EMPLOYMENT TRIBUNALS

Claimant: **Mr. A Thompson**

Respondent: **London United Busways Limited**

Heard at: **London South Hearing Centre (by Cloud Video Platform)**

On **12/13/14/15 July and 19/20 October (in chambers 21 October) 2021**

Before: **Employment Judge McLaren**
Members: **Mr. R Shaw**
Mr. N Shanks

Representation
Claimant: In Person
Respondent: Mr. P Byrne, Consultant

JUDGMENT

The unanimous decision of the tribunal is that

1. **The claims set out below were brought out of time. It is not just and equitable to extend the time limit and the Tribunal does not have jurisdiction to hear these complaints which are dismissed**
    i. Mr Robertson commanding Mrs Sylejmani to find something to discipline the Claimant on.
    ii. Mrs Sylejmani withholding the Claimant's sick pay (for the period 22 Nov 16 to 13 Dec 16);
    iii. Management making up fabricated stories against the Claimant through raising a grievance against him;
    iv. Writing to the Claimant whilst he was in receipt of a sick note;
    v. The appointment of Mrs. Sylejmani and subsequently Mrs. Mitchell and then Mr. Darcy as Staff Manager

2. **The Respondent did not contravene s13 of the Equality Act in relation to the protected characteristic of race as set out below. This means these complaints do not succeed.**

i. The Respondent allowing an Asian female employee to work in management offices in a role for which the Claimant was denied the opportunity to be considered.
ii. Mr Harris not informing the Claimant during their meeting on 24 February 2017 of the complaints raised against him by members of the management team.
iii. The way in which Mr Harris conducted the grievance hearing on 24 February 2017.
iv. Mr Newman not allowing the Claimant to adjourn the investigation hearing on 20 March 2017 to seek advice.
v. Giving the Claimant one day's notice of the investigation meeting.
vi. The Claimant not being provided with notes of investigation interviews or statements made by his accusers.
vii. Mr Newman carrying out the investigation in a manner which was more favourable to those who had made accusations against the Claimant and were of a different race to the Claimant.
viii. On 28 March 2017 Mr Robertson giving the Claimant a vacancy for a Staff Manager a day after the deadline to apply expired.
ix. Mrs Mitchell denying the Claimant's requests for annual leave.
x. Requiring the Claimant to attend an appointment with the company doctor during the period of his fit note.
xi. Mr Robertson requiring the Claimant to resign from his role as bus driver in order to apply for position requiring an interview.
vi. The failure by management to follow protocol regarding the Claimant's grievances and appeals and the complaints made against the Claimant.
xii. Mr Newman refusing to hear an appeal against his investigation outcome.
xiii. Mr Evans' handling of the appeal and the outcome.
xiv. Mr Harris and Mr Robertson hand delivering letters to the Claimant's house on 20 June 2016 and 10 July 2017.
xv. The Claimant being dismissed.

3. **The Respondent did not contravene s13 of the Equality Act in relation to the protected characteristic of sex as set out below. This means these complaints do not succeed.**
    i. Mr Robertson requiring the Claimant to resign from role as bus driver in order to apply for position which requiring an interview.
    ii. The Respondent finding a pregnant Caucasian employee a role working in lost property and not finding the Claimant an equivalent role.
    iii. The failure by management to follow protocol regarding the Claimant's grievances and appeals and the complaints made against the Claimant

4. **The Respondent did not contravene s26 of the Equality Act as set out below . This means these complaints do not succeed:-**
    i. The Respondent allowing an Asian female employee to work in management offices in a role for which the Claimant was denied the opportunity to be considered.

ii. Mr Harris not informing the Claimant during their meeting on 24 February 2017 of the complaints raised against him by members of the management team.
iii. The way in which Mr Harris conducted the grievance hearing on 24 February 2017.
iv. Mr Newman not allowing the Claimant to adjourn the investigation hearing on 20 March 2017 to seek advice.
v. Giving the Claimant one day's notice of the investigation meeting.
vi. The Claimant not being provided with notes of investigation interviews or statements made by his accusers.
vii. Mr Newman carrying out the investigation in a manner which was more favourable to those who had made accusations against the Claimant and were of a different race to the Claimant.
viii. On 28 March 2017 Mr Robertson giving the Claimant a vacancy for a Staff Manager a day after the deadline to apply expired.
ix. Mrs Mitchell denying the Claimant's requests for annual leave.
x. Requiring the Claimant to attend an appointment with the company doctor during the period of his fit note.
xi. Mr Robertson requiring the Claimant to resign from his role as bus driver in order to apply for position requiring an interview.
xii. The failure by management to follow protocol regarding the Claimant's grievances and appeals and the complaints made against the Claimant.
xiii. Mr Newman refusing to hear an appeal against his investigation outcome.
xiv. Mr Evans' handling of the appeal and the outcome.
xv. Mr Harris and Mr Robertson hand delivering letters to the Claimant's house on 20 June 2016 and 10 July 2017.
xvi. The Claimant being dismissed.

5. **The Claimant's complaint of breach of contract for not being paid in lieu of notice is not well founded, there was no breach of contract. This means the claim is not upheld.**

6. **The Claimant's complaint that there was an unlawful deduction from his wages because he was paid insufficient statutory sick pay between 22 November 2016 and 21 July 2017 is not well founded. The Claimant was paid all statutory sick pay. This means the claim is not upheld.**

REASONS

Background

1. We heard evidence from the Claimant on his own account and from three individuals on behalf of the Respondent, Mr Nigel Harris, General Manager West, Mr Ray Newman, Operations Manager and Mr Andrew Evans,

General Manager of the south garages. We were provided with an electronic bundle of 504 pages.

2. We heard and accepted an application from the Claimant that transcripts of covert recordings he had made of 3 meetings should be in the bundle and these were added to follow the consecutive numbering of the bundle.
3. In reaching our decision we have considered all the evidence we heard and those parts of the documents in the bundle to which we were directed. We were assisted by detailed submissions from both parties.

Issues

4. The issues in this matter had originally been set out at the preliminary hearing of 17 August 2018. Subsequently the claim for disability discrimination had been dismissed because the Claimant had failed to comply with an unless order. The judgment had been sent to the parties on 17 July 2020. It specified that it was given because there was a breach of the order of 13 April that the Claimant provide certain documentation by 1 May 2020. The order had warned that the consequences of non-compliance would be dismissal without further order.
5. The Claimant had written to the employment tribunal on 12 August 2020 about a number of matters that included the line and "I would like to point out my objection at disability claim being thrown out." He explained that he had presented email proof that the Respondent had received his medical records and he therefore asked the employment tribunal to investigate. This response was received more than 14 days after the date on which the judgment had been sent to the parties and was out of time for a reconsideration. The Claimant had not applied to the Employment Appeal Tribunal.
6. The Claimant raised this point again in correspondence in July with the employment tribunal and also before us at the start of the hearing. He asked that the decision to strike out his discrimination claim be reconsidered. I explained that I was unable to do so. I can not reconsider the decision of another Judge, particularly a year later.
7. The Claimant's claims of discrimination on grounds of race and sex continue. There are also issues arising about notice pay and sick pay. At the outset of the hearing, we clarified that the Respondent now accepts that the Claimant was entitled to notice pay and it believes it has paid the money. The Claimant disputes that he has been paid the correct amounts. The issues that we are to determine are therefore set out below.

Direct discrimination and harassment on the ground of race

8. Did the Respondent treat the Claimant less favourably on the ground of his race than the Respondent treats or would treat others?
9. The less favourable treatment relied upon by the Claimant is:
    i. Mr Robertson commanding Mrs Sylejmani to find something to discipline the Claimant on.
    ii. Mrs Sylejamni withholding the Claimant's sick pay (for the period 22 Nov 16 to 13 Dec 16);
    iii. The Respondent allowing an Asian female employee to work in management offices in a role for which the Claimant was denied the opportunity to be considered.
    iv. Management making up fabricated stories against the Claimant through raising a grievance against him.

v. Mr Harris not informing the Claimant during their meeting on 24 February 2017 of the complaints raised against him by members of the management team.
vi. The way in which Mr Harris conducted the grievance hearing on 24 February 2017.
vii. Mr Newman not allowing the Claimant to adjourn the investigation hearing on 20 March 2017 to seek advice.
viii. Giving the Claimant one day's notice of the investigation meeting.
ix. The Claimant not being provided with notes of investigation interviews or statements made by his accusers.
x. Mr Newman carrying out the investigation in a manner which was more favourable to those who had made accusations against the Claimant and were of a different race to the Claimant.
xi. On 28 March 2017 Mr Robertson giving the Claimant a vacancy for a Staff Manager a day after the deadline to apply expired.
xii. Mrs Mitchell denying the Claimant's requests for annual leave.
xiii. Requiring the Claimant to attend an appointment with the company doctor during the period of his fit note.
xiv. Writing to the Claimant whilst he was in receipt of a sick note.
xv. Mr Robertson requiring the Claimant to resign from his role as bus driver in order to apply for position requiring an interview.
xvi. The failure by management to follow protocol regarding the Claimant's grievances and appeals and the complaints made against the Claimant.
xvii. Mr Newman refusing to hear an appeal against his investigation outcome.
xviii. Mr Evans' handling of the appeal and the outcome.
xix. Mr Harris and Mr Robertson hand delivering letters to the Claimant's house on 20 June 2017 and 10 July 2017.
xx. The appointment of Mrs Sylejmani and subsequently Mrs Mitchell and then Mr Darcy as Staff Manager; and
xxi. The Claimant being dismissed.

10. Has the Claimant identified appropriate comparators?(direct discrimination)
11. Has the Respondent proved a non-discriminatory reason for any proven less favourable treatment? (direct discrimination)

<u>Direct discrimination on the ground of sex</u>

12. Did the Respondent treat the Claimant less favourably on the ground of his sex than the Respondent treats or would treat others?
13. The less favourable treatment relied upon by the Claimant is:
    i. Mr Robertson requiring the Claimant to resign from role as bus driver in order to apply for position which requiring an interview.
    ii. The Respondent finding a pregnant Caucasian employee a role working in lost property and not finding the Claimant an equivalent role.
    iii. The appointment of Mrs Sylejmani and subsequently Mrs Mitchell and then Mr Darcy as Staff Manager; and
    iv. The failure by management to follow protocol regarding the Claimant's grievances and appeals and the complaints made against the Claimant.
14. Has the Claimant identified appropriate comparators?
15. Has the Respondent proved a non-discriminatory reason for any proven less favourable treatment?

<u>Notice pay</u>

16. Pursuant to his contract of employment, the Respondent accepts that the Claimant was entitled to payment of notice pay upon his dismissal. The Respondent states it has paid the amount in full. The Claimant disputes the amount is correct.
17. What was the amount of payment to which the Claimant was entitled?
18. Did the Claimant receive from the Respondent payment of that amount?

Unlawful deduction from wages

19. What is the total amount of Statutory Sick Pay paid to the Claimant by the Respondent between 22 November 2016 and 21 July 2017?
20. What is the total amount of Statutory Sick Pay properly payable to the Claimant by the Respondent in this period?
21. Was the total amount of Statutory Sick Pay paid by the Respondent to the Claimant in this period less than the total amount of Statutory Sick Pay properly payable to him?
22. If so, was the Respondent entitled to make the deduction by virtue of a statutory provision, relevant contractual provision or because of the consent of the Claimant?

Breach of the Working Time Regulations 1998

23. Has the Respondent denied the Claimant's entitlement to annual leave in breach of Regulations 13 and 13A of the Working Time Regulations 1998?
24. If so, what compensation should be awarded to the Claimant on a just and equitable basis?

Breach of the ACAS Code of Practice

25. Has the Respondent unreasonably failed to follow the ACAS Code of Practice in respect of the Claimant's grievances?
26. If so, what percentage uplift, if any, should be applied to any compensation awarded to the Claimant?

