EMPLOYMENT TRIBUNALS

Claimant: **Ms V Stamper**

Respondent: **NSL Limited**

Heard at: **Cardiff (by video)** **On: 3, 4 and 5 March 2021**

Before: **Employment Judge R Harfield**
Members **Ms H Hinkin**
Mr M Pearson

Representation:
Claimant: In person
Respondent: Ms Quigley (Counsel)

WRITTEN REASONS

An oral judgment was delivered by the Tribunal on 5 March 2021 and confirmed in writing on 8 March 2021. On 15 March 2021 the claimant requested written reasons. Unfortunately, the request was not passed on to Employment Judge Harfield until 18 April 2021 and further delay has been caused by the pressure of other judicial work. Employment Judge Harfield apologises for this.

REASONS

Introduction and Issues to be Decided

1. This is a claim of sex discrimination, harassment related to sex and unauthorised deduction from wages which was presented by the claimant on 2 March 2020. It was originally presented as a claim being about sex discrimination and notice pay. At a case management hearing on 26 June

2020 Employment Judge Jenkins allowed the claimant to amend her claim to bring a deduction from wages claim. He refused the claimant permission to amend to bring a disability discrimination claim. He defined the issues to be determined at this hearing as:

Unauthorised deduction from wages

1. *Did the respondent make a deduction or deduction from the Claimant's wages in the following manner:*
   (a) In relation to approximately 10 hours of overtime claimed via the timesheets prior to the implementation of a clocking system;
   (b) In relation to pension contributions deducted prior to the claimant opting out of the pension scheme;
   (c) In relation to her salary in the month of December 2019;
   (d) In relation to her salary during the notice period in March 2020.

2. *Were the deductions authorised to be made by virtue of a relevant provision of the claimant's contract?*

3. *had the claimant previously signified in writing her agreement or consent to the making of the deduction?*

Direct sex discrimination

4. *Did the respondent subject the claimant to less favourable treatment compared to others?*

5. *If so, was this because of the protected characteristic of sex?*

6. *What does the claimant allege amounted to less favourable treatment?:*

   (a) On June 2019 did Aled Williams state "I have already lowered your target because you're female";
   (b) Being required to drive the Luton van which she contends had defective breaks.

7. *Who is the claimant's real or hypothetical comparator? She considers that all male enforcement staff are comparators.*

8. *Are some or all of the claimant's allegations out of time?*

Harassment related to sex

9. *Did the respondent or an employee of the respondent engage in unwanted conduct?*

10. If so, which acts does the claimant allege amounted to unwanted conduct?

(a) On June 2019 did Aled Williams state "I have already lowered your target because you're female";
(b) Being required to drive the Luton van which she contends had defective breaks.

11. Did this conduct related to the protect characteristic of sex?

12. If there was unwanted conduct, did it have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant considering (a) the claimant's perception (b) the circumstances of the case and (c) whether it was reasonable for the conduct to have that effect?

13. Are some or all of the claimant's allegations out of time.

2. The claimant in her witness statement makes multiple complaints and allegations about her treatment by the respondent and, in particular, Mr Aled Williams, which she says culminated in her decision to resign on 2 March 2020. This is, however, not a constructive unfair dismissal claim and cannot be one because the claimant did not have 2 years' service. The claimant's discrimination claim is about two very particular allegations as identified in Employment Judge Jenkins' case management order. The Tribunal noted that in the claimant's witness statement she said that Aled Williams had targeted her during the entirety of her employment and that this was a sustained campaign against her. We also noted that on the Tribunal file there was an email sent by the claimant to the Tribunal (but not copied to the respondent) dated 4 July 2020 attaching a draft witness statement in which she said "after the preliminary hearing I was concerned that what I saw as a single incident, i.e., a campaign of harassment/ sex discrimination may be seen by the court as a number of separate allegations. If the court considers these to be separate allegations please accept this email as an application to add these allegations to the hearing." That was, on the face of it, potentially an application to amend the claimants' claim and unfortunately it had been placed on the Tribunal file without being referred into a judge to action and had not been copied by the claimant to the respondent.

3. At the start of the hearing we therefore identified with the claimant that based on Employment Judge Jenkins' case management order there were only the two defined allegations before us and asked whether the claimant was making an application to amend to add additional allegations of sex

discrimination or harassment related to sex. We were clear that such allegations had to be specific allegations of less favourable treatment or unwanted conduct. Ms Quigley opposed any such application and we explained that we would ultimately have to consider any such application as a panel, which would include considerations of whether, if granted at all, the case could still proceed or whether there would need to be a postponement. After some discussion the claimant ultimately said that she was not applying to amend her claim to add additional allegations. The claimant said she was satisfied that what she was complaining about all centred around the two issues that Judge Jenkins had identified. Judge Jenkins also identified that it was about 4 (now 3) particular complaints relating to pay as already summarised.

Findings of fact

4. To decide this case it is therefore not necessary for us to make findings of fact about all the issues or allegations that the claimant seeks to make or that are in dispute between the parties. We therefore set out in short form a summary of the main things that happened to explain the general time line of events and make more specific findings of fact where necessary for us to fairly decide the case on the issues actually before us. We heard evidence from the claimant, Mr Kitching and Ms Nightingale for the claimant and from Aled Williams and Mr Barnes for the respondent. We also received written witness statements from them and had a joint bundle of documents. We received closing submissions from both parties which we have taken into account.

5. The claimant worked for the respondent as an enforcement officer, working on behalf of the DLVA, enforcing vehicle tax. She started work on 2 May 2019. As an enforcement officer the claimant would patrol an allocated area in a vehicle fitted with ANPR seeking out untaxed vehicles. The untaxed vehicles are then either clamped or have a warning sticker placed on them (depending on how out of date the tax is). The claimant would carry a handheld device on which she would also be allocated removal of clamps (declamps) once the member of the public had paid what was due. On a weekday if a declamp came through before 4pm the respondent was obliged to remove the clamp that day. There were different rules for the weekends. Therefore if a declamp was allocated the enforcement officers would have to stop their ANPR searching and clamping activity and go off to deal with the declamp.

