# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. Adirazak Ibrahim

**Respondent:** London United Busways Ltd

**Heard at:** London South **On:** 14th, 15th, August 2023 (16th 17th August 2023 in Chambers)

**Before:** Employment Judge Sudra sitting with:
Mrs. R. Bailey and Mr. S. Townsend

**Representation:**

Claimant: Failed to Attend

Respondent: Mr. E. Nuttman (solicitor)

*(References in the form [XX] are to page numbers in the Hearing bundle. References in the form [XX,para.X] are to the paragraph of the named witness's witness statement)*

# JUDGMENT

1. The unanimous decision of the Tribunal is that:
   (i) The Claimant's complaint of unfair dismissal is dismissed;
   (ii) the Claimant's complaints of race and religion or belief discrimination are dismissed;
   (iii) the Claimant's complaint of victimisation is dismissed; and
   (iv) the Claimant's complaint of unlawful deductions from wages is dismissed.

## Preliminary Matters

1. This matter was listed for a Final Hearing from 14th to 18th August 2023. On, 8th August 2023 the Claimant wrote to the Tribunal applying to postpone this Hearing in the following terms:

> *'Dear Sirs,*
> *I hope this email finds you well. I am writing to formally request an adjournment of the upcoming employment tribunal hearing, in which I am the claimant, scheduled for the 14th of August 2023. Unfortunately, due to unforeseen and pressing circumstances, I am unable to attend the hearing as planned.*
> *Regrettably, a severe illness has befallen a close family member, and I am currently providing them with essential care and support during this difficult time. The situation demands my immediate attention and presence, making it impossible for me to prepare adequately for the hearing and present my case effectively on the scheduled date……..'*

2. On 9th August 2023, the Respondent wrote to the Tribunal objecting to the Claimant's postponement application and citied the following reasons:

> 1. *The Claimant has not provided sufficient information to explain which family member is ill, when the illness commenced and why he is required to provide support to the extent that he cannot attend the Final Hearing.*
> 2. *The Claimant has not provided any medical evidence to support his application.*
> 3. *This is a five-day hearing and it is likely that any postponement would cause a substantial delay given the hearing length. The Respondent also contends that all five days are necessary given that there are eight witnesses and multiple heads of claim. It is also noted that the claim relates to events which took place in July 2020 and any further delay is likely to cause prejudice.*

3. Acting Regional Employment Judge Balogun wrote to the Claimant on 10th August 2023, informing the Claimant that he would need to supply medical evidence before his postponement application could be considered. The Claimant wrote again to the Tribunal on 10th August 2023 re-stating his application to postpone the Final Hearing but not providing any details of the circumstances which he said prevented him from attending it nor any medical evidence in support of his application.

4. On 11th August 2023, Acting Regional Employment Judge Balogun wrote to the Claimant stating:

> *'The Hearing will remain listed for Monday 14th August 2024. It will be a matter for the Judge in your absence to decide the outcome'.*

It is noted that the reference to the date, '*Monday 14th August 2024,'* was a typographical error and should have read, '*Monday 14th August **2023**,'* (our emphasis). Whilst the error in respect of the date is unfortunate, it is clear that the Final Hearing had not been postponed and the application to postpone would be decided by the Tribunal on the first day.

5. On 14th August 2023 at 00.22am, the Claimant wrote to the Tribunal expressing gratitude and stated, mistakenly, that it was clear from Tribunal correspondence that the Final Hearing was scheduled to take place on, 14th August 2024.

6. The Claimant failed to attend the first day of the Hearing; the Respondent was in attendance represented by Mr. Nuttman. The Tribunal clerk emailed the Claimant at 11.09am asking him to urgently contact the Tribunal and provide information as to which family member was ill, what the illness was, and whether or not he would be able to join the Hearing remotely.

7. On 14th August 2023, at 16.43pm the Claimant wrote to the Tribunal providing the details he had been asked to. However, the Claimant had not supplied any medical evidence and crucially, had failed to explain to the Tribunal's satisfaction *why* he was unable to attend the Hearing. Therefore, the Hearing commenced at 10.00am on 15th August 2023.