Time/limitation Issues

27. The Claimant contacted ACAS for the purpose of Early Conciliation on 24 May 2017. Accordingly, and bearing in mind the effects of ACAS early conciliation, any act or omission which took place more than three months before that date is potentially out of time, so that the Tribunal may not have jurisdiction.
28. The Respondent is of the view that the following claims are out of time
    i. Mr Robertson commanding Mrs Sylejmani to find something to discipline the Claimant on.
    ii. Mrs Sylejamni withholding the Claimant’s sick pay (for the period 22 Nov 16 to 13 Dec 16);
    iii. Management making up fabricated stories against the Claimant through raising a grievance against him.
    iv. Writing to the Claimant whilst he was in receipt of a sick note.
    v. The failure by management to follow protocol regarding the Claimant's grievances and appeals and the complaints made against the Claimant.
    vi. The appointment of Mrs Sylejmani and subsequently Mrs Mitchell and then Mr Darcy as Staff Manager.
29. In respect of the claims which are out of time, does the Claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

30. Was any complaint presented within such other period as the Employment Tribunal considers just and equitable?

Applications made during the hearing

Application for recusal

31. An application was made by the Claimant on the morning of day 2 that all panel members withdraw from the hearing as he believed that the panel was biased, and he had no confidence in the judge.
32. I explained to the Claimant that this application has to be made to the panel that he wanted to be removed. I later clarified, in answer to a question from the Claimant, that he is able to make an application in writing to the President of the Employment Tribunal and indeed to the Regional Employment Judge, but the application for recusal would be passed back to this panel to deal with. The Claimant was clear that he made this application for the panel to remove itself, but he had no intention of withdrawing his claim.
33. Although an employment tribunal is not entitled to withdraw from a case simply because one of the parties alleges a lack of confidence in it during the hearing, it is right that whenever the possibility of an impression of bias arises, the tribunal should consider this, and this is what we have done. In doing so we have reminded ourselves that whether the panel appears biased must pass the 'fair-minded and informed observer' test. That is whether a dispassionate observer sitting at the back of the hearing would reasonably conclude that a panel was biased.
34. The Claimant raised a number of points on which he made his application and I summarise the key points and the panel's key findings in response to these below:-
    i. That I have had conduct of the file for at least a month before the hearing and have failed to deal with any of the outstanding applications from him.

    I confirm that, as is the custom of the tribunals, I was given the file only on Monday this week, that is the first day of the hearing. I can also confirm I have had no dealings with this file whatsoever in its entire history with the employment tribunal.

    ii. That Mr Shanks name is familiar to him, and that Mr Shanks has corresponded with him on behalf of the employment tribunal.

    I can confirm it is not the case. Nonlegal members do not enter into correspondence with the parties and have no contact with the file.

    iii. That the panel members were not introduced.

    All 3 of us clearly recollect this was done.

    iv. That as Mr Byrne is a lawyer I will be biased in his favour and/or have had dealings with him.

    I confirm that I have had no previous professional (or indeed personal) dealings with Mr Byrne. It is common in the employment tribunal to deal with parties where one party is legally represented and the other is not.

    v. That I told the Claimant he had to answer questions put to him but said that the Respondents' witnesses did not have to answer if they chose not to.

Our notes (which I have explained are for our own use only) show that what was said was the Claimant needs to answer questions put to him, equally the Respondent's witnesses must answer questions put to them, but because they are not first hand witnesses to many of the events, the Claimant may find that they say that they do not know the answer.

vi. That I mentioned that the issue of holiday on sick leave was a matter of law, and would no doubt be the subject of arguments on the law, and this is wrong because ACAS say there is no right to stop holiday during sickness.

This is one of the legal questions we have been asked to determine and will do so as part of this hearing. We must deal with the questions the parties have asked us to address and this is one of the issues.

vii. I took the Respondent's side on sick pay being discretionary.

In evidence the Claimant agreed that is what the contract says. This is a matter of undisputed fact.

viii. That when the Claimant made an application this morning in relation to the transcript and other matters he raised in his email received by the tribunal this morning, I should not have asked him what it was he wanted but should have made a decision.

I made this enquiry because the Claimant's application covered a number of matters and I wanted to understand exactly what he was asking the panel to consider. So far as the panel is concerned this application is still outstanding and has not been addressed.

ix. That yesterday when dealing with the issue of the transcript I did not give him an opportunity to speak and acted as if the transcript did not exist. I did not accept the orders made by the previous employment judges.

I had reviewed the previous employment judges' orders and confirmed that they did not order that the transcripts be in the bundle, but made reference to the existence of transcripts, advised the Claimant they would be disclosable, and that if they were included in the bundle they should be typed. We agreed we would leave consideration of whether the transcripts should be included in the bundle until this morning. That application remains outstanding.

x. That I pulled faces throughout the hearing, did not give the Claimant the chance to speak, interrupting every time he spoke and acted as if he did not have the right to speak.

The panels' recollection is different. We all recall that on one occasion I called the Claimant's name repeatedly in order to get his attention at a point when he was answering questions and both he and Mr Byrne were speaking over each other. This was in order to get the parties attention and to restore order to the hearing which is my role.

There was also one occasion when I was more forceful than my usual manner when I asked the Respondent whether it was possible to provide the Claimant with a hardcopy bundle as I considered it was unfair for an unrepresented party to deal with an electronic bundle which was mis-numbered.

xi. That I sided with the Respondent by telling the Claimant he had to confirm his address when he wished to do so only in an adjournment.

The Claimant's address should have been given when he gave his witness statement and therefore should already have been stated within the tribunal.

xii. That I have lost control of the hearing and allowed Mr Byrne to act disrespectfully to the employment tribunal. Further, the panel did not intervene or remonstrate with me or seek an adjournment to address this.

The panel considers that Mr Byrne has not been disrespectful to the tribunal. We agreed that his comment about the Claimant's choice of music should not have been made and I was attempting to discuss this matter with him but was unable to do so because of the Claimant's interruptions. Mr Byrne is acting in a professional capacity putting his client's side as he is bound to do. The panel have not intervened as they do not consider any circumstances required it.

xiii. Having read the emails which show the Claimant's lengthy correspondence of the tribunal I had taken no steps to investigate these matters. It is clear from the Claimant's perspective that the Respondent failed to comply with relevant orders.

As I explained to the Claimant on day 1, I cannot deal with complaints in relation to matters that occurred before the unless order as they are out of time. As to complaints about the bundle, to the extent that includes the transcript we have yet to address this application.

xiv. That the panel is inappropriately constituted as it is all white and the Claimant cannot have confidence in its ability to deliver him justice where a Claimant brings claims of race discrimination.

The constitution of the panel is drawn from a pool of available employment judges and members. All panel members are aware of their obligation to deal with matters in a fair and just manner.

35. In conclusion, none of these matters, in the panel's unanimous view, amounted to bias judged by the standard of an objective bystander. The Claimant's application was therefore refused.

36. The Claimant stated, after I had given this decision, that he was uncomfortable with the panel and in his view was being held hostage by the tribunal.

<u>Application by the Claimant to strike out the Respondent's case</u>

37. This application was also made by the Claimant at the start of the second day, he has, however, previously made the same application in writing to the employment tribunal. He does so under rule 37, that is non-compliance with an order of the tribunal.

38. The file shows that case management orders were made on 14 April 2020 which varied previous case management orders and therefore provided that the bundle be provided by 26 May 2020 and witness statements by 9 June 2020. The same order provided that unless the Claimant provide the Respondent with documents relating to his personal injury medical records by 30 May 2020, his disability discrimination claim would be dismissed without further order.

39. The bundle was not in fact provided until 10 of May 2021 and witness statements sent via the employment tribunal in early June 2021. It is noted

that the Claimant sent a previous version of his witness statement to the Respondent in 2018.

40. On 19 June 2020, the Respondents emailed the tribunal copied to the Claimant stated they had not received the necessary information from the Claimant, asking for formal confirmation that disability can be struck out and stating that, until such time as it was confirmed, they could not finalise the bundle or draft witness statements.
41. The unless order was made on 16 June and sent to the parties on 17 July 2020.The Claimant did not attend the hearing at which this was made.
42. In an email of 22 of June 2020 the Claimant made an application that the Respondent's case be struck out because, despite him having sent all the documents necessary for the bundle, they had not done so. No order was ever made.
43. A further case management preliminary hearing was due to take place on 29 July 2020. This was, however, postponed and instead the matter was listed for a final hearing.
44. There is nothing further from the parties on the tribunal file until 2 January 2021 when the Claimant asks that the tribunal instruct the Respondents to provide certain witnesses at the hearing and original payslips. On 30 March the Claimant made an application to dismiss the Respondent's case for failure to comply with orders. This specifically states that he has not received payslips. Again, no order was made.
45. On 5 April 2021, the Claimant writes to the Respondent, copy to the employment tribunal, saying documents are missing from the bundle and identifies what those are. The Respondent replied on 13 April 2021 and disputed any documentation was missing. The Respondent also objected to the Claimant's application for strike out of the response. It points out that in relation to what the Claimant characterises as a number of failures to comply the tribunal orders, this is denied and further, that the alleged breaches are three years old and only being raised in 2021. The other matters relate to what the Respondent says are administrative errors. The Respondent confirmed that digital pay slips have been provided and that the Claimant has also been provided with his final 12 payslips.
46. As at the date of this hearing the Claimant's application to dismiss the Respondent's case has not been addressed, we do so now. We note that while the tribunal had made orders for the Respondent to prepare the bundle, as is customary for such orders, this had not been made as an "unless" order and so there is no automatic strike out for default.
47. We must consider this application in the light of the overriding objective to deal with cases fairly and justly, which requires as far as is practicable to ensure the parties are on an equal footing, dealing with cases in ways which are proportionate to the complexity and importance of the issues, avoid unnecessary formality and seek flexibility in proceedings, avoid delay as far as is compatible with proper consideration of the issues, and save expense.
48. While we agree that the Respondent is on the face of it in breach of the tribunal order and that the bundle was provided significantly later than ordered, we also accept the Respondent could not in fact meet the terms of the employment tribunal order until such time as the disability claim had been addressed. It is unfortunate that the preliminary hearing listed for 2020 did not take place as matters could no doubt been sorted out appropriately at that time.

49. We conclude that considering the overriding objective the just and fair thing to the parties is to continue the case. The Claimant has had an opportunity to consider the bundle in advance of the hearing, he has prepared his cross-examination questions and the parties are ready to continue the case. There is no prejudice to the Claimant in doing so, but considerable prejudice to the Respondent if it is prevented from defending a case where it has prepared to do so. For these reasons we reject the Claimant's application.

Claimant's application to admit transcripts in the bundle

50. The Claimant remained aggrieved that the bundle did not include the transcripts of meetings he had recorded and we agreed to allow the inclusion of the additional 110 pages into the bundle. While it was the Claimant's application for these to be included, once we told him our decision, he then said he couldn't agree this without legal advice and he wanted to complain.
51. Following an adjournment we decided to maintain our decision to admit the transcripts. The Respondent asked us to consider the weight to be given to them as they were not able to check them against the recording. The Claimant repeated we were holding him hostage by including the transcripts and the inclusion was up to me. The Claimant then did not refer to these at all. We did not therefore consider them in our decision.

Respondent's application to strike out the Claimant's claim.

52. On the fourth day of the hearing, the Respondent made an application under rule 37 that the Claimant's case be struck out on the basis that the manner in which the proceedings have been conducted have been unreasonable.
53. Mr Byrne summarised what he described as the unreasonable conduct. This included alleging bias of the panel members, alleging bias in the constitution of the panel, challenging the tribunal's orders continuously, challenging my conduct of the proceedings, accusing me (albeit then withdrawn) of dishonesty, refusing to answer questions on documents, being confrontational and continually interrupting and challenging witnesses in an aggressive and unnecessarily confrontational manner.
54. He concluded that the Claimant's conduct was so unreasonable that he should no longer be allowed to continue.
55. The Claimant responded that Mr Byrne had not raised any substantive matters where he said the Claimant's conduct had been inappropriate or unreasonable as directed at himself. The examples he gave were of what the Claimant described as his alleged conduct to the panel. We ourselves have noted throughout the hearing the Claimant's extreme discourtesy to Mr Byrne, mocking his experience and even at one point claiming that Mr Byrne was a disgrace.
56. We carefully considered the matter and have on balance decided to reject the Respondent's application. It is not because we thought that the Claimant had behaved appropriately. That was very far from the case.
57. During the course of this hearing, among other things, the Claimant has accused me of corruption, in that he alleged that I was acting for profit and colluding with Mr Byrne and with the organisation that he represents. He has accused me of lying. He has accused me of misleading him. He has refused to accept my answers to him. He has talked over me, exhibited a

high level of discourtesy to myself, the panel members, the Respondent's representative and Respondents' witnesses.