6. The claimant worked out of the Newport pound, but she could be sent to work in places such as Bristol, Bath and Swindon.

7. The enforcement officers worked different shifts. Some started work as early as 4am. The claimant was recruited to a later shift of 10am to 7pm although she did work different hours at times. When she started work there were only three females working at the depot: herself and Antonia Rosser as enforcement officers, and Elise-Marie Nightingale who worked in the office. Everyone else was male.

8. The team had access to 4 Vauxhall Vans, 1 Peugeot Partner Van and a Luton Van. The Luton Van was a larger vehicle, with a double axle and was set up for the removal of motorbikes. It was, however, used for ANPR checking, clamping and declamping too. As a bigger vehicle it was more difficult to navigate down narrower streets. The prime time for vehicle clamping is in the early morning when vehicles are parked up on the roadside. The roads are of course also then at the narrowest. Enforcement officers working earlier shifts therefore tended to have the smaller vans to use for their shifts. On the shift hours the claimant worked the smaller, more popular vehicles may already be in use. It was more likely the larger Luton Van would be left for the later shifts. Again due to the shift hours the claimant worked she would also not get as many clamps as other enforcement officers. The claimant was also allocated a lot more declamps as members of the public would tend to pay their bills later in the day.

9. There were team targets which, if the team hit, they could get a monthly bonus each of £300. The targets were based on clamps and stickers and not declamps. Enforcement officers also had more informal individual targets set at around 7 clamps a shift. They were used as an informal performance management tool in the sense that they were kept on a spreadsheet by the management team and monitored. Aled Williams told us that if an enforcement officer was showing as low then there may be a discussion with them about improving their clamping rates, but that formal performance action was rare.

10. At some point relatively early on in her employment the claimant went to speak with Aled Williams about her target and expressed her concerns that it was harder for her to get as many clamps. He said he would reduce her target down to 5 clamps.

11. The claimant drove the Luton Van on 14 and 15 May 2019 [67 and 68]. On 15 May 2019 on the inspection sheet she identified a defect with the brakes [68]. On 19 May 2019 the AA was called out. Their report at [88] says: “Brake fault no fault found road test ok drove vehicle to euro commercials. Have vehicle checked for fault.” [135] shows that on 22 May 2019 the van went to a garage for “routine, Brake Efficient Test.” The work is recorded as “Linings (Pads and Shoes) – Remove & Refit, Pads – rear (axle set).

12. The claimant says that on 5 June 2019 she went to see Aled Williams again to discuss targets and the fact that she was getting the most declamps which was reducing her available time to get clamps. She says that Mr Williams said, "I have already lowered your target because you're female." She says that he said to her "so what more do you want." The claimant says that she was extremely upset by this comment. She says that she tried to carry on with her shift but returned to the office as she was mentally unable to continue. The claimant said in oral evidence that she went to her destination but had a break down. She said that she telephoned her partner as she was in tears and he told her to go home.

13. The respondent's case is that Aled Williams did not say this to the claimant and that the claimant did not go home sick that day. This is a fundamental dispute of fact for the Tribunal to resolve as it is the basis of the claimant's first complaint of direct discrimination and harassment related to sex.

14. The Tribunal is not satisfied, applying the balance of probabilities, that it has been established Aled Williams said this. This is for the following reasons. Firstly, as Ms Quigley submits, the particular expression and form of words that the claimant says Aled Williams used is odd. It does not appear a natural turn of phrase for someone, or indeed Aled Williams, to use. The use of the word "female" as opposed to, for example, "woman" or "girl" is unusual. Secondly, both the claimant and Aled Williams were in agreement that there was good reason to reduce the claimant's clamping target because of the shift she was working and the fact she had more declamps. Thirdly, the claimant's evidence about how upset she says the comment made her does not fit with the other evidence. Her partner's witness statement talks about the claimant being very happy in the first few weeks of her job. He says "over the months Vicky became more and more upset. She seemed less interested in anything at all and was constantly telling me about problems with her boss. She was particularly upset one day when her boss criticised her weight… On a few occasions she broke down in tears for no apparent reason." This alleged incident occurred about 5 weeks after the claimant started work. It was early on. It would not naturally fall within the description of being "over the months." The claimant says she was distraught by the comment, and yet it is not a specific example that Mr Kitching gives in his statement. The claimant's GP records from that time also suggest she was happy in her work.

15. Fourthly, the claimant did not complain to anyone else about it at the time. The claimant says that at some point she tried to raise concerns with Mr Main, the area manager, but that he walked off and said he did not manage the Newport pound. We did not hear from Mr Main. However, even if the claimant is correct there is no suggestion she told Mr Main

about the alleged comment. The claimant said in her later grievance meeting [151] that she went to speak to Mr Main about her disciplinary but that she was trying to highlight other complaints. The claimant then raised concerns with Safecall on 29 October 2019 [111] but the claimant did not mention it. On 4 November 2019 the claimant prepared a written statement for a disciplinary hearing and says, having received advice from Acas and Unison, she decided to expand her statement to include her concerns about her treatment but again she did not mention the 5th June allegation [123]. The claimant raised it, in a sense, for the first time, on 22 November when preparing a statement for a grievance hearing [145 – 146] where she mentions targets being reduced because she was female. She did not, however, make a direct allegation about Aled Williams saying that to her and it causing her distress. At the grievance meeting on 28 November 2019 the claimant fully mentioned the allegation for the first time, although it is at the end of the meeting and not a priority grievance that she raises at the beginning. For these reasons, we were unable to find it established that the statement was made in the way the claimant says it was.

