the decision to reverse the Omar swap, was for the sole or main purpose of penalising the Claimant for his activities as a shop steward, including in connection with the industrial action that was taking place in August 2016.

<u>The Mohamed Swap</u>

153. In relation to detriment (g), part of the Respondent's argument is that by the time of this request (made to Braidford on 24 August and approved 25 August 2016) Tower had already informed the Claimant – and also Joe Welch – that no swaps onto the spare rota would be agreed.

154. This is not entirely correct. Ms Bates letter of 18 August 2016 said that no "*additional"* people would be put on spare rotas and that lines would be deleted as they became vacant. However, the proposed swap with Mr Mohamed would not have put any "*additional*" person on the spare. It also did not mean that there was a vacancy on the spare to be deleted.

155. Our finding is that the reason that Mr Braidford did not know about an alleged rule that no swaps at all onto the spare rota could be approved is that no such hard and fast rule existed. Furthermore, as mentioned above, if the rule existed, it was not universally enforced, even after August 2016: Mr Omar was allowed to go (back) onto the spare rota after having become a designated Route 70 driver.

156. We are not satisfied by the explanation given by the Respondent for refusing the Mohamed Swap. Furthermore, our finding is that the cancellation of this swap was to penalise the Claimant for his union activities. In drawing this inference, we have taken into account Tower's decision, in August 2016, that exchanges involving union reps had to be approved by Helen Aska. The union reps were being penalised for their union activities by (potentially) having swaps refused which would have been approved for another person.

157. The Claimant's swap with Mohamed had been validly approved by Braidford (and Mr Edwards did not tell Mr Braidford that swaps could not include "spare" drivers), and it would not have been cancelled, but for the Claimant's trade union activities.

Mr Edwards grievance outcome decision dated 23 February 2017

158. Mr Edwards had the authority to reverse the decisions made previously which allocated the Claimant (back) to Route 70 and disallowed the swaps with Mr Omar and Mr Mohamed. As he confirms in his statement (and as is consistent with the contemporaneous documents) he did not regard Mr Dalzell's 21 September letter as the outcome of Grievance 4. He dealt with Grievances 4 and 5 as fresh issues requiring a determination by him.

159. Mr Edwards decided that the Claimant should not be allowed to swap onto the spare rota, taking the place of either Mr Omar or Mr Mohamed.

160. In our judgment, the reasons expressed in the letter are not the real reasons for rejecting the appeal and there is a prima facie case that the decision might have been linked to the Claimant's trade union activities.

161. In the case of the Omar Swap, it is not correct that the arrangement meant that a full-time route driver (the Claimant) had replaced a part time spare driver (or vice versa). Ms Phillips made that clear to Ms Bates on 9 August.

162. Furthermore, Mr Edwards letter does not specifically address what triggered the cancellation in August of a swap approved in May. He simply says that it should not have been approved, because the fact that Mr Omar was part-time "*was missed by the management team for a period of time*".

    162.1. If "*management team*" means Ms Phillips, it was not missed by her. She approved the swap in full possession of all the relevant facts, and she saw to it that Mr Omar did not remain as part-time.

    162.2. If "*management team*" means people more senior than Ms Phillips, then more senior people did not need to be involved in approving swaps for employees who were not union representatives.

163. In any event, Mr Edwards knew that he could over-rule Ms Bates' decision if he thought the employer had acted unreasonably by purporting to reverse something which had been in place for 3 months. [See, for example, his 10 June 2015 letter to the Claimant, where he said, "*This is why we have a hierarchy of managers in the business to overrule decisions if required*".]

164. We are not satisfied that Mr Edwards would have refused to allow the driver to swap onto the spare if a different driver (not a union representative) had brought this grievance, but the facts were otherwise identical. In his letter to the Claimant, Mr Edwards accepted that there had been no communication to the Claimant that swaps onto spares would not be allowed. Mr Edwards also knew that Mr Omar had gone onto Route 70 and then allowed to go back onto the spare. Our finding

is that – based on this evidence – Mr Edwards would have upheld the grievance and allowed a different employee to go onto a spare. He did not uphold the Claimant's grievance in order to penalise him for his trade union activities. In making this inference, we have taken into account that Tower had introduced special requirements for union representatives seeking to swap.

165. It was suggested in submissions by the Respondent that the fact that Route 70 was in lockdown by January 2017 was a reason for Mr Edwards to reject the grievance. However, that is not a matter referred to by Mr Edwards in his letter.

166. Our conclusion is that Mr Edwards' letter of 23 February 2017 formed part of a series of similar acts with the reversal of the Omar Swap and the rejection of the Mohamed Swap. For that reason, all three of these detriments are in time

Reasonable Practicability

167. It is appropriate for us to say what our finding would have been if we had not decided that Mr Edwards' decision was part of a series of acts.

168. Our finding is that it would have been reasonably practicable for the Claimant to contact ACAS within 3 months of 18 August 2016 (and within 3 months of 6 September 2016), and to submit a claim promptly following the end of any such early conciliation period.

169. Therefore claims relating to detriments (f) and (g) would have been out of time had they not formed part of a series of acts which included the 23 February letter.

Employment Judge Quill

Date: 18th Oct 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

21/10/2019

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FOR EMPLOYMENT TRIBUNALS