58. I advised the Claimant that this was his last warning and he needed to exhibit appropriate conduct from now on.We chose to give the Claimant this warning rather than, as we think we could have done, striking out because, as he himself acknowledged, his behaviour today has improved. Also, while I had given the Claimant a previous warning about his actions, this was not explicit as to the consequences.
59. The panel were also concerned that in accordance with the overriding objective we should, if at all possible, bring matters to a conclusion and hear the evidence. We have endeavoured to deal with the Claimant's disruptive behaviour while pursuing this objective. I made it very clear to the Claimant if there was any repetition of any such matter or any similar incident happens at all, whether that involves the panel, Mr Byrne, or other Respondent's witnesses from now on, the claim would be struck out. This was his last warning.
60. The hearing then had to be postponed as the Claimant told us he was unwell and unable to continue. The case was then relisted for dates in October.

Further application made in writing by the Claimant

61. When we resumed, I explained to the Claimant that his application to the tribunal of 24 September and his letter of 28 September 2021 would not be further addressed. This was another application to strike out the Respondent for failure to comply with directions and to reinstate his disability claim. The latter had been dismissed on 17 July 2020,no in time review or appeal was received. The former was considered at the outset of this hearing. No review was requested nor has any appeal been lodged. Neither matter can be raised again.

Finding of facts

Witnesses

62. While we heard from 3 witnesses for the Respondent, we were not provided with either statements or the attendance of Mrs Sylejmani, Mrs Mitchell, Mr Darcy or Mr Robertson. The Claimant also complained about there being no evidence from Mr Ricardo Morris, a manager the Claimant had identified as meeting with him about his sickness. We understand that Mrs Sylejmani, Mrs Mitchell, Mr Darcy and Mr Robertson have left the Respondent's employment. There were a number of issues which involved one or more of these individuals and the Claimant's account was not, therefore, directly challenged by the Respondent's witness evidence by someone who was a first hand witness to events on all points. We were asked to consider the evidence of contemporaneous documents.
63. Throughout the hearing the Claimant was in his own terms, passionate, giving his evidence and questioning witnesses in what he considered to be a direct and robust way. We find that during the first four days, as set out above in our summary of the Respondent's application to strike out the claim, his manner verged well beyond this. The Claimant moderated his manner for the reconvened hearing but nonetheless still asked questions in a challenging manner and again was discourteous to the Respondent's witnesses .He went as far as accusing witnesses of lying and suggested that individuals often lie under oath.

64. At the outset of the hearing when he began to give his own evidence, the Claimant took the appropriate oath and confirmed that his witness statement was true. Towards the end of the hearing the Claimant told the panel that he had not submitted a witness statement, he explained that in some way he had not been permitted to do so by both the Respondent and possibly by the tribunal panel, and when it was put to him that he had confirmed that his witness statement was true, said that this was not the case. We find it difficult to rely on the Claimant's witness evidence in the circumstances. We also note that in his witness statement he stated that he had a meeting with a Mr McLeod who terminated his employment but that he was not a real manager and the Claimant suggests this was a racist ploy. In submissions the Claimant again said he had a meeting with "Ricardo Morris"(who we believe is the same person as Mr McLeod) who was a fake manager. We find that such statements are not credible. On the balance of probabilities we find it unlikely that a Respondent would send someone to pretend to be a manager to have meetings with the Claimant.
65. In addition, throughout the hearing we find that the Claimant often misrepresented what was said to him both by the panel, by the Respondent's representatives and by witnesses. He challenged documents on the basis they were not genuine, but gave no grounds for this assertion and later relied on documents he had said were not genuine to support his own evidence. He suggested that his evidence was supported by ACAS and HMRC. He gave no details of how this was the case. He made reference to the police having told him not to attend meetings which, on the balance of probabilities we find to be unlikely.
66. We are conscious that the matters complained of occurred some while ago and that memories have inevitably faded. The bundle contained contemporaneous evidence. For these reasons we prefer the written evidence over the Claimant's oral testimony and the evidence of the Respondent's witnesses, which is supported by the contemporaneous documents, over that of the Claimant.

Background and policies

67. The Claimant was originally engaged as a trainee bus driver by the Respondent. He was provided with an offer letter dated 6 November 2015 and began his employment on 23 November 2015. The offer letter (p109) described him as a trainee bus driver. The terms and conditions which were attached show his job title as bus driver. These terms and conditions set out the hourly rates of pay in an appendix. This provided a rate of pay for a new driver whilst in training is £6.50 an hour, and it provides different rates of pay for drivers for the first 30 months of their service. This amount varied from £10.73 Monday to Saturday to £11.85 all day Sunday and on bank holidays. The Claimant accepted that his terms and conditions made provision for his pay rate once he was qualified.
68. The contract of employment contains various provisions relating to absence for sickness or injury. The Claimant accepted that the contract provided that all payments made as a result of sickness or injury would be made at the discretion of the management. Statutory sick pay was paid in accordance with conditions of payment and company sick pay was paid in accordance with the terms of the scheme outlined in appendix 1 attached to the contract. This specifies that after probation, company sick pay is payable from the fourth day of sickness and that after six months of service up to 13

weeks company sick pay can be paid in the calendar year. From the 14 - 28 week SSP only is payable.

69. There is also a requirement to wear company uniform. The contract specifies that the individual be supplied with uniform and must wear it at all times whilst on duty and must report for duty in a full uniform. Any failure to wear items in accordance with the dress code issued by the company could result in disciplinary action being taken against individual.
70. In addition to an offer letter and terms and conditions, the Respondent also had a number of policies in place. This included a disciplinary policy and the Claimant accepted that this policy included a requirement for every employee to comply with all statutory and company rules, procedures, and agreements applicable to their employment. He also accepted that the policy contained a number of principles which govern how any disciplinary procedure would happen, for example that no disciplinary action would be taken before it is fully investigated, and it should be taken without unnecessary delay.
71. The Respondent has two procedures for dealing with absence. The first is a procedure for dealing with non-attendance. This applies if there is irregular attendance, including short-term absence and unauthorised absence from work. The long-term sickness procedure is used where there is a period of continuous absence due to ill-health of more than 14 calendar days. It provides for four weekly interviews during any period of absence in order to confirm the reason for absence and discuss what steps are being taken by the employee to facilitate a return to work, when this is likely to be, and also what assistance can be given by the Respondent.
72. The attendance at work procedure is said to be a progressive one with an individual moving through various stages which can culminate in dismissal. The long-term sickness procedure provides that the company will consider whether the individual is able to return to other work on a temporary or permanent basis, subject to availability of other work and the suitability of the staff member to do it. The Claimant accepted that the policy provided reports from medical experts can also be sought at any stage of proceedings and an up-to-date opinion of the company medical adviser will be sought for any decision to dismiss an employee. The policy provides that employees are required, at the company's discretion, to attend an examination with the company's medical adviser and to authorise his own doctor discloses information related to his medical condition to the company medical adviser.
73. The Claimant did not dispute any of the terms of the offer letter, terms and conditions of employment or policies, and accepted that they state as set out above. We find that uniform is mandatory and disciplinary action can be taken for default.
74. We find that there is no term specifying when any response will be given to a letter. The Claimant states it is 7 days, but this is not mentioned. There is no set period within the policy by which an investigation must start or be concluded. We also find that the ACAS code does not make any reference to an express time period in which letters must be answered. Its spirit is that there should not be unreasonable delay.
75. We find that the policies permit the Respondent to require the Claimant to see a company doctor during the period of a fit note, and allows them to write to an employee while in receipt of a fit note.

The Claimant's absence up to July 2016 and uniform issue

76. While the Claimant passed his probationary period on 20 May 2016, the Claimant started to be absent on a short-term basis at a comparatively early stage. At page 124 of the bundle there is a list of absences from 18 February until 16 June. The Claimant disputed that the information on this log was correct for April. He stated that the absences in April should have been shown as one block and not single absences because he had been advised incorrectly to telephone every day. He nonetheless accepted that he was absent on these days and that the Respondent's records showed the absence as a series of absences in April. We find that the record is accurate. At page 129 of the bundle is a letter of 18 April from his line manager asking the Claimant to explain his unauthorised absence since the 10 April.
77. At this point the absence was addressed informally by the line manager, although the Claimant was warned that any further absence could result in the extension of his probationary period.
78. In July 2016, as the log shows, there were two further unauthorised absences. The Claimant's manager wrote to the Claimant on 14 July 2016 telling him to attend a disciplinary hearing on 19 July relating to his spells of non-attendance. The invitation letter is at p137, and the notes of this disciplinary meeting are in the bundle at page 141. No formal action was taken as a result of this disciplinary process. The Claimant does not dispute that he was absent as the logs show. He has reasons why it occurred, but does not dispute that it was unauthorised. We find that in starting the procedure as the Respondent did following these absences, the Respondent was acting within the terms of its own policy and the Claimant had breached that policy.
79. On 12 August 2016, p142 of the bundle contained a document headed "official's report -information". It shows that an R Notley reports the Claimant for not wearing a tie or the right trainers and states that he was warned about this and informed the individual he was on report for this. The document notes the Claimant replied that he if he has to wear a tie he would not drive as it was too hot on the bus. In cross examination the Claimant explained that he did not have the right uniform. This does not, however, appear to be the reason given by him at the time when he was reprimanded for not wearing a tie. We accept this document on its face and find that it shows that it was not the Claimant's line manager who was involved in this incident and the Claimant accepted at the time that he was not wearing a tie. We find that this is a breach of the uniform policy and it was within the appropriate policy for the Respondent to start the disciplinary process for this.
80. This report would later form the basis of a disciplinary meeting in November 2016 which is referred to below.

Long-term absence and uniform issue

81. There is a further log of the Claimant's absences at page 125. This shows six certified sick days from 11 to 17 October and six unauthorised absences from the 18 to 24 October 2016.
82. On 21 October 2016 the Respondent took a first step under the long-term sickness procedure. The Claimant was invited by letter to attend an interview on 25 October 2016 (p147). The letter was resent on 24 October (p148) and the meeting was rearranged for 26 October and then again

moved to 2 November 2016. At the point the meeting was rearranged for 2 November, it had been expanded to include not just unsatisfactory attendance, but also unsatisfactory conduct for failing to wear a company issued tie and not wearing the correct trainers. This was recorded at p149 of the bundle.

83. The minutes of this disciplinary meeting on 2 November 2016 (p151) show that the Claimant is asked to explain his periods of absence and when asked about this he simply said he had provided a sick note and it says why on his sick note. The Claimant was asked about not wearing the company issued tie and correct trainers and the Claimant indicated that his manager should speak to the general garage manager, Mr Roberts, about this.
84. His line manager contacted Mr Roberts and the minutes report back that she is advised that the unsatisfactory conduct should not be pursued. We accept that the minutes show the meeting was adjourned for 10 minutes for the Claimant to calm down as he was becoming extremely confrontational. He declined to sign the minutes of the meeting, alleging that extra words had been added to the minutes. He also told his union rep to leave as he was not the union but a witness.
85. As a result, and owing to the Claimant being agitated, we find that the matter could not be resolved, and further hearing was arranged to be convened on 22 November 2016. The invite to this meeting can be found at page 154.
86. On 15 November 2016 the Claimant was sent an invitation letter inviting him to attend the reconvened disciplinary hearing on 22 November 2016. That is now to consider only unsatisfactory attendance. The uniform issue is no longer pursued. While the Claimant says that the line manager was commanded by Mr Robertson to find something to discipline the Claimant for, the Claimant accepted he was off sick, and we find that the Respondent was following its appropriate policy in pursuing that absence. Mr Robertson removed a potential disciplinary charge. We find that, contrary to the Claimant's assertion, there was nothing improper about the absence procedure continuing and in fact Mr Robertson assisted the Claimant by dropping the uniform issue. We find that Mr Robertson did not instruct Mrs Sylejmani to find something to discipline the Claimant on. We reach this finding because to do so would be contrary to Mr Robertson removing a disciplinary charge which we have found was a justified one.
87. We note that when the Claimant raised a grievance about the meeting with his line manager, the issue of uniform had become conflated with the poor system in placed in Hounslow to issue uniform. Mr Harris found that the Claimant was not given all the proper uniform. We find this is not relevant to the uniform issue that had in fact been raised and which Mr Robertson dropped which was only to do with a tie and trainers.