8. At 14.32pm on 15th August 2023, after the Hearing had concluded, the Claimant emailed the Tribunal and asked that the decision to proceed in his absence was reconsidered and, '*to reconsider its decision and grant me* (the Claimant) *the opportunity to participate in the hearing at a rescheduled date that would accommodate my presence.*'

9. This, of course, was not possible as the Hearing had concluded. The Claimant had also sent in a GP's letter, dated 14th August 2023, which set out the medical details of his family member. Even if the Tribunal had had sight of this prior to commencing the hearing, the matter would not have been postponed. The GP's letter was a summary of the medical condition of the Claimant's family member

and the medication which had been prescribed. The letter did not address why, if at all, the Claimant was unable to attend the Hearing nor did it identify their patient's condition as critical, serious or ailing (as the Claimant had described).

# REASONS

**Background**

10. The Claimant was a bus driver employed by the Respondent on 24th March 2014 until his dismissal for gross misconduct on, 30th July 2020. By a claim form presented on 16th November 2020, the Claimant complains of unfair dismissal, race discrimination and religion or belief discrimination, and victimisation; the Claimant describes himself as black African and a Muslim.

11. All claims are resisted by the Respondent, who contends that the Claimant was fairly dismissed by reason of his conduct, namely, refusal to undertake a 'for cause' alcohol test. The conduct was said to have occurred on 20th July 2020.

## Claims and Issues

12. The Claimant brings claims of:
    (i) Ordinary unfair dismissal, s.98 Employment Rights Act 1996 ('ERA');
    (ii) direct race and religion or belief discrimination, s.13 Equality Act 2010 ('EqA');
    (iii) victimisation, s.27 EqA; and
    (iv) unlawful deductions from wages, s.13 ERA.

13. The issues to be determined by the Tribunal were confirmed (by EJ Wright on 15th November 2022) to be as per the List of Issues drafted by the Respondent [57-60] as set out in Appendix A at the end of these Reasons.

**Documents**

14. The Tribunal had been provided with:
    (i) A Hearing bundle consisting of 580 pages and an index;
    (ii) a folder containing inter-parties correspondence;
    (iii) a bundle of witness statements;
    (iv) witness order documentation;
    (v) a counter schedule of loss; and
    (vi) a skeleton argument from the Respondent.

**Witnesses**

15. The Tribunal were provided with the witness statements of:

    For the Claimant

    (a) The Claimant;
    (b) Mayurbarthi Goswami;
    (c) Shafi Mahamoud;

    For the Respondent

    (d) Piotr Mistur;
    (e) Enrique Parada;
    (f) Perry Avery;
    (g) Manpreet Kaur Gill; and
    (h) Nigel Harris.

16. The Respondent informed the Tribunal that Mr. Mistur was unwell and had a temperature of 38°c and therefore, he may be unable to attend the Tribunal but may be able to attend remotely to give evidence. The Tribunal asked the Respondent to make enquiries with Mr. Mistur as to whether or not he was able to attend remotely but stated that he should not feel compelled to if ill-health prevented him from doing so. The Tribunal was also informed by the Respondent that it had applied for, and was granted, a witness order for Mark Etherington but that Mr. Etherington had failed to respond to it and had not

attended the Hearing. In fact, the Respondent had had no contact from Mr. Etherington at all.

17. Whilst the Tribunal read all the statements in the witness bundle, in the case of witnesses who failed to attend the Hearing to have their evidence tested, the Tribunal only attached such weight, if any, to those statements as it felt appropriate.

18. The Tribunal heard oral evidence from: Enrique Parada; Perry Avery; Manpreet Kaur Gill; and Nigel Harris. The Respondent asked supplementary questions of these witnesses and the Tribunal asked questions of clarification where necessary.

**Applications**

19. The Respondent applied for the Tribunal to strike-out the aspects of the Claimant's claim which were out of time and to hear the Respondent's evidence on the remaining claims and accept the Claimant's ET1 as his pleaded case.

20. After deliberating, the Tribunal decided not to strike out any part of the Claimant's case but, pursuant to r.37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, to proceed with the Hearing in the Claimant's absence should he not attend on the morning of the second day. A strike-out is the most draconian measure a Tribunal can take and the Claimant would have had no notice and would have been unable to make any representations as to why it would be just and equitable to extend time.

## Findings of Fact

21. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this Judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was

taken to in the findings below but that does not mean it was not considered if it was referenced in the witness statements/evidence and considered relevant.

22. The Respondent, under a contract with Transport for London ('TfL'), operates public passenger transport bus services in and around Central, West and South London. The Claimant started his employment with the Respondent on, 24th March 2014. At the time of his dismissal, on 30th July 2020, he was employed as a bus driver. The Claimant had been in his role for six years.