16. The Tribunal considers it likely that as time went on the claimant was becoming increasingly unwell, there were increasing things troubling her, she was involved in multiple processes and her perception that she was being bullied by Aled Williams grew. We consider it likely that the claimant was analysing her situation and why she thought things were happened to her and discussing it through with various people, including some colleagues who had become friends like Mr Lodge. It is likely when talking about things like targets, the perception became formed that Aled Williams had changed the claimant's target because she was female. But that does not mean that is what Aled Williams in fact had said at the time.

17. Returning now to the main time line of events, the claimant drove the Luton Van again on 10 July 2019. The Luton Van passed its MOT on 16 August 2019 [134]. It was given advisories for "brake fluid close to minimum", and "brake disc worn, pitted or scored, but not seriously weakened" for all 4 brakes. The claimant then drove the Luton Van again on 12 September 2019 and 27 September 2019.

18. The claimant drove the Luton Van again on 16 October 2019. The claimant had to brake suddenly to let a police vehicle through. She says the brakes did not work and she hit the car in front which hit the car in front of that again with a small child in it. The claimant says that the police told her to drive it back and not to drive it again until a mechanic had looked at the brakes.

19. On 23 October 2019 the claimant was called to an investigation meeting with Aled Williams about an allegation that the claimant had failed to carry

out a declamp that was allocated to her the previous day [95 – 103]. On 24 October 2019 the claimant was sent a letter saying that she was required to attend a disciplinary hearing on 1 November 2019 [107]. The claimant was upset about being called to the investigation meeting and then the disciplinary hearing as she did not think she had done anything wrong.

20. Sometime around that date (the date is not given on page [109]) there was an exchange between the claimant Mr Williams by text message about the claimant's pension contributions. He had said "there are no payments coming out of your pay for any pensions." The claimant said, "I have" and she said, "I'm still in it that's why I'm asking for payroll as it's our right to be able to speak to them."

21. On 29 October 2019 the claimant emailed "Safecall" with a complaint that Aled Williams was bullying her into leaving [111- 112]. The complaint set out various matters but, as we have already said, did not make a complaint about the 4 June 2019. The claimant also did not say that she thought Mr Williams was doing any of these things because she was a woman.

22. The claimant was unwell on 1 November 2019. The disciplinary hearing was rearranged for 4 November 2019 before Dale Wood. As already mentioned, the claimant prepared a written statement in advance [123] which she says was produced on the advice of Unison and Acas. The claimant set out her view on the disciplinary allegation and then said she wanted to protest about her treatment by Aled Williams who she alleged was bullying her out of the job. Amongst other things the claimant complained that she and others had reported the brakes on the Luton van as being faulty and that she was pressurised into driving a vehicle that should not have left the yard. She said that Aled Williams' response to these complaints was always the same "just get on with it." The claimant said that two other individuals, Ms Nightingale and "Ricky" (a male) had left under similar circumstances to hers and she believed they were pushed out in the same manner that Aled Williams was trying to push her out. The claimant did not allege her treatment by Mr Williams was because she was a woman, or was sex discrimination, or harassment related to sex.

23. On 14 November 2019 the Luton van went it for repair. The records say that it also had a brake test [131].

24. On 18 November 2019 the claimant emailed Aled Williams about the fact she had been denied a bonus payment and said she was going "on the sick for work place stress and work place anxiety." She asked for an email about why she was got getting a bonus as she needed it for her

solicitor. The claimant explained in oral evidence that her uncle is a solicitor, so she was getting some advice from him [119]. That same day the claimant was also sent a letter by Mr Barnes [136 – 137] referring to the claimant's contact with Safecall and saying that it was being treated as a grievance. The claimant was invited to a grievance meeting on 22 November. On 19 November 2019 Mr Wood also told the claimant that her grievance had been passed to HR and that the disciplinary would be on hold until the grievance was dealt with [128]. The claimant was also signed off work for 1 month [144]. The fit note refers to "stress at work."

25. On 22 November the claimant's grievance meeting was rearranged for 28 November [138]. The claimant agreed to attend whilst being absent on sick leave. The claimant again prepared a note in advance [145]. The note covers various topics and includes the statement "Targets: No-one knows their target as it changes. Mine got changed as I'm female." She also wrote "NSL aim to promote equality? What a joke. Aled lowered my target but no one elses but still getting the majority of declamps to not even get 1 clamp." The claimant also complained that some drivers were getting priority to vans and shifts because they were friends of office staff.

26. The minutes of the grievance meeting are at [148 – 156]. The claimant started with the Luton van and her complaint that when she told Aled Williams the brakes were faulty he told her to get on with it and others use it. She said she had not been updated about the brakes. The claimant also said that Aled Williams had put her target down to 5 and she had told him not to do that but to not give her all the declamps. She also said towards the end of the meeting "No one knows their target at the site, I was told my target has been lowered because I am a woman" [156].

27. The claimant returned to work on 4 December 2019. We pause here to note that the Tribunal's view is that it is likely the claimant had been in the Autumn, and probably still was, quite unwell at that point in time. The claimant's medical records show that she was facing significant debt issues at the time with bailiffs calling. She had been complaining at times that she did not feel her pay was correct and she felt like Aled Williams was not resolving it and was blocking her from contacting payroll. Being on sick leave could potentially compound money worries as there was no pay entitlement for the first 3 days of sick leave and company sick pay was limited. She was very upset about the loss of a bonus payment because of the disciplinary case against her which did not help her money woes and had really impacted upon her son. She was upset and worried about the disciplinary case which she thought was unfair. The claimant did not like driving the Luton Van and the crash had in all likelihood upset her and had made her concerned about driving the van again. Whilst formal action had not be taken against her for her level of clamps, the claimant probably, subjectively from her perception, felt vulnerable and

that she was being singled out for things like the level of declamps and driving the Luton van.