Events from 22 November 2016 onwards in relation to sickness absence

88. Unfortunately, the Claimant suffered a serious road traffic accident, which resulted in admittance to hospital and major surgery, while he was en-route to work on 22 November. The documentation in the bundle (p155) shows that on 25 November 2016 the Claimant was sent a letter indicating that he was on unauthorised absence from the 22 November. The letter suggest that his line manager has not been contacted and is therefore asking him to contact the garage and inform somebody about what is happening. The letter sets out that there might be reasons for the absence that they are not

aware of and sets out multiple routes of contact, either for the Claimant himself or somebody on his behalf.

89. As the Respondent considered the Claimant's absence was without leave, his sick pay was stopped for the week ending 25 November 2016. It is agreed that the Claimant was not paid sick pay initially from the 22 November to 13 December 2016. The Claimant's witness statement said that he notified appropriate staff on multiple occasions throughout the day that he had been involved in this accident, both before and after he was admitted to hospital. However, his line manager appeared to question his reasons for absence and did not give him the lenient treatment and an automatic belief in his credibility that she would have given to others.
90. His self-certification was not submitted until 30 November (p156) and the sick note for the relevant period (at p158),which signed the Claimant off from 22 November, was not signed by the Dr until 7 December. We do not accept the Claimant's evidence on this point. His telling the Respondent promptly is inconsistent with the dates on which he saw his GP and then sent in a sick note. On the balance of probabilities we do not think it likely if the Claimant had telephoned as many times as he said ,or at all, that the line manager would not have been informed. If the Respondent knew of his absence the letter would not have been sent. We find he did not contact anyone as early as he says he did and did not make the many phone calls he mentioned in his evidence. We find that the Respondent acted properly in initiating its procedure and in not paying wages for unauthorised absence.
91. A letter dated 5 December was sent to the Claimant (p157) inviting him to a meeting on 7 December. The Claimant was unable to attend, and the meeting was rearranged for 13 December. On the same day, the Claimant made a written complaint about stopping the sick pay (p160). He attended the long-term sickness interview on 13 December 2016 with his line manager and with his trade union representative. At that meeting it was confirmed that at the manager's discretion, because he had not attended the reconvened disciplinary hearing on 22 November, he been paid statutory sick pay only. However, having met with the Claimant that day, the management decision was to pay sick pay and backdate it from the day that the Claimant originally went sick. This was confirmed straight after the meeting in a letter dated 13 December (p 163-164).
92. The Claimant accepted that he had therefore ultimately been paid the three weeks sick pay. His complaint is that it was stopped at all. In answer to cross examination questions, he said that this was linked to his race because his manager had done nothing to investigate why he was missing, her letter of 25 November does not show that she went and asked any questions or made any active enquiries. We find that the line manager acted in accordance with company policy and applied her discretion not to pay at the time because the Claimant was absent and we have found that he had not contacted anyone He had the obligation to provide a sick note and did not provide his self certification until 30 November. We find that the line manager made her decision to pay sick pay as soon as she had a formal meeting with the Claimant. Her decision not to pay it initially was within policy, as was her decision to re instate it.
93. In accordance with the management of long-term sickness absence, the Claimant's manager arranged a meeting for a further four weeks, that was for 4 January 2017. The minutes of this meeting were at p166. The next meeting is arranged, according to an invitation letter, for the 18 January

2017. The Claimant did not attend, so the meeting took place on 23 January (P170 is the new invite letter). The Claimant was unhappy because he believed he had not had a response to a letter he said he had sent by recorded delivery. This is the letter at page 160 about lack of sick pay. The notes (p171) record that the Claimant became confrontational and indicated he was going to sue his manager and the company. This question about sick pay had already been answered in the meeting on 13 December and in writing on 13 December (p175) as referred to above. The line manager also sent another letter following this accusation on 1 February (p175) confirming the position again.

94. The follow-up letter from this meeting is dated 31 January and calls for the next meeting take place on the same day, although it also refers to the date being the 6 February which is when it did in fact take place. We find this was a simple error as the letter makes it clear the Claimant has already been told of the 6 February date in the meeting. The line manager explains this was an error based on not taking off the old LTS meeting on the letter when she put the new date in. We accept that was the case. A template letter was used and not amended correctly. The Claimant had sufficient notice of this meeting. The Claimant relies on this as an example of breach of process about the dates letters are posted and being given short notice. We find this is not the case here, there was sufficient notice and the Claimant attended on 6 February. We find he acted on the 6 February date and so conclude the letter was clear to him at the time.
95. The next long term sickness meeting was scheduled for 6 February and there was a dispute on the day about the time for which it had been arranged. At 12 that day the Claimant's line manager was in a meeting with other individuals and the Claimant came into that meeting. His line manager advised that the meeting was scheduled for 1 p.m. This was confirmed by Ms Mitchell, another manager. The Respondent's position was that the Claimant became confrontational and was very agitated and intimidating throughout this incident.
96. On investigation, the Claimant's line manager discovered that the time of the meeting had been incorrectly recorded in one part of the letter, although the correct time had also been provided earlier in the letter sent to the Claimant. The meeting then went ahead at 1 p.m. and was chaired by Ms Mitchell and not by Mrs Sylejmani, which we find was because the Claimant was not prepared to deal with Mrs Sylejmani. The Claimant attended with a trade union rep. The meeting was adjourned because of what the Respondent described as the aggressive nature of the Claimant's demeanour. From this point the sickness absence process was then managed by Ms Mitchell.
97. Ms Mitchell wrote to the Claimant rescheduling a long-term sickness interview and arranging the next meeting for the 14 February 2017. The Claimant was unable to attend the meeting which in the end took place on 28 February. Her letter arranging the meeting for the 14th was incorrectly dated the 7 February (p184). We accept she had failed to amend the date from her previous letter but she is giving the Claimant sufficient notice of the meeting, writing on the 7th for a meeting on the 14th and on the 14th (dated 7th) for a meeting on the 28th.
98. By the 28 February, the Claimant was seeing a specialist and had also seen his GP twice in the previous two weeks. The next follow-up interview was arranged for 15 March 2017.

99. As the sickness absence was ongoing, on 1 March Ms Mitchell referred the Claimant to be seen by occupational health advisers working for the company. That was scheduled to take place on 10 March 2017.
100. The Claimant objected to the referral to occupational health. In his letter dated 8 March he stated that decision was not appropriate because he had not been off for 24 weeks and this was therefore a violation of him and his staff rights. This is not correct; we find that the policy allows referral at any point. The Respondent was entitled to refer the Claimant to an appointment with the company doctor during the period of his fit note. We also find that the Respondent was entitled to write to the Claimant whilst he was in receipt of a sick note. In this letter of 8 March, the Claimant also asked to be paid annual leave while off sick for seven days from the 19 to 29 March 2017.
101. Despite his objection, the Claimant did nonetheless attend the occupational health appointment. A report was written, dated 13 March 2017 which estimated it would take another 4-6 weeks before the Claimant was able to get enough power to form a strong enough grip to enable him to drive a bus safely.
102. The next long-term sickness interview was then held on 15 March 2017 and a further interview was scheduled at that meeting to be held on 28 March. In the letter concerning this, page 235 the bundle, Ms Mitchell indicates that the chair of the next meeting will be Robbie Robertson. From this point on Ms Mitchell ceased to be involved in these meetings, although she responded to the Claimant's letter of 8 March.
103. Ms Mitchell did this in a letter of 17 March 2017 (p237) where she addressed his request for annual leave. She said that because the Claimant was absent from work on sick leave, no annual leave could be granted. If he was able to return to work and then sort out annual leave, that would be discussed at the relevant time.
104. The Claimant replied to this the following day,18 March, complaining about the way in which he was treated. His reply is at page 238. In this letter the Claimant raises a number of complaints. He states that because a grievance has been raised against him about what occurred at a meeting on 6 February, it was inappropriate for Ms Mitchell to continue to deal with his sickness absence. He also reiterated his view that the company was acting in an unlawful manner in refusing his annual leave when he was off work on sick leave. He complains that Ms Mitchell took more than seven days to respond to his 8 March letter.
105. The Claimant not only considers that actions against him are premeditated and unlawful, but also complains that he is not made aware of the investigation against him in any correspondence sent to him between 6 February to 19 March. He wants to understand why the company withheld this information.
106. The Claimant sent a second reply to Ms Mitchell's letter of 17th dated 23 March at page 251 – 252. He states that the letter was posted outside of what he describes as the seven-day provided window of response. We find there is no such obligation. He asks for the legal documentation to support Ms Mitchell's refusal to grant an annual leave whilst of sick and sets out what he believes to be the correct legal position. The Claimant continues to state that it was a direct violation for Ms Mitchell to have formal meetings with him from 6 February and that she should not make any decisions concerning him from that date because she was part of grievances against him. As had already been advised to the Claimant, Ms Mitchell was no

longer chairing the long-term sickness interview meetings. The matter had been passed to Mr Robertson.

107. It is the case that Ms Mitchell denied the Claimant leave whilst off sick and this is accepted by the Respondent as an error. We find she was genuinely mistaken. We accept she was a trainee manager seconded to the post and this was an error which was corrected once expert advice was taken from HR. Page 283 shows the Claimant was granted the requested leave which he took from 16 April to 1 May 2017.
108. Mr Robertson conducted the next long-term sickness interview on 28 March. Notes of that meeting were in the bundle p 254-260. In this meeting Mr Robertson asked the Claimant to consider an alternative role in the list of vacancies was given to him. These are at page 263 of the bundle. We were told by Mr Harris and accept that these lists are produced by HR on a weekly basis. While they show the date the original advert for the role closed, they are all vacant at the date the list is sent to management. We find that the Claimant was not given the list after any of the vacancies on it had expired as we accept the evidence of Mr Harris and we also find the document on its face makes it clear the date is the expiry of the original advert. We find the roles were current at the time. The Claimant expressly complains that he was told to apply for the role of office manager and this had expired. We find it had not expired. The Claimant also complains that he was told he would have to resign to apply for a position requiring an interview. This is not in the notes. On the balance of probabilities we find this was not said, there would be no reason to do so when the Claimant was being managed as long term sick.
109. The Claimant was extremely unhappy with the position and responded in a letter dated 28 March 2017 at page 261. This letter is addressed to “who it may concern” and raises a number of complaints and allegations about his treatment. These included that he has been denied annual leave while off sick by Ms Mitchell and again by Mr Robertson and that both individuals scheduled meetings with him after 6 March when both had raised grievances against him which were being investigated. He complains that the vacancy list was for jobs which require the use of both hands and he had not yet regained the use of appropriate muscles. We find that management were following the policy correctly by scheduling meetings at around 4 weekly intervals and by considering whether the Claimant could return to other work by giving him the vacancy list.
110. The Claimant complains that Ms Mitchell has assumed the position of staff manager as of 6 March, yet the position was not advertised on any vacancy list. We accept Mr Harris’s evidence that Ms Mitchell, who was a relief manager and being trained to cover the role of staff manager was seconded into the role which was then advertised and Mr Darcy was successful. We find that Mrs Sylejmani was in her role prior to the Claimant being off sick. We find there was no obligation to give this role to the Claimant. All suitably experienced staff were able to apply .In this letter the Claimant also reiterates that he would like to understand why he was not informed about investigations against him until 5 ½ weeks after they began.
111. On the following day, 29 March the Claimant also wrote to Mr Robertson (page 268) and again on 30 March, p273.He complains that the long-term sickness meeting with him was scheduled after his allegation against the Claimant on 6 February. This is when the Claimant had no idea of the investigation of allegations until 17 March. He states that the meeting on 28 March was biased and calculated and is a breach of ACAS rights and

company protocol. We find that management are entitled to continue to conduct sickness absence meetings, despite the complaint's made about the Claimant's behaviour, because the focus of the meetings was the Claimant's likely return to work and the process was largely administrative, setting review dates and getting medical information. Mrs Mitchell, who was a witness to the grievance, dealt with the Claimant and then the matter was passed to Mr Robertson on 28 March. The grievance had been concluded by the 22 March 2017, before the Claimant met with Mr Robertson. We find there was no question of bias as a line manager is entitled to manage staff who have raised grievances about them once that process has been concluded. We also find there is no bias in Ms Mitchell dealing with the matter when the Claimant had refused to accept Mrs Sylejmani addressing it. There is nothing inappropriate with a witness to a grievance continuing to line manage a staff member through a routine long term sickness interview which is largely administrative and from which no employment consequences flow. This is what happened with Mrs Mitchell taking the long term sickness meeting.

