Case Numbers: 2303465/2017
2300135/2018
& 2300798/2018

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE C HYDE**

MEMBERS: **MS B C LEVERTON**
MS C EDWARDS

BETWEEN:

MR C MATHURIN
Claimant

AND

LONDON UNDERGROUND LIMITED
Respondent

ON: **20, 21, 22, 23 and 27 August 2019;**
and in chambers on 28 and 29 August 2019

APPEARANCES:

For the Claimant: **Mr P Stanislas, Counsel**
For the Respondent: **Ms A Ahmad, Counsel**

JUDGMENT

The Judgment of the Employment Tribunal was that: -

1. The complaints of failure to make reasonable adjustments under the Equality Act 2010 were dismissed upon withdrawal forthwith.

2. The second claim form be amended to include a complaint of discrimination arising under section 15 of the Equality Act 2010 about

the decision of Mr Kingham communicated to the Claimant on 11 January 2018 in relation to upholding the 26-week warning.

3. The other complaints under section 15 of the Equality Act 2010 about the Respondent stopping sick pay and failing to allow the Claimant to meet with his managers were also dismissed on withdrawal forthwith.

RESERVED JUDGMENT

The Reserved Judgment of the Tribunal is that: -

1. Direct race discrimination under the Equality Act 2010
    a. The Tribunal had no jurisdiction to determine the Claimant's direct race discrimination complaints about failure to deal with the grievances raised in the 2017 grievance, when compared with the treatment of the Claimant's 2015 grievance as they were brought out of time, and they were therefore dismissed.

2. Discrimination arising from disability under the Equality Act 2010
    a. The Tribunal did not have jurisdiction to determine the complaint alleging unfavourable treatment by way of confirmation of the 26-week oral warning given on 11 January 2018 as it was brought out of time; and that complaint was therefore dismissed.

3. Victimisation under the Equality Act 2010
    a. The allegation of failing to respond to letter of 1 December 2017 (from the Claimant to Mark Wild), the protected act relied on being the letter, was not well-founded and was dismissed;
    b. The allegation of failing to reinstate company sick pay, the protected act relied on being the letter of 1 December 2017 from the Claimant to Mark Wild, was not well-founded and was dismissed;
    c. The allegation that the Claimant was dismissed by reason of having done the following protected acts, namely (i) sending the letter to Mark Wild on 3 January 2018, (ii) sending the discrimination questionnaire to the Respondent dated 3 January 2018, and (iii) presenting the second Employment Tribunal claim, was not well founded and was dismissed.

4. The claim of unfair dismissal under section 98(4) of the Employment Rights Act 1996 was not well-founded and was dismissed.

5. Unlawful deduction of wages under section 13 of the Employment Rights Act 1996
    a. The complaint alleging unlawful deduction of £203.09 from the

Claimant's pay for 4 September 2017 as notified to the Claimant in his payslip received on 27 September 2017 was not well founded and was dismissed.

b. The complaint that the failure to pay sick pay from 24 November 2017 to 26 January 2018 was an unlawful deduction of wages was not well founded and was dismissed.

REASONS

Application to Amend the Complaint in respect of Section 15 of the Equality Act 2010

1. Reasons for the decision on the application to amend were given orally at the hearing but are set out here as the main decision was reserved and it is material to explain the scope of the complaints considered.

2. This case was listed for seven days and concerned three consolidated claim forms which were presented between the end of November 2017 and the beginning of March 2018. There had been also a telephone preliminary hearing in May 2018 in which, as is usual in cases involving allegations of discrimination, there was an attempt to clarify and identify the issues. Employment Judge Sage before whom that hearing took place made further orders for clarification of aspects of the Claimant's case. The Claimant provided further and better particulars on 13 June 2018.

3. Although Employment Judge Sage had set out the issues as they appeared to the Tribunal as at that point, it emerged during a discussion with the parties on the first day of this case that the way in which the Claimant was putting one aspect, at least, of his case, had changed and there was a question as to whether an amendment was needed. The Tribunal clarified to the representatives that any application to amend would need to be properly formulated and in writing, and the Tribunal referred both representatives to the guidance on amendment in the Presidential Guidance on case management for the Employment Tribunals in England and Wales.

4. At the commencement of the second day and just before the beginning of the Claimant's evidence, Mr Stanislas submitted a document which was headed 'list of issues' and which included under the fourth section, the complaint that was being put forward by the Claimant under section 15 of the Equality Act 2010 – the disputed issue. In addition to that Mr Stanislas had prepared a document entitled 'Application to Amend' although his primary contention was that an amendment was not necessary because it was effectively re-labelling facts which had already been complained

about. That document was marked [C2].

5. The Tribunal heard submissions from both representatives, and Ms Ahmad who represented the Respondent argued that an amendment was needed and that she resisted the application to amend.

6. The application was to include in the second claim which was lodged on 10 January 2018, either by way of confirming that it was part of that claim, or by way of amendment, a disability discrimination complaint under section 15 about unfavourable treatment by Mr Kingham on 11 January 2018 when he confirmed a 26-week oral warning which had been imposed in August 2017 by Mr Dhaliwal. In the second claim form, obviously, there was no reference to that because, it was agreed, the Claimant was not notified about the appeal outcome decision until 11 January 2018, the day after the claim form was presented. It was made absolutely clear on the Claimant's behalf that there was no complaint about the initial decision because it is said that the considerations taken into account by that manager did not relate to the Sickle-Cell Anaemia absence. At the hearing in May 2018 Judge Sage's order at paragraph 3 on page 93 of our bundle records her understanding of what was being said about the oral warning and also at page 95, paragraph 15 of her order, she sets out what was being said on behalf of the Claimant to be the section 15 discrimination arising complaint. The Claimant was represented by Counsel, at that hearing. At this hearing, neither of those positions was being pursued by the Claimant.

7. Moreover, the further and better particulars were ordered by EJ Sage to clarify the failure to make reasonable adjustments claims. There was no clarification sought of the section 15 claim because this had been clarified on the Claimant's behalf and was set out in the Judge's Summary. Under the sub heading "Section 15: Discrimination arising from disability", she recorded that the allegation of unfavourable treatment as "something arising in consequence of the Claimant's disability" falling within section 39 Equality Act was "stopping sick pay and refusing to allow the Claimant to meet with his managers at Queens Park". These complaints were not pursued in the event in the final hearing.

8. Further, on the first day of this hearing the Claimant through his Counsel withdrew the failure to make reasonable adjustments complaint and the Tribunal with the parties' consent dismissed that complaint forthwith.

9. The Claimant's representative, however, indicated that he wanted to make a complaint under section 15 in relation to the oral warning appeal outcome. This had not been formulated in the list of issues that was drawn up by Judge Sage nor indeed was it formulated fully in the list of issues which was handed to the Tribunal on the morning of 21 August. In the application to amend it was not formulated either in the Tribunal's view

and it only became clear to the Tribunal after hearing oral submissions from Mr Stanislas what the allegation was said to be as follows: The first element was that the unfavourable treatment was the action of Mr Kingham in confirming the oral warning on 11 January 2018 as set out in the Claimant's list of issues. However, the second element which was the something arising was not set out in the list of issues nor was it stated clearly in the application to amend document. There was a reference to the introduction by Mr Kingham of the Claimant's disability when upholding the 26-week oral warning. That essentially is what the complaint is, namely that Mr Kingham in upholding the oral warning on 11 January 2018 brought into account or included consideration of Sickle-Cell related absence in 2016.

10. The Tribunal then considered this application having heard submissions from both representatives in accordance with the principles which are set out in the Presidential Guidance and the relevant case laws as well. Neither party referred to the Guidance or case law. These principles are now well known and the Tribunal was satisfied having referred the parties to these principles at the end of the first day that there was no need to repeat them in these reasons.

11. In relation to the first point as to whether amendment was required, the Tribunal considered that the section 15 complaint which the Claimant now wished to pursue would require an amendment of his case, to pursue a complaint which had not been made previously. It was absolutely clear that the context in which the facts were referred to in the further and better particulars was in relation to a complaint of failure to make reasonable adjustments and there are substantive differences between a claim of failure to make reasonable adjustments and a claim under section 15 of the Equality Act 2010. The Tribunal did not accept that this was simply a matter of re-labelling.

12. Among many arguments relied upon, the Claimant asked the Tribunal to take into account that he was acting in person when he settled the claim form. That was not a very powerful argument in this context because the further and better particulars were sent in by solicitors and the Claimant was represented by Counsel during the case management discussion before EJ Sage, and this complaint was not raised then. The Tribunal also considered all the submissions made on behalf of the Respondent and, in particular, the submissions about the potential prejudice to them if they were now faced with a different case legally from the one that they were anticipating up to the first day of the hearing. They had expected to address failure to make reasonable adjustments complaints which had now been withdrawn.

13. The Tribunal also took into account in deciding to allow amendment of the claim form that the Tribunal is entitled to allow amendment of a claim to

include matters which occurred after the date on which the claim form was presented where there is a close connection with the matters which were complained of. There was indeed reference to discrimination arising in the claim form albeit in a completely different factual context and the first reference to the facts that were now being relied on was in the further and better particulars given in June 2018. Despite that the Tribunal considered that it was consistent with the interests of justice to allow the Claimant to bring a complaint about this matter.

14. Clearly also, if the Claimant had sought to amend his claim in May 2018 his complaint about Mr Kingham's action would have been out of time by the date on which the further and better particulars were submitted. The Tribunal therefore confirmed to the parties that the issue of whether the section 15 complaint was out of time would need to be dealt with at the end of the hearing. The list of issues was therefore amended accordingly at section 7, paragraph number 2.

Reasons for Reserved Judgment

15. The Tribunal sets out its reasons only to the extent that it is necessary to do so in order for the parties to understand why they have won or lost. Further they are set out only to the extent that it is proportionate to do so.

16. Further, all findings of fact were reached on the balance of probabilities.

Final List of Issues

17. Ms Ahmad prepared a list of issues [R3] after the Tribunal had spent some time discussing the issues with the representatives and had charged them with agreeing the list. This was then updated to include matters which had been clarified or abandoned following the hearing in front of Employment Judge Sage in 2018. As matters further evolved during the hearing, a second list of issues was agreed between the representatives and provided to the Tribunal on 27 August 2019, along with a cast list. That second and final List of Issues was marked [R9], and is referenced in these reasons.

18. The headline complaints at the conclusion of the hearing, in broadly chronological order, were: -
    a. direct race discrimination
        i. in respect of the treatment of the Claimant's grievances in 2017 by Ms Brown and Mr Clark, when compared with the Respondent's treatment of the grievance he submitted in 2015; and
        ii. Whether this complaint was out of time.
    b. Unlawful deduction of wages

i. The deduction in September 2017 in respect of the Claimant's non-attendance on the CPD course on 4 September 2017;
    1. Whether the complaint was brought out of time; and
ii. The non-payment of company sick pay from 24 November 2017 to the end of the Claimant's employment on 26 January 2018.

c. Victimisation
    i. Failing to respond to the Claimant's letter dated 1 December 2017 to Mark Wild; and
    ii. failing to reinstate the Claimant's company sick pay from 1 December 2017 to the end of the Claimant's employment on 26 January 2018.
d. Discrimination arising from Disability (s15 Equality Act)
    i. in that on 11 January 2018 the Claimant was notified that Mr Kingham had rejected the Claimant's appeal and upheld the 26 week warning; and
    ii. whether the complaint was out of time as the oral attendance warning in respect of which the appeal was brought had been given on 21 August 2017.
e. Dismissal:
    i. That the dismissal was unfair under section 98(4) of the Employment Rights Act 1996; and
    ii. That it was an act of victimisation under the Equality Act 2010.

19. The Tribunal also had to consider the Respondent's contention that the complaint about the deduction in September 2017 was res judicata.

20. Further, the Final List of Issues referred to the Tribunal needing to determine whether the unlawful deduction of wages claim in respect of sick pay from 9 September to 2 December 2017 was brought out of time. It did not appear to the Tribunal that there was a claim for unlawful deductions in respect of that time frame. The Tribunal treated that as an error in drafting the second List of Issues.

Evidence Adduced

21. The parties had co-operated to prepare a bundle of documents [R1] which consisted of some 800 pages in two lever arch files. The Tribunal ensured that both parties and the Claimant, in particular, had all the relevant documents available at the hearing at the beginning.

22. Further, Ms Ahmad had prepared a document [R2] setting out the cast list, reading list and chronology.

23. The Tribunal heard evidence on behalf of the Claimant from Mr Mathurin himself. He produced two documents as his witness statement, one of which was signed and another which was unsigned. It initially appeared that there might have been a discrepancy between the two but this simply turned out to have been caused by the different layout. The contents of the statements were in the event identical. The Tribunal received both into evidence however and they were marked respectively [C1] and [C3], the latter being the signed statement.

24. After the Claimant's evidence, the Tribunal heard evidence from five witnesses on behalf of the Respondent as follows:

    Miss Julia Brown, formerly People Management Advice Specialist ('PMA') until early 2019, witness statement marked [R4];

    Mr Mandeep Dhaliwal, Duty Manager Trains at the relevant time, witness statement marked [R5];

    Mr Terry Kingham, Train Operations Manager ('TOM') for Queens Park on the Bakerloo Line at the relevant time, witness statement marked [R6];

    Mr Simon Bidston, Trains Manager at Elephant and Castle, witness statement marked [R7]; and

    Mr Rob Lawford, TOM at Elephant and Castle at the relevant time, witness statement marked [R8].

Closing Submissions

25. Both Counsel prepared written closing submissions which they supplemented orally. The Respondent's closing submissions were marked [R10] dated 27 August 2019 and the Claimant's closing submissions were marked [C4] dated 26 August 2019.

Findings of Fact, Relevant Law and Conclusions

26. Mr Mathurin ('the Claimant') started employment with the Respondent on 1 June 2007 as a customer service assistant. He then commenced work as a full-time train operator (commonly understood as a driver) from mid-January 2013. For the first two years or so of his employment as a train driver, the Claimant worked in a role which was described as a 'pool' train operator. Pool train operators provide LUL with a flexible resource to cover absences and other resourcing issues. They are allocated duties as and when required by the local management team. As a general rule, pool train operators are notified of their duties and rest days up to three

days in advance of the up-coming working week. This means that the duties of a pool train operator are generally released on a Thursday, with the working week commencing on the following Sunday. Train operator's duties are scheduled on a 'week ending' basis with the week running from Sunday to Saturday.