28. The claimant's contemporaneous medical records for 21 November say, "stress at work, on sick due to grievance at work, not sleeping, walked out of work." On 29 November the GP recorded that the claimant was not sleeping, did not think her medication was working and was speaking to the mental health team. On 3 December the claimant's GP said she could sign herself back to work but was irritable and was awaiting a change in medication. On 29 November 2019 the mental health team [263] were recording that the claimant was suffering from poor sleep, low mood, emotional, anger/gets worked up easily, stress at work and debt that the claimant was not managing with bailiffs calling. The claimant's prime goal was to control her anger and also stop worrying. She was saying that her boss was bullying her. The claimant told Aled Williams herself that he was making her life a misery [114].

29. On 11 December 2019 the claimant was allocated the Luton Van and she refused to drive it. The respondent says that the claimant did agree to go out as a passenger to help her gain confidence but that she then refused to go back out again. The claimant agrees that she went out with Dean Robinson-Le-Gresley but says that it happened on 13 December 2019. It seems unlikely that it was the 13 December 2019 as according to the van records Mr Robinson-Le-Gresley had the van on the 11 and 12 December but not the 13th. The claimant says, which the Tribunal accepts, that after being out as a passenger she was panicked at the thought of potentially having to drive the van herself later that day. The claimant said she would wait until one of the other vans to return and Adam Williams refused this and told the claimant she could not be paid to just sit in the pound. The claimant went home. The claimant emailed Aled Williams and said, "I told you I am not driving that van and I wont be at all the advert for the job didn't say that we would be bullied into driving a Luton van I'm getting sick of not having a van to do the job I applied for I've came home."

30. On 12 December 2019 the claimant was again allocated the Luton Van and she refused to drive it. She went home without working her shift. The respondent says there was a meeting that day with the claimant, Aled Williams and Adam Williams. The claimant says it was on the 13 December 2019. Whichever day there are undated, unsigned minutes at [251-252] of a meeting between the three. The notes say that the claimant said her issue with the van was because she had a crash in the van and other people could refuse to drive it so she could too. It records her saying "point blank not driving that" and that she had driven other big vehicles, but she would just never drive this van again. The claimant was told it was the only van today so what was her plan. The claimant said she would go home then. Aled Williams then said, "this be third time, we would have to

go different measures." The notes say the claimant said she would see them in court and that they were driving her to quit the same as Antonia. The claimant was told it was the only van and a support plan was being offered. The claimant said that there was an issue with the van and handbrakes. Mr Williams said the van had been checked. The notes say that the claimant said she was not driving it and she would go home. She was told she could not be authorised to go home and so she said she would sit in reception all day. She was told she could not be paid to sit in reception. The respondent says the claimant then got up and walked out shouting "anything to stop my bonus."

31. On 12 December Mr Lodge messaged the claimant about the Luton van saying "it pisses me off that me and you are the only people expected to drive it" [165]. He also said [164] "I would rather not get involved but also cant stand by and watch you get singled out. I honestly believe that theres massive favouritism going on in our work with postcodes, work hours and favours."

32. On 13 December 2019 the claimant texted Mr Main and asked if he would meet her. They met at a cafe where the claimant complained about Aled Williams demanding that she drive the van, threatening her with gross misconduct, and that she was owed 3 days' pay as she had had no option other than to leave work. The claimant told Mr Main she would not drive the van as it was dangerous. The claimant said that she had asked on several occasions to see the report but had been denied it. Mr Main says that he asked the claimant if he gave her a copy of the report would she consider deploying. The claimant says she told Mr Main that she would. Mr Main records it differently in his subsequent letter at [167- 169] saying the claimant had said she was adamant she would not drive that van. His letter says that he told the claimant there was an expectation for her deploy that day and that no other van was available because one had been due to be collected but the garage could not start it. The claimant handed him a letter of resignation [166].

33. The claimant's resignation letter said she had been bullied into this by Aled Williams demanding she drive the Luton van that she had previously crashed, and other colleagues had reported the van as dangerous. The claimant said she had been singled out because she refused to drive it. The claimant said she had been threatened with gross misconduct. She said he had made her mental health worse. She said that other drivers were not willing to drive the van. She said other drivers were getting priority, van keys were hidden, and they get the better areas to clamp in so her numbers remained low.

34. Mr Main took the letter but suggested that the claimant sleep on it and reconsider her decision. The claimant did retract her resignation. On 17

December 2019 Mr Main wrote to the claimant albeit she did not receive it until the following day [167 – 169]. He said he had contacted the claimant on 16 December 2019 and had told her she would not be paid for 11 to 13 December as there was a reasonable adjustment to address her concerns about driving the van but she had chosen to leave the pound before completing her shift. The claimant was to return to work on 17 December 2019. He said "I must warn you however that these matters of you leaving work before completing your scheduled shift is not acceptable and will not be tolerated in the future, and refusal to carry out reasonable management instructions is also not acceptable. Both acts, refusal to carry out a reasonable management instruction and leaving shift without permission amount to gross misconduct and will result in disciplinary action."

35. On 18 December the claimant emailed Aled Williams with a dispute about her pay [113]. On 18 December 2019 the claimant was suspended from work. The claimant's view was that she had been repeatedly fobbed off about pay and a union representative advised her to sit in the office until it was dealt with. So that is what she did. It was, as the claimant terms it, a one woman strike. The claimant was given the letter from Mr Main from the day before. She annotated it [170-172] with comments such as "PROVE IT", "I WANT PAYING FOR MY TIME" and "GO FOR IT" (in relation to disciplinary action). The claimant did not otherwise correct the summary of events that Mr Main had set out. The claimant refused to deploy. Aled Williams returned to the office. The claimant was given a letter of suspension [173 – 174]. It says "further to the letter sent by Mark Main dated 17/12/2019 I am concerned with the behaviour you have displayed in response. I am writing to confirm your suspension from your position as an enforcement officer on full pay whilst a full investigation takes place into allegations of

- Refusal to carry out your duties, namely deploying in an ANPR vehicle and carrying out enforcement action
- Failure to carry out a reasonable management instruction
- Insubordination, demonstrating aggressive and disruptive behaviour towards operational management."