112. In this letter, the Claimant reiterates his complaint that he has been denied annual leave while on sick leave. The Claimant also sets out again that the vacancy list is inappropriate for an individual suffering from his medical condition. The Claimant concluded by saying he felt bullied, discriminated against on grounds of disability and possibly race. We note this is inconsistent with his complaint about being given an inappropriate vacancy list which we have found to be appropriate and in accordance with the policy.
113. The Claimant wrote again to Mr Robertson on 4 April, page 278 of the bundle, which was a response to the letter setting out the outcome of the sickness meeting. In this letter he repeats his concerns around annual leave. On 6 April (page 282) the HR team wrote to the Claimant advising them his various complaints should be raised as part of his ongoing grievance. This is dealt with below.
114. The long-term sickness absence process continued and another manager, Mr Darcy, then became involved and on 16 June asked the Claimant to attend to see the company doctor. This was to be on 23 June. Meanwhile, a further long term sickness meeting took place on 20 June chaired by Mr Harris. He gave evidence about this meeting, the notes of which are at p 323-324. The Claimant disputes the notes and says Mr Gumbley, who is referred to as present in the notes and outcome letter, was not present and he does not know who this person is. We prefer the account of Mr Harris as supported by the contemporaneous document.
115. Mr Harris' evidence, which is supported by the notes whose accuracy we also accept, was the Claimant had made allegations that he had been denied union representation in the past. Mr Harris opened the meeting by asking if the Claimant required representation or a workplace colleague. The Claimant indicated that he had been refused this previously. Mr Harris repeated the question, but the Claimant indicated that he was being denied the right to be accompanied. During the course of this interview Mr Harris found the Claimant extremely obstructive. The Claimant declined to discuss his medical condition, saying that all of the relevant paperwork was in front of Mr Harris. When Mr Harris asked him how he was progressing with his condition since his last visit to the doctor, the Claimant responded by saying he was not a doctor and that he should send him to the doctor again so that he can tell Mr Harris. The Claimant then said that it would be lies as the

document would be changed. He then accused all management of being racist and belligerent towards him. We accept that he was extremely confrontational and little progress could be made in the circumstances. Mr Harris informed the Claimant that it was necessary for him to attend the company doctor and that if he could not attend on the arranged date, he would need to contact the garage.

116. Mr Harris wrote to the Claimant on 20 June informing him of the outcome of this meeting. This correspondence can be found at page 328 and 329 of the bundle. Mr Harris further confirmed that further action could be considered once a report was available. This letter was hand delivered and in his response on 22 July (p330-331) the Claimant took exception to this. He suggested that it was done to cause a scene and that Mr Harris had stood outside banging his fist against the door or kicking at the door. He concludes that if he does not get a response within 7 days, then Mr Harris will be accountable for a police report. We find that there was no damage to a door, Mr Harris did not kick it and there was nothing untoward in dropping the letter by hand. We prefer Mr Harris account to that of the Claimant for the reasons already given. He dropped the letter by hand because of the Claimant's allegations that letters had not arrived and / or had arrived too late.
117. The matter was then passed to Mr Robertson again. He wrote to the Claimant on 10 July, asking him to attend a meeting on 14 July. This invitation letter was also hand-delivered, and the Claimant objected. The letter was at p338.The Claimant replied on 12 July (p340-341). He said that under self defence laws he would use appropriate force to restrain anyone approaching his home in future. He asked that Mr Robertson refrain from further contact and the meeting be rescheduled for a more senior manager. He wanted no further contact with him, Mr Darcy, or Mr Harris. He suggested that they might be attempting to "purge the police investigations". We find that on both occasions when letters were delivered by hand this was to ensure receipt. There is nothing in the Respondent's policy preventing this and it is an appropriate thing to do where time is an issue and there have been receipt issues.
118. Mr Robertson took the response as a grievance and therefore referred the matter to Mr Harris. Mr Harris took the view that nonetheless there was no reason why Mr Robertson could not hold the long-term sickness interview. The Claimant was therefore invited to attend such a meeting on 21 July. The Claimant responded on 18 July to Mr Harris (p 347) and indicated he is not prepared to attend. This is because he does not consider anyone who has been involved in a grievance he has raised should chair such a meeting, and because the company no longer pays him. The Respondent has not sent in the proper paperwork to allow him to be paid and his staff pass has been deactivated. In evidence he explained this meant he could not afford to attend and had no pass to let him do so.
119. The invitation letter had indicated that if the Claimant failed to attend the interview, the decision would be made in his absence. The meeting did go ahead with the Claimant not in attendance. Mr Robertson sent an outcome letter (page 357 – 358) setting out the background to the meeting. It specified that he had considered a variety of matters and concluded that because the Claimant had been on long-term sickness since the 22 November 2016, and the medical opinion was that there was still no prospect of a return to work within an acceptable timeframe, he had no

option other than to terminate the Claimant's employment on the grounds of non-attendance at work for medical reasons.

120. We find that the reason that the Claimant was dismissed by the Respondent was for non-attendance at work. The Respondent followed its lengthy and thorough process in reaching this conclusion. It did so on a fair and reasonable basis. The Claimant had been off for a considerable period of time and there was no medical evidence that he will be able to recover sufficiently to take up his employment again within a reasonable timeframe.

Appeal against dismissal

121. The Claimant was informed of his right to appeal this decision and duly did so in a letter of 26 July. He was asked to attend an appeal hearing on 10 August 2017 but did not attend. A further meeting was arranged for 15 August and the Claimant was notified in the correspondence that if he failed to attend the hearing would go ahead in his absence. The Claimant did write a lengthy letter on 12 August 2017 at page 376 – 377 of the bundle, but did not attend the appeal hearing.
122. Mr Harris confirmed the decision to dismiss. Before taking the decision he reviewed the Claimant's file and prepared a chronology of events. He explained that in the absence of any more information, particularly about when the Claimant was likely to be able to come back to work, there was no where else for him to go with it. We find that his decision to uphold the appeal was a fair and reasonable one and was based on the Claimant's absence. Mr Harris had considered all of the Claimant's complaints and took these into account in reaching this decision.

The Claimant's grievance

123. The Claimant continued to be unhappy about the initial stoppage of three weeks sick pay. On 2 February 2017 (page 188) the Claimant wrote to Mr Robertson making a series of complaints against his manager. These complaints include her attempting to discipline him because she has a grievance against the Claimant, withholding statutory sick pay, not responding to correspondence within the seven-day window, denying union representation, authoring invitation letters in a manner calculated to make sure the Claimant missed the appointment so that he could be disciplined or dismissed. He also wrote a complaint that his line manager had assaulted/and screamed at him during his probation and threatened to discipline for not wearing full uniform, although he was not provided with that until eight months after his assignment.
124. Mr Harris gave evidence that he first became involved in this matter following receipt of an email from Mr Robertson after he had received an email directly from the Claimant on 2 February. Mr Harris made initial contact with the Claimant and received a response on 7 February which can be found at page 190 of the bundle. He had invited him to attend the meeting at Hounslow Garage on 9 February. However, the Claimant indicated that he did not want to have the meeting held at Hounslow Garage and, furthermore the provision of two days' notice was not sufficient for him to be able to prepare properly.
125. The meeting was re-scheduled for Wednesday 22 February at 9am. The Claimant asked for the location to be changed to Fulwell Bus Garage, but this was refused as Mr Harris was based at Hounslow Garage and therefore

this would be the most convenient place to hold the meeting. The Claimant suggested Mr Harris did not have an office in Hounslow and did not accept that he did. We find that Mr Harris did indeed have such an office. And accepted his evidence he had been based there since 2004. Again, we prefer the evidence of Mr Harris to that of the Claimant for the reasons we have given.

126. Throughout this period, and as a result of the serious nature of the allegations, Mr Harris investigated the background to the events that occurred up to and after the grievance was received. Mr Patel, the union representative was unable to attend the meeting on 22 February. The date was changed to 23 February at 9am. This can be found at page 200 of the bundle.
127. The minutes of the grievance meeting can be found at page 205 onwards in the bundle. The meeting took place on 24 February 2017. This was originally started by the Claimant confirming that he was unhappy for Mr Rehman to be representing him today. There was a short adjournment and eventually the Claimant agreed that the representative could remain on his behalf. The Claimant was asked to go through the details of his grievance as highlighted in the email and this is detailed within those minutes. Pages 205 to 208 relate to issues surrounding his poor attendance and also the failure to wear appropriate uniform. Mr Harris enquired about the situation in relation to the reinstatement of his sick pay. This can be seen on page 207 of the bundle. Issues were raised in connection with the allegations of assault where the Claimant alleged that his line manager grabbed him by the jumper and screamed at him. He was asked if he raised this matter with management or the union, but he indicated he did not do so because he was frightened about losing his job and being dismissed as a troublemaker.
128. Mr Harris agreed to investigate matters further and write to him with a response and conclusion. On 1 March Mr Harris held an interview with Mr Robertson. This can be found at p211 onwards. The concerns of availability of full uniform were discussed. Upon checking, the Claimant had been issued all of his uniform by the end of August 2016, apart from a coat. We note that the uniform complaint about which he was originally invited to a disciplinary meeting was about a tie and trainers.
129. Mr Robertson confirmed that he had been called into the meeting between the Claimant and his line manager on the basis that the Claimant was becoming more and more aggressive. Mr Robertson advised that the matter in connection with uniform should be dropped as a gesture of goodwill because the issues in connection with his uniform were not all his fault. Mr Harris also asked questions about the interview itself and the Claimant's tone. It appeared that Mr Robertson was able to get him to calm down and we accept that the Claimant was agitated needing this intervention to restore calm to the meeting.
130. Further investigations were then undertaken with the line manager. The minutes of this meeting can be found on page 213 of the bundle of documents. She confirmed that the Claimant was very upset about the charge in connection with uniform. She accepted that the Claimant had not become aggressive and abusive, but that he did make personal comments. He was very loud, and she confirmed that she felt very intimidated and threatened. We have accepted that the Claimant’s behaviour at this meeting required more senior management intervention.
131. She also said the union representative, Mr Rehman came as a witness and the Claimant told him not to speak. Mr Rehman attempted to calm the

Claimant down used his hands in a gesture to do so. The Claimant then seemed to become agitated and aggressive towards the union representative. Mr Harris then asked her about the meeting that was held on 13 December. In particular, he enquired about the issue surrounding the withholding of sick pay. The line manger accepted that the Claimant could have been paid before the long-term sickness interview. As we have already found, she waited to reinstate sick pay until she met with the Claimant which we have found to be a reasonable step as the payment was discretionary. She was entitled to do this, although we accept other managers may have made a different decision. She asked about the allegation that she had grabbed his jumper and she denied this.

132. Mr Harris concluded the investigation and wrote to the Claimant on 10 March. This letter can be found at page 223 onwards. This letter details the background relating to the disciplinary hearing regarding both unsatisfactory attendance and failure to wear a company tie and not wearing the correct trainers. In response to the email addressed to Mr Robertson, Mr Harris considered all relevant factors. It was accepted that there were lengthy delays in obtaining his uniform. Mr Harris concluded that the line manager was entirely correct in dealing with the uniform issue. She was not aware that Mr Robertson had already spoken to him and as a result the allegations in connection with the uniform were withdrawn. In connection with withholding company sick pay, Mr Harris concluded that the line manager was not aware of the reason for the absence on 22 November. This was discussed at length on 13 December between them and it was agreed that the sick pay would be reinstated.
133. Details of the allegations regarding refusal to allow union representation were also detailed at page 225 of the bundle. Mr Harris confirmed that the right to union representation does not extend to probation interviews. Additionally, the matter regarding the assault was addressed and Mr Harris informed the Claimant that the allegation was denied. Mr Harris attached some weight to the fact that the Claimant had not raised any concerns about this incident until approximately nine months later.
134. Mr Harris concluded that management could and can improve on the uniform issues and that the sick pay could have been reinstated earlier. However, he found no evidence of malpractice, bullying or fraud as alleged. He also found that the Claimant's actions were deemed as threatening and very intimidating to both his line manager and his own union representative. The Claimant was reminded to behave appropriately with all members of staff. Mr Harris then confirmed that he had the right to appeal against the decision.
135. There is a general complaint about the way in which Mr Harris conducted the grievance hearing of 24 February 2017. The issues list did not detail the particular issue with conduct. From the Claimant’s evidence and cross-examination questions we understand that he complains that the company should not have been in correspondence with Mr Patel, the trade representative; that it was for the company to organise his trade union representative, but one that was satisfactory to the Claimant; that Mr Harris did not interview Mr Robertson and the line manager in the appropriate order; that Mr Harris did not challenge Mr Robertson’s answers appropriately; and that Mr Harris did not ensure that either Mr Robertson or the line manager had properly investigated the uniform issue. In his witness statement the Claimant also complains that Mr Harris was at the same level of seniority as Mr Robertson and so should not have carried out the

process. The Claimant also complains that Mr Harris is biased and this outcome was "tit for tat" and no mention is made of the 6 February grievance.