23. The Claimant's employment contract contains a clause in respect of drugs and/or alcohol testing and states that failure to undergo such a test will amount to gross misconduct which could result in dismissal. Clause 26 of the Claimant's employment contract reads:

> '*The Company reserves the right to test for the use of drugs and/or alcohol. If you are requested to undergo a drug and/or alcohol test by a manager or supervisor, for any reason, you should agree. Failure to undergo such a test or tests will amount to gross misconduct and may result in your dismissal.'*

24. Clause 27 of the Claimant's employment contract states (so far as material):

> *'…The Company has a Drugs and Alcohol Policy which means it reserves the right to carry out random and for cause alcohol breath tests and for cause drug tests*.'

25. Clauses 26 and 27 are express provisions of the Claimant's employment contract and it is clear that a failure by an employee to undergo a drugs or alcohol test would constitute gross misconduct which may lead, ultimately, to dismissal.

26. The Respondent also had in place an 'Employment Policy Statements' document which incorporated policy statements on, but not limited to, grievances, alcohol at work, and drug abuse. The Alcohol at Work policy states:

> *'Any breach of these rules, or refusal/failure to comply with the breath testing*

*procedure, will be regarded as gross misconduct and will render an employee liable to summary dismissal.'*

27. During the COVID-19 pandemic ('the pandemic') the Respondent's policy statements on alcohol at work and drug abuse remained the same but new guidelines were issued, in May 2020, in respect of safe procedures for alcohol and drugs testing during the pandemic.

28. The new guidelines issued for drugs and alcohol testing - due to the pandemic - made changes to the way in which testing was carried out so that the process was compliant with best practice and undertaken in as safe manner as possible. The relevant changes were:

    (a) Additional PPE and safety equipment were to be used including single use nitrile gloves, face masks, cleaning wipes and nappy bags;
    (b) Specific rooms were identified in each garage that had sufficient ventilation and space to allow all participants to adhere to the social distancing guidelines; and
    (c) The subject was required to administer the test themselves under the instruction of the tester. To ensure that tests were conducted correctly, the policies were updated to provide a detailed explanation as to how the test should be conducted. These instructions were read to the employee prior to undertaking the test.

29. The testers were trained on the changes under the guidelines put in place after the pandemic.

30. The Respondent's Disciplinary Procedure provides a non-exhaustive list of behaviours which could constitute, *'gross misconduct/gross negligence.'* Contained within this list as an example of gross misconduct/negligence is, contravention of the Respondent's Alcohol at Work and Drug Abuse Policies. The Disciplinary Procedure also states that if the Respondent is satisfied that

gross misconduct/negligence has occurred, *'the result will normally be summary dismissal'* [83].

31. TFL had a practice of random screening for drugs and alcohol. The Respondent's HR department would generate a report which picks employee numbers at random for a drugs or alcohol test; the Respondent did not choose which employees were to be tested.

32. On 6th May 2020, the Respondent received a list of employees who worked from their Hounslow garage whom had been selected for random testing [179]. Amongst those on the list to receive a random drugs test were the Claimant and Piotr Mistur (Service Controller). Mr. Mistur is white and non-Muslim.

33. On 6th July 2020, Mr. Mistur approached the Claimant and informed him that he was required to participate in a random drugs screening test and asked the Claimant to follow him to a suitable room. The room used for the test had been adapted to meet the required pandemic guidance in place at the time. Yellow and black on floor strips were placed on the floor to ensure social distancing, sealed boxes of sterile apparatus were kept in a in briefcase until used, and the room met the guideline requirements for testing. The Claimant's witness, Mayurbarthi Goswami, accompanied them.

34. Mr. Mistur explained that due to the pandemic guidelines, the Claimant would have to administer the test himself under Mr. Mistur's instruction. Mr. Mistur followed a standard script and used the words, '*Do you consent to provide a sweat and saliva sample? Yes or no?*' Mr. Mistur had to put the question to the Claimant several times as the Claimant did not give him an equivocal answer. Eventually, the Claimant agreed to be tested as long as he did not have to: *'put anything I don't know in my mouth'* [186].