36. On 19 December the claimant was sent the outcome of her earlier disciplinary case about rejecting a declamping. The claimant was given a verbal warning [175-176]. The claimant said she wanted to appeal it [181 and 183].

37. On 2 January 2020 Mr Main wrote to the claimant inviting her to a disciplinary appeal meeting on 10 January 2020 [184 – 185].

38. On 6 January 2020 Mr Barnes wrote to the claimant with her grievance outcome [186 – 192]. Mr Barnes summarised the other inspection records for the vehicle and that there was a training plan for the claimant to drive

the van. The claimant's grievances in general were not upheld other than one point relating to Adam Williams. Mr Barnes said that according to the records he had looked at the claimant had been paid the right amounts of overtime.

39. The disciplinary appeal hearing took place on 10 January 2020 [193-196]. An investigation meeting also took place with Dale Wood about the claimant's latest suspension. The claimant said she had done nothing wrong and that Aled Williams was making her life a living hell and that he was harassing her. The claimant said she was not driving the Luton van until she was shown proof that the brakes had been changed.

40. On 13 January 2020 Mr Main provided the outcome to the first disciplinary appeal process [209 – 210]. He upheld the verbal warning.

41. The disciplinary hearing for second disciplinary charge took place on 21 January 2020 before Mr Holt. The claimant prepared a statement [211 – 213]. The claimant accepted that she had refused to deploy in the van until evidence was provided that the vehicle was safe to drive. She said that Aled Williams could easily have diffused her concerns by producing an inspection letter or repair report. She said she considered he had engineered the position to compromise her position in work. She said she would have refused to deploy anyway without evidence that the Luton van was safe. The claimant said she had also refused to deploy as a passenger with Dean. The claimant said, "Why does Aled have a problem working with women?" The claimant also prepared a handwritten note [214 – 217] in which she again said that she would not drive the van until proof was given. She said that she initially refused to go out as a passenger but on the 4th occasion she agreed to do so when Aled offered a support programme with Dean because she trusted him. She said she got really upset when she agreed to be a passenger with Dean. The claimant said that herself and Mr Lodge were the only ones made to drive the Luton van and new drivers get priority over older ones. The claimant said, "I got all of the declamps so I could not hit my daily target that Aled lowered because I'm female (discrimination in the workplace)."

42. On 28 January 2020 Mark Holt emailed Mr Main and Aled Williams and others with his findings [218 – 220]. He said he considered there was no case to answer in respect of the Luton van and that the claimant had a right to see current up to date information about the vehicle and that there were no documents to prove a check had been carried out. Mr Holt said he thought overtime payments were missing from May 2019 to September 2019 totalling £93.79. He said the claimant should be paid bonus payments she was refused of £25 and £300. At the time he thought the there was also a problem with the claimant's December pay. He said that

the claimant should be given written documentation about the brakes before she is requested to drive the vehicle.

43. Mr Holt's outcome letter to the claimant is at [221] to [224] and is dated 5 February 2020. Its terms are slightly different to his initial email, presumably due to feedback he had received from Mr Williams and others. It is likely that he had by then been given the records for the van showing the brake check as he told the claimant that there was a brake test certificate from November 2019 which he was attaching to his letter. He accepted the claimant had not been provided with it before and had requested sight of it. He said that the claimant may be deployed in the vehicle in the future and that she had agreed she had no concerns to deploy. He said he appreciated there had been a breakdown in communication. He told the claimant about the overtime he considered she was owed and the bonus payments. He also said that the claimant's January pay and December pay were correct. He said that the claimant had demonstrated disruptive behaviour but that he believed this largely stemmed from having had pay queries which management were trying to resolve but there had been a clear breakdown in communication and understanding which had allowed matters to escalate. He said he did not consider disciplinary action was appropriate. He requested the claimant contact Aled Williams about a return to work.

44. The claimant returned to work on 6 February 2020. She was not again allocated the Luton van. On 18 February 2020 she had a day's sickness absence. The claimant was invited to a formal absence review hearing on 4 March 2020 as she had 15.5 sick days in a rolling 12-month period [227]. The claimant went off work sick on 27 February 2020 [285]. She said it was the stress of being called to another meeting about why she had been off. On 2 March 2020 the claimant was given a sick note for 21 days. The claimant also handed in a letter of resignation [231] saying that the harassment by management made it impossible for her continue in her position and that she would remain on the sick leave until her notice was complete. The claimant was invited to reconsider her resignation [233] but declined to do so.

45. On 26 March 2020 Mr Williams emailed the claimant [240] saying that her payslip included a backpayment for what was owed from the date the claimant resigned until 31 March in sick pay as "we felt it right to pay until the end of the sick note, but I paid until the end of the month." On 30 March the claimant said that her pay was messed up again and she had received £359.03 when she was due £1555.81 [238]. The claimant said that there were deductions for unpaid time off when there should not have been any. Mr Williams said it was correct as the claimant had only worked the first week in March and so the £359.03 was for 5 days. He said he had raised a query with payroll about the sick pay element. The claimant

then sent various other emails chasing about her pay [235 – 237]. The claimant also presented her claim form on 2 March 2020 bringing a claim for sex discrimination and notice pay. In box 15 of the claim form the claimant included "Aled Williams lowered my target because I am female."