136. We find that there is nothing inappropriate with Mr Harris letting the Claimant know that the date of a meeting has been changed, having been advised that a trade union representative is not available. Sending out such a letter is a matter of courtesy. We find that Mr Harris was sympathetic towards the Claimant's perspective on uniform and found that the process of providing uniform was slower than it should have been. We find there is nothing inappropriate in the order in which he spoke to those involved nor did he fail to follow up any relevant points. The Claimant raises as an example of less favourable treatment the fact that Mr Harris did not tell him during this grievance process that there had been complaints raised against him. We find that this was the appropriate thing to do. Mr Harris was not investigating the 6 February incident and to have raised it would have been incorrect.
137. We find Mr Harris's handling of the grievance was fair and appropriate in all ways. We accept that Mr Harris was senior to Mr Robertson, a point the Claimant also appeared to accept. We find no evidence of bias and accept that Mr Harris acted fairly and properly throughout.
138. On 18 March, the Claimant responded. This can be found at page 240 of the bundle. This was a detailed response addressing a number of paragraphs that were contained within the document. In the circumstances, Mr Harris treated this as an appeal against the outcome of the grievance. The matter was therefore referred back to HR with a view to determine who would determine the appeal against the outcome of the grievance.
139. On 6 April (page 282) the HR team wrote to the Claimant advising them that his letters of 23 March (to Ms Mitchell p 251-2), two letters of 28 March (this should have been one of 28 March at p 262-2 and one of 29 March at p 268-70), two letters of 30 March (p 273-4 and 275) and letter of 4 April 2017 (p278), should be raised as part of his ongoing grievance. This summarised the complaints made as the refusal of request of annual leave while off sick which amounted to unfair treatment; scheduling meetings involving Mr Robertson and Mrs Mitchell after they had raised complaints against the Claimant; ill-treatment by Mr Robertson regarding his return to work/alternative employment; the procedure and outcomes investigation against the Claimant; and alleged discrimination on the grounds of disability and race and harassment.

Appeal against the grievance outcome

140. We heard from Mr Evans that he was appointed to deal with the grievance appeal, although he could not recall who asked him to do this. He was dealing with the points raised in the appeal letter and the points identified by HR as matters that should be pursued as part of the grievance.
141. Mr Evans met with the Claimant and the handwritten notes of that meeting were in the bundle at page 304. The Claimant says that the notes show he was given no opportunity to discuss matters and was not invited to give additional details. For example, he refers to his complaint that Mr Robertson has an issue with him. In the notes of the meeting, he explains Mr Robertson is an American Civil War enthusiast and he has a problem with the Claimant as a black man. The Claimant said that had he been given the opportunity to elaborate he would have explained that Mr Robertson's office

is full of American Civil War memorabilia books and figurines and further the door punch codes that staff have to use to enter the building are programmed with the dates of the start and finish of the American Civil War.

142. Mr Evans is clear that the Claimant had not said any of this at the time and had been given ample opportunity to say everything that he wished to in the meeting.
143. The decision letter (page 300 of the bundle) addresses each paragraph of the Claimant's grievance appeal. It reflects the notes of the meeting. We accept Mr Evan's account that notes, albeit not a verbatim account, are accurate as they are reflected in the outcome letter. We find it unlikely that the Claimant would not have used the meeting as an opportunity to voice his full views. We accept Mr Evan's evidence, which is supported by contemporaneous documents, and prefer his evidence over the Claimant for the reasons given previously. We find that Mr Evans properly investigated the Claimant's appeal and reached a reasonable conclusion.

Investigation regarding the incident on 6 February 2017

144. Following the incident on 6 February referred to above, Mr Robertson sent an email to Mr Harris page 182 of the bundle. It summarised what he felt happened and concluded that he would appreciate it if Mr Harris could arrange for someone else to deal with the Claimant's complaint against him. Mr Robertson no longer felt it would be appropriate for him to deal with the Claimant's issues after his experience with him. Mr Robertson's email identified those who were present at the meeting that day. He provided four other names.
145. Mr Harris responded on 7 February saying that, as discussed, from what he reported it would appear this would need to be dealt with formally by another operations manager, preferably sooner than later. Mr Harris suggested to Mr Robertson that he should request statements from the witnesses, then engage with one of his operation manager colleagues to deal with this.
146. Statements were then provided by each of the individuals who were present. We find it more likely than not that these statements were produced at the request of Mr Robertson, following the advice of Mr Harris. They were not formal statements prepared as part of any investigation at that point. It is accepted that the statements did not start with the individual's name, nor were they signed. They were not on headed notepaper or on any other official looking report form. One was in fact on a report form, but this was not a form that was intended to be used for this sort of complaint.
147. Mr Newman, on behalf the Respondent, confirmed that he was unaware that there was any set requirement for a statement such as this to be on particular stationery. We find that it is more likely than not that the statements were attached to emails, and we also find that it is highly unlikely that there was any prescribed format for such documents. We also find that, despite the fact they are not signed or dated, it is clear from reading them which individual produced which statement and that they show a cohesive, coherent, and consistent picture. We are satisfied that there was sufficient information for investigation to be started.
148. Mr Newman, who was at the relevant time operations manager, a role which is also described as garage manager, was requested to carry out the

investigation. He could not recollect exactly who asked him to do this but believed it was likely to be Mr Evans who was his boss.

149. Mr Newman explained that he was in hospital having an operation when the incident occurred and on his return from this absence had thought it likely that the matter had been dealt with. He accepted that investigations should occur in a timely manner and that this one had not progressed quickly because of his unavoidable absence. We find that there is no requirement, either in the company policy or in the ACAS guidelines for any time period to be adhered to. Investigations must simply be carried out in a timely way. While the delay was regrettable it did not involve a breach of any procedure.
150. The statements that had been prepared and which had been sent to Mr Newman, were not provided to the Claimant prior to his meeting with Mr Newman. We accept that Mr Newman decided on this occasion he would start his formal investigation by speaking to the Claimant. There is nothing wrong in speaking to the alleged wrongdoer first. We also find that had Mr Newman decided that the matter needed further investigation, then he would have gone on to take formal statements from those who had been identified as a witness and these would have been provided to the Claimant.
151. In fact, Mr Newman told us that when he met with the Claimant, he found him to be a pleasant individual and he was very aware of the Claimant's mitigating circumstances. The Claimant had just suffered a serious accident and an operation and was still sick and was concerned about sick pay. He concluded that the appropriate step would be to advise the Claimant not to have a repeat of conduct that led to these types of complaints but to take no formal action. Mr Newman told us, and we accept, that he believed the incident described in the reports he had was sufficiently serious to warrant making a comment on the Claimant's future conduct. We are also satisfied that the incident occurred as described. There are 4 witnesses to it, and Mr Newman who found the Claimant to be pleasant in the investigation process, nonetheless concluded the incident had occurred as described. We accept his evidence and find that this was not a fabricated story raised by management to raise a grievance against the Claimant.
152. Mr Newman wrote to the Claimant on 22 March 2017 confirming that no action would be taken. His letter concluded that the Claimant should be advised that if he behaved like this again, disciplinary action could be taken against him. The initial investigation meeting was the first time that Mr Newman met the Claimant, and this letter ended his involvement with the Claimant.
153. The Claimant criticises Mr Newman for not allowing him to adjourn the meeting to take advice, giving him one days' notice of the meeting and for not giving him the notes of his accusers. We find that as this was the start of an investigation process Mr Newman acted appropriately and the Claimant was treated the same way as anyone else. We find that the Claimant was given reasonable notice, he was able to address the points put in at the meeting and did so in a way that led to a favourable outcome and that the investigation went no further. An adjournment was unnecessary and the Claimant was not prejudiced by the lack of an adjournment. We find that it is appropriate to conduct an investigation meeting in the way that Mr Newman did. Mr Newman did not carry out his investigation in a way that was favourable to the accusers. We find to the contrary, that he carried it out in a way that was more favourable to the Claimant, choosing to start with him

before formally speaking to the accusers. This allowed him to conclude the matter without proceeding further.

154. The Claimant was very unhappy about the outcome letter and in an email of 4 May 2017 (p 290) sent a letter to Mr Newman appealing against his investigation conclusion. The Claimant in his evidence explained that he was appealing about the sentence that his conduct needed to improve because he felt that that was on his personnel record and was a conclusion that Mr Newman had reached without any evidence. Mr Newman did not respond to this letter, nor was any appeal held against the decision not to pursue disciplinary action after the investigation. Mr Newman was clear that no such right existed and we agree with him. There is no right to appeal when a Respondent decides not to take any action.

Complaints of procedural errors.

155. We have addressed the points raised in relation to the investigation carried out by Mr Newman and the complaints relating to Mr Harris. There is a general complaint about what is said to be the failure by management to follow protocol regarding the Claimant's grievances and appeals and complaints made against the Claimant. Again, from the Claimant's evidence and questioning of the witnesses this complaint appears to relate to a number of points. These are the dates on which letters are sent, giving the Claimant what he considers to be inappropriate notice, not providing copies of the handwritten notes of meetings or typed copies of these notes, not arranging an appropriate trade representative to attend, the company being involved in organising trade union representatives which is inappropriate, individuals within the management chain still being involved in meetings when a grievance was raised by them.
156. The Claimant makes the statement that the company is in breach of its own policy and in breach of ACAS guidelines. There is no specified time limit within the company policy in which letters must be sent. There is no specific time limit in the ACAS guidelines. There is therefore no breach of either company policy or ACAS mechanics or guidelines.
157. The Claimant referred us to the envelopes which show the post marks of letters which he told us evidence the letters were sent so as to give him insufficient notice. We find that the Claimant was able to attend all relevant meetings and was clearly aware of the time which they were to take place. We find that there was no procedural issue, and certainly no issue that prejudiced the Claimant, in the dates on which letters are written and posted by the Respondent.
158. There is no requirement in the company policy or indeed in the ACAS guidelines for the handwritten notes to be provided or indeed for typed copies of notes be provided. On the balance of probabilities we find that the trade union representative would have raised an objection if this was something that was expected within the Respondent organisation.
159. The Claimant was provided with outcome letters and clearly understood what had happened in each meeting as he pursued grievances and appeals. We find that there is no breach of process by not providing copies of notes or typed copies of notes.
160. The Claimant complains that the company had arranged for trade union representatives he did not want to attend to be present. We find that the Respondent's letters are clear. On every occasion where a trade union representative was permitted, the Claimant was advised of this in writing in

advance and was told it was for him to organise that representative. This is what we would expect and is in accordance with legislation. On the balance of probabilities we find it unlikely that any manager would then arrange for the a trade union representative to attend with the Claimant. It is clearly something that the Claimant must do for himself. We find that he did not get on with some of the representatives that the union provided, we find that there was no breach of process in the way such representation was organised.

161. The Claimant has made a complaint about bias of managers dealing with hearings. This complaint is about line management continuing to deal with long-term sickness absence after grievances had been raised by management about the Claimant's behaviour on 6 February. We have found that the grievance was raised by Mr Robertson, other mangers were witnesses only. There is nothing inappropriate with a witness to a grievance continuing to line manage a staff member through a routine long term sickness interview which is largely administrative and from which no employment consequences flow. This is what happened with Mrs Mitchell taking the long term sickness meeting. We have found she was involved because the Claimant would not deal with Mrs Sylejmani. Other managers were then involved in meetings that ultimately led to the Claimants dismissal , but this was after the conclusion of the grievance.
162. The Claimant suggests that as a complaint had been made by managers within the garage that Mr Harris was responsible for, a manager from another garage should have been involved. The Claimant complains that Mr Harris should not therefore have dealt with the Claimant's grievance appeal or his appeal against dismissal and long-term sickness process. We find no reason Mr Harris could not be involved. He was not involved in raising a grievance against the Claimant. There is no procedural issue which renders the process unfair because of his involvement.

Notice Pay and Unlawful Deduction from Wages

163. As the contract sets out, the Claimant was entitled to 13 weeks statutory sick pay. Mr Harris told us that there were repeated exchanges between the Claimant and payroll about how this was calculated. However, there were a series of fluctuations within the payments made to him based upon the rules and regulations relating to statutory sick pay. In particular, the Company wrote to the Claimant on 15 August confirming that he had been overpaid statutory sick pay. This can be seen at page 382 and full details of this overpayment were provided in the calculation found on page 383. There is then a lengthy exchange in connection with sick pay discrepancy between the Claimant and the payroll administration manager. This can be seen on page 384 to page 398 of the bundle. Repeated attempts were made to explain the situation to the Claimant.
164. The Claimant has not provided any evidence other than to make an assertion that is incorrect. He has not told us how or in what way the calculation is incorrect .We have previously found that the contract specified pay rates varied depending on the times and dates worked. We are satisfied that the Respondent's explanation is clear and accurate. We find that sick pay was properly paid and this was clearly set out to the Claimant.
165. The Respondent now accepts that the Claimant was entitled to be paid in lieu of notice and it was submitted by the Respondent that one week's pay, that is £422.18, was paid to the Claimant on 16 October 2020. The

Claimant made a number of statements in his evidence that he did not accept the sum was correct. He gave no information as to how or why it was not correct and in cross examination refused to acknowledge whether he had had received this sum.

166. In the absence of any evidence from him on this point, we accept the Respondent did pay this money to the Claimant. We find therefore that the Claimant has been properly paid one week's wages in lieu of notice.

Comparators

167. Within the issues list the Claimant has referred to 2 separate individuals. He refers to one as a female Asian employee who was allowed to work in management offices when the Claimant was denied the opportunity to be considered for this role. He describes the second as a pregnant Caucasian employee who was found a role in lost property when the Claimant was not found an equivalent role.
168. It is unclear who these individuals are and the time period involved. In his evidence the Claimant said that in fact both individuals were pregnant when they were given these opportunities. If, which appears probable, the complaint is these vacancies arose during pregnancy and at the time when the Claimant was off sick, we find that it was reasonable for the Respondent to seek to accommodate pregnant staff who remained at work with desk jobs if their pregnancy meant they were unable to continue with their duties. The Claimant was provided with the vacancy list while he was off sick but did not identify any roles he considered suitable .We note that the Claimant also objected to the idea of being offered work during his sick leave in his claim form.
169. In any event, we find that there is no link between the Claimant's race or his gender and his not being offered desk jobs during the period of sickness absence while pregnant women may have been accommodated with alternative roles while they continued to attend work.

Relevant Law

170. The claim is one of direct discrimination on grounds of race and gender. S13 of the Equality Act provides "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.". S.13 Equality Act focuses on whether an individual has been treated 'less favourably' because of a protected characteristic, the question that follows is, treated less favourably than whom? The words 'would treat others' makes it clear that it is possible to construct a purely hypothetical comparison.
171. Whether the comparator is actual or hypothetical, the comparison must help to shed light on the reason for the treatment. For this purpose, S.23(1) stipulates that there must be 'no material difference between the circumstances relating to each case' when determining whether the Claimant has been treated less favourably than a comparator.
172. The unfavourable treatment must be "because of" the protected characteristic. The protected characteristic needs to be a cause of the less favourable treatment but does not need to be the only or even the main cause.

Burden of proof

173. Igen v Wong ltd [2005] EWCA Civ 142, [2005] ICR 931, CA. remains the leading case in this area. There, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the Claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e., on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the Respondent to prove — again on the balance of probabilities — that the treatment in question was 'in no sense whatsoever' on the protected ground.
174. The Supreme Court in Royal Mail Group v Efobi, considering s136(2) of the Equality Act confirmed that at the first stage of the two-stage test, all the evidence should be considered, not only evidence from the Claimant.
175. The bare facts of a difference in treatment and a difference in status only indicate a possibility of discrimination, they are not 'without more' sufficient material from which a Tribunal can conclude that there has been discrimination, Madarassy v Nomura International [2007] IRLR246 CA para 54-57. Likewise, that the employer's behaviour calls for an explanation is insufficient to get to the second stage. There still has to be reason to believe that the explanation could be that the behaviour was "attributable (at least to a significant extent)" to the prohibited ground. Therefore 'something more' than a difference of treatment is required.

Limitation period

176. S123 Equality Act provides that

".a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

177. The Court of Appeal made it clear in Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA, that the onus is on the Claimant to convince the tribunal that it is just and equitable to extend the time limit. The exercise of the discretion is an exception.
178. Previously, the EAT (British Coal v Keeble) suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in S.33(3) of the Limitation Act 1980. That section deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the Claimant to obtain appropriate advice once he or she knew of the possibility of taking action.
179. The Court of Appeal in Southwark London Borough Council v Afolabi 2003 ICR 800, CA, confirmed that, the checklist should be used as a guide. However, the Court went on to suggest that there are two factors which are

almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the Respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh). In Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA, the Court of Appeal pointed to the fact that it was plain from the language used in S.123 Equality Act that it would be wrong to interpret it as if it contains such a list.

Harassment

180. Harassment is defined at s 26 Equality Act 2010 AS

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

2. ..

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

181. Harassment has 3 essential elements, unwanted conduct which has the prescribed effect, and which relates to a protected characteristic.

Holiday pay

182. The Working Time Regulations 1998 provide workers with a statutorily guaranteed right to paid holiday. Subject to certain exclusions all workers are entitled to 5.6 weeks' paid holiday in each leave year beginning on or after 1 April 2009 — comprising four weeks' basic annual leave under Reg 13(1) and 1.6 weeks' additional annual leave under Reg 13A (2). The entitlement to 5.6 weeks' leave is subject to a cap of 28 days. Reg 13(1)
183. Workers absent on long-term sick leave are entitled to paid annual leave under the Working Time Directive and must be paid for it at their normal rate of remuneration. They are also entitled to a payment in lieu of unused leave, calculated at their normal rate of remuneration, if their employment is terminated.
184. While workers are entitled to take paid annual leave during a period of sickness absence, they cannot be compelled by their employer to do so. A worker who is either unable or unwilling to take annual leave during a period of sick leave has the right to take it during another period, if necessary, during a subsequent leave year.

Conclusion

185. Applying the relevant law as we have set it out to our findings of fact we conclude as follows in relation to the issues we were asked to detemine.We have considered jurisdiction first.

Time/limitation Issues

186. The Respondent is of the view that the following claims are out of time

i. Mr Robertson commanding Mrs Sylejmani to find something to discipline the Claimant on; (2.11.16)
ii. Mrs Sylejmani withholding the Claimant's sick pay (for the period 22 Nov 16 to 13 Dec 16);
iii. Management making up fabricated stories against the Claimant through raising a grievance against him.
iv. Writing to the Claimant whilst he was in receipt of a sick note.
v. The failure by management to follow protocol regarding the Claimant's grievances and appeals and the complaints made against the Claimant.
vi. The appointment of Mrs Sylejmani and subsequently Mrs Mitchell and then Mr Darcy as Staff Manager;

187. The period of ACAS conciliation started on 24 May 2017.Anything before 23 February 2017 would be out of time unless they are continuing acts. We conclude that none of these, with the exception of a failure to follow protocol, are continuing acts. While this failure is limited to each grievance or appeal, if this is an habitual course of conduct we find it amounts to a continuous act. We have therefore treated this complaint as made within time.

188. We have considered whether to extend time on a just and equitable basis for those acts we have determined were not continuous. The Claimant has made no submissions to us, nor has he provided any evidence as to why we should extend the time limit. The Claimant is clearly aware of how to issue a claim as he has done so. There is no evidence as to why he could not do so sooner and in the absence of any reason in front of us as to why he was unable to do so earlier, conclude that there is no good reason for the delay. The Claimant could have issued within time. We have considered any prejudice to the Respondent in extending time. We find that the passage of time means that the Respondent no longer has all the relevant witnesses that it would find of assistance. It would therefore be prejudiced by extending time. The Claimant still has a significant number of claims that are within time and so are within our jurisdiction which we are able to consider.

189. In the absence of any reason given for the delay and in the clear light of the Claimant's understanding of how to raise claims, both internally and via the employment tribunal, together with the greater prejudice to the Respondent in allowing these claims to proceed, we conclude it is not just and equitable to extend the time limit. With the exception of the complaint about the failure by management to follow protocol regarding the Claimant's grievances and appeals and the complaints made against the Claimant, the complaints set out above do not fall within the tribunal's jurisdiction.

Direct discrimination on grounds of race

190. The less favourable treatment relied upon by the Claimant and our conclusions are set out below. The Claimant has referenced an actual comparator for one complaint, but for the rest relies on a hypothetical comparator. We deal with each allegation in turn. For the sake of completeness, we also set out conclusions on those matters which are out of time.

i. Mr Robertson commanding Mrs Sylejmani to find something to discipline the Claimant on;

We have found that this instruction was not given. There was therefore no unfavourable treatment. This claim cannot succeed. It is also out of time.

ii. Mrs Sylejmani withholding sick pay (for the period 22 Nov 16 to 13 Dec 16);

We have found that Mrs Sylejmani was exercising management discretion appropriately and was entitled to withhold sick pay .There was a rationale for her action which was not motivated by race. While we have found that other managers may have reinstated sick pay earlier, we are satisfied that this manager would have acted the same way for anyone who had not followed the reporting requirements. The Claimant has not proved facts from which we could infer that discrimination has taken place. We conclude that the action was in no way whatsoever on the protected ground. There is no less favourable treatment and this claim cannot succeed. In any event the tribunal has no jurisdiction to deal with it as it is out of time.

iii. The Respondent allowing an Asian female employee to work in management offices in a role for which the Claimant was denied the opportunity to be considered;

The Claimant told us that this female employee was pregnant. She is not therefore an appropriate comparator. We found that it was wholly reasonable and not connected with the Claimant's race that this pregnant female employee be given a role to allow her to continue at work. We have considered whether or not failure to give the Claimant this role was less favourable treatment than an appropriate hypothetical comparator and conclude that there is no less favourable treatment. We conclude a pregnant employee attending work would be prioritised over an employee who was off sick and so this role was not vacant. The Claimant was off sick and the Respondent was going through its sickness management process. It provided the Claimant with all vacant roles as it would do all those off sick. This claim does not succeed.

iv. management making up fabricated stories against the Claimant through raising a grievance against him;

We have accepted Mr Newman's evidence that the stories were not fabricated, the conduct complained of occurred. There is therefore no less favourable treatment because there was no fabrication. This claim cannot succeed. It is also out of time.

v. Mr Harris not informing the Claimant during their meeting on 24 February 2017 of the complaints raised against him by members of the management team.

We have found that it was appropriate for Mr Harris not to tell the Claimant about the grievance that had been raised by Mr Robertson. Mr Harris was not investigating this incident and to have raised it would have been incorrect. There is therefore no less favourable treatment because Mr Harris was acting entirely properly and would have treated any hypothetical comparator in the same way. This claim cannot succeed

vi. the way in which Mr Harris conducted the grievance hearing on 24 February 2017;

We have found Mr Harris conducted the grievance fairly and in accordance with company procedures. There is no less favourable treatment because the hearing was conducted entirely properly and Mr Harris would have treated any hypothetical comparator in the same way. This claim cannot succeed.

vii. Mr Newman not allowing the Claimant to adjourn the investigation hearing on 20 March 2017 to seek advice;

We have found that Mr Newman acted appropriately. This was the start of the investigation process. The Claimant had sufficient notice and was able to address the matter put to him successfully. Mr Newman would treat any hypothetical comparator in the same way. There was no less favourable treatment, this claim cannot succeed

viii. giving the Claimant one day's notice of the investigation meeting;

We have found that Mr Newman acted appropriately. This was the start of the investigation process. The Claimant had sufficient notice and was able to address the matter put to him successfully. Mr Newman would treat any hypothetical comparator in the same way. There was no less favourable treatment, this claim cannot succeed

ix. the Claimant not being provided with notes of investigation interviews or statements made by his accusers;

We have found that Mr Newman acted appropriately and had the matter gone further, the Claimant would have gone on to take formal statements and the Claimant would have been provided with appropriate documentation. The Claimant suffered no disadvantage or prejudice. Mr Newman would treat any hypothetical comparator in the same way. There is no less favourable treatment, this claim cannot succeed.

x. Mr Newman carrying out the investigation in a manner which was more favourable to those who had made accusations against the Claimant and were of a different race to the Claimant;

We have found that, to the contrary, Mr Newman carried out the investigation in a way which was favourable to the Claimant. There was no less favourable treatment and this claim cannot succeed.

xi. On 28 March 2017 Mr Robertson giving the Claimant a vacancy for a Staff Manager a day after the deadline to apply expired;

We have found that this did not occur. We have accepted the Respondent's evidence that the vacancy list showed the date on which the original application process closed. These were vacant jobs and they were on the HR list. This claim cannot succeed.

xii. Mrs Mitchell denying the Claimant's requests for annual leave;

We have found that Mrs Mitchell did originally deny the Claimant's request for annual leave, but once HR advice was taken this was corrected. We have found that she was an inexperienced manager dealing with a complex area and made a genuine mistake. We conclude that any hypothetical comparator would have been treated in the same way. This claim does not succeed.

xiii. requiring the Claimant to attend an appointment with the company doctor during the period of his fit note;

This is not unfavourable treatment. It is the application of the Respondent's policy. The claim cannot succeed.

xiv. writing to the Claimant whilst he was in receipt of a sick note;

This is not unfavourable treatment. It is the application of the Respondent's policy. The claim cannot succeed. It is also out of time.

xv. Mr Robertson requiring the Claimant to resign from his role as bus driver in order to apply for position requiring an interview;

We have found that this did not occur. The claim cannot succeed.

xvi. the failure by management to follow protocol regarding the Claimant's grievances and appeals and the complaints made against the Claimant;

We have set out throughout our findings of fact our findings on the Claimant's complaints of management failure to follow protocol. We have found none of them occurred as the Claimant complains. We have found that the Respondent was following its protocol appropriately and there is therefore no less favourable treatment. Any hypothetical comparator would have been treated in the same way, this claim cannot succeed. It is also out of time.

xvii. Mr Newman refusing to hear an appeal against his investigation outcome;

We have found that Mr Newman did refuse an appeal hearing, but that his decision to do so was entirely justified. We found that no right exists for an appeal where no action is taken by the Respondent. There is no less favourable treatment. Mr Newman would treat any hypothetical comparator in the same way, this claim cannot succeed.

xviii. Mr Evans' handling of the appeal and the outcome;

We have found that Mr Evans handled the appeal and the outcome entirely properly. He was acting in accordance with company protocol. There is no less favourable treatment. Any hypothetical comparator would be treated in the same way, the claim cannot succeed.

xix. Mr Harris and Mr Robertson hand delivering letters to the Claimant's house on 20 June 2017 and 10 July 2017.

We have found that on both occasions when letters were hand-delivered, there was nothing untoward in dropping these letters by hand and we have accepted that this step was taken because of the Claimant's allegations that letters have not arrived or had arrived too late. In doing so, the Respondent was acting entirely properly. We find that there is no less favourable treatment. Any hypothetical comparator would have been treated the same way, this claim cannot succeed.

xx. the appointment of Mrs Sylejmani and subsequently Mrs Mitchell and then Mr Darcy as Staff Manager;

Mrs Sylejmani was appointed to her role before the Claimant was off sick. We accepted Mr Harris's evidence that Ms Mitchell, who was a relief manager and being trained to cover the role of staff manager was seconded into the role which was then advertised and Mr Darcy was successful. There is no obligation on the Respondent to give the Claimant such a role. He was free to apply as all other staff were. There is no evidence he did apply. There is no less favourable treatment as we are satisfied that no hypothetical comparator would have been treated differently. The complaint can not succeed .It is also out of time.

xxi. the Claimant being dismissed.

We have found that the reason for the Claimant's dismissal was absence from work. He was dismissed following a lengthy, fair and reasonable process. Any hypothetical comparator would be treated in the same way. There is no less favourable treatment. This claim does not succeed.

191. Has the Claimant identified appropriate comparators? We have dealt with the issue of hypothetical comparators where it has been appropriate to do so as set out above.

192. Has the Respondent proved a non-discriminatory reason for any proven less favourable treatment? In relation to each allegation, we have found that there was no less favourable treatment. The burden of proof does not therefore shift to the Respondent to provide a non-discriminatory reason as the Claimant has not proved facts from which we could infer that discrimination has taken place. There is no bare fact of a difference in

treatment which could indicate a possibility of discrimination and certainly nothing other than an assertion of differential treatment by the Claimant. For these reasons the claims of discrimination on grounds of race do not succeed.

Harassment on grounds of race

193. The same matters are brought as complaints of harassment. Again, for the sake of completeness, we have addressed matters that are out of time. We deal with these complaints in three sections.

194. Where we have found that the matter complained of did not occur, the complaints of harassment can not succeed. There is no link to any protected characteristic and there was no unwanted conduct that could therefore create the perception of an intimidating, hostile, degrading, humiliating or offensive environment or which could reasonably have that effect on the Claimant. This applies to the following which do not succeed as we have found they did not happen.
    i. Mr Robertson commanding Mrs Sylejmani to find something to discipline the Claimant on;
    ii. management making up fabricated stories against the Claimant through raising a grievance against him
    iii. the way in which Mr Harris conducted the grievance hearing on 24 February 2017;
    iv. Mr Newman carrying out the investigation in a manner which was more favourable to those who had made accusations against the Claimant and were of a different race to the Claimant;
    v. 15.11. On 28 March 2017 Mr Robertson giving the Claimant a vacancy for a Staff Manager a day after the deadline to apply expired;
    vi. Mr Robertson requiring the Claimant to resign from his role as bus driver in order to apply for position requiring an interview;
    vii. the failure by management to follow protocol regarding the Claimant's grievances and appeals and the complaints made against the Claimant;
    viii. Mr Evans' handling of the appeal and the outcome;

195. We have found that the following matters occurred as a result of company policy or best practice. They are not acts carried out by the Respondent related to a relevant protected characteristic. There is no link to any protected characteristic and there was no unwanted conduct that could therefore create the perception of an intimidating, hostile, degrading, humiliating or offensive environment or which could reasonably have that effect on the Claimant. They do not succeed.
    i. Mr Harris not informing the Claimant during their meeting on 24 February 2017 of the complaints raised against him by members of the management team.
    ii. The way in which Mr Harris conducted the grievance hearing on 24 February 2017.
    iii. Mr Newman not allowing the Claimant to adjourn the investigation hearing on 20 March 2017 to seek advice.
    iv. Giving the Claimant one day's notice of the investigation meeting.
    v. The Claimant not being provided with notes of investigation interviews or statements made by his accusers.
    vi. Requiring the Claimant to attend an appointment with the company doctor during the period of his fit note.
    vii. Writing to the Claimant whilst he was in receipt of a sick note.

viii. Mr Newman refusing to hear an appeal against his investigation outcome.
ix. Mr Evans' handling of the appeal and the outcome.
x. Mr Harris and Mr Robertson hand delivering letters to the Claimant's house on 20 June 2017 and 10 July 2017.
xi. The Claimant being dismissed.

196. We have found that the following occurred, which arguably are not as a result of company policy and so we consider them separately. We conclude that in each case there is no link to any protected characteristic and there was no unwanted conduct that could therefore create the perception of an intimidating, hostile, degrading, humiliating or offensive environment or which could reasonably have that effect on the Claimant. They do not succeed.

i. The appointment of Mrs Sylejmani and subsequently Mrs Mitchell and then Mr Darcy as Staff Manager;

The first individual was in place well before any of the matters complained of took place. There is no evidence before us that the appointment of Mrs Sylejmani was not as the result of a proper recruitment/promotion exercise. We have accepted the Respondent's reasons for the appointment of the other two. There was an open recruitment process and the Claimant did not put himself forward for this. The secondment of a member of staff on a temporary basis which occurred while the Claimant was off sick and unfit to work, and a valid recruitment exercise that appointed Mr Darcy, are not related to the protected characteristic of race.

ii. The Respondent allowing an Asian female employee to work in management offices in a role for which the Claimant was denied the opportunity to be considered.

We found that it was wholly reasonable and not connected with the Claimant's gender that this pregnant female employee be given a role to allow her to continue at work. We conclude a pregnant employee attending work would be prioritised over an employee who was off sick and so this role was not vacant. The Claimant was off sick and the Respondent was going through its sickness management process. It provided the Claimant with all vacant roles as it would do all those off sick. This role was not vacant. This conduct is not related to protected characteristic of race.

iii. Mrs Mitchell denying the Claimant's requests for annual leave

We found this was a mistake due to inexperience that was then corrected. This conduct is not related to the protected characteristic of race.

<u>Direct Discrimination on the ground of sex</u>

197. We set out or conclusions ,including on those matters that are out of time below. The less favourable treatment relied upon by the Claimant is:

i. Mr Robertson requiring the Claimant to resign from role as bus driver in order to apply for position which requiring an interview.

We have found this did not occur. The claim can not succeed.

ii. The Respondent finding a pregnant Caucasian employee a role working in lost property and not finding the Claimant an equivalent role.

The female employee was pregnant. She is not therefore an appropriate comparator. We also note our findings that it was wholly reasonable and not connected with the Claimant's sex that he was not given a desk job

provided to this pregnant female employee. We have considered whether or not this was less favourable treatment than an appropriate hypothetical comparator and conclude that there is no less favourable treatment .No hypothetical comparator would have been treated differently. The Claimant was off sick and the Respondent was going through its sickness management process. It provided the Claimant with all vacant roles as it would do all those off sick. This claim does not succeed.

iii. the appointment of Mrs Sylejmani and subsequently Mrs Mitchell and then Mr Darcy as Staff Manager;

Mrs Sylejmani was appointed to her role before the Claimant was off sick. We accepted Mr Harris's evidence that Ms Mitchell, who was a relief manager and being trained to cover the role of staff manager was seconded into the role which was then advertised and Mr Darcy was successful. There is no less favourable treatment as no hypothetical comparator would have been treated differently. The complaint can not succeed.

iv. the failure by management to follow protocol regarding the Claimant's grievances and appeals and the complaints made against the Claimant.

We have found this did not occur. The claim can not succeed.

198. Has the Claimant identified appropriate comparators? We have dealt with the issue of hypothetical comparators where it has been appropriate to do so as set out above.

199. Has the Respondent proved a non-discriminatory reason for any proven less favourable treatment? In relation to each allegation, we have found that there was no less favourable treatment. The burden of proof does not therefore shift to the Respondent to provide a non-discriminatory reason as the Claimant has not proved facts from which we could infer that discrimination has taken place. There is no bare fact of a difference in treatment which could indicate a possibility of discrimination and certainly nothing other than an assertion of differential treatment by the Claimant. For these reasons the claims of discrimination on grounds of sex do not succeed

Notice pay

200. Pursuant to his contract of employment, the Respondent accepts that the Claimant was entitled to payment of notice pay upon his dismissal. The Respondent states it has paid the amount in full. The Claimant disputes the amount is correct.

201. We have found the Claimant was paid what he was entitled to. The claim does not succeed.

Unlawful deduction from wages

202. We found that the Respondent paid all of the sick pay to which the Claimant was entitled ,there was no deduction from wages.

Breach of the Working Time Regulations 1998

203. Has the Respondent denied the Claimant's entitlement to annual leave in breach of Regulations 13 and 13A of the Working Time Regulations 1998?

204. The Claimant was not denied leave. Any initial refusal was corrected and we found that the Claimant took his leave entitlement .There can be no claim and the complaint does not succeed.

Breach of the ACAS Code of Practice

205. Has the Respondent unreasonably failed to follow the ACAS Code of Practice in respect of the Claimant's grievances? We have found there was no breach of the ACAS code.
206. For all these reasons we dismiss the claims in their entirety.

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Employment Judge McLaren
Date: 28 October 2021

Sent to the parties on
Date: 29 October 2021