27. The Respondent is a quasi-public body providing underground train services in London. There was no dispute that the provision of a safe and reliable service was paramount to its existence. The safety critical nature of its functions and the importance of efficiency and attendance were reflected in its employment contracts and policies.

28. It operates in a highly unionised environment and must abide by negotiated collective agreements in order to prevent strike action and to deliver the service.

29. The contract of employment which the Claimant signed when he commenced his employment in 2007 was not part of the original bundle but a copy of an unsigned contract was produced (pp117A-117G). During the hearing the Claimant produced his original signed contract of employment which was signed on the cover page. The material terms of that document were identical to the one in the bundle.

30. From 17 May 2015 the Claimant worked as a 'rostered' train operator. Like the majority of train operators working on this basis, his duties were set to very specific schedules which ran many weeks and months in advance. It was agreed that the documents at pages 198 and 199 reflected the rosters generally for the ninety plus operators that were rostered (p198) and for the Claimant (p199). Train drivers usually only had the opportunity to work on a rostered basis after having been on a waiting list, based on seniority. The rostered train operator's duties were set out in the duty roster and they provided more certainty as to their working pattern over a much longer period of time (ninety weeks). However, there was some built-in greater flexibility in the rostered train operators' duties in that on average they were also rostered to work as 'leave cover' every thirteen weeks. When a rostered train operator was working as 'leave cover' it was custom and practice that they were provided with 28-days' notice of their duties.

31. The Claimant continued in the capacity of a rostered train operator until his dismissal on 26 January 2018. This was a decision made by Mr Lawford, Trains Operations Manager ('TOM'). Mr Lawford and the Respondent purported to terminate the Claimant's employment on the basis of incapability due to medical reasons.

32. Prior to that the Claimant had been off work due to sickness absence from 9 September 2017.

Direct race discrimination – handling the 2017 grievances

33. The first issue chronologically concerned the allegation of direct race discrimination in relation to the way in which the Respondent dealt with the Claimant's two grievances in 2017. The Claimant compared the way that his grievance in 2015 had been dealt with by the Respondent. The facts relating to both 2017 grievances also form the background to the September 2017 unlawful deduction of wages complaint and to the Respondent's response to it.

34. The 2015 grievance arose out of events which had occurred when the Claimant was still working as a pool train operator in April 2015.

35. On 19 and 20 April 2015, after a period of annual leave, the Claimant failed to report for his duties. The explanation he gave for this was that he had notified the Respondent that those two days would be his rest days.

36. In early 2015 the Claimant had informed the then TOM, Steve Manuel, at the Elephant and Castle Depot at which all the events we were concerned with took place, that he did not believe that he should have to telephone the depot whilst he was on a period of annual leave in order to find out his duties for the week immediately after his return from annual leave. He asked the Respondent to email him his duties in those circumstances (pp118, 119, 120-121, 122, 123-124, 125, 126-127, 128-129, 130 & 132).

37. We accepted Mr Lawford's evidence that it was widely accepted custom and practice that it was train operators' responsibility to find out what their duties were each week. We accepted this because it was consistent also with the Claimant's actions in trying to secure a change from the normal practice by way of having an email sent to him. The practice was that the train operators telephoned in to the Respondent to find out what their duties were even whilst on annual leave. It was further not in dispute that at the Elephant and Castle, the duties assigned to pool train operators were generally available after 12.00pm on the Thursday before the working week commenced.

38. The conflict about this issue led to the Claimant presenting a formal complaint on 14 May 2015 (pp133-138) about the actions of Mr Manuel and Mr Lawford under the Respondent's Harassment and Bullying Procedure. In relation to this matter, he narrated (p134) that on 20 February 2015 he had approached the duty TSM Okoh and had made a request for his duties to be sent to his work email address or by post to his

home address whilst he was enjoying block annual leave. He indicated that he did not wish to have to telephone the depot every time that he was on annual leave. On the advice of the DTSM he made his request to the assistant to the TOM who he acknowledged was responsible for scheduling. He did this promptly. He complained that the TOM's assistant agreed to his request and took details of the Claimant's work email address in order to facilitate this in relation to the annual leave which was due to start on 8 March 2015. Then, 'less than thirty minutes later DTSM Okoh called [the Claimant] and told [him] that he had spoken to the assistant to the TOM and that she had called him to advise him that after checking with the TOM, they had ascertained that [he] was obliged to call in himself whilst on annual leave and enquire as to what day and time [he] would be required to return to work.'

39. The Tribunal has quoted this account as it is the Claimant's own account as of 14 May 2015. It was the Respondent's position that the fact that the Claimant was required to comply with that practice was therefore made clear to him thirty minutes after he had received an indication from the assistant to the TOM that his request would be agreed. The Respondent subsequently in the correspondence referred to above in the page references maintained their position in relation to this request.

40. The Claimant set out in his grievance various matters that he was unhappy with surrounding this issue and explained the factual circumstances in the grievance referred to above. This grievance was addressed to Ms Brown who was People Management Advice Specialist (referred to subsequently as 'PMA'), a member of staff within the Human Resources Department who was responsible for human resources support to this depot.

41. The Claimant's case was that he was content with the way in which this grievance was dealt with and he used it as a comparison with the way the 2017 grievances were handled. There was no dispute that Ms Brown referred the May 2015 complaint to be dealt with by an accredited manager and this was in accordance with the Harassment and Bullying at Work Policy and Procedure under which the complaint by Mr Mathurin was expressly made (p133). The Tribunal accepted the evidence from Ms Brown that although at the time she was also an accredited manager, for reasons including matters of retaining the confidence of the Trade Unions, neither the PMAs nor the personnel department got involved in actual investigations of bullying and harassment complaints. The investigation was dealt with by an accredited manager by the name of Tunde Taiwo, Area Manager, Piccadilly Circus.

42. The Claimant was written to by Mr Taiwo with the outcome of the bullying and harassment complaint by letter dated 10 July 2015 (pp160-162). Mr

Taiwo upheld certain of the allegations and did not uphold certain others.

43. He did not agree with the Claimant that the Respondent was not entitled to require him to telephone in to discover his duties – the complaint about Mr Manuel's decision.

44. That complaint was in effect against Mr Lawford because at some point between 10 April and 20 April 2015, he had replaced Mr Manuel as TOM of the Elephant and Castle Depot (p135). Thus, although Mr Manuel made the original decision about the Claimant being responsible for phoning in, Mr Lawford maintained this stance and then he became the subject of the harassment and bullying grievance about this matter.

45. The second alleged incident of bullying was in relation to the use of the Claimant's emergency contact in a non-emergency situation. The Respondent had telephoned the emergency contact for the Claimant who it turned out was the Claimant's grandmother to enquire about his presence when he did not attend for work in April 2015. Mr Taiwo upheld that complaint of bullying because he did not consider that it was an emergency because the management was aware that the Claimant may not turn up for duty in the light of the dispute about the notification of his post-annual leave duties on 3 April 2015 (p119).

46. Mr Taiwo also upheld the third complaint, namely that Mr Lawford had failed to remove the Claimant's emergency contact details from the file.

47. The important issue about the dispute about calling in to find out the post annual leave duties was that following the Claimant having been told that the Respondent was not going to agree to his request to have his duties emailed to him whilst he was on annual leave, the Claimant sent a memo to the DTSM on 3 April 2015 (p119) indicating that he would be treating 19 and 20 April 2015 as rest days. He also referred to other duties but it was the rest days that were the contentious ones.

48. Mr Manuel wrote to the Claimant on 10 April 2015 while the Claimant was still on annual leave apologising for not having been able to meet with Mr Mathurin in person to confirm why his original request to have his duties sent to him by email was declined. Mr Manuel then reiterated that the responsibility for obtaining the duties lay solely with Mr Mathurin. Mr Manuel went on to explain to the Claimant that his request had been discussed before at a body referred to as the Train Functional Council where it was confirmed that the responsibility lay solely with the train operator to obtain their duties for work. He continued that he had had this confirmed by Tom Morris who was the Employee Relations Manager. Mr

Manuel then gave the Claimant the means by which he could contact Mr Morris to address any concerns that he had. He also recorded that he had spoken to the Claimant's union representative who confirmed that he would be happy to discuss the issue with him. He then confirmed that he was now leaving the post and that Mr Lawford would be the new Employee Manager.

49. Mr Taiwo upheld the fourth complaint of bullying regarding Mr Lawford's refusal to address his complaints in a formal grievance dated 21 April 2015. He agreed that the Claimant should have been advised of the next steps after he had submitted the grievance and some of the issues raised in the complaint could have been actioned immediately.

50. The fifth complaint of bullying was regarding the request by the Respondent for a medical report on the Claimant two days into his sickness. Mr Taiwo upheld this complaint.

51. The allegation of bullying in relation to the Claimant being referred to Occupational Health during a return to work interview with the DTSM on 28 April 2015 was not upheld.

52. Also related to the issue of the Respondent treating the Claimant's absence as unauthorised absence and therefore deducting his pay, Mr Taiwo rejected the seventh complaint that the pay deduction amounted to bullying.

53. The final allegation of bullying, regarding a letter from Simon Bidston dated 29 May 2015 was upheld. He found that Mr Bidston had threatened the Claimant that there was a possibility that his pay would be suspended. Mr Taiwo considered that this was unnecessary because the Claimant had been making contact with the Respondent during his absence, on average every two days between 11 and 26 May 2015. Importantly, however, he noted in his findings that management reserves the right to make a reasonable demand for employees to call at a certain time when they are off sick and it is for the employee to comply with the local reporting procedures. He found the fact that this was not prescribed in the policy was irrelevant.

54. It appeared to the Tribunal that the notification of the outcome of this complaint to Mr Lawford highlighted an issue which arose later. This was that it was clear from the terms of the Claimant's complaint (p133) that complaints three, four and seven were said to have been acts of Mr Lawford and complaints two and five were said to have been done under 'Robert Lawford's tutelage'. During the questioning of Mr Lawford by Mr

Stanislas in relation to his knowledge of the Claimant's 'issues' with him, Mr Lawford denied knowledge of Mr Mathurin having an issue with him. To a certain extent this was corroborated by the terms of the letter dated 27 July 2015 sent to Mr Lawford by Ms Brown in which she referred to Mr Taiwo having recently written to Mr Lawford advising him of his decision 'not to uphold the complaint made against you by Mr Christopher Mathurin with regards to his allegations of bullying and harassment'. She then advised Mr Lawford that there was an appeal.

55. Unfortunately, this was a letter which was not put to either Ms Brown or Mr Lawford at the hearing and appeared to contradict the actual terms of Mr Taiwo's report. The Tribunal also noted that in his original complaint the Claimant had described Mr Lawford as the 'alleged perpetrator'. He had named Mr Manuel and Mr Okoh as other relevant persons.

56. In the outcome letter to the Claimant on 10 July 2015 Mr Taiwo stated before setting out his findings on the individual allegations that he needed to emphasise that the Claimant had contributed significantly to the position he found himself in by initially allocating rest days to himself on 19 and 20 April (in his 3 April 2015 note) and then not turning up for work despite being advised by the then TOM, Mr Manuel, that the responsibility was his to call on the Thursday prior to resumption of duties from annual leave to find out what his duties were for the following week. Mr Taiwo continued that he believed it was the Claimant's failure to follow this simple instruction that triggered the chain of events that led to the submission of the harassment and bullying grievance.

57. The Claimant appealed against the two adverse findings in relation to Mr Manuel's decision not to email or post his duties to him after a period of annual leave (first allegation of bullying and harassment) and the seventh allegation in the letter about the pay deduction in respect of the missed duties on 19 and 20 April 2015 (pp163-167) by a letter to Ms Brown dated 20 July 2015.

58. The appeal was chaired by Daniel Howarth, General Manager – Transformation, and took place on 28 August 2015. Mr Howarth sent a letter to the Claimant informing him of the outcome dated 24 September 2015 (pp186-187).

59. The Claimant was then put through a local disciplinary interview process by way of a hearing before Mr Archie-Pearce, Train Operations Standards Manager, in relation to an allegation of misconduct because of failure to follow reasonable instructions and the non-attendance on 19 and 20 April 2015. Mr Archie Pearce decided to dismiss the charge and issued a letter of advice for future reference (pp188-190). The Claimant was informed of

this shortly after the conclusion of the investigations in early December 2015 (p191).

60. Mr Taiwo had made two recommendations following his findings in relation to the harassment and bullying complaint in relation to the recording of the emergency contact details for the Claimant. The Claimant put in a follow-up formal complaint to Mr Clark, Performance Manager Trains (Bakerloo Line) by letter dated 22 February 2016 about the fact that these recommendations had to date not been complied with (pp191i – iii). These were the immediate deletion of the Claimant's emergency contact details and the written assurance to him that this had been done (p191ii).

61. The full wording of recommendations 7.2 and 7.3 (p153) from Mr Taiwo was as follows: -

'7.2 C's emergency contact details should be deleted immediately. Either the TOM or the TOSM should see C and explain the importance of having a next-of-kin details on SAP.

7.3 The TOM should give a written reassurance to C that his emergency contact details will only be used in an emergency situation only if C should decide to supply an emergency contact.'

62. During the hearing Mr Lawford contended that the provision to the Respondent employer of an emergency contact was actually a legal requirement. This was confirmed to a certain extent by the later emails when the Claimant's complaint in February 2016 was being considered by the Respondent's managers.

63. Also at paragraph 7.9, Mr Taiwo recommended that the TOM should determine and agree when and in what circumstances medical consent forms would be included in the standard first day letters; and that this should be communicated to all. His recommendation at 7.10 was that the DTSMs should be encouraged to make immediate referrals to OH for sicknesses such as work related – stress as soon as the staff called in sick and that consent should be taken over the phone.

64. The 2015 grievance was concluded by way of the written assurances that the Claimant asked for in his February 2016 grievance being provided in a letter from Mr Lawford to the Claimant dated 24 March 2016 (p191(x)). In that letter, Mr Lawford also expressed his understanding that the Claimant's new emergency contact details had been recently supplied to the Trains Performance Manager and that this would be added to the Respondent's records in the near future.

65. The Claimant then presented a complaint to Mr Lawford in February 2017 about the way in which he had been spoken to by a member of service control staff (pp191E-191F). This was not one of the matters that the Claimant complained about to us. However, it was relevant background evidence about the interactions between the Claimant and Mr Lawford, who subsequently dismissed the Claimant and whose action was said to have been unfair and victimisation.

66. The complaint was responded to on 30 March 2017 by letter from Mr Lawford to the Claimant. He did not accept, as the Claimant alleged, that the signaller had made an accusation but that he was simply attempting to ascertain facts from the Claimant. However, the Tribunal noted that Mr Lawford expressed an understanding of the Claimant's concerns and reported that the Service Control Manager had advised him that she had commenced some work with the Service Managers to investigate how they could obtain a better insight into the different working environments across the trains, stations and service control. This was with a view to improving communications in such circumstances.

67. The Claimant responded on 17 April 2017 to Mr Lawford to express his slight disappointment with the outcome but to accept the conclusion and that he would not be seeking further redress. He declined to visit the Bakerloo Line control room which had been suggested to him although he wished the project success and hoped that in the future communications between the control and train staff would be improved. He finally thanked Mr Lawford for his time and effort in resolving his complaint.

June and July 2017 grievances

68. By a memo dated 3 May 2017 Mr Mathurin complained to the DTSMs at Elephant and Castle about the non-display of leave covers for the week ending 3 June 2017 - the week of 29 May to 3 June 2017 (p191N). The Claimant's point, in essence, was that he understood that the drivers were entitled under the relevant framework agreement to a minimum of twenty-eight days' notice of leave cover duties. His position therefore was that the last day by which notice should have been given for the week ending 3 June 2017 was Sunday, 30 April 2017. He argued that since the 28 day notice requirement had lapsed and notice of the leave cover duties had not been forthcoming, the Respondent had not complied with the Framework Agreement on that occasion. He had brought to the attention of DTSM O'Dwyer on 17 April 2017 that there had been a delay in terms of displaying the sheets for the week ending 20 May 2017. He therefore considered that this was a repetition of an earlier default. He accepted that following his bringing this matter to the notice of DTSM O'Dwyer on 17 April, the leave cover display sheets were then posted on 18 April. This was, he stated, three days late.

69. It was not disputed that the delay in displaying leave cover display sheets affected all ninety plus drivers. It was not specific to the Claimant.

70. Mr Mathurin continued 'the DTSM sought to have the person(s) responsible provide me with an explanation as to why the display sheets were posted late yet no-one had the courtesy to respond. This lack of respect concerning my personal time and commitments will no longer be tolerated.'

71. In his memo of 3 May 2017, he stated that in light of the above i.e., the lack of respect concerning his personal time and commitments, he had decided to confirm some personal engagements for the week ending 3 June 2017 and he asked the Respondent to up-date their records to reflect the fact that he would be on rest days on 28 May and 3 June 2017.

72. This issue ultimately led to the Claimant submitting a grievance addressed to Ms Brown against Mr Lawford by letter dated 2 June 2017 (pp201I-201L). The Claimant agreed that he had posted this on 3 June 2017. In addition, there was correspondence between the Claimant and Ms Brown prior to the date on which this grievance was sent in because the Claimant had had discussions with the management at Elephant and Castle about their approach to his designating the rest days to himself. Thus, on 1 June 2017 he wrote to Ms Brown to indicate that it was his intention to submit a formal complaint under the Individual Grievance Procedure 2010 within the next one to two days. He asked for her confirmation that she would be available to receive his complaint between 1 June and 7 June 2017 by way of service of physical documents at the Respondent's Westferry Circus address. He offered the alternative of sending them by post.

73. Ms Brown responded on 2 June 2017 also by email to inform the Claimant that she was willing to receive his grievance and that the policy stated that in the first instance his complaint should be submitted to his immediate manager (p205). She also referred him to the fact that the policy suggested that he should attempt to resolve matters informally. She asked him to advise her whether or not he had attempted to do this. However, if he still wanted to send his grievance to her, she indicated the address to which it needed to be sent at Baker Street. She also gave him the alternative of sending the grievance to her as a PDF attachment.

74. Mr Mathurin confirmed in his email response on 2 June 2017 that the complaint he would be registering 'fully meets the criteria as set out in paragraph 5.3 of the Individual Grievance Procedure 2010'. He then indicated that he would be electing to forward the documents to her by post to the address given and that he would do so within the next forty-

eight hours. Ms Brown confirmed at about 10.00am on 2 June 2017 that she would be awaiting the documents.

75. By further email sent at 5.12pm on 6 June 2017, the Claimant enquired of Ms Brown whether she had yet received his letter sent on 3 June 2017 (p204). 3 June 2017 was a Saturday.

76. Ms Brown responded by email sent at 9.16am on Wednesday, 7 June to confirm that she had received his grievance. She stated that having carefully read it, in her opinion, this should be tabled as a level 1 item, i.e., through the machinery as it related to a collective matter rather than an individual one. She then stated that this was in accordance with paragraph 2.2 of the London Underground Grievance Procedure (2010).

77. In her email, Ms Brown did not set out the terms of the paragraph referred to, but there was no dispute that this was a reference to paragraph 2.2 of the London Underground Individual Grievance Procedure (2010) ("the IGP"). Reference was made to the text during the hearing (p668) and there was no dispute that it read as follows:

> *'2.0 SCOPE*
>
> *2.1 This procedure applies to all employees of London Underground and is to be used to resolve individual grievances. Where employees raise a collective grievance this should be dealt with in accordance with the Machinery of Negotiation and Consultation…*
>
> *2.2 A collective grievance is an issue that affects two or more employees.'*

78. Mr Mathurin then responded disagreeing that the complaints which he had made could be classed as a collective issue. He requested an opportunity to discuss this matter with her in accordance with paragraph 5.6 of the IGP. In the following email correspondence, the Claimant maintained that this was indeed an individual grievance and that the Respondent had failed to comply with the process which applied if an individual grievance was made.

79. Ms Brown sent a further email on 8 June 2017 at 10.27am in which she maintained her disagreement and stated that the Claimant's grievance was about the application of a process which could have a collective impact. As such it was best tabled through the machinery. She continued that it was not appropriate either for the complaint to be investigated under paragraphs 2.2 and 5.3 simultaneously i.e., both as a collective matter

and an individual grievance.

80. By this time the Claimant had received a response from Mr Dhaliwal to the effect that there was no requirement for leave covers to be displayed twenty-eight days in advance.

81. Ms Brown cited paragraph 3.1 of the Framework Agreement (p689) which stated the following:

> '(ii) twenty-eight days notice of roster and complete duty sheet alterations will normally be given'.

She noted that Mr Dhaliwal had also pointed out that this agreement was in reference to the permanent roster and not the leave covers. She stated that there was no formal agreement for leave covers and providing a notice period. She also commented on the fact that the Claimant had selected his own rest days outside of the roster. She indicated however that he had been granted 3 June but not 28 May which could not be accommodated. She reminded him that he had been clearly advised that he would be marked absent if he went ahead and took 28 May as a rest day.

82. This grievance was initially submitted on 3 June 2017 to Ms Brown as described above. Mr Mathurin then forwarded the same complaint to Mr Clark by email dated 25 July 2017 (pp 212-215 & 220), enclosing various relevant documents. Hence the references in the papers to two grievances in this complaint.

83. Mr Clark responded by email dated 31 July 2017 acknowledging receipt of the documents and saying that he would be in touch again shortly in respect of the next steps (p 219). It was not in dispute that in an email to the Claimant dated 1 August 2017 (pp229-230), Mr Clark supported the approach which had been set out by Ms Brown namely that this was not an individual grievance.

84. The Claimant's case was that both Ms Brown and Mr Clark dealt with the 2017 grievances less favourably than either Ms Brown had dealt with his 2015 grievance, or than Mr Clark had dealt with his February 2016 grievance. He argued that this was because they now knew in 2017 that he was Black (Claimant's closing submissions para 2). He relied on the fact that Ms Brown had met him on 28 August 2015 when she attended the appeal hearing before the General Manager Daniel Howarth. He further contended that Mr Stuart Clark, Mr Lawford's line manager, had met him for the first time in person on 15 March 2016 and as a result of that Mr Stuart Clark also was aware at the time the 2017 grievance was submitted, that the Claimant was Black. Mr Clark was the Bakerloo Line Performance Manager.

85. The Claimant argued that when he had made the complaint in February 2016 about the Taiwo Investigation recommendations not having been complied with by Mr Lawford, in contrast to Mr Clark's stance in 2017, Mr Clark had responded sympathetically to the Claimant in the email dated 23 March 2016 (p191(iii)(a)). In that email Mr Clark noted that there had been a delay by Mr Lawford in complying with the recommendations and that he was disappointed to report that Mr Lawford could not offer him any mitigation for not resolving the issues from his grievance which he found quite disturbing and that he had consequently taken appropriate action to prevent a similar event in the future.

86. In the March 2016 email, Mr Clark also suggested that a mediation session would be set up immediately after Easter apparently involving himself, the Claimant and Mr Lawford. This was with a view to finding a way forward and hopefully rebuilding a positive working relationship. In the event this session never took place.

87. It appeared to the Tribunal that the Claimant's case about receiving less favourable treatment from Mr Clark in 2017 because Mr Clark now knew that the Claimant was Black, was considerably undermined by the Claimant's own case that after having met the Claimant on 15 March 2016, Mr Clark sent what the Tribunal found was an extremely supportive email to the Claimant on 23 March 2016.

88. The Claimant also relied on the fact that a meeting had taken place between Ms Brown and Mr Lawford at the Elephant and Castle Depot on Monday 5 June 2017 lasting approximately two hours, as evidence which tended to establish that they had had the opportunity to discuss and agree upon a joint, unhelpful, approach to his 2017 grievance. The Claimant happened to observe Ms Brown's attendance at the depot on that day [C1, para 23]. Mr Mathurin relied on the fact that as set out above, he had been corresponding with Ms Brown in advance of submitting his grievance about his intention to do so, and that the grievance was posted to her on 3 June to support his contention that they must have discussed their approach to his complaint at that meeting.

89. The fact of the meeting between Mr Lawford and Ms Brown on 5 June 2017 was not in dispute. The Respondent's case was that this was a routine meeting between Ms Brown and Mr Lawford who met about twice a week at the time to discuss human resources issues relating to the depot as a whole, and particularly the problem of attendance levels generally at the Elephant and Castle Depot. Neither Ms Brown nor Mr Lawford had any specific recollection of having discussed Mr Mathurin's complaint against Mr Lawford on that occasion. The Tribunal accepted,

given their roles, that the subjects discussed by them, were as described.

90. The Tribunal did not consider that the fact that this meeting had taken place made it either more or less likely that the Respondent had discriminated against the Claimant on racial grounds. Certainly, the Tribunal considered that there were good grounds for accepting the Respondent's case that the reason why there was a difference in the way in which the two sets of grievances were dealt with was because the 2015/2016 grievance was an individual grievance under the bullying and harassment process whilst the 2017 grievance to Ms Brown and then re-submitted to Mr Clark was indeed about collective agreements. The fact that the Respondent then failed to hold a meeting with the Claimant was fully consistent with their interpretation of the 2017 grievance and classification of it as not falling within the individual grievance procedure. The Tribunal considered that they were fully entitled given the nature of the complaint to treat it that way.

91. There was no evidence from a Trade Union representative or anyone else to support the Claimant's interpretation. It was not in dispute that throughout these matters the Claimant was a member of the relevant Trade Union.

92. It was further suggested during cross-examination that Ms Brown had not taken adequate steps to explain to the Claimant what was meant by 'the collective machinery' or what steps he needed to take. The Tribunal rejected that complaint. We considered that in the Claimant's email responses to Ms Brown (pp203 & 202) he gave no indication whatsoever that he did not understand what was meant by Ms Brown's reference to the 'machinery'. Moreover, in the last email in the chain on 8 June 2017 when Ms Brown referred to this for a second time, the Claimant indicated that he believed that the fairest and most appropriate way in which his complaint should be progressed was that he would seek counsel from his Trade Union before he decided on his next actions.

93. During the Summer of 2017 the Claimant also made a complaint against Ms Brown in relation to her handling of this issue. This was not upheld.

94. As stated above the Claimant used himself as a comparator in terms of the way he was treated in 2015 before the two managers knew that he was Black, and the way they dealt with his grievance in 2017. In addition to the Tribunal finding credible and accepting the Respondent's explanation that the reason for the difference of treatment was because they were different types of grievances, the Tribunal also noted that there was no evidence to suggest that there were any other incidents of either Ms Brown or Mr Clark treating other Black members of staff

disadvantageously in relation to their grievances. Further, the limited evidence that there was about the racial make-up of the work force (the annotated cast list) confirmed the evidence of Ms Brown that the work force was extremely diverse racially.

95. In all the circumstances the Tribunal rejected the direct race discrimination complaint on its merits.

Jurisdiction - Time

96. Further and in any event, the Claimant alleged race discrimination only in the second claim form which was presented on 10 January 2018 (Case Number 2300135/2018). The acts complained of occurred on 7 and 8 June 2017 (Ms Brown's emails) and on 1 August 2017 (Mr Clark's email). Accordingly, the primary limitation periods expired on 7 September and 31 October 2017 respectively. Ms Ahmad submitted that taking into account the dates of ACAS Early Conciliation in respect of the certificate which was relied upon in the second claim (2 – 8 January 2018), any allegation of race discrimination that occurred prior to 3 October 2017 was out of time (para 64 of Ms Ahmad's submissions). These dates were not disputed by the Claimant.

97. It appeared to the Tribunal that even if the Claimant were entitled to the benefit of the earlier EC certificate which was issued 27 November 2017, ACAS having been notified on 24 November 2017, he would not have brought this claim in time. The limitation periods had expired before the dates on which the EC process(es) began, and so the limitation period could not be extended for that reason.

98. The Tribunal then considered whether it was just and equitable to extend time under section 123 of the Equality Act 2010.

99. The Claimant was notified of the outcomes in relation to both the grievance directed to Ms Brown and the grievance directed to Mr Clark on 8 June and 1 August 2017. There was no evidence presented to the Tribunal which would entitle the Tribunal to exercise its jurisdiction to extend time to 10 January 2018 on the basis that it was just and equitable to do so. The Tribunal took into account that the Claimant had already presented the first claim on 27 November 2017 complaining about unlawful deduction of wages. He had further, as the Tribunal has noted, had access to a Trade Union throughout the material times. As is also apparent from the summary of the background set out above, the Claimant was well able to formulate a written complaint about any grievance.