46. On 1 April the claimant emailed the Tribunal asking to add to her claim. She said, "sex discrimination this is due to Aled Williams lowering my target as he said because I am female." The claimant wanted to add a disability discrimination claim and also said she was claiming injury to feelings [26]. On 6 May 2020 the claimant emailed the tribunal again [24] saying that she wanted to add to her case as her last payslip was wrong again and she did not receive the other payment that Mr Williams had promised her for the last two weeks of March. The respondent's solicitors emailed the claimant on 7 May 2020 [23] asking what she thought he was owed by way of pay and saying the deductions in March were from the claimant's normal pay when she was off sick. The claimant said that Aled Williams had said he was paying her until the end of March, so she was owed was had been deducted for unpaid time

The Legal Framework

47. As foreshadowed in our oral reasons, these written reasons include a more in-depth summary of the applicable law.

Direct Sex Discrimination

48. In the Equality Act 2010 direct discrimination is defined in Section 13(1) as:

> (1) A person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

49. Sex is a protected characteristic. The concept of treating someone "less favourably" inherently requires some form of comparison. Section 23 provides that when comparing cases for the purpose of Section 13 "there must be no material difference between the circumstances related to each case."

50. It is well established that where the treatment of which the claimant complains is not overtly because of sex or race, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of the mental processes, conscious or subconscious, of the individual(s) responsible; see the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009]

IRLR 884 and the authorities discussed in that case at paragraphs 31- 37. The protected characteristic must have had at least a material influence on the decision in question. Unfair treatment by itself is not discriminatory; what needs to be shown in a direct discrimination claim is that there is worse treatment than that given to an appropriate comparator; Bahl v Law Society 2004 IRLR 799.

Harassment related to sex

51. Section 26 of the Equality Act defines harassment under the Act as follows:

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

(4) In deciding whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account –
(a) the perception of B;
(b) the circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

52. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336 the Employment Appeal Tribunal set out a three step test for establishing whether harassment has occurred:

(i) was there unwanted conduct;
(ii) did it have the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them; and
(iii) was it related to a protected characteristic.

53. It was also said in the case that the Tribunal must consider both whether the complainant considers themselves to have suffered the effect in question (the subjective question) and whether it was reasonable for the conduct to be regarded as having that effect (the objective question). The Tribunal must also take into account all the other circumstances. The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have that effect. The relevance of the objective question is that if it was not reasonable for the

conduct to be regarded as violating the claimant's dignity or creating an adverse environment for her, then it should not be found to have done so.

54. In Grant v HM Land Registry 2011 IRLR 748 the Court of Appeal reiterated that when assessing the effect of a remark, the context in which it is given is highly material. An Employment Tribunal should not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive" as they are an important control to prevent trivial acts causing minor upset being caught up in the concept of harassment.

55. The phrase "related to" a protected characteristic encompasses conduct associated with the protected characteristic even if not caused by it; Equal Opportunities Commission v Secretary of State for Trade and Industry [2007] ICR 1234.

Burden of Proof

56. Section 136(2) of the Equality Act provides that:

"If there are facts from which the court (which includes a Tribunal) could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred."

57. Section 136(3) goes no to say that *"subsection (2) does not apply if A shows that A did not contravene the provisions."*

58. Guidance as to the application of the burden of proof was given by the Court of Appeal in Igen v Wong 2005 IRLR 258 as refined in Madarassy v Nomura International Plc [2007] ICR 867. The Court of Appeal emphasised that there must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the respondent. They are not, without more, sufficient material from which a Tribunal could properly conclude that, on the balance of probabilities, the respondent had committed an act of discrimination. The guidance to be derived from these decisions was approved by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37. In some cases, however, it is appropriate for the tribunal to dispense with the two stage analysis if it is able to make a positive finding about the reason for the treatment in question.

Unauthorised deduction from wages

59. Section 13 of the Employment Rights Act 1996 states: -

"(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 make of the deduction.

(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"

60. The case law has established that for a sum to be "properly payable" to the claimant, the claimant had to have a legal (albeit not necessarily contractual) entitlement to the sum.

Discussion and Conclusions

5 June 2019

61. The Tribunal has found as a matter of fact that Aled Williams did not say the comment that the claimant alleges he did. It cannot therefore succeed as a complaint of direct sex discrimination or harassment related to sex as we have found it did not happen as a matter of fact. Those complaints are not well founded and are dismissed.

Being required to drive the Luton van – direct sex discrimination

Pre-December 2019

62. There is a spreadsheet at [75] to [86] setting out, on some dates at least, who was driving the Luton Van and when. It shows the claimant driving it on 14th of May 2019, 15th of May 2019, 10th of July 2019, 12th of September 2019 and 16th of October 2019. The claimant did not dispute this in evidence. The spreadsheet shows otherwise the van being driven by men: Paul Reid, Glyn Aguirre, Gareth Povey, Richard Lodge, Jordan John, Gareth Jones, Scott Cummins, Marc Gwynne, Simon Morgan, Marcus Thomas, Connah Main, Alan David, Mark Hutchinson, Dean Robinson, Adam Williams, Zak, Ross Smith, John Parton and Steve Harding- Cousins although some drive it more frequently than others. The

claimant did not drive it particularly frequently, which stands to reason if it was generally the vehicle of last resort.

63. Looking at the spreadsheet it does not paint a picture of the claimant being allocated the Luton van disproportionately more than anyone else, particularly bearing in mind that she would be more likely to be at risk of the vehicle being allocated to her because of her later shift start time. Richard Lodge worked similar shift hours to the claimant, and he was driving the van with some frequency at times, particularly in October and December 2019.

64. The Tribunal finds that until at least the December 2019 dispute, the claimant was required to drive the Luton van because it was the van that was available at her later start time of 10am shift. That is the reason why the claimant was deployed to the vehicle. It was not due to her gender but due to the vehicle's size and utility and her shift start time. There were many men also driving the van. These include Richard Lodge who worked similar hours to the claimant so is a man in a comparable situation also being deployed to that van.