*35.* The same exchange continued between the Claimant and Mr. Mistur several times and eventually, the Tribunal find in exasperation, Mr. Mistur said: '*When I ask you, are we talking different languages?*' The Claimant responded and said: '...*I am not talking a different language, you can understand exactly what I am saying to you*.' By way of clarification, Mr. Mistur told the Claimant: '*Mr*

*Ibrahim we both speak English however, I am asking you a simple question, yes or no, and you keep refusing to give me an answer, yes or no.*' The Claimant was evasive and did not answer Mr. Mistur's question for a very long time. Mr. Mistur tried to explain to the Claimant that it was a straightforward question to answer by saying, *'you are going up against a wall…at a T junction it's left or right.'*

36. Due to what can only be described as an impasse, Mr. Mistur called his supervisor, Ryszard Blazewicz (Senior Controller) to the testing room and asked that Mark Etheridge (Service Delivery Manager) should attend too, if feasible; they both attended albeit Mr. Blazewicz attended before Mr. Etheridge.

37. The Claimant continued to answer the question Mr. Mistur had put to him but stated that he would provide a urine sample. At the point Mr. Etheridge entered the room Mr. Goswami had ten minutes left until the end of his shift so he then left to sign-off his shift. Soon after, Mr. Mistur also left the room as he had also come to the end of his shift.

38. As the Claimant did not agree to undertaking the saliva test Mr. Blazewicz offered him the opportunity to provide a urine sample which could be tested for the presence of drugs. The Claimant accepted to be tested in this way and Mr. Blazewicz organised for the Claimant to have a urine sample test.

39. Urine testing for drugs was not carried out by the Respondent but outsourced to an external company, 'SYNLAB.' Mr. Blazewicz remained with the Claimant until a technician from SYNLAB arrived at the Respondent's premises to take urine samples from the Claimant for analysis. The result from the urine test would normally be communicated to the Respondent by SYNLAB within three to five days. Mr. Blazewicz then informed the Claimant that he was suspended on full pay (except for rest days) pending the results of his urine test.

40. On 7th July 2020, Enrique Parada (Hounslow Traffic Manager) wrote to the Claimant confirming his suspension from duty and invited him to an investigation interview scheduled for 11.00am on 8th July 2020 at the Hounslow depot. The Claimant attended the interview and was handed a letter by Mr.

Parada outlining what had been discussed between them. Mr. Parada informed the Claimant that he would remain on suspension until the Respondent received the results of his urine test after which, the suspension would be lifted (if the results was negative) or a disciplinary interview would be held (in the case of a positive drugs test result).

41. The Respondent received the outcome of the Claimant's urine test from SYNLAB on 8th July 2020 and the result was negative.

42. On 8th July 2020, the Claimant attended an investigation meeting with Mr. Parada. Mr. Parada discussed, with the Claimant, what had occurred during the random drugs test on 6th July 2020. The Claimant explained that he was scared to take a drugs test as he was fearful of contracting COVID-19 and could not be sure that the testing equipment was not infected with it. Mr. Mistur had asked the Claimant several times if he consented to being tested but the Claimant did not provide an unequivocal answer.

43. It is the Claimant's contention that he handed Mr. Parada a written grievance at this meeting [232] and that it constituted a protected act. Mr. Parada has no recollection of having received the grievance and we find that the Claimant did not hand a grievance to Mr. Parada on 8th July 2020. Mr. Parada would have remembered receipt of a grievance complaining of discrimination, bullying and intimidation. The Claimant's grievance appears to have been signed by Mr. Parada although he does not recall doing this. Mr. Parada most likely passed on the Claimant's letter to a colleague without reading it or realising that it was a grievance.

44. On 20th July 2020, the Claimant was involved in an 'at fault' accident on the forecourt of the bus garage when he collided with a stationary bus in which Mr. Fojtik was seated. The collision occurred at around 8.00pm, the ground conditions were dry and there no issues of visibility as it was still a time of natural daylight.

45. Due to the nature of the collision, the middle door, offside front panel, side mirror and entire side-carriage of the Claimant's bus was damaged. There was panel damage to the bus the Claimant had collided into.

46. Perry Avery (operations manager) attended the scene soon after the collision and was surprised at the Claimant's demeanour. The Claimant was laughing and joking and not shaken, apologetic or frustrated.

47. Under the Respondent's Alcohol at Work Policy, employees are required to submit an alcohol test if they have been involved in a road traffic incident ('RTA') notwithstanding that the incident occurred on the garage forecourt and not a public road. This was a standard practice of the Respondent. Mr. Fojtik was not required to take an alcohol test as he was sitting in his stationary vehicle and therefore, had not contributed to the collision.