100. The Claimant did not argue that this was a course of conduct which was continuous with anything else. The Tribunal considered that properly construed these were decisions made about the way in which the 2017 grievances would be dealt with and therefore the relevant date was the date on which the Claimant was notified of each of the Respondent's decisions.

101. The Tribunal therefore had no jurisdiction to determine the Claimant's direct race discrimination complaints, and they were dismissed.

Unlawful deduction of Wages – September 2017

102. Section 13 of the Employment Rights Act 1996 (ERA 1996) gives workers the right not to suffer unauthorised deductions from their pay. It provides as follows:

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

103. The first of these complaints was that the deduction of the sum of £203.09 from the Claimant's pay for not attending a shift on 4 September 2017 constituted an unlawful deduction of wages. There was no dispute that the Claimant had a clear indication that this deduction would be made prior to 27 September 2017 but that it was on 27 September 2017 that he received his payslip for September and he was clear that the deduction had been made. This was the matter which was complained about in the claim form presented on 27 November 2017 (the first claim form).

104. In relation to the question of when the Claimant was informed that he was being marked down as absent in relation to 4 September 2017, and also the manuscript note of Mr O'Dwyer telling the Claimant about this, there was (p340) a contemporaneous email from Mr O'Dwyer to Ms Dixon, Trains Manager, confirming that he had told the Claimant about this at the request of his colleague, Dean. The email was subsequently forwarded to Mr Bidston on 9 November 2017 who in turn forwarded it to others including Mr Lawford on 10 November 2017 (p340). Although this document was not put to the Claimant the Tribunal considers that it is consistent with those documents which were considered during the hearing and it was always part of the bundle.

105. The burden of proof lies on the Claimant under section 13 ERA 1996. The issue, in essence, was whether the Respondent had acted in breach of the Claimant's contract by changing his rest day from 4 September 2017 and requiring him to work on that date.

106. The factual background was agreed. Indeed a reasonably contemporaneous record of the Claimant's account about what had happened in relation to the Respondent's notification to him of the need to attend the CDP is recorded in the return to work interview with Mr Antoine which took place on 6 September 2017 (p284).

107. On 31 July 2017 the Claimant had been approached by a manager, Mr Rolfe, and informed that he had been booked to attend continuing development from 4 to 7 September 2017. The Claimant agreed that there had been a conversation between himself and Mr Rolfe in which he informed Mr Rolfe that he was booked as a rest day on 4 September 2017 and Mr Rolfe had endorsed the slip as a request that the Claimant be given another date to attend.

108. On 1 August 2017 the slip was given to the Claimant and he signed to confirm this on that date. This was agreed by the Claimant. The Claimant was therefore clear from 1 August 2017 that the Respondent still required him to attend the training from 4 to 7 September 2017.

109. It was not in dispute that the training ran from Monday to Thursday and was an on-going programme of training. All drivers were required to attend it. There were two issues.

110. The first was in relation to whether the Respondent was entitled to require the Claimant to change his rest day in order to attend this training. The Respondent relied specifically on the provisions governing the Claimant's hours of work in the contract of employment (p117B). This provided: "Your contractual hours of work are 35.0 over 5 days per week. Duty rosters operate on a 24 hour, 7 day a week basis and include statutory holidays. In addition to your contractual hours, you may be called upon to work additional hours to meet the needs of the business.

    Your working pattern may be changed from time to time to meet the needs of the business. Your manager will advise you of your times of attendance."

111. The Respondent also relied on the provisions in the Framework Agreement for Train Staffing Schedule No: 3 Rostering and Overtime working (at pp689-690) in particular. This provided at section 1.2 that the rostering would provide two rest days each week, except on nights when no rest day would be rostered until after completing nights. It further continued under section 3 'Duty Sheet Alterations':

    "3.1 Following consultation with the local staff representatives
    (i) 3 days notice will normally be given of duty sheet alterations.
    (ii) 28 days notice of roster and complete duty sheet alterations will normally be given.'

112. The Tribunal considered that even if the Claimant were right it was admitted evidence that he was given notice on 1 August 2017 of the need to change his rest day on 4 September 2017. This clearly exceeds twenty-eight days.

113. There was initially some questioning about whether the Claimant was told that the training was due to start on 4 September 2017 or on some other date (p 278). However, the Claimant subsequently produced the document that he had actually received and this confirmed that the dates he had been told that he was to attend the course were from 4 to 7 September 2017. The Tribunal therefore treated the other document in

the bundle about this (at pp278-279) as merely a draft.

114. The Respondent also argued that in any event the provisions of the Framework Agreement which the Claimant relied on in relation to duty sheet alterations were modified by the use of the word 'normally' which implied that the Respondent was not bound to give that amount of notice and could give shorter notice. Further, the Respondent contended that three days' notice would normally be given of what they described as a duty sheet alteration. They drew a distinction between duty sheet alterations and the description in sub-paragraph 2 of "roster and complete duty sheet alterations (emphasis added). Their contention was that the latter provision referred, for example, to an alteration to the document at page 198. This document was entitled 'Elephant and Castle Duty Rotation – WTT42 – From 2/05/2017'. It was not in dispute that this was the 90 week roster given to the Claimant and the other ninety plus drivers involved. It was also not disputed when the Claimant described that this was the second such document that he received after he became a rostered train operator in May 2015. This was consistent then with Mr Lawford's evidence that these alterations were unusual and that they only took place after the consultation referred to at section 3.1. Mr Lawford's evidence was that this was the document which called for twenty-eight days' notice normally. The Tribunal accepted this as a cogent explanation.

115. The Tribunal has already expressed its view about what the Respondent was required to do under the contract by way of notice. However, the Tribunal noted that the Claimant's own account to Mr Antoine on 6 September 2017 was that he accepted from Mr Anderson on 1 August 2017 that he had been given twenty-days' notice of the change to his duty. He stated: 'I took this to be a reference to a Trains Framework Agreement, so with that in mind, I signed the slip acknowledging receipt of the invitation to attend the CDP'. He then continued 'I then advised T/M Anderson that should other appropriate Trains Framework Agreements not be complied with, I would not be attending CDP. In exchange for my signing of the invitation to attend the CDP, T/M Anderson agreed to put that statement in the log book on that day. I would like to add that other appropriate Trains Framework Agreements were not complied with.' Mr Anderson then asked Mr Mathurin to tell him what other Trains Framework Agreements had not been complied with and Mr Mathurin responded: 'the other relevant ones.'

116. The Tribunal accepted the Respondent's submission that was put to the Claimant in evidence that there was no breach in relation to the notice of the change to 4 September 2017 but that the Claimant had decided not to attend work on 4 September and attend the Continuing Development Programme because he believed that other agreements on the Respondent's part had been broken. The Tribunal refers generally to the

background of all the grievances and complaints, and issues which were being raised by the Claimant at around this time.

117. During his cross-examination the Claimant appeared to maintain, even as at the date of the hearing, that he did not believe that the Respondent could alter the rostered rest days without the Claimant's agreement.

118. This had echoes of the dispute with the Respondent in relation to whether the Claimant could allocate his own rest days and how much notice they needed to be given of the dates on which he was working in April 2015.

119. As set out above the Tribunal considered that Mr Lawford was in a better position to know about the functioning and effect of the roster arrangements given his role within the Respondent, than the Claimant was. Also, Mr Lawford's evidence was consistent with the views of the other managers which had been expressed in the correspondence before us about this matter.

120. The Tribunal considered the question of the reasonableness of the managers requiring the Claimant to attend the CPD starting on 4 September 2017, as opposed to changing it to another date. The course ran for 4 consecutive days from a Monday to Thursday. The Tribunal accepted Mr Lawford's evidence that although there were probably other CPD courses being run in the following weeks to which the Claimant could have gone, placing him on one of those instead was not logistically straight forward, given such matters as the incidence of the Claimant's allocated shifts which included night shifts, and the compulsory rest days.

121. The further point that Mr Lawford made was that other train drivers would have been allocated to other training slots and therefore if Mr Mathurin was allocated to a different training slot, it would have required the Respondent to 'bump' another train driver and this could have had further knock-on difficulties.

122. The Tribunal therefore considered that the Claimant had not established that the Respondent had failed to comply with their contract by amending his attendance dates at the beginning of September 2017, and by deducting his pay for 4 September 2017 when he failed to attend work.

123. The Respondent raised at the outset a question of whether the Tribunal was estopped from dealing with this complaint on the basis that it was res judicata (Issue 6 of the second List of Issues – R9).

124. The County Court had dismissed a contractual claim by the Claimant for unpaid wages in relation to his unauthorised absence from work on 19 and 20 April 2015.

125. His claim form issued in the County Court on 12 April 2018 complains that he was contractually entitled to two rest days per week and that the Respondent had failed to grant these to him in respect of 19 and 20 April 2015. The issue therefore in the County Court was whether the Respondent was entitled to give the Claimant the notice of the rest days as he required. It appeared to the Tribunal that there may well have been overlap with the points which were considered in the County Court and dismissed on 23 August 2018 (p115F) and the points being made before this Tribunal in relation to the September 2017 absence. However, the exercise of trying to ascertain on the limited paperwork available to the Tribunal as to what had taken place in the County Court did not justify this matter being dealt with in detail. Further, it appeared on balance to the Tribunal, to relate to a different legal and factual issue.

126. The Tribunal rejected the res judicata argument put by the Respondent in closing to the effect that because the deductions in respect of the absences both in April 2015 and September 2017 arose from circumstances in which the Claimant had been given clear instructions to attend and still failed to do so, the legal basis of the deduction was the same, and that this Tribunal was estopped from dealing with the complaint as it had already been determined by the County Court.

127. The Tribunal rejected the complaint about the unlawful deduction in respect of 4 September 2017 on its merits and not on the basis that it was res judicata.

128. No jurisdiction (time) point arose about this complaint.

129. This complaint of unlawful deduction of wages was therefore not well founded and was dismissed.

Kingham Disciplinary Appeal Decision - Discrimination Arising from Disability – Section 15 Equality Act 2010

130. The Tribunal next considered the amended complaint of discrimination arising from disability in relation to Mr Kingham's confirmation on 11 January 2018 at the hearing following an appeal against the 26-week oral warning which was given to the Claimant by Mr Mandeep Dhaliwal on 21 August 2017 in respect of the Claimant's absence of one day on 26 June 2017. The Respondent argued in the alternative, that if the Tribunal found

that there had been discrimination arising from disability, it was justified as a proportionate means of achieving a legitimate aim – namely effectively managing staff absence to reduce the negative effect that staff absence can have on the Respondent's ongoing operations, including maintaining customer standards and safety. Further, there was a substantial issue about whether this amended complaint had been brought in time and whether the Tribunal had the jurisdiction to determine it under section 123 of the Equality Act 2010.

131. It was confirmed by the Claimant that there was no complaint made about Mr Dhaliwal's actions in the disciplinary process. Further, it was agreed that the Claimant was at all material times a disabled person by reason of the condition of Sickle Cell Anaemia. The issue in this complaint was whether and to what extent the Sickle-Cell Anaemia affected Mr Kingham's decision to confirm the disciplinary sanction on appeal.

132. It is necessary to set out the background to the disciplinary action.

133. By an undated letter from Mr Dhaliwal, responding to the Claimant's memorandum dated 3 May 2017 about non-display of leave covers, the Claimant was informed, among other matters, that the Respondent could not accommodate his request for a rest day on 28 May 2017 (p194). He was further warned that should he not attend for work on that day, it would be treated as unauthorised absence. Although it was undated, the Claimant had clearly received that letter by 8 May 2017 because that was the date on which he wrote to Mr Lawford complaining about Mr Dhaliwal's refusal to grant him the rest day (p195-196). Mr Lawford then responded on 15 May 2017 (p197) telling the Claimant that he had reviewed Mr Dhaliwal's letter in response to the Claimant's memo of 3 May 2017 and that he was happy with Mr Dhaliwal's response to the Claimant. Mr Lawford indicated that he considered the matter now closed.

134. The Claimant then did not attend work on 28 May 2017 and as part of the general review of attendance, Mr Lawford asked one of his duty managers to hold a fact-finding interview with the Claimant. However, before that, the Claimant attended a return to work interview on 5 June 2017 (pp201D-201E) with Mr Antoine. The Claimant indicated that he was absent from 28 May to 2 June 2017 because of 'abdominal discomfort'. There was no suggestion that this absence was in any way related to the Claimant's disability or Sickle-Cell Anaemia.

135. Following this interview, the issue was reviewed and the decision was taken that the Claimant should be asked to attend a fact-finding interview because of the coincidence of the sickness with the dates in respect of which the Claimant had been refused a rest day.

136. Thus, on 13 June 2017 a fact-finding discussion took place between the Claimant and Mr Akinbode, Train Manager, and a note of this meeting was kept (pp207-208). During the discussion Mr Mathurin pressed Mr Akinbode as to the appropriateness of holding this discussion. However as indicated above the holding of the discussion was not in itself a head of complaint.

137. The outcome of the fact-finding interview was notified to the Claimant by letter dated 30 June 2017 from Mr Akinbode (pp209-210). He informed Mr Mathurin that the answers given at the interview had been sufficient to resolve the questions of non-attendance at the end of May beginning of June and that the matter was therefore closed. He explained that if the Claimant had not given satisfactory answers, a different course of action may have been taken. He also explained that he had been directed to look into the period of absence because it coincided with the period that the Claimant had earlier raised a concern and to establish the facts.

138. The Claimant was then absent again for one day on 26 June 2017 (pp208A-208B). At the return to work interview which took place with the Train Manager, Pat Dixon, on 27 June 2017, notes were made on a template (pp208A-208B). The Claimant indicated that the reason for the absence was 'domestic'. The absence was not said to have been caused by any underlying medical problems. A section on the template asks if there are any underlying problems and also asks whether there are any suggestions to resolve the problems. In relation to the latter, a note was made on the form that there was a suggestion about London Underground's Occupational health counselling and speaking with another train manager outside Elephant and Castle. It was agreed that if there were a recurrence, the Claimant would inform the train manager if he needed to either book off duty or not attend work.

139. In response to the discussion about a referral to Occupational Health counselling and the possibility of speaking with another manager outside Elephant and Castle, the document records that the Claimant declined both offers at that time and that he stated that he was aware of his options and would utilise them if needed, 'without the assistance of E&C staff'.

140. The effect of this further day of sickness was to trigger formal action under the Respondent's Attendance Procedure. This was not in dispute. The Claimant was given notice of a local disciplinary interview ('LDI') to take place on 31 July 2017 by way of a letter which was sent to him by Mr Dhaliwal dated 14 July 2017 (pp211C -E). Within that letter the specific dates and time frames of 28 May to 2 June and then 26 June 2017 were itemised as the relevant dates of absence which had triggered the action.

He was warned that the outcome may be an oral or written warning. He was given all the usual advice about the entitlement to be accompanied, etc.

141. Under section 4 of the LUL Attendance Procedure (p630), standards of satisfactory attendance would not have been met when:

    f. In any 13 weeks, there had been 2 or more items of non-attendance;
    g. In any 26 weeks, there had been 2 or more items of non-attendance totalling 5 or more shifts/working days.

142. The invitation to the LDI cited the 2 incidents of absence in 2017 (items).

143. The Tribunal noted that during this time the Claimant was in correspondence with Mr Clark and other senior managers of London Underground in relation to the grievances already referred to. Throughout this time the Claimant was engaged in correspondence with other managers about other issues of complaint including the appeal against the decision in relation to the individual grievance of 27 July 2017 to Mr Lance Ramsey, the General Manager, Bakerloo Line (pp247-250).

144. The letter from Mr Dhaliwal of 14 July 2017 required the Claimant to acknowledge receipt by 29 July 2017 and to indicate which of the two alternative dates of 31 July or 7 August 2017 which were in that letter, he could make. He was told that he was entitled to propose an alternative date if neither of those dates was suitable within seven calendar days of the second date given above and that should be done by 29 July 2017.

145. Mr Akinbode met with the Claimant to discuss why he had not responded to Mr Dhaliwal's letter of 14 July 2017 (p237). By a letter dated 1 August 2017, two further alternative dates were proposed by Mr Akinbode, namely 9 and 17 August 2017 (p238A). The deadline for confirmation of the meeting dates in the letter of 1 August 2017 was 6 August 2017.

146. By letter dated 9 August 2017, the Respondent reminded the Claimant of the earlier correspondence. In the absence of a response from the Claimant, Mr Akinbode, the writer of this letter, informed the Claimant that he had decided to formally discuss the Claimant's attendance with him on 21 August 2017 at midday. The Claimant acknowledged receipt of this letter and confirmed that he had retained a copy on 11 August 2017.

147. On 21 August 2017 the LDI went ahead but the Claimant failed to attend.

He attended work but did not attend the LDI. The Respondent had made arrangements to facilitate his attendance including cancelling a train. It was unclear whether the Claimant was aware of this step.

148. The hearing was conducted by Mr Dhaliwal. In the absence of the Claimant, there was evidence that the Respondent had sought to ascertain why the Claimant had not attended the interview. The Claimant stated that his non-attendance was due to personal reasons (p271A). Mr Dhaliwal had the bare facts of the procedure having been triggered.

149. In a note dated 21 August 2017 (pp268-269), he informed the Claimant of his decision to impose an oral warning. Mr Dhaliwal stated that the Claimant's attendance was unacceptable and that the Claimant had to show an improvement over the twenty-six weeks following the date of the last item of sickness absence, therefore this warning would expire on 18 December 2017. Failing that, he advised, further action could be taken and this oral warning quoted.

150. The Claimant appealed against the imposition of the oral warning by letter to Mr Lawford dated 27 August 2017 (pp272-273). He stated that the primary reason for the appeal was that the decision to charge and then reprimand him for allegedly 'breaching the attendance policy' was contrary to section 5.1 of the Attendance Support Pack 2004. It was not in dispute that the Attendance Support Pack was a reference to guidance to managers in terms of applying policies. He stated that although there was a 'plethora' of procedural errors he wished to concentrate his appeal on what he described as the most notable failure of process and that this was sufficient to have the decision of Mr Dhaliwal reversed.

151. Section 5.1 of the Respondent's Attendance Support Pack 2004 to which the Claimant referred, stated (p641) that where the employee had been identified as infringing the attendance standards (or a pattern of non-attendance had been identified), and the manager decided "not" to proceed to an LDI, the manager should meet with the employee to confirm that no disciplinary action would be taken. It continued that:

"When making this decision, the following should be considered:

- The employee's attendance record prior to the current period(s) of absence. For example, disciplinary action would not take place if the employee had no absences from work in the previous 52 weeks".

152. The Respondent argued that the guidance at that point referred to the decision whether or not to proceed to an LDI, not whether or not to impose an oral warning. The Respondent relied on the fuller context of paragraph

5.1 of the support pack.

153. This issue came to be referred to as the 'fifty-two weeks clear' point.

154. The Claimant's position was that the management evidence before Mr Dhaliwal covered the period 10 July 2015 to 11 July 2017. This absence report showed that the Claimant's last unauthorised absence of 2016 ended on 22 May 2016; and that his first absence of 2017 was from 28 May to 2 June 2017.

155. At the end of the case, his argument on this point (Mr Stanislas' closing submissions [C4]) was that the decision by Mr Kingham to confirm the appeal was based on the Claimant's two periods of sickness in 2016, which were related to sickle-cell anaemia, which in turn it was agreed, was a disability. Mr Stanislas submitted that the basis on which Mr Kingham upheld the oral warning was different from the basis upon which it was initially given by Mr Dhaliwal. Mr Dhaliwal, it was argued, gave the oral warning because he believed that there had been two periods of sickness in a 13-week period (i.e. 5 days and 1 day in 2017). However, it was argued, the Claimant's warning was upheld by Mr Kingham because of the Claimant's disability related absence (in 2016).

156. The Tribunal understood this argument to be that because the two absences which he had had in the fifty-two weeks prior to the current period which was under examination were related to Sickle-Cell absence, these absences should have been disregarded and therefore the Claimant treated as someone who had 52 weeks clear. In accordance with the Attendance Support Pack, this should have been considered when deciding whether to proceed to an LDI, and in accordance with that guidance, no LDI should have been held, and therefore the appeal should have been upheld.

157. It was not clear that this was how the Claimant actually put his case, because this would have impugned Mr Dhaliwal's decision, which the Claimant said he was not challenging. It would also have been a challenge out of time.

158. The Claimant's challenge was only to Mr Kingham's appeal decision.

159. Mr Stanislas further submitted that the outcome was not justified as 26 weeks was the most severe type of oral warning.

160. Mr Mathurin attended the appeal meeting without a Trade Union

representative or work place colleague. The Tribunal had both the typed and the manuscript notes of the appeal meeting (pp373-375 and 376-388 respectively). The notes record that fairly early on into the meeting, having discussed procedural matters such as representation, Mr Kingham confirmed with the Claimant that the main basis for his appeal was that he had fifty-two weeks clear (p373). The Claimant confirmed this and said that there were other points that he would go into.

161. During the hearing there were various questions asked about how much knowledge Mr Kingham had of the case prior to the appeal but the Tribunal did not consider that it was material to this issue of discrimination arising. This was not an unfair dismissal disciplinary hearing. It was certainly the case that within the notes there were references to Mr Kingham having several relevant documents. He had clearly read the letter of appeal also. The other points raised by the Claimant were matters such as the procedure of going ahead with the LDI meeting previously in his absence. However, as the Claimant confirmed that there were no criticisms being made of the process or the decision of Mr Dhaliwal, the Tribunal disregarded those points. He also raised points about the delay in the presentation of the appeal. Once again, the Tribunal did not consider that that was relevant to the point about the fifty-two weeks clear.

162. Following the hearing of the appeal which had taken place on 21 December 2017, Mr Kingham wrote to the Claimant to inform him of the outcome on 11 January 2018 (pp403- 405).

163. The Tribunal considered Mr Kingham's outcome decision. He repeated Mr Mathurin's primary appeal point about the fifty-two weeks clear and he recorded that the Claimant believed that as the items in that fifty-two week period running up to the triggering events were recorded as 'Sickness Explanation Accepted' (SEA), the LDI was therefore invalid. This is the point recorded earlier about the Claimant saying that the Sickle-Cell Anaemia absence dates should have been disregarded. Mr Kingham recorded that during the appeal meeting he took an adjournment to consider the Claimant's attendance history, more specifically the fifty-two week period. He confirmed that the items which fell into the fifty-two weeks prior were:-

    (i) 2 August 2016 to 8 August 2016 (three shifts) – SEA Sickle-Cell Disorder
    (ii) 4 October 2016 to 15 October 2016 (ten shifts) – SEA Sickle-Cell Anaemia

164. He then stated for the avoidance of doubt that the fifty-two week period

that he was referring to was from 28 May 2016 to 27 May 2017 which took the Claimant to the first date of the first item which triggered the current procedure, i.e., 26 May to 2 June 2017. Mr Kingham then continued by informing the Claimant that whilst he noted that the items in question were recorded as SEA, 'this does not take away from the fact that they are still items of non-attendance and even though discountable from disciplinary action they are still recorded in SAP. This is the case for all employees'.

165. This was the basis of the Claimant's argument that Mr Kingham had taken into account disability related absence in upholding the decision of Mr Dhaliwal. In particular, Mr Stanislas relied on the quotation above (p 403) which referred to Mr Kingham taking the adjournment to consider the attendance history.

166. There was no evidence before the Tribunal to contradict Mr Kingham's evidence that the reference in the support pack to consideration being given to whether there were no absences from work in the previous fifty-two weeks meant that sickness or disability related absence should be ignored. His evidence was that such absence was ignored for the purposes of triggering the process but that it was relevant in relation to the previous fifty-two weeks point.

167. The Respondent's submission was that in his evidence to the Tribunal, Mr Kingham was clear that he had reviewed Mr Dhaliwal's decision and upheld the 26-week warning in relation to the 2 periods of absence. Ms Ahmad submitted that Mr Kingham merely looked at and expressed his view on the section 5.1 and the 52 weeks clear issue, but that it fell outside his remit to review. She argued that Mr Kingham could only review Mr Dhaliwal's decision and that his evidence was that he reviewed that decision and upheld it.

Jurisdiction – time points

168. It appeared to the Tribunal that this allegation was clearly arguable. However, as set out above when the amendment was granted, the Tribunal also had to consider whether this amended complaint was brought in time, such that the Tribunal had jurisdiction to determine it.

169. The Claimant sought the amendment as an amendment to his second claim form which was presented on 10 January 2018. This claim form obviously made no reference whatsoever to the appeal outcome and to the factual matters which were the subject of this claim not least because they had not yet occurred because Mr Kingham only informed the Claimant of the outcome on 11 January 2018.

170. The third claim form was presented on 5 March 2018 and related to other matters. The only claim form which raised allegations of disability discrimination was the second claim form of 10 January 2018. As set out above the Tribunal acknowledged that it had referred to disability discrimination under section 15 but at the case management discussion which followed the Claimant, who was represented by Counsel at the time, described completely different factual matters to those which were said to be discrimination arising.

171. Then the Claimant was directed in relation to the second claim (p69): -

    (i) To confirm whether the only type of disability discrimination claim being brought was that there was a failure to make reasonable adjustments (as per heading of the Claimant's ET1 claim statement); and

    (ii) That being the case, specify for the purposes of section 20 and 21 of the Equality Act 2010, the details of the PCP, substantial disadvantage and the relevant adjustments that were being argued for.

172. This direction was incorporated into the order made at the hearing and sent to the parties on 22 May 2018.

173. In the order the Claimant was directed to provide that information by 31 May 2018. In fact, the responses were provided in a document dated 13 June 2018. The Claimant stated: 'the type of disability discrimination claim being brought against the Respondent is that there was a failure to make reasonable adjustments.'

174. The Claimant then went on to describe as details of the failure to make reasonable adjustments the factual matters in relation to the cancellation of the twenty-six week oral warning and the appeal hearing before Mr Kingham and referred to the Claimant's 'historic attendance record and absences due to his Sickle-Cell Anaemia'. Here he pleaded that Mr Kingham subsequently upheld the original decision against the Claimant and made clear that the decision was due to having discovered that the Claimant had had an absence during the preceding fifty-two week period due to his Sickle-Cell Anaemia.

175. This was pleaded as a failure to make reasonable adjustments in June 2018. It was only at the beginning of the hearing on 20 August 2019 when the Tribunal raised various questions about the issues and what the Tribunal had to decide that an application for an amendment was made. The Tribunal notes that at the commencement of the hearing the parties

had actually referred to the issues as drawn up by Employment Judge Sage at the hearing on 17 May 2018 which, as the Tribunal has already noted, referred to completely different matters as allegations of discrimination arising from disability (p95).

176. The Tribunal considered therefore that whether one took 13 June 2018 or 20 August 2019 as the date on which this complaint was put forward, it was a complaint which was brought considerably out of time. In the circumstances, it was necessary to consider whether it was just and equitable to extend time.

177. In this context also, the Claimant gave no evidence whatsoever to permit the Tribunal to have a factual basis for extending time. In addition to the other points that we made earlier about why it was not just and equitable to extend time for the direct race discrimination complaint, the chronology clearly demonstrated that before the Claimant put forward the facts that he now complains about in June 2018, he had presented the third claim form on 5 March 2018 complaining about both unfair dismissal and victimisation under the Equality Act 2010. There was no reference in that document to this allegation, despite the Claimant clearly having the opportunity to have included a complaint about this.

178. Moreover, even if he had not presented the third complaint, the Claimant was clearly familiar with the Tribunal process as he had already submitted two claims. Arguably also, the challenge to Mr Kingham's decision was really a challenge to Mr Dhaliwal's process taken in August 2017. The Claimant articulated his criticism of the process in the appeal letter dated 27 August 2017, so he was aware of the point by then.

179. In all those circumstances the Tribunal did not consider that there were any good or adequate grounds for us to extend time and that complaint was therefore out of time in relation to the section 15 complaint.

Claimant's Sickness Absence Sept 2017 to Dismissal

180. The Claimant brought a number of complaints about his treatment in the timeframe after the commencement of his sickness absence on 8 or 9 September 2017 (p287A) and the termination of his employment. These were as follows:

Unlawful deductions of wages: 24 Nov 2017 – 26 Jan 2018;
Victimisation
– Failure to respond to Claimant's letter of 1 Dec 2017 to Mark Wild
- Failure to reinstate suspended Company Sick Pay; and
Dismissal – Unfair dismissal & Victimisation

181. The Claimant complained that he had been victimised under the Equality Act 2010 in relation to a failure to respond to the letter that he sent to Mark Wild on 1 December 2017; and that the Respondent failed to reinstate company sick pay which had been suspended with effect from 24 November 2017. The protected act relied on for both these complaints was the letter to Mark Wild of 1 December 2017 (p345).

182. In addition, the Claimant complained that the suspension of sick pay between 24 November 2017 and 26 January 2018 was an unlawful deduction of wages. This complaint was in the second claim form presented on 10 January 2018. Although the time covered continued after the date of presentation, the Tribunal considered that amendment was not necessary to include complaint about the continuing deductions. We considered that this complaint was also brought in time.

183. The Tribunal rejected Ms Ahmad's submissions that both the unlawful deductions of wages complaints about the 4 September 2017 deduction, complained about in the 3rd ET1 presented on 5 March 2018, and the deductions from 9 September to 2 December 2017 were out of time: page 29 of her written closing submissions. First, the complaint about the 4 September deduction was made in the first ET1, presented on 27 November 2017, so was not out of time, as set out above. Further, there was no separate complaint, in the event, about deductions in the time frame 9 September 2017 to 2 December 2017: Second List of Issues – [R9].

184. Mr Mathurin also alleged that the dismissal on 26 January 2018 amounted to an act of victimisation because of the protected acts of (i) the letter and questionnaire sent to Mark Wild on 3 January 2018 (p390), and (ii) the issuing of the second claim form which alleged race and disability discrimination and victimisation on 10 January 2018 (pp16 and following).

185. The final complaint relating to the sickness period was about to the decision to dismiss the Claimant which was said to be unfair under section 98(4) of the Employment Rights Act 1996.

186. After Mr Mathurin's absence on 4 September and then his return to work on 5 September 2017, he attended a return to work interview on 6 September 2017 with one of his managers, Mr Antoine (pp283 – 285). At this meeting, he was made aware that there was likely to be a deduction in respect of his pay for 4 September 2017 (p283 & [C1, para 7]). There was a dispute on the evidence as to whether Mr Antoine had actually informed the Claimant at the interview that his pay would be deducted not least because although the box was ticked, there was a manuscript entry

to the effect that Mr Antoine's decision was communicated to the Claimant via the Trains Manager, Mr O'Dwyer, verbally. The Tribunal accepted the Claimant's evidence that this had not been said to him during the meeting but also accepted that given the Claimant's knowledge of the Respondent's processes that he understood that a deduction of pay was likely to follow from his having failed to attend on 4 September 2017.

187. The Respondent kept an online log in which the relevant managers made entries of contacts between themselves and the Claimant, and also of interventions such as Occupational Health referrals and appointments, covering the Claimant's sickness absence from early September 2017.

188. Mr Bidston recorded on the log that the Claimant informed the Respondent on Friday 8 September 2017 that he would not be in to work the following day due to work related stress, as a result of having been victimised by the management team (p286E). Mr Mathurin declined to go into details when asked why by Mr Bidston. Mr Bidston recorded finally that the Claimant was to try and seek professional help on the Monday. His absence continued to be on the basis of work related stress or depression/anxiety. He remained off sick thereafter until the termination of his employment on 26 January 2018.

189. The Claimant also made clear from the beginning of the hearing and subsequently that there was no contention that he was a disabled person by reason of stress/depression and anxiety.

190. The Claimant's absence was initially self-certificated but in a conversation with his managers on 20 September 2017 he reported that he had seen his General Practitioner and had been given a medical certificate until 17 December 2017. That statement of fitness for work was dated 20 September 2017 but the Doctor back-dated it to cover the period 13 September 2017 to 17 December 2017 (p291B). The first statement of fitness for work diagnosed the reason for the Claimant's sickness absence as 'work related stress'. The next statement of fitness for work was dated 11 December 2017 and was stated to cover the period from 11 December 2017 to 25 February 2018, a period of about two and a half months. The diagnosis on this latter statement was 'work related stress, anxiety and depression'.

191. There was no suggestion by the Claimant that the Respondent had not complied with its normal process in terms of contacting the Claimant and also informing him of the requirements of sickness reporting. The Claimant was also in contact with the Respondent during the initial sickness period about his sickness although not always strictly in accordance with the agreed regime. This included, however, the Claimant

contacting the Respondent, for example on 14 September 2017, one day early.

192. The first certificates relating to the sickness absence were received by the Respondent on 25 September 2017 (p286C). The Train Manager Antoine recorded in the log that the self-certificate and the medical statement for fitness for work were received on 25 September 2017. The latter covered the period from 13 to 17 September 2017.

193. The Claimant raised an issue at the Tribunal hearing about not having been sent a form requesting his consent for the Respondent to have access to his medical records. This had apparently been done during a previous absence in 2015. The Tribunal accepted the evidence of Mr Lawford that this document could be and often was completed when the member of staff attended the Occupational Health assessment. In any event the Tribunal noted that there was no request by the Claimant for this document to be sent to him at the time. The Tribunal has already noted and it was not in dispute that the Claimant continued to be in correspondence with the Respondent about various other matters including the appeal against the warning by Mr Dhaliwal, further complaints and also formal requests for access to personal information which were made at the end of September 2017 (pp294-296).

194. The Respondent wrote to the Claimant by letter dated 28 September 2017 inviting the Claimant to a sickness review meeting on 5 October 2017 to discuss his current symptoms and anything that the Respondent could do to support the Claimant and possibly facilitate a return to work. The Claimant was also told in the letter that following that meeting Mr Dhaliwal, the writer of the letter, would like to hold a fact-finding interview in order for the Respondent to explore the circumstances which had led to his current health condition including his non-attendance at his scheduled continuing development course. The letter was appropriately worded in the Tribunal's view and explained that what was being proposed was in line with the Respondent's current Occupational Health guidance which stated:

> 'although an employee may not be fit for work, they may well be fit enough to engage in work meetings that are part of management processes. Indeed, postponing of any proceedings may have a negative impact on their symptoms. Resolution of issues usually has the most positive impact on an individual's symptoms and aids recovery.'

Mr Dhaliwal made an offer for the Respondent to support the Claimant in any way that he might require.

195. Mr Mathurin's response was the letter dated 2 October 2017 (pp298-299). He complained about being invited to attend a sickness review meeting and also the fact-finding interview 'less than four weeks into [his] period of 'fitness for work' related absence.' Mr Mathurin then referred back to the complaint that he had made in April 2017 concerning the non-display of leave covers (the complaint about the adequacy of the notice for the duty on 28 May), that he had been subjected to 'a vicious and incessant campaign of victimisation, bullying and harassment by the line manager and this was well known by a number of trains managers including yourself, yet the efforts to 'support and assist' me was absent during this period'. Mr Mathurin and Mr Lawford both confirmed in oral evidence that the reference to the line manager was a reference to Mr Lawford. The Claimant effectively set out in this letter that he was not happy with the way in which he had been dealt with and been called previously to fact-finding interviews and did not consider that the return to work interviews were genuine. There was no suggestion that any of the return to work interviews or the fact-finding interviews was in breach of the Respondent's procedures.

196. He accused the Respondent of being disingenuous in purporting to express an interest in his well-being currently. He made it clear that he objected to the on-going actions of the Respondent in terms of monitoring his sickness absence which he saw as victimisation, bullying and harassment.

197. He then stated in terms: 'I will not be attending any more fact-finding interviews with members of staff who have contributed to my current spell of ill-health nor will I will be harassed into a premature return to work. Please do not send me any more letters pretending to be concerned about my recovery because this only further increases my levels of stress. Please further ensure that your fellow train managers are also suitably advised so that everyone clearly understands my position.'

198. In the context of the Claimant's submission that he had asked for Mr Lawford not to be involved in the case conference and that was the reason why he had not participated, the Tribunal notes that this statement was made when Mr Mathurin was receiving correspondence from Mr Dhaliwal about whom he makes no complaint of discrimination or indeed any other criticism in this case. Further this statement was made by Mr Mathurin prior to the active involvement in the attendance management process of Mr Lawford. Mr Lawford only got involved in seeking to schedule a case conference in December 2017.

199. In a letter dated 2 October 2017 which was sent to Mr McNaught, Operations Director BCV, the Claimant then presented a further formal complaint of harassment and bullying against Mr Lawford who was named

as the alleged perpetrator by him (pp300-306). In essence, it set out seven numbered complaints which related to the steps which had been taken earlier to interview the Claimant concerning a fitness for work related absence and the process which had then led to LDI and the imposition of a warning (the Dhaliwal warning). He also included a complaint about the refusal of Mr Lawford to assure him that an impartial LUL manager would be appointed to hear the appeal 'despite it being clear that [Mr Lawford] is not an appropriate person to act as chair'. The Claimant finally also complained about the deduction of pay and the action that had been taken in relation to his non-attendance on 4 September 2017.

200. The Claimant was informed by letter dated 9 October 2017 (pp314-316) from Mr D'Souza, PMA Manager – Asset Operations, that he had not upheld the Summer 2017 complaint against Ms Brown.

201. By a letter dated 18 October 2017, and signed by Mr O'Dwyer, Trains Manager, (p319) the Claimant was informed that as the Respondent had not had contact with him since Monday, 9 October they were extremely concerned about his health and well-being as they had expected to have an up-date from him on 16 October about his on-going condition. He was asked to make contact with a member of the Trains Manager team as soon as possible and by no later than 20 October in order to reassure the Respondent that he was okay. The letter continued that due to their on-going concerns over his health, the Claimant had been referred to London Underground Occupational Health for an assessment 'in an effort to aid and help promote your recovery.' In the letter Mr O'Dwyer explained that he had intended to inform the Claimant of this when he made contact with them but unfortunately to date he had been unable to do this. The Tribunal noted that there was an internal email from Mr Dhaliwal to the other train managers dated 6 October 2017 indicating that they should inform the Claimant about the referral to Occupational health when he next telephoned (p311).

202. The Claimant was informed that his appointment had been booked for 2 November 2017 with Occupational Health and he was given details of this appointment. The Tribunal has already noted that the Claimant did not use this or any other occasion to request the consent form that he complained during the Tribunal hearing about not having been given. The Tribunal was satisfied that the failure on the Respondent's part to send that document to the Claimant was if anything a procedural issue but it was not clear how it disadvantaged the Claimant if at all.

203. The first Occupational Health referral was then made by email sent on 23 October 2017 (pp323-329). There were no questions asked during the hearing about the contents of the referral. It was not sent to the Claimant

at the time but there was no suggestion that this was a breach of a procedure.

204. By letter dated 24 October 2017 the Claimant was informed by Ms Bosquette, People Management Advice Specialist, that in accordance with a previous advice to the Claimant, an accredited bullying and harassment manager had reviewed his complaint (against Mr Lawford) and the appendices submitted on 2 October 2017 (pp332-333). This review had been undertaken by Mr Morris, Employee Relations Manager, and she informed him that he did not consider that the case met the definition of harassment and/or bullying. In the course of his reasons he also referred to the fact that there was an outstanding appeal (the one that was dealt with eventually by Mr Kingham) so he considered that the appeal would provide Mr Mathurin with an opportunity to put forward his points in relation to that particular issue. He acknowledged that if the Claimant continued to feel aggrieved in relation to the deduction of pay because of his non-attendance at the continuing development course then this should really be raised as a grievance. It was not, in his view, appropriate however to be pursued as a harassment and bullying claim.

205. In relation to the issue of whether Mr Lawford should have dealt with the case conference, which was relevant to the dismissal complaints, he was cross-examined about the fact of the harassment and bullying allegation having been made about him which was reviewed by Mr Morris. It appears from the documents that Mr Lawford was not asked about the detail of that allegation and indeed it is not clear that he was aware of it, given that there was not a substantive investigation of them.

206. Finally, Mr Morris recommended that the outstanding LDI appeal be heard by a Trains Operations Manager away from the Claimant's home depot. Ms Bosquette informed the Claimant that she could make arrangements for an alternative manager to be the chair and that she would be writing separately to him once this had been scheduled. This was the role eventually taken by Mr Kingham.

207. The Claimant failed to attend the Occupational Health appointment which had been made for him and also failed to inform any of the Trains Managers about the reason for his non-attendance or to advise them that he would not be attending. In a letter to him dated 3 November 2017 from Mr Bidston, one of the trains managers, he was reminded that in the appointment letter he had been advised to up-date the trains managers as to the reason for non-attendance. He was further informed that, as an employee of London Underground, he was required to follow company procedure and this included engaging with the attendance at work procedure. One part of the medical appointment, he was told, was to understand if he had been declared fit to attend meetings with management to discuss his on-going sickness absence from work. He

was then told he had been booked in for a further appointment on 22 November 2017. This therefore gave the Claimant just one day short of three weeks' notice of that appointment. Mr Bidston had apparently cut and pasted a further letter from the Occupational Health Medical Services Team to the Occupational Health Service which provided further information about the appointment.

208. Mr Bidston continued (p339) by strongly encouraging the Claimant to attend this re-arranged medical appointment to prevent further delay in understanding his fitness to attend meetings and the work place. He was again reminded of his contractual obligation to attend Occupational Health appointments as directed and Mr Bidston explained that the basis of the appointment was to determine if/when he might be able to return to work and when he did, if any restrictions to duties may be required. He explained to Mr Mathurin that doctors at Occupational Health were specialists in that field and provided detailed reports which considered an employee's health and working environment.

209. Then Mr Bidston warned the Claimant that a failure to attend may result in his company sick pay being suspended unless there were exceptional reasons which had been provided to and accepted by Mr Bidston or one of the trains managers prior to the day of his appointment (only in extreme circumstances, he was told, could notification on the day be considered reasonable). The Claimant was further told that he may be asked to provide medical evidence to support his explanation before company sick pay was approved.

210. This action by Mr Bidston led to one of the victimisation complaints in this time frame, that the Respondent failed to reinstate the suspension of sick pay. It was not argued that the Respondent had no power to suspend sick pay. Nor was there any reference to any procedure for reviewing the suspended sick pay. The Tribunal considered that the Respondent made it very clear to the Claimant at various stages during the suspension of the sick pay, what the conditions for a reinstatement of company sick pay were. The Tribunal also took into account that the Claimant had long notice that the Respondent was considering suspending sick pay.

211. The Claimant was next spoken to by one of the TMs, Mr Rolfe, on 8 November 2017 (p286C). Mr Rolfe asked the Claimant why he had not attended the OH appointment on 2 November. Mr Rolfe's note was that the Claimant said that as previously outlined, he was at his GP on that day. He also said he would not have attended this appointment as he had given no consent in the matter.

212. The Tribunal did not consider that that was either an adequate or

satisfactory response. The Tribunal also considered that when making arrangements to see his general practitioner on 2 November, the Claimant should have taken into account the OH appointment and/or should have been in contact with the Respondent to re-arrange the OH appointment.

213. The Claimant did not attend the re-arranged OH appointment booked for 22 November at 9.00am. TM Rolfe recorded at about 11.20pm on 22 November that the Claimant had telephoned the Respondent to provide him with an up-date on his sickness (p286B). During that conversation he indicated that he had not attended the OH appointment because he had not scheduled it. He also indicated that he was seeing his own medical team and getting treatment from them. The Tribunal considered that this betrayed a fundamental misunderstanding by the Claimant of the role of the OH service. An OH Service is not a treating organisation. Its purpose is to assess the Claimant's condition against the requirements of his job and then inform the Respondent about matters such as the likelihood of his return to work, within what time frames, and of what action the Respondent can take to assist and facilitate the return to work. The Tribunal considered that this had been quite adequately explained to the Claimant on several occasions in the correspondence. Indeed, Mr Bidston reiterated the explanation about the purpose of the OH appointment and also that there were contractual obligations to attend in his letter of 24 November 2017. He referred to the fact that he had previously explained this in correspondence. He made the further point that the OH resource needed to be used to its full potential. The Tribunal understood this to be a concern that appointments were being made and then not kept by the Claimant thus wasting the resource.

214. Mr Bidston then informed the Claimant that in view of the history, he had suspended the Claimant's company sick pay from 22 November 2017. The Claimant would, as a result of the suspension, only be entitled to statutory sick pay. He then continued:

'Once you have attended the sickness meeting with me and a re-arranged occupational health appointment (to be sent out once we have been notified) we can then discuss the re-instatement of your London Underground company sick pay.'

215. He continued by explaining to the Claimant that one part of the reason for arranging the medical appointment was to understand if the Claimant could be declared fit to attend meetings with management to discuss his on-going sickness absence from work. As the Respondent had not been able to obtain this information thus far, he proposed two further dates for sickness review meetings, namely Wednesday, 29 November and Friday, 1 December 2017. He offered to hold the meeting at a neutral location away from the depot and informed the Claimant that he was entitled to bring a trade union representative or a workplace colleague to the meeting

with him to the meeting. He asked for confirmation either by email or telephone call as to which one of the dates the Claimant could attend and also a suggested venue for the meeting. If either of those dates was not suitable he asked the Claimant to provide him with an alternative no later than Wednesday, 29 November providing the alternative date was within seven calendar days of the second date suggested, i.e., 1 December.

216. In the letter Mr Bidston also referred to the Claimant's failure to contact the trains desk to speak to him about the sickness absence on 23 November 2017. He recorded his understanding of events: that the Claimant had called initially but Mr Bidston had not been available. He was asked to call back an hour later when it was anticipated that Mr Bidston would be available but that the Claimant had apparently not done so.

217. Towards the end of the letter, Mr Bidston then addressed the Claimant's request to TM Rolfe on 22 November as to which managers should hold the review meeting, by telling him that it would not be appropriate to arrange the sickness review meeting with the Queen's Park Depot Trains Manager as they were not managing his sickness items.

218. This was one of the issues which the Claimant developed at the Tribunal hearing in relation to his unfair dismissal claim and the suggestion that Mr Lawford should not have dealt with the case conference in December 2017 and January 2018. The Tribunal considered that there was indeed a substantive difference between calling in an outside manager to deal with an appeal which was a one-off event and calling in an outside manager to deal with sickness monitoring which was usually and potentially an on-going issue.

219. The Claimant then wrote a letter dated 1 December 2017 to Mr Wild, Managing Director of London Underground Limited. This letter was relied upon as the first protected act in the victimisation complaints (pp345-349).

220. There was no suggestion by the Respondent that this letter did not constitute a protected act under the Equality Act 2010. Whilst clearly referring to direct discrimination, harassment and bullying, and victimisation in relation to many of the events which had happened up to that date some or most of which have been dealt in these reasons, he then indicated to Mr Wild that he was now making a claim of 'racial discrimination' to him for the first time. Essentially the Claimant complained that there had been a failure by the various managers and members of staff who had been charged with dealing with his complaints, to deal with them fairly and with equality. He contended that the rejection of the separate formal complaints lodged in 2017 without inviting the Claimant and his union representative or colleague to a meeting to further

outline the complaints was evidence of this. During the course of the complaint to Mr Wild he referred to the procedure that Mr Taiwo had followed and the finding by Mr Taiwo that there had been bullying and harassment.

221. He cited the Equality Act 2010 and the fact that it rendered unlawful direct discrimination against an employee by treating them less favourably because of their protected characteristic. He also referred to the letter he had recently received from TM Bidston dated 24 November 2017 about the suspension of company sick pay. He contended that there was no legal basis for Mr Bidston's actions and that it was instead an emotional one 'fuelled by hatred'.

222. The Claimant presented his first claim to the Tribunal on 27 November 2017 alleging unlawful deduction of wages in relation to his pay for 4 September 2017 only. He had not included a complaint about the suspension of sick pay.

223. By a letter dated 11 December 2017 Mr Lawford wrote to the Claimant for the first time in relation to procedures relating to his sickness absence inviting him to a medical case conference (pp351-353). In this letter Mr Lawford recited the history of contacts between the Respondent and the Claimant attempting to arrange sickness review meetings and OH assessments. He prefaced this by stating that the Respondent had tried on numerous occasions to engage with him to understand the reasons for his absence as they were unaware at this time what the work-related stress, which had been stated in the statement of fitness for work, may be. In his outline of the history, he also referred to the explanations provided by the Claimant about why he had not attended the OH appointments as set out above.

224. Mr Lawford then continued: 'Even though you are signed off by your GP and you have submitted the GP fit note to us, you have been absent now for three months and it is standard practice to refer our employees to OH for medical advice on your condition with a view to supporting you back to work, it's a referral arranged by management and not a self-referral. We appreciate you are seeing your own medical team but our OH doctors understand our working environments and provide us with advice in accordance with your job as a train operator.' He then went on to explain that as the Respondent had not been able to obtain any information from OH, he would like to hold a medical case conference with the Claimant in line with the Attendance at Work Procedures to gather more of an up-date regarding his on-going absence from work and anything that he could do to support Mr Mathurin in returning to work. Mr Mathurin was then informed that the case conference had been booked for 18 December at

3.30pm. He was also informed that he could bring a trade union representative or workplace colleague to the meeting.

225. In relation to all the meetings, the Respondent gave the Claimant appropriate advice as to his entitlement to be accompanied by a trade union representative or workplace colleague. The Claimant was given one week's notice of the meeting. He was told that if his chosen representative could not attend then he should seek to arrange an alternative. He was also informed of the fact that a PMA specialist from HR would be present at the meeting as would a note-taker.

226. Mr Lawford then warned the Claimant that if he did not attend this meeting it was likely to go ahead in his absence and that Mr Lawford would be making a decision on the information available to him. If the Claimant would like Mr Lawford to consider any additional information relating to his sickness, he was asked to provide this to him by no later than Friday, 15 December either via email or post to Mr Lawford at the Elephant and Castle Depot.

227. Mr Lawford then also made it clear to the Claimant that one possible outcome of this case conference could be termination of his employment on medical grounds.

228. The Claimant was also reminded that because he had not yet attended a meeting to discuss his absence and he had failed to attend two OH appointments, his company sick pay remained suspended from 22 November 2017. However, he was told once again that once he had attended the case conference with Mr Lawford and a re-arranged OH appointment, the Respondent could discuss the re-instatement of his company sick pay.

229. In this letter, as in all the others, the Respondent also gave appropriate advice about access to independent and confidential support and advice through the employee assistance service. He was also informed about access to the OH counselling team.

230. By letter dated 14 December 2017 Ms Bosquette gave the Claimant notice of the appeal hearing against the LDI warning which was to be dealt with by Mr Kingham. This was to take place on 21 December. The Claimant was told that Mr Kingham would be referring to the LDI paperwork whilst considering the appeal but that if there were any additional documents that he wished to bring to Mr Kingham's attention as part of the appeal, he should send copies, marked confidential, as soon as possible to Mr Kingham either by post or email and in any event at least three calendar days prior to the LDI appeal. Ms Bosquette gave the Claimant appropriate

advice again about the process and went on to explain that Mr Kingham had the authority to uphold or overturn Mr Dhaliwal's decision. His decision regarding the appeal would be confirmed in writing to the Claimant and would mark the final stage of the procedure. The Claimant was asked to acknowledge receipt of the letter which he did by signing and dating it on 18 December 2017.

231. The Claimant then responded to Mr Lawford's invitation to the medical case conference dated 11 December 2017 (pp356-357). He disputed the statement by Mr Lawford about the need for London Underground to become fully aware of the reasons for his absence because he said that London Underground knew this and various records showed this to be the case. It appeared that the Claimant was relying on his various communications and complaints to the Respondent and did not accept that it was appropriate for him to comply with the procedure that Mr Lawford was asking him to submit to.

232. The Claimant also referred to the action of suspension of sick pay taken by TM Bidston.

233. Importantly he accepted in the letter that the invitation to attend the medical case conference was in line with his contract of employment but he continued 'it should be clear that at this stage the employer is already in breach of the terms of that very contract, at least according to yourself and Mr Bidston. Since the employment contract binds both employer and employee there cannot be a situation whereby I am the only person who is in compliance with it. This would also be the reason I did not make contact with the desk on 6 December 2017.' He characterised the decision about suspension of the sick pay and the justification of it by Mr Lawford as being both in breach of the employment contract and further evidence of discriminatory practices that Mr Lawford and his staff had been responsible for inflicting on him since he took over as Head of Operations at Elephant and Castle in 2015. Mr Mathurin later stated that he had no fundamental objection to attending a medical case conference but that he would not be blackmailed into doing so and therefore no progress could be made whilst the employer remained in breach of the term of his employment contract.

234. The Claimant continued:

> "As soon as I am made aware that Company sick pay is no longer being used as a means of leverage and that a neutral member of staff is to be appointed as chairperson, I should be happy to agree a mutually convenient date in order to attend the Medical Case Conference so that my fit for work related absence may be

discussed in line with the Attendance at Work Procedure.

Any attempt to terminate my employment or cause any other kind of further hardship in the meantime will be challenged without delay and all appropriate mechanisms will be utilised."

235. On the same date, 15 December 2017, the Claimant also wrote to Ms Bosquette (pp358-359) about what he entitled 'deliberate misuse of TFL systems/processes for malicious purposes'. He enquired whether she would be able to investigate the communications between Mr Lawford and one of the trains managers, Mr Anderson. He expressed a reluctance to submit an individual grievance since recent history had demonstrated the inability of some individuals to conduct one in accordance with the prescribed procedure and that this had subsequently resulted in a significant portion of his time being wasted.

236. There was no evidence before the Tribunal that Mr Lawford was aware of this enquiry as another section of the Respondent, i.e., the Privacy and Data Protection team, investigated the complaint just referred to. In the correspondence which followed, the Claimant wrote to the privacy adviser (Ms Seeq) and outlined to her what he contended was a late change of his rest day for the week of 4 September. He referred to a conversation with Train Manager O'Dwyer on 7 September during which he was told that Mr O'Dwyer had been told to tell the Claimant that he was now being given 8 September as a rest day so he should not report for duty on that day (p360). The Claimant did not include in that explanation the reason why the Respondent had not treated 4 September as the rest day namely because that was the day that he had been given notice to attend for training and that notice of this had been given to him, on the Claimant's own account, on 1 August 2017.

237. The letter to Mr Wild of 1 December 2017 was said to be the first protected act. It was also the source of complaint in that it was the first act of victimisation alleged. The Claimant alleged that the Respondent had failed to respond to his letter.

238. The Tribunal found that by email dated 19 December 2017 from Mr Wild to the Claimant, Mr Wild indeed responded to Mr Mathurin. He thanked him for writing to him personally about the staff complaint but expressed his disappointment to hear of staff grievances. He said that he did not receive many but when he did he always sought assurances that they were being taken seriously. He went on to say that he also urged all his staff to keep engaging with the process so he asked Mr Mathurin also to do so. He continued: 'I really think it is the best way to help alleviate what is clearly a stressful situation for you.' In the letter he expressed regret that Mr Mathurin's health was suffering and advised him to speak to the

occupational health team and gave the contact details. He closed the letter by reiterating that it was important that everyone involved remained within the Respondent's process for handling such complaints.

239. It appeared to the Tribunal that the allegation of victimisation as put by the Claimant was therefore not made out. The Claimant had failed to establish the primary facts alleged. Apparently recognising this reality, in his closing submissions, Mr Stanislas put a modified case on behalf of the Claimant namely that the Respondent had failed to 'properly' respond to the letter of 1 December 2017. The Tribunal considered that Mr Wild's letter was perfectly proper and appropriate so even if this had been the case that was put it would not have succeeded. The Tribunal was satisfied that this allegation of victimisation was not made out because the Claimant had failed to establish the primary facts relied on. It was therefore dismissed.

240. Despite the Tribunal's considerable efforts from the beginning of the case, it proved difficult to identify at what stage the Claimant was alleging that the Respondent had failed to reinstate sick pay. This was important because, as is clear from the chronology, the first protected act relied upon happened after the decision to suspend sick pay had been made. Eventually, in closing submissions Mr Stanislas allocated the date of 15 December 2017, when the Claimant wrote to Mr Lawford as cited above as the occasion on which the Respondent was invited to reinstate the company sick pay.

241. The Tribunal considered that from the text of the correspondence from the Respondent to the Claimant about the issue of suspending sick pay initially and warning the Claimant about it prior to the letter to Mr Wild from early November and then doing so again in late November 2017, and the absence of any process for reviewing the suspension of the sick pay but most importantly, the failure by the Claimant to engage with the conditions which the Respondent laid out which would have involved attending sickness review meetings and occupational health appointments, the Tribunal considered that it was absolutely clear that the non-compliance by the Claimant with the appropriate steps to engage with the sickness absence monitoring process was the reason why the company sick pay was not reinstated. There was no change in the Respondent's position before and after the letter sent by the Claimant to Mr Wild which was the protected act which was said to have caused the failure to reinstate the company sick pay.

242. The Tribunal therefore found that this complaint was not made out and it was therefore dismissed.

243. The issue of not being paid company sick pay was also an unlawful deduction of wages claim. On the facts as found above the Tribunal did not consider that there was any basis for finding that the Respondent was not entitled to have suspended sick pay. The point was made during the course of the case that it should have been done at an LDI hearing. However, on perusal of the relevant procedures it was acknowledged that that only applies in relation to the withdrawal of company sick pay and not its suspension. Company sick pay was never withdrawn in this case. It remained suspended up to the date of termination but there was no reason why it could not have been reinstated if the Claimant had complied with the Respondent's reasonable instructions to attend with occupational health assessment and the sickness review meetings.

244. The complaint therefore that the failure to pay sick pay from 24 November 2017 to 26 January 2018 was an unlawful deduction of wages was not well founded and was dismissed.

245. The next relevant date was 3 January 2018 when the Claimant sent a further letter directly to Mr Wild (p390). This was said to be the second protected act. The Tribunal noted that there was no complaint in this letter that Mr Wild had failed to respond to his earlier letter or indeed had failed to respond 'properly' to the earlier letter.

246. This was a covering letter serving a discrimination questionnaire. In the covering letter Mr Mathurin explained that the discrimination questionnaire had been 'prepared for litigation'.

247. The Claimant did indeed however refer to his earlier letter to Mr Wild on 1 December 2017 and the points that he had made in it. He characterised as a failure his efforts to address the issue of the suspension of sick pay and stated that due to the further damage which he had now suffered due to this act of suspension of sick pay, he would no longer by relying on his employer to resolve these matters on his behalf.

248. He made it clear at the beginning of the questionnaire that he believed that Mr Lawford, Mr Bidston, Mr Dhaliwal, Mr Clark, Mr Ramsey, Ms Brown and Mr Morris were all responsible for discriminating against him and that the discrimination that he was alleging was race discrimination, discrimination arising from disability, failure to make reasonable adjustments in relation to disability and victimisation.

249. There was no dispute that the letter and questionnaire taken together constituted the second protected act. Further, findings have been made earlier in these reasons about the matters cited by Mr Mathurin in that

document.

250. Finally, the document was dated 3 January 2018 but was stamped as received in Mr Wild's office on 4 January 2018.

251. In the meantime, also by a letter dated 3 January 2018, Mr Lawford wrote to the Claimant informing him of the outcome of the medical case conference which had proceeded in his absence on 18 December 2017 (pp395-398).

252. Mr Lawford outlined that he had taken into consideration the letter sent to him dated 15 December 2017 by the Claimant; the new GP fit note dated 11 December 2017 which was due to expire on 25 February 2018; and the Claimant's outstanding LDI appeal booked for 21 December 2017.

253. He disputed the Claimant's contention that his GP had provided a summary of reasons for the current absence and confirmed that the Respondent had not received this information. He invited Mr Mathurin to send such information to him if it was available or at least to provide it to the OH doctor at the next arranged appointment.

254. There was no reference in the Tribunal hearing to any additional information and the Tribunal could only assume that the Claimant was referring to the statement of the reason for absence in the fitness statement.

255. Mr Lawford then went on to address the Claimant's accusations that the Respondent had not taken any meaningful action to facilitate his return to work by referring to all the support which had been offered to the Claimant and the action in terms of arranging OH appointments and sickness review meetings. He once again explained to the Claimant that the OH appointment is a management referral and that there is no self-referral process for employees off work through long term sickness. He referred the Claimant to the relevant provisions of his contract of employment.

256. The Tribunal once again considered that this letter was appropriately worded and addressed the points being made by the Claimant in his earlier correspondence. Further, the details of the next OH appointment which had been arranged for 10 January 2018 were provided in this letter.

257. Mr Lawford then informed the Claimant that the case conference which took place on 18 December 2017 had decided to postpone the meeting until after the LDI appeal had been concluded and the Claimant had

attended an OH appointment to enable them to review his fitness to work following receipt of the new GP fit note. In the letter Mr Lawford had referred to the LDI appeal and that he had been informed by Ms Bosquette that it was booked for 21 December 2017 with Mr Kingham at Queen's Park. He told the Claimant that he had no involvement in this process but that he hoped that by attending this appeal and bringing the matter to a conclusion, this would have a beneficial impact on the Claimant's health.

258. The Claimant was informed that the next case conference had been booked for 15 January 2018 at 2.00pm at the Blackfriars Road office. He was warned that if he did not attend this meeting it was likely to go ahead in his absence and Mr Lawford would be making a decision on the information made available to him. He then expressed the view that at this stage he would hopefully have OH advice to consider. Once again, the Claimant was invited to send any additional information which he wanted Mr Lawford to consider to him no later than 12 January 2018.

259. The Claimant was also warned that one possible outcome of this forthcoming case conference could be termination of his employment on medical grounds. Mr Lawford told the Claimant that once he had attended the case conference with Mr Lawford and the rearranged OH appointment, the Respondent could then discuss the reinstatement of his London Underground company sick pay. Once again reference was made to sources of support for the Claimant which were confidential.

260. The next relevant date was the presentation of the second claim form by the Claimant on 10 January 2018 (Case Number 2300135/2018) in which the Claimant alleged race discrimination, disability discrimination, victimisation and unlawful deduction from wages.

261. On 11 January 2018 the Claimant was written to by Mr Kingham with his decision about the LDI appeal. Our findings about that have been set out above.

262. The Claimant relied on the presentation of the second claim form as the fourth protected act. The letter to Mr Wild and the discrimination questionnaire of 3 January 2018 were the second and third protected acts.

263. The Respondent also agreed that the presentation of the claim form on 10 January 2018 constituted a protected act.

264. The Claimant did not attend the case conference scheduled for 15

January 2018 and it went ahead in his absence. He did not send in any further information nor did he provide a reason for non-attendance. The letter sent to the Claimant after the meeting was from Mr Lawford and dated 18 January 2018 (pp409-411).

265. Mr Lawford explained that as part of the case conference he had considered all the meetings and appointments which had been scheduled in the lead up to 15 January and any reasons for non-attendance. He then outlined all the steps that had been taken in terms of arranging OH appointments and sickness meetings of which there were three OH appointments and two sickness meetings which had not been attended by the Claimant. In addition, the Claimant had not attended either the case conference which was due to have taken place on 18 December 2017 or the case conference on 15 January 2018. He also made the point that by now, the last contact which the trains management team had had with the Claimant in relation to managing his sickness was on 24 November 2017 when the Claimant had said that he did not need to meet with the trains manager as he had already updated the desk with regard to his non-attendance at OH. Mr Mathurin had indicated that he would update the desk by 6 December 2017 but this did not happen and Mr Lawford noted that up to the time of writing the letter, no such update had been received.

266. Mr Lawford set out that the Respondent had received two GP fit notes from the Claimant, the most current one stating that he was unfit for work up to 25 February 2018. He cited the conditions which had been set out on those fit notes as also set out above in these reasons. He indicated that as the Claimant had not attended the case conferences or the OH appointments arranged for him, the stress and alleged victimisation were not issues that either Mr Lawford or OH had been able to explore with him. He noted that he had received no other medical information either from the Claimant's own medical team or any specialist. He stated that he had no medical assessment from the OH department because the Claimant had failed to attend all the booked appointments or indeed to engage with London Underground in order that they could assist the Claimant back to work. He noted that he had been advised that the local disciplinary appeal had now been concluded and that he was hopeful that it would have resolved some matters for the Claimant due to his current absence for work-related stress.

267. He referred to a further letter that had been sent to the Claimant by the Senior PMA Manager – Human Resources on 8 January 2018 to encourage the Claimant to attend and to engage with OH but that this had not happened. Mr Lawford was here referring to the letter sent by Miss O'Neil in reply to the 3 January 2018 letter to Mr Wild and questionnaire (p400). She stated in that letter that she had been asked by Mr Wild to respond on his behalf.

268. In his letter to the Claimant (p410) Mr Lawford continued that in addition to everything he had set out up to that point, he understood that the Claimant had submitted a discrimination questionnaire to Mr Wild which had been passed over to the Respondent's legal department for review. He continued that due to the fact that it was a lengthy document which required a detailed response he was asking the Claimant to allow time for this response.

269. There was some debate in the evidence as to the exact date of knowledge of Mr Lawford as to the contents of that discrimination questionnaire and the letter to Mr Wild of 3 January 2018. The Tribunal considered that there was no question that Mr Lawford had notice of the protected act even if he had not read the questionnaire himself simply because he referred to the fact that he was aware of the existence of a discrimination questionnaire. The Tribunal accepted his evidence because it was credible and likely that the response had been drafted by Ms Bosquette, the PMA, and that this was a matter which she had noted hence the expression 'I understand'.

270. The Tribunal also took into account the position that Mr Lawford was in and likelihood that he would allow matters to be dealt with according to the appropriate processes namely that the legal team would address the questionnaire. The Tribunal did not consider it therefore likely that he would have demanded to see a copy of the questionnaire before he was asked to address this.

271. He continued by telling the Claimant that his absence from work continued to be a concern and that without receiving any OH advice on his health and fitness for work, Mr Lawford had very limited information to consider how to progress his case. He therefore recommended that the Claimant provide him with a date to reconvene the case conference on or before 26 January. He stated this could be held at a neutral location but he would need advance notice and at the very least two calendar days' notice. He also said that the second request was for the Claimant to provide any specialist medical information supplemental to his current GP fit note, which advised Mr Lawford of the Claimant's health condition and what he should consider regarding next steps with respect to his current non-attendance and failure to engage with the Respondent.

272. He then made it completely clear that the decision at the case conference on 15 January was currently on hold while he awaited the above information from the Claimant. The Claimant was given clear instructions as to where and by what date to send that information. He was told that if the information was not received by the Respondent by 26 January then a decision would be made in the Claimant's absence and that one possible

decision could be the termination of his employment on medical grounds.

273. The letter also referred to an enclosed ill-health pension consent form which he requested that the Claimant sign and send back to him. He explained that this was to arrange consent for the pensions department to explore ill-health options for the Claimant if, in the event the decision of the case conference was to terminate his contact on medical grounds.

274. Whilst questions were asked about this consent form during the hearing, and whether this was an indication that the Respondent had made up its mind in advance, the Tribunal noted that the procedures provided for this step to be taken by the Respondent in the normal course. The Tribunal also considered that this was not a disadvantageous or detrimental act for the Claimant.

275. The case conference was reconvened on 26 January 2018. Mr Mathurin did not attend. Mr Lawford wrote to him by letter dated 29 January 2018 (pp422-425) informing him of the outcome of the case conference. He noted that the Claimant had not provided an alternative date for the case conference as he had been advised therefore the case conference had proceeded on 26 January in the Claimant's absence. The decision made by Mr Lawford was to terminate the Claimant's contract on the grounds of medical incapability with effect from 26 January 2018.

276. Mr Lawford listed the medical evidence before him namely: -

    (i) the current fit note valid until 25 February 2018 in respect of work-related stress and anxiety and depression and other comments such as 'stress due to alleged victimisation';

    (ii) no London Underground occupational health advice due to failure by the Claimant to attend three appointments;

    (iii) despite requests for further medical advice from a specialist/consultant none had been received by the 26 January 2018 deadline; and that the Claimant had been absent from work since 9 September 2017 and had not attended any meeting to discuss his absence which totalled twenty-six weeks. The Claimant did not accept that Mr Lawford had correctly added up the number of weeks. The Tribunal accepts that it was closer to twenty weeks, but that this was not a materially different picture.

277. Mr Lawford then referred to the correspondence that had been exchanged and the outcomes of the two previous case conferences. He stated that he had regretfully concluded that the Claimant had failed to meet and

engage with the Respondent and that in the absence of that engagement to discuss the Claimant's condition and also to gain relevant advice on the Claimant's fitness for work he had to consider whether he could sustain the Claimants absence. He concluded that he could not and that this was the reason for the decision.

278. Although the Claimant's effective date of termination was 26 January 2018, the Respondent paid him ten weeks' salary in lieu of notice. Mr Lawford provided further relevant information to the Claimant concerning the termination of his employment. Most important for these purposes he informed the Claimant that he had the right to appeal against his decision and he gave him the details as to where the appeal letter should be sent and within what timeframe. He then concluded by thanking the Claimant for his service over the last ten years.

279. It was not in dispute that the Claimant did not appeal against the dismissal. He gave no explanation either to the Tribunal or to the Respondent as to why he had not pursued an appeal. The Tribunal considered that an appeal would have allowed him the opportunity to put forward any relevant medical evidence and also to have the appeal heard by an independent manager.

The dismissal – unfair and/or victimisation

280. The Tribunal first considered whether it was likely that the Claimant had been dismissed by reason of having done the protected acts relied upon. There were no unusual legal issues arising in relation to the unfair dismissal complaint. The Tribunal had regard to the statement of the law in Ms Ahmad's submissions. The Respondent here relied on capability as the potentially fair reason for dismissal. The principles cited by Ms Ahmad in the context of a conduct dismissal were however relevant. The Tribunal had to assess whether the Respondent had complied with a fair process and had investigated fairly the circumstances surrounding the Claimant's ability to continue performing his job. It was also important to consider whether it had given the Claimant a fair opportunity to address the concerns, in all the circumstances.

281. The Tribunal also reminded itself that although the guidance in the case of *BHS v Burchell* [1978] IRLR 379 referred to by Ms Ahmad was generally relevant, the burden of proof under the 1996 Act was neutral.

282. Similarly, the band of reasonable responses test applied in relation to the procedural and substantive aspects of the case: *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23.

283. On the basis of the Tribunal's findings above, it appeared to the Tribunal

that the allegation of victimisation in relation to the dismissal was not well-founded.

284. There was no proper basis for finding that the Claimant had been dismissed as a consequence of having done the protected acts. It was clear that the only reason for the dismissal was that the Respondent believed that the Claimant was unfit to continue with his duties after a considerable absence, and that continued employment was untenable given the Claimant's failure to engage with the Respondent's attendance management procedures. This belief was genuinely held, given the process Mr Lawford had gone through, and was reasonable, for the same reasons.

285. The unfair dismissal complaint was not well-founded and was dismissed.

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Employment Judge Hyde

Dated: 12 March 2020