65. The claimant also says that she was made to drive the van despite protesting when others who protested were not required to do so. She says that Antonia Rosser also protested but was made to do so. Ms Nightingale's evidence alleges something similar. Aled Williams denied this and said that Antonia did not refuse to drive it but was not confident in driving it so had been given a programme of support. He said that she left before she completed the programme because she found another job ultimately elsewhere. The Tribunal did not feel able to draw meaningful conclusions about Ms Rosser's situation as we did not hear from her directly. Ms Nightingale's evidence on the point also troubled us as her witness statement was written in a way such as to suggest she was a direct witness to the allegations she was making. Yet it became apparent from the cross examination of her that she was probably not in the workplace at the time due to her own issues with the respondent and she was then dismissed.

66. The claimant also identified in evidence that Richard Lodge had been required to drive the van contrary to his wishes or protestations. He himself says as much in the text message he sent to the claimant on 12 December where he said, "it pisses me off that me and you are the only people expected to drive it." This is again a comparable male being required to drive the van against his wishes.

67. The claimant says that Richard Lodge was only deployed to the van after she had raised her grievance. She says this was an attempt by the respondent to hide the fact that she was being deployed to the van as a

woman. However, we were not satisfied we had evidence of this or an evidential basis on which to infer this. The claimant presented her grievance to Safecall on 29 October 2019. The spreadsheet shows, for example, Richard Lodge driving the van on 2 and 3 October 2019.

68. The claimant at times, as set out already, complained about favouritism in the workplace and that newer staff were being given the worst resources. Richard Lodge also complains about this in his text messages with the claimant. The Tribunal is satisfied, however, that even if that was taking place it does not mean that it was happening because the claimant was female, as opposed to just not being in the group of "favourites" or being a newer member of staff. A comparator has to be credited with the same material relevant circumstances at the claimant. The claimant would therefore have to be compared with a male also not considered to be one of the favourites or a newer male member of staff. Here again, we have Mr Lodge who was also complaining that he was a victim of the favouritism and was a newer member of staff having started at around the same time as the claimant. There would be no less favourable treatment when compared to such a comparator.

69. Moreover, the allocation of the Luton van does not appear to the Tribunal to be a particular matter in respect of which it is likely there was much favouritism at play. As we have set out above many men in the workplace were driving the van. One regular driver of the Luton van in particular was Glynn Aguirre who according to Ms Nightingale (although we have set out already our concerns about the credibility of her evidence) was the ringleader in the powerful group. He incidentally also recruited the claimant. We are also mindful in that regard that the claimant's clear allegation is that it was Aled Williams who was deliberately allocating her the Luton van and yet even Ms Nightingale accepted that he was not in what she termed the "boys club" and sat in a separate office.

70. We therefore find that ultimately the reason the claimant was allocated the Luton van on the dates in question was because it was the available van on that day for her shift. She was not treated less favourably than a man was or would be treated in the same kind of situation. The reason for her treatment was not because of and was unrelated to her sex. Her sex was not a material influence on the treatment in question.

<u>December 2019 onwards</u>

71. The claimant was told she would have to deploy in the Luton van on 11, 12 and 13 December and she refused to do so. The claimant would also have had to deploy in it on 18 December and would have refused to do so, albeit the claimant was refusing to deploy that day in general because of her "strike" about pay.

72. The Tribunal considers that the reason why the claimant was required to deploy in the Luton van was, at least at the start of that group of days, because it was the van that was available at that time for her shift. This is a reason unrelated to the claimant's sex for the reasons that we have already given.

73. We did take heed of the fact that it became a grouping of days largely back-to-back when the claimant was being told that van was her only option, in circumstances in which historically that degree of frequency had not occurred. We considered it may well have been the case that as those days unfolded something of a stand-off occurred between the claimant and the respondent whereby she was refusing in deploy in it and they were refusing to deploy her to another vehicle. We considered it may well have been the case than more than simple vehicle availability came into play.

74. The Tribunal also considered that, similar to Mr Holt's conclusions, a degree of miscommunication and intransigence developed on both sides. We consider it likely that the claimant was refusing to drive the van for a number of reasons. We consider it likely that the claimant developed something of a phobia about the van following the crash in October, particularly in circumstances where she was suffering poor mental health. It does not, however, appear likely that she communicated that well to the respondent, given according to the undated meeting minutes she denied having a confidence issue, she did not mention her panic attack with Dean, and Mr Williams said he did not know about that. We consider it likely that (which would be linked to her fear of that particular van) that she did want to see proof of the brake safety. We accept it is likely that she did at times ask for that. But we also accept that it is likely that Aled Williams and others involved at the time, including Mr Main, did not understand its importance from that perspective or that they thought it was the key to getting the claimant to deploy back on the van. Mr Main recorded in his letter that the claimant had told him that she still would not drive the van. The claimant did not amend this when she annotated his letter on the 18 December. It is also a sentiment that echoes what the undated minutes record the claimant saying to Aled Williams and Adam Williams about the fact she would never drive it again. The claimant, as already discussed, was also refusing to drive the van because she thought the way in which it was being allocated was unfair.

75. The claimant was behaving angrily at the time. No doubt in large part due to the poor state of her health. It is likely at the time that Aled Williams and his colleagues had the impression that the claimant was being obstructive and obstinate. It is likely that led to further intransigence on their part and then contributed to a lack of communication and understanding on both sides as to what was going on. It would have been

helpful if they had given the claimant the paperwork relating to the brakes. But it is also likely that they did not consider that it was the solution to the problem. It is likely the claimant presented a different, more balanced, impression of what her concerns were by the time she met with Mr Holt. She was of course by then facing a second set of disciplinary proceedings. It is likely that at the time Aled Williams and his colleagues thought from their perspective that the claimant was acting unreasonably and therefore they needed to take a stand in insisting that she deploy using that vehicle if it was the one allocated to her.