48. Mr. Avery informed the Claimant that due to the nature of the incident he would be required to undergo an alcohol test; the alcohol test took place in the Operations Managers office. The Claimant was asked by Mr. Avery if he would like a work colleague to be in attendance but the Claimant declined. However, also present in the Operations Managers office was Olga Ermolenko (Service Controller) who was to witness the test.

49. Whilst the Claimant agreed to being tested, he was unhappy to place any objects into his mouth. Mr. Avery explained that the equipment which the Claimant would have physical contact with (a tube which had to be blown into) was completely sterile, unused and contained within a sealed packet. Not persuaded by Mr. Avery's assurances the Claimant asked him to sign a piece of paper stating that Mr. Avery guaranteed that the Claimant would not contract COVID-19 and that he took full responsibility for the Claimant's health. Mr. Avery said he would not do this so the Claimant did not agree to undertake the test.

50. Mr. Avery explained to the Claimant that if he refused the test, Mr. Avery would have no option but to suspend him from duties as per the Respondent's policy. The Claimant did not agree to being tested so Mr. Avery suspended the

Claimant from duty and asked him to attend the garage at 10.00am the next day so that he could meet with a manager regarding the collision and his refusal to take an alcohol test.

51. On 21st July 2020, the Claimant attended an investigation meeting with Mr. Parada. Mr. Parada told the Claimant that there would be two investigations: One for the RTA; and one for refusal to be tested for alcohol. The Claimant provided Mr. Parada with his version of the RTA and stated that following it, he had refused to undertake a breathalyser test but would participate in a urine test.

52. The Claimant believed that he had been asked to take a breathalyser test because he had previously refused to undertake the random drug and alcohol test on, 6th July 2020. This was not the case. The requirement for the Claimant to provide a sample of breath, to be tested for the presence of alcohol, was because of the RTA. At the conclusion of the meeting, Mr. Parada confirmed to the Claimant that he had been suspended on full pay (except for rest days) whilst the investigations continued.

53. By a letter dated 21st July 2020, Mr. Parada invited the Claimant to attend a disciplinary hearing scheduled for 28th July 2020 to answer two allegations:

    (i) Unsatisfactory driving standards: colliding with another bus on site; and
    (ii) unsatisfactory conduct: refusing to follow the alcohol testing policy.

54. The Claimant was advised of his right to attend with a representative and that a possible outcome of the disciplinary hearing could be termination of his employment.

55. Manpreet Kaur Gill (General Manager) chaired the Claimant's disciplinary Hearing on 28th July 2020 and the Claimant attended accompanied by his colleague, Shafii Mohamoud. The Claimant told Ms. Gill that his trade union representative was unable to attend the hearing and was offered an opportunity to adjourn the hearing so that his trade union representative could attend. The Claimant confirmed that he was content to proceed with Mr. Mahmoud

accompanying him and that he had read the paperwork sent to him in advance of the hearing.

56. The Claimant admitted being at fault for the RTA and that it was a misjudgement and human error. MS. Gill then discussed the second allegation (refusing to follow the alcohol testing policy) with the Claimant.

57. It was explained to the Claimant that he had not being singled out as another colleague had been tested for alcohol on the same day. That colleague had complied with the request so was allowed to return to work. The Claimant accepted this and confirmed that he did not have any medical condition which prohibited him from participating in a breathalyser test. At the conclusion of the meeting Ms. Gill gave the Claimant the opportunity to ask further questions or make representations but the claimant declined.

58. On 30th July 2020, Ms. Gill wrote to the Claimant informing him of her outcome decision following the disciplinary hearing. In respect of the first allegation (colliding with another bus on site) the Claimant was given a stage one oral warning. Regarding the second allegation (refusing to follow the alcohol testing policy) the sanction imposed was summary dismissal for gross misconduct. Ms. Gill informed the Claimant of his right to appeal her decision to summarily dismiss him. Throughout her involvement in the process, Ms. Gill was unaware of any grievance the Claimant may have submitted.

59. On 2nd August 2020 the Claimant appealed against his dismissal complaining that the disciplinary action was unfair and that his evidence and defence were not taken into account. The Claimant did not mention the grievance he alleges he raised on 8th July 2020 [276].

60. Nigel Harris (General Manager) was appointed to chair an appeal panel to deal with the Claimant's appeal and he had no prior involvement with the disciplinary process. Mr. Harris was also unaware that the Claimant may have raised a grievance alleging discrimination or otherwise.

61. On 13th August 2020, Mr. Harris wrote to the Claimant inviting him to an appeal hearing scheduled for 3rd September 2020. The Claimant was informed of his right to be represented. Thereafter, there was various communications between the Claimant and Mr. Harris as the Claimant was experiencing difficulties in arranging a trade union representative to attend an appeal hearing with him. Eventually, it was agreed that an appeal hearing would proceed on 18th September 2020.

62. The Claimant attended the appeal hearing, on 18th September 2020, with his trade union representative. Mr. Harris chaired the appeal and was joined on the panel by Mr. Etheridge as a 'side-member.' Neither the Claimant nor his trade union representative objected to Mr. Etheridge being on the appeal panel.

63. The appeal proceeded and the claimant was given the opportunity to ask questions and make representations. At the conclusion of the appeal hearing Mr. Harris advised the Claimant that he would be notified of the appeal outcome once the panel had considered all the evidence and arrived at a decision. On 21st September 2020 Mr. Harris wrote to the Claimant with the appeal outcome; the Claimant's appeal was not upheld and the decision to summarily dismiss the Claimant remained unaffected.

## The Law

*Unfair Dismissal*

64. This important right is set out in s.94 Employment Rights Act 1996 ('ERA'), and by s.98, the employer has first to show a fair reason for the dismissal, in this case conduct. If that is shown, then the test of fairness under s.98(4) depends in part on the respondent's size and administrative resources. The Respondent is clearly a large organisation and so a very high standard of fairness is to be expected.

65. The question in unfair dismissal cases is not therefore whether the employee was guilty of the misconduct, but - broadly speaking – whether it was

reasonable of the employer to conclude that he was, and that he should be dismissed as a result.

66. As is well established from the case of *British Home Stores Ltd v Burchell* [1978] ICR 303 and others that question can be broken down further as follows:
    (a) Was there a genuine belief on the part of the decision-maker that the Claimant did what was alleged?
    (b) Was that belief reached on reasonable grounds?
    (c) Was it formed after a reasonable investigation?
    (d) Was the decision to dismiss within the range of reasonable responses open to an employer in the circumstances?

67. This 'range of reasonable responses' test (sometimes referred to as the 'band of reasonable responses') reflects the fact that whereas one employer might reasonably take one view, another might with equal reason take another. Tribunals are cautioned very strictly against substituting their view of the seriousness of an offence for that of the decision maker.

68. That applies not just to the reasonableness of the decision to dismiss but also to the process followed in coming to that conclusion. If a failing is identified in the disciplinary process it is necessary to ask whether the approach taken was outside that range, i.e. whether it complied with the objective standards of the reasonable employer: *Sainsbury's Supermarkets Ltd v Hitt* [2003] ICR 111.

69. However, it is well established that where an employee admits an act of gross misconduct and the facts are not in dispute, it may not be necessary to carry out a full-blown investigation at all: *Boys and Girls Welfare Society v Macdonald* . The Employment Appeal Tribunal in that case said that it was not always necessary to apply the test in *Burchell* where there was no real conflict on the facts.

70. Procedural fairness is nevertheless an important aspect and in considering it tribunals are required to take into account the guidance in the ACAS Code of Practice for Disciplinary and Grievance Procedures (2015).

*Race Discrimination*

Race as a Protected Characteristic

71. Race is a protected characteristic under the s.4 EqA 2010. According to s.9(1) of the EqA 2010, race includes:

(a) colour;
(b) nationality; and
(c) ethnic or national origins.

Direct Race Discrimination

72. S.13 EqA 2010 provides that, *'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.'*

73. Under s.23(1) EqA 2010, where a comparison is made, there must be no material difference between the circumstances relating to each case. It is possible to compare with an actual or hypothetical comparator.

74. In order to find discrimination has occurred, there must be some evidential basis on which we can infer that the Claimant's protected characteristic is the cause of the less favourable treatment. We can take into account a number of factors including an examination of circumstantial evidence.

75. We must consider whether the fact that the Claimant had the relevant protected characteristic had a significant (or more than trivial) influence on the mind of the decision maker. The influence can be conscious or unconscious. It need not be the main or sole reason, but must have a significant (i.e. not trivial) influence and so amount to an effective reason for the cause of the treatment.

76. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the '*reason why*' the Claimant was treated as he was.

77. S.136 EqA 2010 sets out the relevant burden of proof that must be applied. A two-stage process is followed. Initially it is for the Claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the Respondent, that the Respondent committed an act of unlawful discrimination.

78. At the second stage, discrimination is presumed to have occurred, unless the Respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to discharge that burden of proof, the Respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the Claimant's race. The Respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory.

79. Guidelines on the burden of proof were set out by the Court of Appeal in ***Igen Ltd*** v ***Wong*** *[2005] EWCA Civ 142; [2005] IRLR 258* and we have followed those as well as the direction of the court of appeal in the ***Madarassy*** case. The decision of the Court of Appeal in ***Efobi v Royal Mail Group Ltd*** [2019] ICR 750 confirms the guidance in these cases applies under the EqA 2010.

80. The Court of Appeal in ***Madarassy***, states:

'*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination*.' (56)

81. It may be appropriate on occasion, for the tribunal to take into account the Respondents' explanation for the alleged discrimination in determining whether

the Claimant has established a prima facie case so as to shift the burden of proof. (*Laing v Manchester City Council and others* [2006] IRLR 748; *Madarassy*) It may also be appropriate for the Tribunal to go straight to the second stage, where for example the respondent assert that it has a non-discriminatory explanation for the alleged discrimination. A Claimant is not prejudiced by such an approach since it effectively assumes in his favour that the burden at the first stage has been discharged (*Efobi* para 13).

82. We are required to adopt a flexible approach to the burden of proof provisions. As noted in the cases of *Hewage v GHB* [2012] ICR 1054 and *Martin v Devonshires Solicitors* [2011] ICR 352, they will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they may have little to offer where we in a position to make positive findings on the evidence one way or the other.

83. Allegations of discrimination should be looked at as a whole and not purely on the basis of a fragmented approach (*Qureshi v London Borough of Newham* [1991] IRLR 264, EAT. This requires us to '*see both the wood and the trees*' (*Fraser v University Leicester* UK EAT/1055/13 at paragraph 79).

*Victimisation*

84. S.27(1) EqA 2010 provides that:

> '*A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.'*

85. The definition of a protected act is found in s.27(2) EqA 2010 and includes:

(a) bringing proceedings under the Equality Act 2010;
(b) giving evidence or information in connection with proceedings under the Equality Act 2010;
(c) doing any other thing for the purposes of or in connection with the Equality Act 2010; and
(d) making an allegation (whether or not express) that an employer or another person has contravened the Equality Act 2010.

86. A grievance can amount to a protected act under s.27(2)(d) EqA 2010 without referring to the Equality Act 2010 and without using the correct legal language. It must however contain a complaint about something that is capable of amounting to a breach under the Equality Act 2010 (*Beneviste v. Kingston University* EAT 0393/05).

87. If the Tribunal is satisfied that a Claimant has done a protected act, it must then consider whether the Claimant has suffered any detriments and/or been dismissed *because of* the protected act.

88. The analysis the tribunal must undertake is in the following stages:

    (a) We must first ask ourselves what actually happened;

    (b) we must then ask ourselves if the treatment found constitutes a detriment or dismissal;

    (c) finally, we must ask ourselves, was that treatment because of the Claimant's protected act.

89. The essential question in determining the reason for the Claimant's treatment is what, consciously or subconsciously, motivated the respondent to subject the Claimant to the detriment? This is not a simple "*but for*" causation test, but requires a more nuanced inquiry into the mental processes of the Respondent to establish the underlying "core" reason for the treatment. In overt cases, there may be an obvious conscious attempt to punish the Claimant or dissuade him from continuing with a protected act. In other cases, the Respondent may subconsciously treat the Claimant badly because of the protected act. A close analysis of the facts is required.

*Unlawful Deductions from Wages*

90. S.13 of the ERA 1996 provides (so far as material),

***13 Right not to suffer unauthorised deductions.***

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

*(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
*(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*

*(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*
*(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
*(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*
….

## Analysis and Conclusions

*Unfair Dismissal*

91. The Claimant was dismissed for the fair reason of conduct; the Respondent summarily dismissed the Claimant for refusal to follow an alcohol screening test on, 20th July 2020.

92. Clause 26 of the Claimant's contract of employment provides that,

*'The Company reserves the right to test for the use of drugs and/or alcohol. If you are requested to undergo a drug and/or alcohol test by a manger or supervisor, for <u>any reason</u>, you should agree. Failure to undergo such a test or tests will amount to gross misconduct and may result in your dismissal.'* (Our emphasis).

93. Clause 27 of the contract stipulates,

*'The Company has a Drug and Alcohol Policy which means it reserves the right to carry out random and for cause alcohol breath tests and for cause drug tests.'*

94. The Respondent's Alcohol at Work Policy states that refusal or failure to comply with the breath test procedure, will be regarded as gross misconduct and may result in the summary dismissal of employment. The Respondent's Disciplinary Policy lists breach of the Alcohol at Work Policy as an example of gross misconduct.

95. The Claimant admitted to not providing a breath test for the use of drugs and/or alcohol following the 'at fault' collision on 20th July 2020.

96. Therefore, the Respondent had a genuine belief that the Claimant was guilty of misconduct and had reasonable grounds for that belief.

97. Mr. Parada, on behalf of the Respondent, carried out a prompt and reasonable investigation into the Claimant's refusal to undertake a breath test for alcohol and/or drugs. The Claimant's disciplinary hearing was conducted with equal fairness and it was entirely within the range of reasonable responses to summarily dismiss the Claimant.

98. The requirement for drugs and alcohol testing is to ensure the safety of the Respondent's service users and staff. A bus driver who operates a vehicle whilst under the influence of alcohol and/or drugs would be placing service users at great risk and therefore, it was entirely reasonable for the Respondent to make provisions for such tests in its policies and contracts of employment. Due to the dangers involved if bus drivers drove buses whilst under the influence of alcohol and/or drugs, it was also appropriate for the Respondent to view refusals to accede to testing for these substances to amount to an act of gross misconduct resulting in summary dismissal.

*Direct Race and/or Religion or Belief Discrimination*

99. The Claimant is black African and Muslim; these are protected characteristics.

100. As has been found above, the requirement for the random drugs test on 6th July 2020 was just that; a *random* drugs test. There is no evidence that the Claimant's race or religion played a part in him being asked to supply a random drugs test.

101. The Claimant was one of 10 employees who were to be screened for the random drugs test and they shared various protected characteristics. Ms. Mistur was randomly tested and he is white and not a Muslim. Therefore, it is not accepted that the reason the Claimant was tested or the manner the test was conducted was due to his race or religion.

102. Whilst the Tribunal accepted that Mr. Mistur mentioned '*going up against a wall*' this was in the context of explaining that if he was heading to a wall, he would have to turn left or right i.e. he was either agreeing to be tested for drugs or was refusing to do so. This was not a discriminatory comment.

103. Similarly and as discussed at paragraph 98 (supra.) the Respondent requiring the Claimant to provide a breath test for alcohol and/or drugs, following the collision on 20th July 2020, was not a discriminatory act. Due to the collision being the fault of the Claimant and his nonchalant and blasé attitude immediately after it, the Respondent would have been remiss in their duties to other staff and service users if they had not carried out the impugned test. The Tribunal further do not accept that the Claimant was denied the opportunity to have a witness present at the test. It is Mr. Avery's evidence that the Claimant was asked if he would like a colleague present but the Claimant said 'no.' Mr. Avery's evidence is preferred to that of the Claimant.

104. It is further accepted that the Claimant was told to go home as he was suspended on full pay but this was a statement of fact and not an act of discrimination.

*Victimisation*

105. The bundle contains a grievance dated 8th July 2020, said to have been submitted to the Respondent by the Claimant [232]. However, none of the Respondent's witnesses recall having seen it or having any knowledge of it. The Respondent's witnesses' evidence was that the first time they became aware of the grievance was when disclosure took place after the Claimant submitted his ET1.

106. The grievance contains a signature that appears to be Mr. Parada's but his evidence is that he cannot remember receiving or signing it and that his standard practice is to sign and date all documents he receives. The grievance does not contain a manuscript date.

107. Prior to the Disciplinary hearing, Mrs. Gill checked all files but did not discover the grievance then. The Claimant did not pursue his grievance at any point after he says he submitted it and did not mention it during the disciplinary or appeal hearings. Therefore the Tribunal accepts the evidence of the Respondent's witnesses that they were unaware of his grievance and thus, the Claimant's victimisation claim fails.

*Unlawful Deductions from Wages*

108. The Claimant was paid all monies owed by the Respondent when his employment was terminated. The Claimant was not paid for his rest days whilst on suspension as he was not working and this is as per the Respondent's practises. Therefore, the Claimant is not owed one week's pay as claimed.

109. For these reasons the Claimant's claims are not well founded and are dismissed.

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Employment Judge Sudra

Date: 6th December 2023