76. That is a complicated set of circumstances but in a direct sex discrimination claim it is set of circumstances that has to be attributed to the male comparator. The Tribunal is satisfied that faced with the same or similar scenario involving a male employee that Aled Williams (and those alongside him such as Adam Williams and Mr Main) would have behaved in a similar manner and would have continued to insist that the individual drive the Luton van.

77. The reason for the claimant's treatment was unrelated to her sex. The claimant's sex was not a material influence on the decisions made to insist the claimant drive the Luton van. A male comparator in not materially different relevant circumstances would be treated the same way. The claimant's complaint of direct sex discrimination is not well founded and is dismissed.

Driving the Luton van - Harassment related to sex

78. The claimant did not want to drive the Luton van and therefore insisting she do so would amount to unwanted conduct. However, the Tribunal does not find that the unwanted conducted was related to the claimant's sex. This is for the same reasons we have already given.

Wages complaints

79. In an unauthorised deduction from wages claim the burden is on the claimant to establish her claim on the balance of probabilities. It involves her establishing that she had a legal entitlement (usually a contractual entitlement) to the sum she is seeking.

Overtime

80. The claimant says that her best estimate is that she is owed 10 hours unpaid overtime. There is, however, no evidence before us as to how it is said that claim is established. The claimant says that she is unable to do so without access to her paper time sheets which are not in the bundle. We can only decide the case on the evidence actually presented to us and

there is none. There is nothing in the Tribunal file to say that the claimant make an application for specific disclosure for an order requiring the respondent to disclose the paper records if she was indeed asking them to do so and they refused. The claim is therefore not well founded on the evidence actually before us and is dismissed.

Unpaid time off in December 2019

81. The claimant accepted, once Ms Quigley had been through with her the December pay figures, that there was not anything outstanding and she withdrew that complaint. That complaint is therefore dismissed upon withdrawal.

Pension Contributions

82. The claimant is seeking pension contributions that she says she is owed that she says were deducted after she had opted out of the pension scheme she had been automatically unrolled in. She puts that at £174.80 although that figure would appear to include the respondent's own employer contributions would not be something the claimant would be owed. There is also case law that suggestions pension contributions cannot fall within the description of "wages" for the purposes of an unauthorised deduction from wages claim. But in any event, the Tribunal would not be able to uphold the claim as we have no positive evidence in support of it before us. We do not have the claimant's paperwork relating to her opting out and the date it was effective. We do not have the payslips or other pay information showing that deductions were still made after the opt out was effective. The claimant gives no evidence as to what she says happened in her witness statement. On the evidence before us the claim is not well founded and is dismissed.

March pay

83. The pay slip is at [258]. This issue has been very difficult for the Tribunal to determine as the claimant was not able to put before us a clear statement of what it is she says she was owed in her March payslip. Even if she did not understand the respondent's calculations she should have been able to set out what she said she was owed on her own calculations. We also told the claimant that she needed to put a positive case before us and also take the respondent's witnesses through the issue, and we suggested that she do that with Aled Williams. She did not, however do so.

84. Equally, however, the payslip is hard to understand and the respondent's witnesses did not explain it in their statements. Ms Quigley took the

claimant and the Tribunal through it but the figures she gave did for different items did not match what is in the payslip.

85. On the face of it, however, what the payslip appears to do is to pay the claimant for part of March 2020 but then deduct from the claimant 7 days' pay. Quite how and why the payments are made before the deduction is not clear as it has the claimant being paid for 5 days salary when she was in fact on sickness absence. It also seems to the Tribunal that the deduction is likely to represent the last 7 working days of March on the basis that the claimant did not have a sick note at that point.

86. However, the claimant had a one-month notice period, that is not in dispute. In the Tribunal's judgment the claimant was entitled to be paid for that month's notice period at the appropriate rate. It appears the respondent deducted 7 days' pay on the basis that the claimant's sick note ran out. But there is no evidence that the respondent asked the claimant to file a further sick note. It is the Tribunal's industrial experience that it would be standard practice for an employer to request a further sick note rather than just placing an employee automatically onto unpaid unauthorised absence. The claimant had said she was going to be sick for her notice period. She did not say what that was, however, she did not say she was limiting it to 21 days. Mr Williams also said that backpayment was owed to the claimant from the date she resigned until the 31st March in sick pay.

87. The Tribunal has therefore decided that the fairest way to proceed on the limited evidence before us would be to make our own assessment of the claimant's pay for March 2020. The claimant appeared not to disagree with Ms Quigley's assessment that the claimant would have had 4 days company sick pay left. 3 days sick leave would be unpaid in the month under the agreed sick pay rules. There were 22 working days in the month. That would leave 15 days to be paid as statutory sick pay. At the time in question SSP was paid at £18.85 a day. 4 days of company sick pay would be £287.20. 15 days of SSP would be £282.95. Adding back in the £75 bonus that would give an entitlement to the claimant at £644.95. She was paid (before adjustments for deductions that seem unrelated to the payslip in question and which we will therefore ignore) £608.13. The claimant is therefore owed the gross sum of £36.82. That deduction of wages claim is therefore well founded, and we award the sum of £36.82 (gross).

88. We would add that the claimant seemed to suggest in closing submissions that the pay slip in question related to a period February to mid-March 2020 as opposed to being the calendar month in question. However, we simply had no evidence on that before us or an analysis of the figures on that basis. The fact the payslip is based on a calendar month would also

seem to be supported by the deduction of the 7 days' pay for the last 7 days of the calendar month. We therefore proceeded on the basis of a calendar month as already set out.

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Employment Judge R Harfield
Dated: 10 June 2021

JUDGMENT SENT TO THE PARTIES ON 11 June 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche