EMPLOYMENT TRIBUNALS

Claimant:	Mr Ali Hassanuddin
Respondent:	Metroline Travel Limited
Heard at:	Bury St Edmunds (via CVP)
On:	20, 21, 22, 23, 24, 28 November 2023 12 December 2023 (in chambers)
Before:	Employment Judge Graham
Members:	Mrs B Handley-Howarth Mr S Holford

Representation

Claimant:	In person
Respondent:	Ms S Chan, Counsel

RESERVED JUDGMENT

It is the unanimous decision of the Employment Tribunal that:

1. The complaints of direct race discrimination fail and are dismissed.

2. The complaints of harassment related to race fail and are dismissed.

REASONS

Introduction and procedural history

1. By claim form dated 23 August 2021 the Claimant complains of direct race discrimination, and harassment related to race.

2. A response denying the claims was filed by the Respondent on 12 November 2021. The Respondent had raised an issue in the ET3 that no particularisation of the claims had been included.

3. An examination of the Tribunal's electronic and paper files suggests that the Claimant had sent his particulars with the ET1 form on 23 August 2021 in RTF format, however the Tribunal did not forward these on to the Respondent until 15 March 2022, at which time the Respondent was granted permission to file an Amended Response by 5 April 2022. Unfortunately due to another error this was not done because the Tribunal used the wrong email domain, thus the particulars were not received by the Respondent until either the day of the preliminary hearing below, or some time afterwards.

4. Until the date of the preliminary hearing the Respondent had no knowledge as to what the claim was about. This is not the fault of the Claimant who had sent the information with his ET1, it was simply a series of unfortunate events at the Tribunal.

5. Following a private preliminary hearing for case management on 6 October 2022 where the issues were agreed, the Claimant was directed to provide additional information concerning his claim by 24 October 2022 following which the Respondent had permission to file an Amended Response by 22 November 2022. Both of these documents were received.

Issues

6. The Case Management Summary of 6 October 2022 produced by Employment Judge Daniels lists the following Issues.

2.1 Direct Discrimination on Grounds of Race (s.13 Equality Act 2010 'EqA')

(i) Has the respondent subjected the claimant to the following treatment (the claimant is of Asian (Pakistani) ethnic origin):

A On 31st October 2019 Mr Wozniak (a Polish employee of the respondent and another bus driver) punched the claimant's can of drink and acted aggressively and dismissively when the claimant asked him to apologise;

B On 2nd March 2020 Mr Wozniak was taking pictures/filming him at a bus stand (which the claimant then reported to management);

C The respondent via Ms Anna Tkaczyk (who is also Polish) the Operations manager, failed to properly deal with his complaints about Mr Wozniak between 31 October 2019 and 5 March 2020;

D The (General Manager) Yvonne Dawson threatened to transfer the claimant to another garage on 5 March 2020;

E From 10 March 2020, after a further grievance was submitted about Mr Wozniak's treatment of him, the managers at West Perivale allegedly did not deal with this complaint properly either.

F On 22nd August 2020 Mr Wozniak intentionally blocking the claimant's vehicle in Norwood road Southall when coming in the opposite direction at a known narrow spot leading to a traffic jam and a road diversion;

G Anna Tkaczyk allocated the grievances to herself on 4 September 2020 (even though she is alleged to have had a potential conflict);

H The company's delay in dealing with the grievance hearing and outcome;

I After 22nd September 2020 when the claimant submitted an occurrence report submitted against Mr Wozniak for using a mobile whilst standing next to the bus driver's cab and leaning inside, the Claimant did not receive any reply from the company at all;

J From 16th June 2021 the company did not deal with the further grievance against Mr Wozniak (regarding him not giving way at the right time (on that day)) and there was an unnecessary and excessive delay in the hearing and outcome);

K The company not permitting the claimant to appeal against the grievance outcome or outcomes;

L On 15th August 2021 the Operations Manager Anna instructing the allocation team to stop agreeing to informal requests for changes to his working hours, made by the claimant, (which was then part of his grievance);

M On or about a date to be specified management allocated the space of the "90 regular rota" (which is a favourable route and which would have enabled him to avoid Mr Wozniak who he felt was mistreating him) to a new driver; and/or

N After the Claimant contacted the regional director Nick (on a date to be specified by the claimant) asking him to revisit the appeal, the employer allegedly refused to comment on it and did not respond further.

(ii) If so, did any of the treatment listed under above amount to less favourable treatment of the Claimant (as a person of Asian/Pakistani ethic origin) compared with how a hypothetical comparator would have been treated by the Respondent?

(iii) If so, was the difference in treatment because of the Claimant's race/ ethnic origin)?

7. Unfortunately, the Claimant's harassment complaints were not clarified at the preliminary hearing. The Claimant was directed by Employment Judge Daniels to confirm which of the above complaints were relied upon as harassment. The Claimant did not do so therefore I spent some time with the Claimant at the start of this final hearing identifying which of the above are relied upon for this claim. The Claimant confirmed that Issues A, B, D, F and L were relied upon. Accordingly, the issues as respect the harassment complaints are as follows:

2.2 Did the respondent engage in conduct as follows:

A On 31st October 2019 Mr Wozniak (a Polish employee of the respondent and another bus driver) punched the claimant's can of drink and acted aggressively and dismissively when the claimant asked him to apologise;

B On 2nd March 2020 Mr Wozniak was taking pictures/filming him at a bus stand (which the claimant then reported to management);

D The (General Manager) Yvonne Dawson threatened to transfer the claimant to another garage on 5 March 2020;

F On 22nd August 2020 Mr Wozniak intentionally blocking the claimant's vehicle in Norwood road Southall when coming in the opposite direction at a known narrow spot leading to a traffic jam and a road diversion;

L On 15th August 2021 the Operations Manager Anna instructing the allocation team to stop agreeing to informal requests for changes to his working hours, made by the claimant, (which was then part of his grievance).

(i) If so, was that conduct unwanted?

(ii) If so, did it relate to the protected characteristic of race?

(iii) Did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Procedure

8. We were provided with a hearing bundle of documents of 249 pages together with a witness statement from the Claimant, and also witness statements from Anna Tkaczyk, Yvonne Dawson, Jonathan Parry, Nick Faichney and James Wright for the Respondent. The hearing was originally listed for seven days but was reduced to six days due to lack of judicial resource. There was no prejudice to the parties as the seventh day was intended to be for deliberations, and this took place on 12 December instead.

9. The hearing took place via CVP. The CVP worked well save for a few instances where there was a delay on the feed, the parties were asked to wait whilst the Tribunal logged out and back in again. Unfortunately, counsel for the Respondent encountered some issues with her connection which were resolved. The fairness of the hearing was not impacted as we factored breaks around this.

10. The Claimant is a litigant in person and is unfamiliar with the Tribunal process. I therefore had to assist the Claimant with framing his questions, putting his case to the Respondent, and asking relevant questions. The Respondent did not object to the assistance provided to the Claimant.

11. The parties' closing submissions were presented on the sixth day of the hearing after we finished hearing evidence from Jonathan Parry as the Respondent's final witness. Ms Chan, counsel for the Respondent, went first and relied upon her 13 pages of submissions which she briefly supplemented orally. The Claimant had the Respondent's written submissions beforehand, and we granted him a break of almost two hours to update his written submissions which had already been prepared. This was to allow the Claimant to add anything with respect to Mr Parry's evidence, and also to give him time to read Ms Chan's written submissions. The Claimant made some brief oral submissions to supplement his written ones.

12. The hearing then adjourned and was reconvened on 12 December 2023 for the Tribunal panel to deliberate.

Application for disclosure

13. Prior to the hearing on 5 November 2023 the Claimant applied for an order for specific disclosure against the Respondent. The Claimant was seeking the performance records for three members of the Respondent's staff. These were Anna Tkaczyk (Deputy Head of Transport Safety, previously Operations Manager), Yvonne Dawson (General Manager), and Earnest Wozniak (former bus driver). Mrs Tkaczyk and Mrs Dawson were due to attend the hearing as witnesses, Mr Wozniak was not.

14. The basis for the application was that the Respondent had put the Claimant's performance records in the hearing bundle, therefore he wanted to see theirs. Once I explained to the Claimant that the test for disclosure was relevance, he then asserted that these documents were relevant. The Respondent objected to that application.

15. We were not satisfied that the documents were relevant. The applications with respect to Mrs Tkaczyk and Mrs Dawson appeared to be entirely without any basis whatsoever. We therefore rejected those applications.

16. As regards Mr Wozniak, we noted that like the Claimant he was a bus driver (unlike Mrs Tkaczyk and Mrs Dawson) however his employment had ended in or around March 2022. There was a history of counter complaints between the Claimant and Mr Wozniak. We also noted that the Respondent was accused of treating the Claimant less favourably than Mr Wozniak due to race. However, we also noted that the Respondent did not suggest that it had issued Mr Wozniak with anything other than advice and guidance, it did not suggest that it had disciplined him at any time. The Claimant did not suggest that Mr Wozniak or he had been disciplined either.

17. Had the Respondent argued that Mr Wozniak had been disciplined and the Claimant sought to dispute that, then the records may have been of some relevance. However, this is not what the claim was about. The most that either of these two drivers had received was advice and guidance from the Respondent. There was no dispute between the parties that Mr Wozniak had not been disciplined, rather the Claimant's assertions are that Mr Wozniak should have been disciplined formally.

18. Accordingly the performance records of Mr Wozniak were not relevant to the issues to be decided in this case and the panel rejected the Claimant's application. The Claimant suffered no prejudice by this decision, and he was able to vigorously press his case that the Respondent had not acted upon his complaints against Mr Wozniak.

Alleged spoilation

19. At the same time as his application for disclosure, the Claimant notified the Tribunal that he believed that the Respondent had deliberately destroyed evidence – specifically an alleged email of 12 August 2021 sent from Mr M Farrukh (Allocations Officer) to Yvonne Dawson (Garage Manager) in which he allegedly complained that Mrs Tkaczyk had threatened to remove him from his position as Allocations Officer if he became a witness in the Claimant's grievance. The grievance in question was dated 15 August 2021 concerning a decision to remove the Claimant from a (route) Preferences List. The Claimant says that the Respondent's solicitor informed him that Mrs Dawson routinely deletes emails every 6 months so it no longer existed, the Claimant alleged that this was spoilation.

20. Having reviewed the list of issues this appeared to potentially relate to Issue L, the alleged decision of Mrs Tkaczyk to remove the Claimant from the Preferences List, however it was very much on the periphery as the handling of the Claimant's grievance of 15 August 2021 was not one of the agreed issues to be decided by the Tribunal. The issue related to the decision itself to remove the Claimant.

21. I asked the Claimant what action it was that he wanted the Tribunal to take, given that if the email had been deleted then we cannot order disclosure of something which does not exist. As the Claimant was unsure what action he wanted us to take, I informed him that he could question Mrs Dawson on this matter and that the Tribunal would listen carefully to her answers and form its own view and then draw whatever inferences were appropriate. I asked the Claimant twice whether he had sought to obtain a copy of the alleged email from Mr Farrukh, however the response was that he had not.

22. Following an answer from Mrs Tkaczyk under cross examination on 22 November, it appeared that she may still hold a document which was relevant to Issue L concerning the Preference List decision. Upon my request, during the hearing the Respondent obtained and disclosed an email dated chain dated 12 - 15 August 2021 between Mr Stavros Heracleous and Mrs Tkaczyk which helped to explain how the decision to remove the Claimant from the Preference List had been taken. It had not been disclosed before, however this was a relevant document. This was a very short email and the Claimant had the opportunity to review it and to question the witnesses on the contents.

23. The Claimant persisted with his allegations that Mr Farrukh had sent an email on 12 August 2021 about the Preference List. Mrs Tkaczyk in her evidence suggested that she had seen something, although it was not clear what she had seen. I therefore I asked the Respondent's counsel to take instructions overnight and for the Respondent to double check whether this alleged email exists, and if so, to provide a copy to the Claimant and the Tribunal (redacted if necessary).

24. That evening we were provided with four documents which were screen shots of messages on the Respondent's "Blink" system which we understand to be some form of messaging app. The screen shots were a message from Mr Farrukh to Mrs Dawson on 15 August 2021 in which he complained that Mrs Tkaczyk had removed him from allocation duties. The response from Mrs Dawson was that this was temporary whilst investigations into grievances were submitted. The contents of those messages did not appear to be directly relevant to Issue L or any of the other issues in the claim.

25. It appeared to the Tribunal that there had not been any spoliation of evidence, and if the email of 12 August 2021 existed, and even if it said what the Claimant said that it did, it was not relevant to any of the legal issues to be decided in the case.

Application for Amendment

26. A Tribunal cannot determine a claim until it knows what the complaint is. This is clear from the case of ***Cox v Adecco Group UK & Ireland and others*** **[2021] ICR 1307** (although that case related to a strike out, the principle remains the same). On the first day of the hearing I sought to clarify the Issues with the parties as some of them appeared to be inadequately particularised notwithstanding the earlier private preliminary hearing and directions that had been issued. Whilst doing so it appeared that there was some confusion with Issue K below:

"K The company not permitting the claimant to appeal against the grievance outcome or outcomes."

27. The Claimant had seven complaints and grievances. It was therefore incumbent upon me to ask the Claimant to confirm which grievances Issue K related to, and he informed me that he was referring to his grievances of 23 August 2020 and 16 June 2021, where he received the grievance outcome on 3 October 2021. The Claimant said he had sent an appeal on 7 October 2021, and following which he sent a further email to the Respondent asking for an update on 22 October 2021. The Claimant said that he had not been permitted to appeal the grievance outcomes.

28. The Respondent disagreed and said that they had been under the impression that the Claimant was referring to one of his other grievances or complaints. When I pressed why, counsel for the Respondent pointed out that Issue K could not possibly have been referring to the grievance outcome the Claimant had said as his ET1 was issued on 23 August 2021 which was **before** the grievance outcome on 3 October 2021. It should be noted that the outcome was dated 16 September 2021 but it was not received by the Claimant until 2 October 2021 in hardcopy which he did not collect and was then re-sent on 3 October 2021. The Claimant could not possibly have been referring to something which had yet to occur at the time of issuing his claim – the grievance outcome had not been issued at that time so it could not possibly have been that which Issue K was referring to. The Respondent said that this was not a relabeling exercise and that an amendment application would be necessary.

29. It should be noted that whereas the Respondent's belief that the Claimant was referring to another grievance is plausible, the Claimant did make passing reference to not being allowed to appeal the grievance outcome of 16 September 2021 in his witness statement. This had not been picked up by the Respondent.

30. Nevertheless I agreed with the Respondent that the ET1 could not possibly have been referring to matters which had yet to occur. By the time he issued his ET1 on 23 August 2021 the grievance outcomes had yet to be delivered. It is the ET1 which sets out the case the Respondent has to meet – not any other document.

31. It was unsatisfactory that both sides had allowed this matter to proceed to hearing without clarifying which one of the grievances Issue K related to.

32. I again asked the Claimant to first consider whether Issue K referred to another grievance. The Claimant informed me that he was referring to the grievance outcome of 3 October 2021. It is clear from the case of ***Chapman v Simon*** **[1994] IRLR 124** that the jurisdiction of the Tribunal is limited to complaints which have been made to it. It is also clear from the case of ***Chandhok v Tirkey*** **[2015] ICR 527** that:

"The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made— meaning, under the Employment Tribunals Rules of Procedure 2013 (SI 2013/1237), the claim as set out in the ET1." [16]

33. As the claim was not set out in the ET1 I therefore informed the Claimant that he would need to make an application to amend his claim if he wished to pursue that complaint. The Claimant made his application which the Respondent objected to.

34. The Claimant's argument was that he thought that Issue K was already included in his claim lodged on 23 August 2021 and that no one had raised it with him before and ACAS had given him some advice on a continuing act. The Claimant referred us to two pieces of correspondence in the bundle **[bundle page 221-225]** where on 7 October 2021 he had asked to appeal the decision of Mr Parry dated 16 September 2021 (received on 2 and 3 October 2021) dismissing two of his grievances. We were referred to the Claimant's email on 22 October 2021 where he chased the Respondent for an update. The Claimant's argument was that this was all part of a continuing act. The Claimant said that this had been discussed with Employment Judge Daniels at the previous private preliminary hearing on 6 October 2022 and it was allowed to proceed.

35. Having reviewed the Case Management Summary of 6 October 2022 there was no record of this discussion. I noted that within that Case Management Summary Employment Judge Daniels had specifically ordered:

"The claimant is ordered by 24 October 2022, to provide, by reference to the list of detriments set out above only, further particulars of which such claims he pursues, under which type of claim (s13 or s26), and against which person/s. In regards to each alleged claim, being pursued, full details of which type of claim is being brought, against which personal persons, and with dates included. If he raises an incident only as background and not as an alleged act of discrimination this should be made clear in the particulars."

36. The Claimant provided his additional information on 26 October 2022 – whereas he provided some information about some of the other issues, when it came to Issue K he said *"Not sure about this point as there is no date or details mentioned."* The dates had not been provided by the Claimant, therefore the particulars of Issue K remained unresolved until I raised them on the first day of the hearing.

37. For the Respondent, their argument was that the complaint regarding the 3 October 2021 grievance outcome had not been raised before, this was not a relabeling exercise putting a new label to already pleaded facts, it was a brand new complaint, and that it would cause them significant prejudice as the hearing had started, none of the Respondent's witnesses who had been called and who had provided witness statements were the correct people to deal with it, and it would involve bringing an additional witness (Darren Hill) and producing a new witness statement for that witness.

38. The panel adjourned to deliberate on the Claimant's application. We paid attention to the Presidential Guidance on General Case Management – Guidance Note 1, and of course noted that *"Claimants must set out the specific acts complained of, as Tribunals are only able to adjudicate on specific complaints. A general complaint in the claim form will not suffice. Further, an employer is entitled to know the claim it has to meet."*

39. The approach to be adopted when considering applications to amend has been recently considered in the matter of ***Vaughan v Modality Partnership Limited*** **[2020] UK EAT 0147/20**. Here it was noted that the Tribunal has a broad discretion when considering applications to amend and it was noted that the key test for considering amendments has its origin in the decision of ***Cocking v Sandhurst (Stationers) Ltd*** **[1974] ICR 650**:

    "In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused." [657BC]

40. Moreover in ***Selkent Bus Co Limited v Moore*** **(1996) ICR 836** it was said:

    "Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it." [843D]

    And:

"Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment." [844B]

41. It was also observed in ***Vaughan*** that in ***Transport and General Workers Union v Safeway Stores Ltd*** **UKEAT/0092/07** the court noted that that on a correct reading of ***Selkent*** the fact that an amendment would introduce a claim that was out of time was not decisive against allowing the amendment, but was a factor to be taken into account in the balancing exercise.

42. The list of factors espoused by Mummery J in ***Selkent*** as examples of factors that may be relevant to an application to amend ("the Selkent factors") should not be taken as a checklist to be ticked off to determine the application (per Underhill LJ in ***Abercrombie v Aga Rangemaster Limited*** **[2014] ICR 209** [47]), but are factors to take into account in conducting the fundamental exercise of balancing the injustice or hardship of allowing or refusing the amendment. Further in ***Abercrombie*** Underhill LJ stated:

"Consistently with that way of putting it, the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted." [48]

43. It is necessary to focus upon the practical consequences of allowing an amendment when conducting the balancing exercise – what will be the effect if the application is approved or rejected? As per Tayler J in ***Vaughan***:

"Refusal of an amendment will self-evidently always cause some perceived prejudice to the person applying to amend. They will have been refused permission to do something that they wanted to do, presumably for what they thought was a good reason. Submissions in favour of an application to amend should not rely only on the fact that a refusal will mean that the applying party does not get what they want; the real question is will they be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence. This is not a risk-free exercise as it potentially exposes a weakness in a claim or defence that might be exploited if the application is refused. That is why it is always much better to get pleadings right in the first place, rather than having to seek a discretionary amendment later." [22]

44. It is therefore appropriate to consider the ***Selkent*** factors (but not to the extent that they become merely a check box exercise). These are:

i. the nature of the amendment

ii. the applicability of time limits

iii. the timing and manner of the application.

45. These are merely examples of factors which may be relevant to consider. Each application will be different and will require an assessment of the circumstances of each case. There may be a situation whereby a minor amendment if refused may cause great prejudice to a claimant who would not be able to pursue an important of their claim. Likewise, an amendment if granted may cause a respondent prejudice in having to defend a claim it would not otherwise have to, and one which may have been dismissed as out of time had it been brought as a new claim on a fresh ET1. Clearly some prejudice may be experienced if witnesses have left their roles or documents have been lost in the interim, as well was additional costs. Accordingly, it is clear to see that each application must be viewed in its own particular circumstances – there are no automatic presumptions.

46. The overriding principle is the balance of justice between the parties rather than any specific factor weighing more heavily than others. It is of course possible to balance the additional expense faced by a party by an award of costs against the applicant, although costs remain relatively rare in the Tribunal, and it would depend upon the paying party's means and ability to pay. Moreover, costs will not help where witnesses have gone away or documents have been lost.

47. In ***Vaughan*** it was noted that:

    "An amendment that would have been avoided had more care been taken when the claim or response was pleaded is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional cost; but while maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice." [28]

48. The panel considered the submissions from both parties. It was clear to the panel that the complaint at Issue K was not in the ET1 and that an amendment application was necessary because the facts giving rise to it had not occurred at the time the ET1 was issued on 23 August 2021. This was therefore not a relabeling exercise. It was also clear that there had been a failure by the Claimant to put a date on Issue K even when directed by the Tribunal at the preliminary hearing for case management on 6 October 2022.

49. The Respondent appears not to have raised this with the Claimant at the time, and it proceeded on the assumption that he was referring to another one of the Claimant's seven complaints or grievances. Whereas it would have assisted had the Respondent queried this much earlier, as this is the Claimant's case it is for him to prosecute it. It appeared to the Tribunal that there was no good reason for those dates not having been mentioned earlier, especially when the Claimant had attended a preliminary hearing and had been directed to provide additional information for each of the issues. Had the Claimant addressed this when he responded to the Tribunal on 26 October 2022 when he provided his additional information, then the issue would likely have been resolved earlier – as it had not it was necessary for it to be resolved at the start of this hearing.

50. It was therefore relevant to the panel that the Claimant had failed to properly particularise issue K even when he was directed to do so by Employment Judge Daniels. It was a key factor that the Claimant had delayed in dealing with this matter for almost a year despite knowing that clarification by him was needed with respect to Issue K.

51. We also took into consideration that the grievance appeal was lodged on 7 October 2021, it was now 20 November 2023, and the complaint would quite clearly be long out of time in any event for the purposes of s. 123 Equality Act 2010. Over two years had elapsed since the Claimant sent that email on 7 October and a chaser on 22 October 2021.

52. We also considered the issue of prejudice and the balance of injustice and hardship to the parties. It was the view of the panel that there would be some prejudice to the Claimant if the amendment was refused as he would be denied the opportunity to pursue the allegation that the Respondent had refused to allow him to appeal the grievance outcome in relation to his grievances of 23 August 2020 and 16 June 2021 and the outcome, however the panel noted that the subject matter of those grievances (Mr Wozniak blocking the road with his bus) were issues to be decided by the Tribunal, moreover the person who heard the grievance, Mr Parry, is a witness who will be giving evidence. We also noted that if the Claimant's claims regarding the subject matter of those grievances succeeded then he would be entitled to ask to be awarded financial compensation. We also noted that the Tribunal would be examining the handling of the Claimant's other complaints and grievances, including any delay, therefore the prejudice to the Claimant appeared to be limited.

53. Conversely we found that there would be significant injustice and hardship to the Respondent as it would have to bring an additional witness to the Tribunal hearing which had already started, the witness would need to produce a new witness statement, and that would involve the expenditure of costs and also potentially increase the length of the hearing which had been listed for over a year. This would need to take place whilst a hearing was underway which would cause some disruption. One option would have been to have postponed the final hearing however the panel noted that this matter had already taken just over two years to reach trial. A postponement may have meant that the hearing would not take place until the end of the following year or possibly later, and this would have involved an exceptional time for the matters in the original ET1 claim form to reach trial.

54. We did not have sufficient information in front of us to consider the merits of the proposed amended claim. It appeared at its highest to be a bare allegation that the failure to deal with a grievance appeal, either at all or at least in a timely way, amounted to an act of direct discrimination. We were not in a position to weigh the strengths of the claim and therefore did not do so as it was clear that live witness evidence would be needed.

55. Having assessed the submissions made by both parties, and having carried out a balancing exercise, the panel were of the view that the Claimant's application should be refused because the Respondent would suffer a greater injustice and hardship in the amendment being allowed than the Claimant would by it being refused.

56. We therefore concluded that it was in the interests of justice to refuse this application and in accordance with the Overriding Objective under Regulation 2 of the Employment Tribunal Regulations 2013 to deal with cases fairly and justly.

Findings of fact

57. From the information and evidence before the Tribunal it made the following findings of fact. We made our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgment all of the evidence which we heard but only our principal findings of fact, those necessary to enable us to reach conclusions on the issues to be decided.

58. Where it was necessary to resolve conflicting factual accounts, we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against any contemporaneous documents. We have not referred to every document we read or were directed or taken to in the findings below, but that does not mean they were not considered.

59. The Claimant is employed by the Respondent as a bus driver at the Respondent's Lampton Bus Garage in London. The Claimant's employment commenced on 19 August 2013. The Claimant previously worked at the Perivale West Bus Garage until it closed in March 2022.

60. The Respondent is a large bus company with several garages and routes in and around London and other areas. The Respondent's employees come from a diverse background with the high number of employees from Asian, African, and European countries in particular. The former West Perivale garage had a high number of Polish employees, representing approximately 20% of the work force.

61. The Claimant has raised a succession of grievances and other complaints since around October 2019. Due to the number of complaints it may assist if we put these in a table below for ease of reference.

No.	Date	Details
1	31.10.19	Complaint that Mr Wozniak punched the Claimant's can of drink.
2	05.03.20	Complaint that Mr Wozniak filmed the Claimant at the bus station.
3	09.03.20	Complaint against management (Mrs Tkaczyk, Mrs Dawson and Mr Morrison) for treating the Claimant unfairly.
4	23.08.20	Complaint that Mr Wozniak blocked the Claimant's bus.

5	22.09.20	Complaint that Mr Wozniak used a mobile phone next to the bus.
6	16.06.21	Complaint that Mr Wozniak did not give way whilst driving his bus.
7	15.08.21	Complaint that Mrs Tkaczyk removed Claimant from allocation preference list.

First complaint against Mr Wozniak – 31 October 2019

62. On 31 October 2019 the Claimant completed an Occurrence Report in which he complained of bullying and harassment. An Occurrence Report is a way of passing information to management, for example that there is an issue with a vehicle, to explain why a bus did not complete a route, or even to raise health and safety concerns.

63. In his report, the Claimant complained that his colleague Mr Wozniak had punched the Claimant's can of drink whilst at the bus station and acted rude and aggressively when the Claimant asked him to apologise. The Claimant also said of Mr Wozniak *"… he is showing some stupid signs to every oncoming bus driver, just to tease, bully or upset them, you can call the following drivers into your office and ask them – Kosova, Nuno, Sheikh Nadeem."* The Claimant also alleged that Mr Wozniak did not follow the dress code, and that he wanted strict action taken against him.

64. There was no mention of racial discrimination in the Claimant's Occurrence Report, although we note that the Claimant said that Mr Wozniak made signs towards every oncoming bus driver – there was no suggestion that it was directed to drivers of any particular race.

65. The matter was passed to Anna Tkaczyk as Operations Manager to deal with. Mrs Tkaczyk accepted during the hearing that this was a grievance. We will refer to this as grievance one. Mrs Tkaczyk was the Claimant's line manager and is of Polish national origin as is Mr Wozniak.

66. Mrs Tkaczyk recalls that she formed the view that the matter of a can of drink was petty. It appeared to the Tribunal that this preliminary view formed by Mrs Tkaczyk that the matter was petty influenced her subsequent handling of the matter.

67. On 2 December 2019 Mrs Tkaczyk met with the Claimant to discuss his grievance. Mrs Tkaczyk could not recall why she had not met the Claimant earlier to discuss his grievance, however she said that the delay in the outcome was due to the lead up to Christmas so the garage was extremely busy. The Tribunal notes that this was the period before the COVID-19 pandemic, and the passage of time in the intervening four years up to the date of the hearing might explain why Mrs Tkaczyk cannot remember the specific reasons for the delay, although we accept that she would have had her day job to do in addition to dealing with the Claimant's grievance.

68. We were referred to a copy of the handwritten notes of the meeting between Mrs Tkaczyk and the Claimant however these were of a poor copy and were generally illegible. In any event it is not disputed that the meeting took place.

69. The following month on 17 January 2020 another driver, Mr Bilal Sikander, brought a grievance against Mr Wozniak in which he argued that he was being bullied by him. There was no mention of race discrimination in that complaint either. The complaint said:

"I would like to complain regarding unprofessional behaviour and rude behaviour of 120 rota driver Wozniak, as he has been continuously bullying me from past several weeks by putting the bus's assault alarm on purposely and laughing while driving past me and inappropriate hand gestures."

70. Whereas the complaint from Mr Sikander concerns different forms of behaviour by Mr Wozniak, we of course note that the Claimant and Mr Sikander are both Asian Pakistani. The Claimant was questioned about his failure to mention race discrimination in his earlier complaints. The Claimant gave evidence that he started to think the behaviour of Mr Wozniak might be related to race after Mr Sikander's complaint, although he wasn't sure.

71. Mrs Tkaczyk interviewed Mr Wozniak on 23 January 2020. Mrs Tkaczyk made handwritten notes of the conversation, however again regrettably these are of a poor copy and are generally illegible. We should note that paragraph 8 of Mrs Tkaczyk's tribunal witness statement is incorrect as the names of Mr Wozniak and the Claimant were transposed, and this had to be corrected at the hearing.

72. Mrs Tkaczyk's evidence was that she found Mr Wozniak to be a peculiar individual, she said that he was ex Army, he was unpopular with the other drivers, and he appeared to not have much in the way of feelings or emotions. Mrs Tkaczyk said that when she spoke to him he was very apologetic about the can incident and that he said he thought that it was empty when he punched it on the way to the toilet, and then an argument ensued between him and the Claimant when he came out of the toilet and that had he realised it belonged to someone he would not have punched it. It appears that the can was either on a table or a pedestal.

73. Mrs Tkaczyk says that she told Mr Wozniak not to do that in future and she issued him with advice and guidance as she did not believe that he had done this deliberately as she accepted that he thought the can was empty, and he was genuinely remorseful. Mrs Tkaczyk was clear that she did not believe there was any racial motivation behind this incident. No other witnesses were interviewed as part of this investigation, and Mrs Tkaczyk's evidence was that it was not necessary as the can punching was not in dispute.

74. Herein lies the genesis of the rest of this claim. The Claimant has remained dissatisfied that Mrs Tkaczyk did not interview any other witnesses, and that Mr Wozniak was not disciplined. The Claimant has raised repeatedly raised these issues in the intervening period.

75. Mrs Tkaczyk says that she also spoke to Mr Wozniak about Mr Sikander's complaint, during which Mr Wozniak told her that every time he drove past

another Metroline bus driver, he would pull funny faces just to make the day more interesting. Mrs Tkaczyk says she informed him that this was not appropriate.

76. Mrs Tkaczyk issued the Claimant with the grievance outcome on 4 February 2020 in which she informed him that she had dealt with the matter in accordance with the Respondent's procedures, but she could not disclose the outcome of any interview because the contents are confidential between her and the employee concerned.

77. Mrs Tkaczyk admitted during the course of her evidence that this grievance could have been handled better as it had taken three months which was a long time, the outcome was not clear, and the Claimant was not informed of his right to appeal - Mrs Tkaczyk denies that this had anything to do with the Claimant's race. Whereas the Claimant was not notified of his right to appeal this outcome, the Respondent did consider the issue when the Claimant raised subsequent grievances. Jonathan Wright considered it as part of the grievances he subsequently dealt with in October 2020, and then it was considered by Mr Faichney at the appeal stage. Both made findings about the manner in which Mrs Tkaczyk handled the 31 October 2019 grievance – these are addressed below.

Mr Wozniak's complaint against the Claimant – 3 March 2020 and Claimant's complaint against Mr Wozniak – 5 March 2020

78. On 3 March 2020 Mr Wozniak completed an Occurrence Report in which he reported the Claimant for not wearing a hi vis jacket at a bus stand the day before and for walking around the bus registration area holding his mobile phone.

79. On 5 March 2020 the Claimant filed an Occurrence Report in which he complained that Mr Wozniak had filmed him at the bus station on 2 March 2020. We will refer to this as grievance two. There was no mention of race discrimination within the complaint although the Claimant gave evidence that he started to suspect Mr Wozniak of race discrimination from the time of Mr Sikander's complaint on 17 January 2020.

80. Mrs Tkaczyk allocated the Claimant's second grievance to Mr Khaleel Morrison (Acting Operations Manager) to deal with. This was on the basis that he was a new manager and that it would be good experience for him.

81. That day Mr Morrison asked to speak to the Claimant. The Claimant was on his break at the time and he remains annoyed that he was spoken to by Mr Morrison during his break. Mr Morrison spoke to the Claimant about the Occurrence Report he had filed and he also issued the Claimant with advice and guidance about the failure to wear his hi vis jacket, and also about using his mobile phone whilst near the bus.

82. It should be noted that advice and guidance is not a formal disciplinary sanction under the Respondent's policies. It is an informal way of raising issues with staff to nip problems in the bud and to avoid the need for more formal action. It is used to address less serious issues. The advice and guidance can be provided in writing. Repeated conduct in breach of advice and guidance could lead to formal action being taken. The Claimant

disputes that the advice and guidance was informal, he argues that because it was committed to writing then it became formal, and as such he should not have been disturbed whilst on his break, he should have received an invite and had his trade union present. The Claimant says that Mr Morrison's advice and guidance was predetermined because there was no interview, he was merely given a pre-written letter about the hi vis jacket and the mobile phone.

83. We find that Mr Morrison received the Occurrence Report from Mr Wozniak, he then reviewed the CCTV footage which showed the Claimant not wearing his hi vis jacket as he should have been, and also using his mobile phone near the bus, and as such he deemed it appropriate to issue the Claimant with advice and guidance to wear his jacket in future and not to use his phone near the bus again as it might be a safety issue.

84. The Claimant accepts that he should have been wearing his jacket, however he disputes that he should not have been using his mobile phone in that area. The Claimant states that there is no policy which says this.

85. Later that day the Claimant went to complain to the Garage Manager, Mrs Dawson. The Claimant was accompanied by his trade union representative, Mr Gill.

86. There are differing accounts of that conversation between the Claimant and Mrs Dawson. The Claimant says that Mrs Dawson was not prepared to listen to him, and she shouted and threatened to transfer him, leaving him feeling threatened and humiliated.

87. Mrs Dawson for her part denies threatening the Claimant but says that she told him that if the two drivers (the Claimant and Mr Wozniak) could not get on then she would transfer both of them. The Claimant says that Mr Gill witnessed this conversation, and the Tribunal notes that the Claimant did not call him as a witness to this hearing.

88. Having heard the evidence of the Claimant and of Mrs Dawson we find on the balance of probabilities that Mrs Dawson was expressing frustration that both the Claimant and Mr Wozniak were engaging in what appeared to be "tit for tat" complaints and that if it carried on she would transfer both of them out of the garage. Whilst this was not written in any particular formal policy, we find that it was both her practice and what she said to the Claimant. We find that her comments were directed to both parties.

89. On 6 March 2020 Mr Morrison wrote to the Claimant to invite him to a grievance hearing on 11 March 2020 with respect to the allegation about Mr Wozniak filming him on 5 March 2020 (grievance two).

Claimant's grievance against management – 9 March 2020

90. On 9 March 2020 the Claimant submitted a third grievance in which he complained about his managers Mrs Dawson, Mr Morrison and Mrs Tkaczyk in which he alleged that they had mishandled his complaints and showed favouritism against him in connection with his complaints against Mr Wozniak. Notwithstanding that the Claimant alleged that Mrs Tkaczyk had not dealt with his first grievance properly, he complained that she allocated

his second grievance to Mr Morrison instead of keeping it for herself which he says she should have done as she was familiar with the issues. The Tribunal found this an unusual and an illogical argument to make given how unhappy the Claimant was with the way in which he said Mrs Tkaczyk dealt with his first grievance coupled with his arguments that she was showing favouritism.

91. The Claimant complained that Mr Morrison had not carried out a proper investigation before issuing him with advice and guidance. The Claimant accepted he was in the wrong with respect to the jacket but not the mobile phone and he said that this was due to Mrs Tkaczyk and Mrs Dawson instructing him to do this. The Claimant also accused Mrs Dawson of not giving him a chance to say anything and that she threatened to transfer him without a proper investigation, and he made references to a dictatorship, jungle law and drivers being treated like beggars. The Claimant stated that Mrs Dawson did not deserve to be a Garage Manager.

92. On or around this time the Claimant wrote over the invitation letter from Mr Morrison inviting the Claimant to a hearing in connection with his second grievance. The Claimant said that he would not be attending the grievance hearing as he had issued a grievance against Mr Morrison and that it would be a conflict of interest. The grievance of 5 March 2020 which was initially allocated to Mr Morrison was eventually allocated to Mr James Wright which will be addressed below. Mr Wright also investigated the Claimant's grievance of 9 March 2020.

Claimant's complaint about road blocking by Mr Wozniak – 23 August 2020

93. On 23 August 2020 the Claimant submitted an Occurrence Report about an alleged incident on 22 August 2020. The Claimant alleged that he and Mr Wozniak were driving their buses on opposite sides of Norwood Road in Southall. The Claimant says he pulled in to service a bus stop and then Mr Wozniak pulled into a gap on his side of the road, however the Claimant said that after he pulled out Mr Wozniak did so as well. As the road was not wide enough for both buses, which all drivers on that route would know, this caused a traffic jam. The Claimant said that Mr Wozniak showed unprofessional behaviour in order to give the Claimant a hard time, and that he performed an unsafe manoeuvre by reversing the bus without external assistance but with passengers onboard in breach of company procedure. The Claimant said that Mr Wozniak had done this because he knew that he was in the wrong and that he had panicked when he got out of the bus and then made the manoeuvre. The Claimant said that this was bullying and harassment, however there was no mention of race discrimination. We will refer to this as grievance four.

94. The Claimant has alleged in these proceedings that Mrs Tkaczyk allocated grievance four (dated 23 August 2020) to herself to deal with and that this was a conflict of interest. The documents in the bundle show that it was Mrs Tkaczyk who made Human Resources and Mrs Dawson aware on 24 August 2020 that the Claimant already had a grievance against management and she asked them what to do with it. It was Mrs Dawson who on 25 August 2020 asked Mrs Tkaczyk to deal with it. Mrs Tkaczyk did therefore not allocate it to herself as alleged.

95. In cross examination Mrs Dawson admitted that she was not really aware who in management the earlier grievance was against, so in hindsight she could have explored that first before allocating to Mrs Tkaczyk. In any event the documents are clear that Mrs Tkaczyk again raised this with Human Resources on 7 September 2020 after the Claimant informed her that it would be a conflict of interest for her to deal with. The response from Jenny Watson in Human Resources to Mrs Tkaczyk was not particularly helpful. It stated *"Hi Anna, We don't allocate managers. I have spoken to Nick and he informed that it's heard by the line manager unless they are involved in that specific grievance."* Mrs Dawson then intervened, it appears because Mrs Tkaczyk had not received a satisfactory response from Human Resources, and she emailed on 10 September 2020 to state *"The issue in this case is there is an outstanding grievance against all PA managers which had not been heard as yet. I believe this is with James."*

96. The grievance was subsequently allocated to Mr Parry (Operations Manager, Greenford Garage) however this was not considered until July 2021 – the delay is addressed below, and we note that an apology was issued by Nick Faichney for the delay in dealing with this matter.

97. We have heard evidence from Mrs Dawson and Mrs Tkaczyk about when they became aware of the Claimant's grievance against them (third grievance dated 9 March 2020). Mrs Tkaczyk's written witness statement appeared to be at odds with her oral evidence. In her written statement Mrs Tkaczyk said that she was not aware of the third grievance, whereas in her oral evidence she said that she was aware of it but not aware of whether it had been resolved. Mrs Dawson's witness evidence was that she could not really recall when or how she became aware.

98. The Tribunal has considered the inconsistency in Mrs Tkaczyk's evidence. We have formed the view that the relevant paragraph in Mrs Tkaczyk's witness statement was incorrect – the emails make it clear that Mrs Tkaczyk was aware of the existence of the third grievance of 9 March 2020 by the time the fourth grievance had arrived on 23 August 2020. We understand that the reference in the statement was a further unfortunate error due not having thoroughly checked it. We of course take into account the passage of time, and also the number of complaints and grievances in this matter which may have impacted memories and caused confusion – we therefore do not draw any adverse inference from the error. In any event, the contemporaneous documents show that Mrs Tkaczyk did not allocate the Claimant's third grievance to herself, and it was Mrs Tkaczyk who on a number of occasions attempted to have it reallocated.

Fifth complaint re Mr Wozniak using a mobile phone – 22 September 2020

99. On 22 September 2020 the Claimant submitted an Occurrence Report against Mr Wozniak for using a mobile whilst next to bus driver's cab and leaning inside. We will refer to this as complaint 5. Whereas the Claimant has referred to this as a grievance, we do not find that it was. It was a complaint about another driving using a phone, there was nothing within the complaint which suggested that it impacted the Claimant individually or personally in some way.

100. This matter was looked into by Mrs Tkaczyk who spoke to Mr Wozniak about the incident. Mrs Tkaczyk says that Mr Wozniak confirmed that he had been standing in the yard by his cab with the engine switched off and he used his mobile to take a photograph of a vehicle defect card. Mrs Tkaczyk formed the view that Mr Wozniak had not done anything wrong so she simply reminded him of the process for using a mobile phone at work.

101. Mrs Tkaczyk confirms that she did not tell the Claimant the outcome because it was not a grievance. In cross examination Mrs Tkaczyk conceded that she could have at least acknowledged receipt of the complaint from the Claimant. Mrs Tkaczyk told us that the reason she did not was because it was placed on her desk in hardcopy, had it been emailed to her then she would have responded to it.

102. We find that it is not the Respondent's practice, nor that of Mrs Tkaczyk, to acknowledge Occurrence Reports if they are not grievances due to the volume and subject matter of them. There is no requirement within the Respondent's policies that an Occurrence Report will be acknowledged either upon receipt, or with the outcome of any investigation.

103. The Claimant has sought to argue that he should have received an acknowledgment as he believed that customers have their complaints acknowledged. We heard evidence from the Respondent's witnesses that customer complaints are directed to Transport For London ("TFL") who may then pass on some complaints to the Respondent for comment, and occasionally a response may be provided by the Respondent to TFL.

104. Accordingly, we do not find that there was any requirement or expectation that the Claimant should receive either an acknowledgment of his Occurrence Report about Mr Wozniak (where it was not a grievance), nor that he should have been informed of the outcome by the Respondent. It appeared to us that the Claimant has repeatedly misunderstood the difference between a grievance and an Occurrence Report. We also find that the Claimant also repeatedly misunderstands the difference between formal disciplinary action and informal action (specifically advice and guidance).

Investigation into Claimant's complaints of 5 and 9 March 2020

105. On 14 October 2020 James Wright, General Manager at Willesden interviewed the Claimant via Webex online platform about his second grievance dated 5 March 2020 that Mr Wozniak had filmed him, and his third grievance dated 9 March 2020 about his managers' alleged unfair treatment of him. Mr Wright then interviewed Mr Morrison, and Ms Tkaczyk, and Mr Wozniak on 9 November 2020.

106. We note that Mr Wright did not interview Mrs Dawson even though the Claimant had specifically complained that she had threatened to transfer him.

107. We have read the notes of the interview between the Claimant and Mr Wright on 14 October 2020 and we can see that Mr Wright gave the Claimant the opportunity to explore the reasons why he felt unfairly treated

by management, and he also explored the long running disagreements he had with Mr Wozniak starting with the can of drink incident the year before. There was insufficient time to deal with all of the Claimant's complaints during that hearing as the Claimant was due back on shift, therefore it was adjourned. We note that during that hearing Mr Wright told the Claimant that he inferred from what the Claimant had said that Mr Wozniak had issues with everyone and purposely created issue for others and that he wasn't suitable for the company's environment, to which the Claimant responded yes.

108. The Claimant has criticised Mr Wright for alleged delays in dealing with his second and third grievances dated 5 and 9 March 2020. The Claimant accepts the initial delays prior to the first meeting on 14 October 2020 were due to the COVID-19 Pandemic and his initial insistence on meeting in person, rather than online. We note that Mr Wright started to message the Claimant on or around 4 May 2020 to offer an online interview, and it was not until the beginning of October that the Claimant changed his mind and agreed to an online hearing. Had the meeting taken place in person then this would have required Mr Wright to travel across London in order to do so, thus placing himself at risk during the COVID-19 Pandemic.

109. The interview notes with Mrs Tkaczyk record that she allocated the Claimant's grievance to Mr Morrison. When asked why she allocated it to Mr Morrison she said that he was a new manager and it would be good experience for him, and also the Claimant had not been happy with the last outcome she did so she did not think he could be satisfied either way. Mrs Tkaczyk also said she believed that the Claimant was keen for Mr Wozniak to be transferred.

110. During his interview with Mr Wright, Mr Morrison denied threatening to transfer the Claimant but acknowledged saying words to the effect that if someone was found to be acting maliciously then he could be seen formally and possibly transferred if proven. Mr Morrison said that the Claimant made no secret of wanting Mr Wozniak transferred. Mr Morrison confirmed that upon receipt of Mr Wozniak's Occurrence Report about the Claimant not wearing a high vis jacket and using his mobile phone, he obtained the CCTV and viewed and decided to issue the Claimant with advice and guidance as an outcome. We heard evidence from Mr Wright that he questioned Mr Morrison about the contents of the CCTV and he informed him that having viewed it the footage showed Mr Wozniak using his phone in front of him – it was not possible to see what was on Mr Wozniak's mobile phone screen.

111. Mr Wozniak was also interviewed and he denied filming the Claimant, and he said he was on a video call with his wife however he had noticed the Claimant was not wearing his hi vis jacket and he had written an Occurrence Report and he was told after filing it that the Claimant had filed another grievance against him.

112. The Claimant complains about delays in the outcome of his grievance. We note that this was the period in which the COVID-19 Pandemic started and that bus drivers in London were key workers, therefore the Respondent was very busy attempting to deliver a reduced bus service with a reduced number of staff. We heard uncontested evidence from the Respondent that a large number of drivers and managers were either considered clinically

extremely vulnerable or were required to be furloughed for other reasons and that the Respondent's trade unions had agreed that almost all disciplinary and grievance matters should be put on hold during those initial few months of the Pandemic to allow the Respondent to keep services running and to try and keep drivers as safe as possible.

113. We were not provided with documentary evidence of this agreement with the unions, nor were we given details of the specific dates when it was agreed that formal processes would be put on hold. However, we note that this was not challenged at all by the Claimant during the hearing, and we find it is entirely plausible given the circumstances which the Respondent found itself during that period that an agreement of this nature would have been reached between the Respondent and the unions, and that formal action would likely have been placed on hold for some months.

114. The Respondent was required to recommence running full services after that initial period of the Pandemic however this presented difficulties to the Respondent's service delivery as some drivers were unable to return to work, including those from overseas who had returned home and had become stuck abroad or chose not to come back to the UK.

115. We also heard evidence from Mr Parry (Greenford Garage) that six members of his staff died during this period due to COVID and that this would have had a considerable impact upon the Respondent, its staff and its managers. We also heard that there was an enormous amount of work to be done to combine keeping the buses running whilst keeping passengers and staff safe, including getting to grips with regulations, installing safety measures and making arrangements for the service to run.

116. We note that the reconvened hearing did not take place until 1 February 2021. We have reviewed the messages between the Claimant and Mr Wright in the bundle **[pages 120-122]** where Mr Wright chased the Claimant for a response to his requests to discuss some further questions. The Claimant had to be repeatedly messaged by Mr Wright. We also note that the Claimant's union representative Mr Gill was away for three weeks, following which the Claimant was due to commence a long period of leave, although we do not have the exact dates.

117. It is clear from the messages that Mr Wright repeatedly sought to advance the Claimant's grievance by asking any additional questions and attempting to arrange to meet the Claimant. We find that the delay in reconvening was due to the annual leave of the Claimant and his representative and a failure to respond to Mr Wright's messages promptly. We therefore find that the delay in the outcome of grievance two and three was due to a combination of the Pandemic and also the Claimant's own tardiness in responding to Mr Wright, as well as his leave and that of his representative Mr Gill. We do not find that the delay was attributable to the Respondent or Mr Wright.

118. On 1 February 2021 Mr Wright reconvened the grievance hearing with the Claimant via Webex with the Claimant's agreement. This meeting lasted for most of the day. We have reviewed the contents from the outcome letter dated 10 February 2021 which demonstrate a detailed discussion with the Claimant. We note that Mr Wright recorded the Claimant wanted Mr

Wozniak to be transferred. Mr Wright found no evidence that Mr Wozniak had been recording him. As regards Mrs Tkaczyk's conduct, it was noted that the Claimant asserted that had she conducted the first grievance properly then a second one would not have been necessary – Mr Wright rejected this allegation. Mr Wright also said that it was a matter for management who is allocated grievance investigations. Mr Wright found that the three months to resolve the Claimant's first complaint was long but not excessive, however Mrs Tkaczyk was correct not to disclose the outcome as it was confidential.

119. As regards Mr Morrison, Mr Wright examined the complaint that he had called the Claimant into his office whilst he was on a break and asked him about the issues he had raised, and then in that same conversation he had also talked about the Claimant's failure to wear a hi vis jacket and had given him advice and guidance on the point. Mr Wright found it reasonable of Mr Morrison to have proceeded in this way and to have discussed the Claimant's complaints informally. Mr Wright also discussed the Claimant's complaint about being issued with advice and guidance at the same time without notice or a union representative being present. Mr Wright told the Claimant that there was no right to representation for informal action and that *"the items discussed were safety related and important and I feel the outcome was fair, rational, justified and in the best interests of common sense and ensuring your safety*." Mr Wright dismissed the Claimant's allegation that Mr Morrison was following the instructions of Mrs Tkaczyk and Mrs Dawson.

120. Mr Wright also dismissed the Claimant's complaints about Mrs Dawson. We note that Mr Wright found the Claimant's comments to be distasteful, and he rejected the assertion that there was a cover up. Specifically he stated *"I do not find that this aspect of your grievance warrants much by way of a response or further investigation. Let me be entirely clear that you have no jurisdiction as to whether Yvonne Dawson deserves to be a Garage Manager or not and you should be responsible and mature enough as an employee to inherit the advice given to you by Khaleel without feeling the need to command the whole attention of the whole Operations Management Team at West Perivale Garage. To compare your leadership in your garage to that of a dictatorship I do not find balanced or reasoned in any capacity."*

121. The Tribunal has closely examined Mr Wright's reasoning with respect to Mrs Dawson. It is not disputed that Mr Wright did not interview her. Leaving aside the Claimant's allegations that Mrs Dawson ran a dictatorship, that jungle law operated at the garage, and that staff were treated like beggars, the Claimant had expressly alleged that Mrs Dawson had threatened to transfer him without any investigation. We find that this allegation was not investigated as the person who allegedly made the comment was not spoken to even though it was open to the Respondent to have done so. This was a procedural failing.

122. We note the wording of the Claimant's complaint in his particulars of claim with respect to Mr Wright's rejection of the complaint against Mrs Dawson, is that *"Overriding the complainant's statement with Mrs Yevonne* [sic] *Dawson's statement by using assumptions and discriminating again on the basis of her role and seniority without even taking a witness statement."* It would appear that this is therefore not intended to be a claim of race

discrimination, but some other form of discrimination related to defending or protecting Mrs Dawson on the basis of her role and seniority.

123. We noted that Mr Wright reminded the Claimant that where drivers are unable to get along it is imperative for those involved to retain professionalism and good reasoned judgement when highlighting any issues. We have also noted the concluding comments from Mr Wright which we have set out below:

"It appears a commonality that when you did not get your desired outcome, your reaction is to continually escalate or assert your concerns when there is no merit to do so. You make repeated accusations of predetermination without evidence and discredit the entire management team for an issue that was handled diligently and in line with procedure. You also make assumptions and highlight discrepancies that you believe exist between support staff and driving staff that are not factual or even relevant to the core of your submission. I vigorously deny that drivers are as you describe treated as slaves and I urge that you be very careful and mindful of such a assertions as they are a far cry from reality and can be rather offensive for those that have to address such submission I must advise you that if this is something that you are unable to understand and learn from, this could result in you being seen in a formal capacity."

124. By this time the Claimant had submitted his two Occurrence Reports dated 23 August and 22 September 2020 which Mr Wright said he would inform the Claimant's line managers that the Claimant would like investigated. The Claimant was notified of his right to appeal.

125. On 3 February 2021 the Claimant sent an email to Human Resources and to Nick Faichney (Area Operations Director) saying he had raised two complaints against Mr Wozniak for blocking a road and then reversing (complaint 4 dated 23 August 2020), and Mr Wozniak using a phone in a driver cab area (complaint 5 dated 22 September 2020) some months earlier, which he alleged had not been dealt with. The Claimant said that another driver, Mr Rashid, had been sacked by Mrs Tkaczyk for using his mobile phone in the cab previously, and the Claimant alleged that there was discrimination and favouritism in not dealing with complaints against Mr Wozniak.

Appeal against outcome of grievances two and three

126. On 15 February 2021 the Claimant submitted a four page appeal letter against Mr Wright's decision with respect to grievances two and three. We do not intend to recite the entire contents of the appeal, however we note that the Claimant criticised Mr Wright for rushing his grievance, but at the same time criticised him for the delay in dealing with it. Although the Claimant acknowledged his part in the initial delay before the first meeting, he then said Mr Wright should have seen him in person rather than online. The Claimant also criticised Mr Wright for emailing him at home for more information before his holiday which he said had stressed him. The Claimant also said that Mr Wright did not give him a chance to speak. The Claimant accused Mr Wright of trying to cover up the faults and favouritism of management. There were nine specific allegations which will be summarised briefly below:

126.1 Failure to explain why an eye witness to his first grievance from 31 October 2019 had not been interviewed.

126.2 Failure to address favouritism by Mrs Tkaczyk, specifically with relation to similar grievance from Mr Sikander which had been lost.

126.3 Failure to address why Mrs Tkaczyk tried to allocate herself the Claimant's third grievance to deal with.

126.4 Failure to address why Mr Morrison called the Claimant into his office and gave him advice and guidance without notice or representation.

126.5 Failure to review CCTV which the Claimant said showed Mr Wozniak filming the Claimant.

126.6 Failure to address why he did not receive a reply to his complaint of 22 September 2020 about Mr Wozniak using a mobile phone by his cab.

126.7 Mr Wright wrongly focussed on the Claimant's comments of a jungle law and dictatorship, rather than taking into consideration his point that he had approached Mrs Dawson but had been humiliated, discouraged and threatened by her.

126.8 Failure to address predetermination by Mrs Dawson and her threat to transfer the Claimant.

126.9 Mr Wright wrongly accused the Claimant of wanting Mr Wozniak to be transferred.

127. The Claimant's appeal against the outcome of grievances two and three was heard on 14 April 2021 by Mr Faichney. The Claimant was accompanied by Mr Gill as his trade union representative. Both the Claimant and Mr Gill were given the opportunity to explain the Claimant's appeal. We note that within the hearing the Claimant said *"How many Polish drivers have been sacked or dealt with since Anna has been here. I will take my grievance back."* The outcome of the appeal is addressed below.

Claimant's complaint about road blocking by Mr Wozniak – 16 June 2021

128. On 16 June 2021 the Claimant submitted a sixth complaint. The Claimant alleged that Mr Wozniak had deliberately blocked the road that day with his bus, that he showed the Claimant a wicked smile, and that he was causing delay to the service. The Claimant said that this was bullying and harassment. The Claimant did not mention race discrimination in the complaint.

129. Mr Faichney asked Mr Parry (Operations Manager) to deal with the Claimant's sixth complaint together with the Claimant's fourth complaint of 23 August 2020. Both complaints involved allegations of Mr Wozniak blocking the road with his bus.

130. On 29 June 2021 the Claimant contacted ACAS for mandatory conciliation.

Appeal outcome – grievances two and three

131. On 3 July 2021 Mr Faichney sent the appeal outcome letter to the Claimant with respect to grievances two (5 March 2020) and three (9 March 2020). We have carefully reviewed the outcome letter which is a comprehensive eight page letter which in the view of the Tribunal demonstrates a detailed review of many of the issues which the Claimant had raised. We note that this was a paper based appeal save for Mr Faichney speaking to the Claimant in the presence of Mr Gill, none of the other witnesses appear to have been spoken to, including Mrs Dawson who was not interviewed in the first place by Mr Wright. Mr Faichney did not review any of the CCTV footage referred to by the Claimant.

132. We do not intend to recite the entire contents of the outcome letter but we have noted that Mr Faichney made the following findings:

132.1 Mrs Tkaczyk followed procedure with respect to the Claimant's first grievance (31 October 2019) however there were short comings in that process. Mrs Tkaczyk could have made it clearer that no action had been taken against Mr Wozniak regarding the can punching incident, the three month delay in dealing with it was excessive (contrary to Mr Wright's finding that it was long but not excessive), and the Claimant was not advised of his right to appeal which should have been done. Mr Faichney found that the Claimant had been aware of his right to appeal, and in any event he had considered the matter during this appeal process which he believed had corrected that shortcoming.

132.2 Mr Faichney acknowledged that there had been a complaint against Mr Wozniak by Mr Sikander, and that there was a correlation between his and the Claimant's complaint, and there was some confusion why it had not been dealt with, however that would be a matter for the Respondent to discuss with Mr Sikander directly. The Tribunal understands that this complaint had been misfiled in error, and once identified the Respondent spoke to Mr Sikander and the issue was resolved.

132.3 Mr Faichney was satisfied with the way in which Mr Wright dealt with the filming complaint of 3 March 2020, and that Mr Wozniak had been interviewed and there was no evidence of him filming the Claimant.

133. We note that Mr Faichney had therefore upheld part of the appeal with respect to the handling of the grievance of 31 October 2019.

134. As regards the grievance complaint against management dated 10 March 2020 Mr Faichney found:

134.1 The suggestion by Mrs Dawson of 6 March 2020 of separating the Claimant from Mr Wozniak was a pragmatic solution and that no

offence would have been intended. It was noted that the Claimant would have been upset at the time he approached her and that the Claimant's choice of language, such as jungle law, and his suggestion that she did not deserve to be garage manager, were unhelpful. We note that this finding was made without either Mr Wright having interviewed Mrs Dawson, therefore Mr Faichney would not have had any interview notes to have based his finding on. We find that Mr Faichney failed to address the failure of Mr Wright to interview Mrs Dawson.

134.2 Mr Morrison was correct to have issued the Claimant with advice and guidance regarding the Claimant using his mobile phone in the vehicle movement area (a bus stand). Mr Faichney felt that this was the minimum he could have done, it was arguably too lenient, but it was right to have raised it as it was a safety issue. Mr Faichney felt that Mr Morrison could have better explained the difference between a grievance and a disciplinary process to the Claimant, and that the right to representation did not extend to informal meetings. It was noted that if Mrs Dawson and Mrs Tkaczyk were forcing Mr Morrison to penalise the Claimant then he would not have issued the least severe action. Mr Faichney said it was Human Resources who allocated the grievance to Mr Morrison and that it was right for Mr Morrison to have made notes when speaking to the Claimant.

134.3 Mr Faichney apologised that the Claimant's grievance of 22 August 2020 about Mr Wozniak allegedly blocking the road with his bus, had not been dealt with. We note that it was carefully explained to the Claimant that it had been received by Mrs Tkaczyk and then passed to Human Resources with some consideration as to who should hear it, however no action had been taken. Mr Faichney said *"I apologise for this, and I appreciate how your grievance not being heard may have exacerbated your feelings of mistrust, but I can state that this did not happen through any deliberate action from either Mrs Dawson, or Ms Tkaczyk. It has been an Incredibly demanding year for our business running with reduced resource for long periods, and I reiterate my apology for this shortcoming."* The complaint of 22 August 2020 was passed to Mr Parry to deal together with a similar subsequent complaint of 16 June 2021.

134.4 As regards the Claimant's complaint dated 22 September 2020 regarding Mr Wozniak using a mobile phone on a bus, the Claimant's complaint was that he had not received a reply and that he believed that Mrs Tkaczyk was protecting Mr Wozniak by taking no action. Mr Faichney recorded that he had reviewed the staff records and found the investigation did take place, CCTV was retrieved, and witness statements were sought and action was taken by Mrs Tkaczyk however, it would not have been appropriate for her to disclose the outcome to the Claimant and he was not entitled to know it. Mr Faichney said "*what I can say is that the action taken was not less severe than the action taken against you when Mr Wozniak reported you for safety related breach. I trust this is reassuring to you."* It was explained to the Claimant that an Occurrence Report is not the same as grievance, and that the manager is not obligated to respond to the Claimant and nor did he ask for a reply.

134.5 Mr Faichney reviewed the handling of the grievances as a whole by Mr Wright and found no evidence that this had been a rushed process. It was noted that the Claimant's insistence on not attending a video meeting when originally offered in March 2020 delayed the hearing until October 2020 when it was then heard by video. It was pointed out to the Claimant that contrary to his assertion that he was entitled to an in person meeting, it had been agreed with Unite the Union that a face-to-face meeting is preferable but not that it is mandatory. The Claimant was reminded that there had been a global virus pandemic that necessitated nationwide liberty restrictions to minimise contact between citizens in order to reduce transmission and death rates, which Mr Faichney said was quite obviously a reasonable cause to vary from the preferred means of holding an in person meeting. It was also noted that the Claimant's insistence on attending an in person meeting could have placed Mr Wright at risk as it would have involved him travelling.

134.6 Mr Faichney found that Mr Wright conducted a reasonable grievance investigation and was faced with a myriad of documents and past grievances, and he made a fair attempt at getting into the core of the complaints and that he made some forthright conclusions, although the Claimant may not have received them well.

134.7 Mr Faichney also considered the Claimant's complaints of favouritism and discrimination by management. In answer to the Claimant's question during the appeal hearing as to how many Polish drivers Mrs Tkaczyk had disciplined, Mr Faichney having examined this particular allegation by reviewing the Respondent's HR database, said he identified multiple instances of Mrs Tkaczyk applying formal disciplinary sanctions to Polish drivers, and that non Polish drivers had been treated consistently and that each case had to be considered on its own facts.

134.8 It was noted that the Claimant had informed Mr Faichney about a Polish driver who had been reinstated on appeal after committing a mobile phone offence. Mr Faichney looked into the matter and advised the Claimant that it was Mrs Tkaczyk who had instigated disciplinary action against the driver, he was then dismissed, but it was another manager who had reinstated him. Mr Faichney clarified an apparent error in his witness statement to the Tribunal where he said that Mrs Tkaczyk had dismissed this driver, the correction was that she had suspended him and recommended disciplinary action. We draw no negative inferences from this as it was clearly an inadvertent error.

134.9 The Claimant was informed that it would be ill judged to infer that the driver had been reinstated because he was Polish. Nevertheless, the Claimant was informed that the case was materially different from another case where the driver had been dismissed as he had been a repeat offender, and the Claimant was notified that the appeal officer who had reinstated the driver was not Polish.

134.10 Mr Faichney referred to the Claimant's further complaint about Mr Wozniak dated 16 June 2021 allegedly blocking the road with his bus,

and he informed the Claimant that the best way forward was for that to be heard separately from this process so that it could be dealt within a timely fashion with the full rigour of the grievance procedure to avoid any repeat of previous shortcomings so that the allegations could be fully tested. Mr Faichney informed the Claimant he had already arranged for the CCTV footage to be secured to allow the full investigation to take place.

135. In conclusion the Claimant was informed that his appeal had been upheld that some of his previous grievances could have been handled better, and in a more timely manner, and that there could have been greater consideration to multiple complaints received about the same driver, and that Mr Morrison's handling of his grievance in disciplinary matters could have been more empathetic.

136. The Claimant was informed that his appeal regarding the behaviour of Mrs Tkaczyk, Mrs Dawson and Mr Wright had been rejected as was his broader allegations about management discrimination. The Claimant was informed that Mr Parry was entirely separate from previous proceedings and would deal with his outstanding grievances dated 22 August 2020 and 16 June 2021.

137. We noted the closing comments from Mr Faichney where he apologised if the handling of the grievance and contact matters had caused him to be stressed and unhappy at work, and he encouraged the claimant to take heed of advice on how to approach relations with colleagues. Given the grievance proceedings can be difficult to deal with Mr Faichney enclosed details of the Employee Assistance Program which may offer the Claimant some support. The Claimant was notified that there was no further right of appeal. It is the finding of the Tribunal that the outcome letter from Mr Faichney demonstrates a rigorous investigation of most of the Claimant's grounds of appeal with the exception of the complaint against Mrs Dawson as she had yet to be interviewed by anyone.

138. Whereas there was no further right of appeal, there is a possibility of a director's review, and this can be engaged by full-time recognised trade union official, who would be entitled to refer the outcome of the grievance process to appropriate director, or the chief operating officer where it is believed that there has been a serious breach in the process resulting in an unfair outcome. An employee may raise this themselves if they are not a member of the trade union. At the material time the Claimant was a trade union member and he was represented by Mr Gill who could have escalated this matter for him but we understand that he did not do so. The Claimant also confirms that he was aware of the grievance policy as it was posted on the wall outside of the management area. We find that the fact that the Claimant did not ask for a director's review was not the fault of the Respondent as the Claimant was represented by his trade union, and he confirmed sight of, and access to, the grievance policy.

139. The Claimant clearly remained very dissatisfied as to how his complaints had been handled as he then sent a four and a half page letter to Mr Faichney in which he alleged that *"Your conclusion statement in the attached letter has a big conflict with the actual evidence and scenarios which I am able to challenge. I believe none of my questions has been fairly*

answered or investigated which I raised in the appeal letter. Let me again break these points below and make them easy to understand." We do not intend to recite the entire contents of the Claimant's letter given that there was no further right of appeal nevertheless we will highlight the following key passages contained within that letter:

139.1 The Claimant continued to complain that Mrs Tkaczyk had not interviewed witnesses to the can punching incident in October 2019. The Claimant said had she done so then Mr Wozniak would have been found guilty of a serious bullying and harassment act, and instead she pretended that she had taken the appropriate action.

139.2 The Claimant appeared to challenge the handling of his appeal with respect to Mrs Dawson's involvement. The Claimant asked how a garage manager with such a long-standing reputation was not aware of a complaint from Mr Sikander. The Claimant said that if driver made a silly little mistake they would get penalised, but that thanks to the management, Mr Wozniak would have one less complaint on his file.

139.3 The Claimant asked whether Mr Faichney had personally viewed the CCTV footage where he alleged that Mr Wozniak was filming him. The Claimant again said that he had checked the footage and that Mr Wozniak can be clearly seen standing right in the middle of the bus movement area facing his mobile phone towards the Claimant.

139.4 As regards the conversation with Mrs Dawson on 6 March 2020., the Claimant said that he had not been emotionally charged but that he felt insulted and humiliated by Mrs Dawson's attitude and that Mr Faichney was using his assumption that she would never use such behaviour as she was a garage manager and the Claimant was just a bus driver and that his eight year service was not taken into account. The Claimant complained that Mrs Dawson had not been interviewed, and that Mr Gill his trade union representative had not been asked to provide a statement.

139.5 The Claimant repeated his earlier complaints about Mr Morrison, specifically requesting to speak to the Claimant whilst he was on a break, and also the decision to issue him advice and guidance without notice or an invitation, or allowing his trade union representative to be present. The Claimant remain dissatisfied that he had been issued with that advice and guidance with respect to using his mobile phone, and he expressed concern that he was spoken to so soon after submitting his own complaint moments earlier that day. The Claimant repeated that no action had been taken against Mr Wozniak for allegedly using his mobile phone to record the Claimant.

139.6 The Claimant maintained his disagreement that an occurrence report is not a grievance and that he should have received a response. The Claimant posed the question that passengers get a response when they complain to TFL, so why should it be different to staff?

139.7 The Claimant remained dissatisfied with alleged delays from Mr Wright in dealing with his grievance outcome.

139.8 The Claimant said that he was unhappy that assistance from Canada Life (EAP) had been offered, which he said he found to be hurtful and offensive because he believed the Respondent was trying to say that he had some mental problem and needed counselling. The Claimant then went on to say that since this all started back in 2019, he was suffering from mental trauma and severe stress, because of bullying, harassment and discrimination, but he had never let it affect his work and his relations with other colleagues, but it had affected his health and personal life. The Claimant said he had been left with no other option other than to take the Respondent to an employment tribunal.

140. On 12 July 2021 Mr Faichney responded to the Claimant saying he was happy to meet the Claimant and to discuss his findings, but not to revisit the appeal. The Claimant rejected that offer as he said that there was no point in doing so if Mr Faichney was not going to revisit the outcome.

Investigation into Claimant's road blocking grievances of 22 August 2020 and 16 June 2021

141. On 21 July 2021 Mr Parry held an initial meeting with the Claimant and Mr Gill to deal with the Claimant's two grievances about Mr Wozniak blocking Norwood Road on 22 August 2020 (grievance four) and of Mr Wozniak not giving way on the road on 16 June 2021 (grievance six). Mr Parry adjourned the meeting to watch the CCTV of both incidents from all four buses. During the hearing Mr Parry asked the Claimant what outcome he was seeking, to which the Claimant responded "*Outcome should be its bullying and harassment, Company has a zero tolerance to this, he shouldn't be here."*

142. On 26 July the ACAS certificate was issued.

143. On 3 August 2021 Mr Parry reconvened the grievance hearing in respect of complaints four and six. The notes of the meeting demonstrate a thorough discussion of the two incidents complained about by the Claimant, including the timings of the CCTV and the position of the Claimant's bus and Mr Wozniak's bus on the road at the material times for each incident.

144. The Claimant was given the opportunity to discuss both of his complaints and he suggested that seven other drivers were witnesses, however this was rejected by Mr Parry who informed him that unless they witnessed either incident then their evidence would not be relevant.

145. During the grievance hearing it is recorded that the Claimant told Mr Parry that Mr Wozniak had acted in the same way and blocked another driver, Mr Artur Weresko, on 6 July 2021 on the assumption that it had been the Claimant driving. Mr Parry informed the Claimant that this was a separate matter and that if Mr Weresko wished to report the matter then he should do so but he would not be interviewed as he had not witnessed the incidents of 22 August 2020 or 16 June 2021.

146. During the Tribunal hearing the Claimant informed us that he had told Mr Parry that Mr Wozniak had apologised to Mr Weresko for blocking him as he believed that it had been the Claimant driving. Mr Parry denied that

the Claimant had said this, although he agreed in his evidence that had the Claimant done so then that would have been a relevant consideration and that he would need to have interviewed Mr Weresko. The Claimant maintained that he did tell Mr Parry that Mr Wozniak apologised to Mr Weresko. This is a dispute of fact that the Tribunal must resolve.

147. On the one hand there is no written evidence of this information being passed to Mr Parry by the Claimant. The information could not have appeared in the grievances of 23 August 2020 and 16 June 2021 as the incident had yet to occur on 6 July 2021, therefore the Claimant could not have put it in writing then. We have been provided with a copy of an email string dated 2 August 2021 between the Claimant and Mr Faichney and Ian Dalby (Area Operations Director) where he said the following:

"Dear Mr Nick,

Good morning and hope you are well. I have got my hearing tomorrow for the remaining 2 grievances. I requested Mr Parry that a coulege Driver who is also a victim of a bullying incident by Wozniak recently and his statement will definitely corroborate my grievance is willing to give a statement anonymously. I did not receive a clear reply from Mr Parry regarding the same. Instead he told Mr Gill that the witness had to put a occurrence report. This witness do not want to put in occurrence report as he wants to keep himself anonymous and dose not want to disclose him self infront of Wozniak. I humbly request you to please ask Mr Parry to allow and to arrange this witness because it is very important.

Many thanks in advance and have a nice day."

148. Mr Dalby informed the Claimant that he would pass the email on to Mr Parry. The Claimant responded to say that the driver wanted to be a witness under the whistleblowing policy and his details were already with Mr Parry. Mr Dalby replied to say that he was not involved in the case and he suggested that the Claimant inform Mr Parry during the meeting as it would be for him to decide. Mr Faichney also replied to say that he was not involved in this case and had copied in Mr Parry for his visibility.

149. We note that nowhere within the Claimant's emails did he mention that Mr Wozniak had apologised to Mr Weresko as he believed he was the Claimant. The most that can be said from that email is that the Claimant was saying that Mr Weresko was also a victim of bullying by Mr Wozniak. The email goes no further than that. This is consistent with what Mr Parry recorded in his notes of the meeting with the Claimant the following day on 3 August 2021. We cannot therefore find that the Claimant informed Mr Parry about the alleged apology. It is for the Claimant to prove his case, however in this instance he has not demonstrated to the level we require (the balance of probabilities) that he made the comments he alleged.

150. The remainder of the hearing on 3 August considered the details of each incident. As regards the 22 August 2020 incident, this complaint has been set out above and concerns the incident on Norwood Road where the road was too narrow for the Claimant's bus and Mr Wozniak's to pass. The Claimant maintained that Mr Wozniak's action was deliberate and that Mr

Wozniak had harassed him in the past by walking past him smiling or talking loudly.

151. As regards the 16 June 2021 incident, this was a complaint that Mr Wozniak had blocked the Claimant's bus on the road, had not given way to the Claimant, and had shown the Claimant a "wicked smile."

152. Mr Parry asked the Claimant what was the actual bullying that he described on 16 June 2021, to which the Claimant replied "*whenever we passed he would just smile or a wicked smile, and he would just do it to wind me up, nothing further that I can remember."* The Claimant was asked what did he mean by harassment, to which the Claimant said *"when he walks past people there was smiling or talking loudly. Clearly you can see it done purposely, he needs to get dismissed as this is bullying and harassment, policy saying no tolerance for this behaviour. Never had any problems with anyone in my eight years of service."*

153. We note that when Mr Parry met with the Claimant they viewed the CCTV footage together and that Mr Parry made a note of the timings of key events to the second for the Claimant's bus and Mr Wozniak's bus.

154. Mr Parry interviewed Mr Wozniak on 17 August 2021. The notes of the meeting demonstrate that Mr Perry made extensive efforts to uncover the source of the difficulties in the relationship between the Claimant and Mr Wozniak. During his interview, Mr Wozniak said that he had not been looking to make friends at work, however he felt that he was being bullied by some other drivers who were friends and who made complaints about him, including that he had been drinking alcohol. Mr Wozniak said that it was normal for drivers to acknowledge each other on the road, they would waive their hands but he would raise his elbow as had been done when he was in the Army. Mr Wozniak admitted that he did smile but did not know how a smile could be taken another way, and he also admitted singing as a way to relax as he also did karaoke and sang in Italian. Mr Wozniak denied bullying or harassing the Claimant and suggested that the Claimant had complained about the road incidents to cover up his own errors.

155. We understand that following the interview with Mr Wozniak, Mr Parry went on a period of annual leave between 21 – 31 August, following which he injured his ankle and was based at home for some time. The Claimant was issued with an outcome letter from Mr Parry dated 16 September 2021.

156. In the outcome letter Mr Parry rejected the Claimant's complaint about the 22 August 2020 incident. Mr Parry noted that the CCTV footage showed that the buses were on opposite sides of the road, and the Claimant had stopped to serve the bus stop at which time Mr Wozniak had pulled into a gap following which both buses had pulled out at the same time, however the road was not wide enough to accommodate both buses at the same time. Mr Parry noted that the Claimant could be seen sitting in his cab with his arms folded for three minutes with his foot pressed on the brake rather than engaging the hand brake as he should have done. After two minutes Mr Wozniak could be seen exiting his bus, checking behind his bus before returning inside and then reversing the bus with passengers onboard without someone to direct him from behind which was an unsafe manoeuvre.

157. Mr Parry said that it was the Claimant who should have given way to Mr Wozniak, not the other way around, and that he had concerns that the Claimant had simply sat with his arms folded effectively giving Mr Wozniak little choice but to perform the unsafe manoeuvre. The grievance of 23 August 2020 was therefore not upheld. As regards the incident of 16 June 2021, Mr Parry explained that having viewed the footage, it appeared that there was a hazard on the Claimant's side of the road and that the Claimant's bus was slightly over the white line in the centre of the road, and as Mr Wozniak did not believe that he could move safely he stopped and waited in his bus rather than proceeding and getting the bus stuck.

158. It was also explained to the Claimant in that there was no evidence to suggest that Mr Wozniak had deliberately blocked the Claimant's bus on either occasion, nor that he smiled at him in a wicked way. The grievance of 16 June 2021 was also dismissed.

159. A considerable amount of time was taken up in the Tribunal hearing during the cross examination of Mr Parry by the Claimant where he was taken to the timings of the CCTV. The Claimant did not dispute the actual timings but suggested that the CCTV should have been disclosed. The Respondent disagreed. It was clear that the timings were not in dispute, nor where the events which Mr Parry had recorded.

160. What was in dispute was Mr Wozniak's motivation for moving out of the gap on 22 August 2020 when the Claimant was moving out of the bus stop, thus causing a jam. The complaint at Issue F was that Mr Wozniak had intentionally blocked the Claimant. The CCTV would not have assisted with that. Similarly, the CCTV would not have assisted with the complaint about 16 June 2021 for the same reason. We heard evidence that the CCTV on buses captures between 14-16 areas, but it does not capture the face of the driver. Accordingly it would not have assisted with the Claimant's grievance complaint that Mr Wozniak showed him a wicked smile as alleged.

161. During the final hearing the Claimant took issue with the grievance finding that he should have given way to Mr Wozniak on 22 August 2020. This was not one of the issues to be decided by the Tribunal, and it is not for us to make a decision on who should have given way on the road that day. The focus of the Employment Tribunal is on the claims which the Claimant has brought. As to whether Mr Parry was right to say that the Claimant should have given way, this is not a dispute of fact which we need to resolve. The most we can say is that the CCTV was viewed by Mr Parry in the presence of the Claimant, and again between Mr Parry and Mr Wozniak, and the timings (which are not disputed) show only 18 seconds between the two drivers pulling out.

162. We also heard evidence from the Claimant that there had been a delay in sending the outcome to him. The outcome was sent as two printed letters in an envelope and the Claimant was asked to sign and return one copy. This was sent to the garage where he worked. Mrs Dawson gave evidence that the letter would have been received either on Friday 17 September or Monday 20 September 2021. When Mrs Dawson returned from annual leave, she was busy because two bus routes had closed and 145 drivers had transferred to her garage, but as soon as she was aware the letter had

been received she asked Mrs Tkaczyk to open the sealed envelope and put it out at the garage counter for the Claimant.

163. It was only on 30 September 2021 that the Claimant became aware that the outcome letter had been issued after he had messaged Mr Parry to ask him about the outcome and Mr Parry told the Claimant it had been sent prior to the last week. The was handed to the Claimant on 2 October 2021 and he requested the counter supervisor Mr Pradep to sign and date stamp the letter to confirm when the Claimant had taken it. Mr Pradep declined to do so, therefore the Claimant refused to take it away and it was subsequently sent to him by other means on 3 October 2021.

164. Accordingly any delay in receiving the outcome letter would have been in the period from either 17 or 20 September until 2 October 2021. We note that Mr Parry could have emailed the Claimant the outcome letter, however we accept that it was his (and the Respondent's) practice to send this in hardcopy in duplicate so that one copy could be signed to confirm receipt and then returned to the Respondent.

Claimant's grievance regarding removal of the preference list – 15 August 2021

165. We have heard evidence that the Respondent operated what is known as a preference list. Drivers are allocated their duties and routes by an allocation team. A number of drivers have regular commitments which mean that they are unable to work particular shifts - for example trade union representatives who are stood down on Fridays for their activities, as well as drivers who only work part time, although there can be other reasons why a driver is unable to work such as due to jury service. The preference list was intended to record these matters and to help with the allocation of routes or shifts to drivers. This list is different to a flexible working request under the Respondent's policies – the latter being a formal process whereas the preference list is something looser and more informal and intended to be used to record the matters described above.

166. The preference list appears to have grown over the years to include personal preferences from drivers as to the routes and shifts they wished to do or to avoid, and this created additional bureaucracy for those undertaking allocations. By August 2021 there were 50 names on the list and it became unmanageable and difficult to allocate less popular shifts. It also resulted in feelings of resentment by some drivers who felt that there was favouritism. This culminated in two grievances from two drivers about the way in which the list operated in or around July 2021. At this time Mrs Dawson was absent from work, therefore her cover as Garage Manager was Mr Stavros Heracleous. Having dealt with those two grievances Mr Heracleous gave instructions to Mrs Tkaczyk to notify drivers that they were being given two weeks' notice that the list was being withdrawn.

167. The Tribunal was provided with a copy of an email exchange between Mr Heracleous and Mrs Tkaczyk dated 12 August 2021 in which he provided her with template wording that she could edit or add to as she wished. This wording was to be used in letters to go to drivers who would be removed from the list. It transpired that those removed from the list were simply those who had expressed a personal preference for a particular shift (or to avoid

particular shifts) rather than disregarding those with other commitments such as trade union time. The Claimant was one of eight such drivers who had only expressed a preference as opposed to a commitment which prevented him working.

168. The draft wording said that due to a review of allocation of workload, it had become apparent that it would no longer be possible to sustain the preference list any further and that the arrangement would stop on 24 August 2021. The wording said that if a driver wished to have different duties they should ask other colleagues for mutual exchange.

169. Mrs Tkaczyk responded to Mr Heracleous to inform him that following a review of the allocation list, she would be writing letters to the eight drivers, however union officials, night panels, spare drivers and part time drivers would not be written to unless he requested otherwise. There was no evidence before the Tribunal that this decision emanated anywhere other than from Mr Heracleous, at the most it showed that Mrs Tkaczyk was simply following his instructions. The Claimant has challenged that during these proceedings and maintains the argument that the decision to remove him was made by Mrs Tkaczyk and that he was told on 11 August 2021 by the allocation officer Mr Farrukh (before the email exchange) that the allocation staff would no longer entertain his request for duty changes and that it would have been done by mutual agreement with other drivers in future. The Claimant raised this by email dated 12 August 2021 to Mr Faichney and Mr Heracleous, to which Mr Faichney responded to advise the Claimant that he would need to raise this with his line manager, or alternatively formally as a grievance via Human Resources. The Claimant received no response from Mr Heracleous.

Claimant's grievance of 15 August 2021

170. The Claimant raised this as a three page grievance letter on 15 August 2021 (grievance seven). In his grievance the Claimant accused Mrs Tkaczyk of harassing, victimising, and targeting him once again. There was no explicit reference to race discrimination although the Claimant said that Mrs Tkaczyk's "acts of favouritism" would soon be exposed with the outcome of his other two pending grievances against another driver for bullying and harassment, whom he said that Mrs Tkaczyk had been trying to protect from day one.

171. The Claimant suggested that Mrs Tkaczyk's letter removing him from the preference list, was produced after he had sent his email to Mr Faichney The Claimant's email to Mr Faichney and Mr Heracleous was timed at 1.25am on 12 August, the email from Mr Heracleous to Mrs Tkaczyk was timed at 08:55 on the same date. The Claimant said that he was shocked that Mrs Tkaczyk had taken such quick action against his email to take revenge against him, and that she had impacted many drivers. The Claimant said this would cause more flexible working requests thus creating more paperwork for HR and management and that this was simply an unprofessional and childish attitude by Mrs Tkaczyk.

172. The grievance also referred to a separate matter, which was his request on 16 June 2020 to Mrs Tkaczyk for him to change his bus route. We were provided with a copy of the message which reads:

"Dear Anna, I request you to please change my rota to route 90 regular as the shift pattern suits me because I travel to work by public transport therefore it's very hard for me to start very early or very late duty and also it will save the hassle of shift swaps as it is getting very difficult nowadays. It will also give me an opportunity to avoid the driver against to my grievance as he is still not letting go a single opportunity to tease me while going past me on the road. I have also submitted a memo in this regard."

173. Mrs Tkaczyk said that she would pass the request to the Garage Manager to process. The Claimant says that management refused his request and purposely allocated the space to a new driver, whereas that route is normally allocated on the basis of seniority. The Claimant said that when he requested the same route a few years back, he was told that only senior drivers had the priority to go on the 90 route.

174. The Respondent had not appreciated until the hearing that the Claimant was referring to the 16 June 2020 request, and it had assumed that it related to a subsequent flexible working request. It is not clear why the Respondent formed that mistaken view as the date of 16 June 2020 was clearly referred to in the Claimant's grievance of 15 August 2021 although the dates were absent from the Claimant's ET1 and particulars. It was a recurring theme in this case that the parties had different understandings as to the issues. This is unfortunate given that there had already been a preliminary hearing for case management, and the Respondent could have asked for clarification where it was in doubt. This also meant that paragraphs 6, 7 and 8 of Mrs Dawson's witness statement related to a claim which hadn't been brought and was of no relevance, however we heard evidence from Mrs Dawson as far as she could remember about the Claimant's 16 June 2020 request.

175. Mrs Dawson informed us that previously routes were allocated on the basis of seniority, however the trade union had raised this with her, and it was agreed that henceforth allocation would be there on the basis of first come first served. It is understood that it was allocated to Mr Etienne who is of Afro Caribbean origin.

176. Mrs Dawson did not accept that this person was a new driver, her evidence was that he was both experienced and senior having worked there for many years. The Claimant did not challenge Mrs Dawson on that, but argued that he made his request first. No evidence was provided from either party as to the dates when the Claimant submitted his original request. Mrs Dawson's evidence was that Mr Etienne had requested it first as she had remembered Mr Gill querying it and having provided him with that explanation at the time.

Outcome of grievance dated 15 August 2021

177. This seventh grievance was allocated to Rodolfo Brusa, (Garage Manager, Cricklewood). Mr Brusa did not appear as a witness in these proceedings, however the handling of the grievance was not an issue to be decided by the Tribunal.

178. The documents within the hearing bundle show that Mr Brusa interviewed the Claimant with his trade union representative Mr Gill on 21 October 2021. The notes of the interview are comprehensive and demonstrate a thorough examination of the Claimant's grievance including a background to the preference list and also some of his previous complaints about Mrs Tkaczyk.

179. We were referred to an email exchange of 18 October 2021. This was an email sent to the claimant at his personal Gmail email address. The email reads as follows:

"Hello Ali, i am a metroline west perivale staff and for my job security reasons i am unable to disclose my name and my position in the company. I am aware of your grievance against the operation manager Ms Anna for stopping allocation changing your duties, and your hearing is sometime this week, just would like to inform you that when you actually emailed Mr Nick Faichney and Ms Anna to complain and mention to call the allocation member who refused to change your duties, just after that the operation manager tried to remove Mr Farrukh from the panel allocation position so that his statement does not make any value to this case and to pressurise Mr Farrukh to not give any statement against her. The proof is Mr Farrukh sent an email to the Garage manager, just couple of days after your email, to complain about this event and the garage manager, then assured Mr Farrukh not to worry because he will not lose his possession. This email won't be in the system. The reason I am informing you is that Mr Farrukh was pressurized, manipulated and may back of from his words and the actual statement."

180. This email was sent from an anonymous email address with the name "anonymouslightuk". There were subsequent exchanges between the Claimant and this individual where the Claimant asked if he could rely upon the email, to which the anonymous author replied that he could.

181. We placed no weight on the anonymous email and have treated it with a degree of scepticism. The email could have been written by anyone for all sorts of motivations. The Claimant says that he does not know who the author is. Clearly the author is someone who knows the Claimant's home email address (which the Claimant says is available on the Respondent's Blink messaging app) and also this individual knows of the Claimant's grievance.

182. We heard evidence from Mrs Tkaczyk that she temporarily relieved Mr Farrukh from allocations as he was covering it for someone who was off, and he was struggling with it due to personal circumstances. We also received a copy of a message from Mr Farrukh to Mrs Dawson of 15 August 2021 querying why Mrs Tkaczyk had removed him from allocations, although in his message he admitted that he had told her that no one wanted to do allocations due to such pressure and enormous workload, however he said that he not resigned from the duties. The response from Mrs Dawson was that she had spoken to Mrs Tkaczyk who informed her that she had not removed him from the panel but had *"taken you off covering temporarily whilst the investigation into grievances submitted are being investigated, I am not in the garage so I suggest that you speak to Anna direct and sort out*

the issue with her in order to continue a working relationship moving forward."

183. This appeared to contradict Mrs Tkaczyk's evidence, however we note that the decision to remove the Preferences List was due to the administrative burden and the two grievances which had been lodged, therefore it was entirely plausible that Mr Farrukh was removed for that reason, and that it was a combination of these matters which was having an impact upon him resulting in these duties being temporarily removed from him. We also heard evidence that allocations was simply an additional function and not a substantive role in itself. We therefore do not draw any negative inferences from the inconsistency in the evidence of Mrs Tkaczyk when compared to the contemporaneous documents.

184. We also heard evidence from Mrs Dawson that Route 90 was favourable to drivers due to the higher rate of pay. We also heard evidence from the Respondent's witnesses that route 90 would still have involved the Claimant encountering Mr Wozniak on the route towards Northolt, and that both routes shared the same garage so he would have still encountered him there at lunch breaks.

185. On 23 August 2021 the Claimant issued his ET1 claim form.

186. On 3 November 2021 Mr Brusa sent an outcome letter to the Claimant in relation to his grievance about the preference list (grievance seven). Whereas we did not hear from Mr Brusa as a witness, we have viewed the outcome letter. We note that the Claimant's seventh grievance was rejected and he made the following findings:

186.1 Mrs Tkaczyk did not make the decision to remove the preference list, rather this was Mr Heracleous' decision. Mrs Tkaczyk's role during these events was very limited and that the decision was not hers.

186.2 It was more likely that before the formal removal of the preference list, the Claimant had not in fact been removed, but rather the allocation team was not able to change his shift and that he had to find his own mutual exchanges.

186.3 The preference list had been misunderstood, misused and relied upon too much to the point of became a burden more than an assistance.

186.4 There were no grounds to believe Mrs Tkaczyk harassed, victimised, or bullied the Claimant in anyway.

187. In March 2022 the Respondent closed the West Perivale garage. The Claimant transferred to Lampton, and Mr Wozniak left the business. Before he left, Mrs Tkaczyk says that Mr Wozniak spoke to her and apologised for the issues he had caused. It was Ms Tkaczyk's evidence that Mr Wozniak was apologising for the work management had to undertake in dealing with complaints from or about him, rather than apologising for issues he had allegedly caused other drivers.

Submissions

188. We were helpfully provided with written closing submissions from the Respondent (13 pages) and from the Claimant (11 pages) which both parties supplemented with brief oral submissions. The contents of those submissions are not repeated here, however we have made reference to the key arguments within the conclusions and analysis section below.

189. We wish to address one matter which the Respondent has made explicit reference to in their submissions which relates to the Respondent's failure to call Mr Wozniak as a witness. The Claimant has not invited the Tribunal to draw a negative inference from the Respondent's failure to call Mr Wozniak, however we would not have expected him to do so as a litigant in person who is unfamiliar with this arena.

190. The Respondent reminds us that it did not have knowledge of the precise allegations against it until after the preliminary hearing in October 2022 (the ET1 having been issued in August 2021). We have already recorded that this is accurate and was due to an issue with the Claimant's attachment and the Tribunal then having erroneously sent it to the wrong email domain.

191. The Respondent says that by the time the Respondent had those particulars Mr Wozniak had left the Respondent's employment seven months earlier, and moreover the specific allegations relating to Mr Wozniak were significantly out of time by between 7 and 17 months. The Respondent invites us not to draw a negative inference on the basis of the judgment in ***Efobi v Royal Mail*** **[2021] ICR 1263**:

> *"The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in Wisniewski v Central Manchester Health Authority [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."* [41]

192. We will address the issue of Mr Wozniak's absence in the conclusions and analysis section below.

Law

193. References within square brackets below relate to paragraph numbers in the judgments which have been referenced.

194. Section 9 Equality Act 2010 provides:

Race

(1) Race includes—

(a) colour;

(b) nationality;

(c) ethnic or national origins.

195. Section 39 Equality Act 2010 provides:

Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—
…

(d) by subjecting B to any other detriment.

…

196. Section 40 Equality Act 2010 provides:

Employees and applicants: harassment

(1) An employer (A) must not, in relation to employment by A, harass a person (B)—

(a) who is an employee of A's;

…

Burden of proof

197. Section 136 Equality Act 2010 provides:

…

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred;

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

…

198. There is a two-stage process. At the first stage, the Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the Claimant. At the second stage, if the Claimant is able to raise a *prima facie* case of discrimination following an assessment of all the evidence, the burden will then shift to the Respondent to show a non-discriminatory reason for the difference in treatment.

199. Guidance to Tribunals on the burden of proof can be found in a number of cases including ***Igen v Wong*** **[2005] IRLR 258** which was approved in ***Madarassy v Normura International Plc*** **[2007] EWCA 33**.

200. In ***Igen*** the Court of Appeal cautioned tribunals "against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground" [51]. Similarly In ***Madarassy*** Mummery LJ cautioned:

> *"…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 act of discrimination."*

201. More recent guidance on the burden of proof can be found from the case of ***Efobi v Royal Mail Group Ltd*** **[2021] ICR 1263**. Here the Supreme Court reiterated that it is for the Claimant to prove facts from which a tribunal could conclude, in the absence of an explanation, that an unlawful act of discrimination had occurred – however this may include consideration of the employer's evidence and not just the Claimant's evidence. It was noted that:

"…the Court of Appeal in Igen Ltd v Wong, at para 24, made it clear that the employment tribunal could take account of evidence from the respondent which assisted the tribunal to conclude that, in the absence of an adequate explanation, discrimination by the respondent on a proscribed ground would have been established." [21] and further:

"The central point made in this passage is that section 136(2) requires the employment tribunal to consider all the evidence from all sources, not just the claimant's evidence, so as to decide whether or not "there are facts" etc. I agree that this is what section 136(2) requires. I do not, however, accept that this has made a substantive change in the law. The reason is that this was already what the old provisions required as they had been interpreted by the courts. As discussed at paras 20—23 above, it had been authoritatively decided that, although the language of the old provisions referred to the complainant having to prove facts and did not mention evidence from the respondent, the tribunal was not limited at the first stage to considering evidence adduced by the claimant; nor indeed was the tribunal limited when considering the respondent's evidence to taking account of matters which assisted the claimant. The tribunal was also

entitled to take into account evidence adduced by the respondent which went to rebut or undermine the claimant's case." [26] and:

"… the claimant has the burden of proving, on the balance of probabilities, those matters which he or she wishes the tribunal to find as facts from which the inference could properly be drawn (in the absence of any other explanation) that an unlawful act was committed. This is not the whole picture since, as discussed, along with those facts which the claimant proves, the tribunal must also take account of any facts proved by the respondent which would prevent the necessary inference from being drawn. But that does not alter the position that, under section 136(2) of the 2010 Act just as under the old A provisions, the initial burden of proof is on the claimant to prove facts which are sufficient to shift the burden of proof to the respondent." [30]

202. Accordingly, only once that first stage is satisfied, does the burden then shift to the employer to explain the reasons for the treatment and to satisfy the tribunal that the protected characteristic played no part in those reasons – however a tribunal is entitled to take into account evidence from the Respondent at that first stage.

203. Mere unreasonable treatment by an employer "casts no light whatsoever" as to the question of whether an employee has been treated unfavourably - ***Strathclyde Regional Council v Zafar*** **[1998] IRLR 36**. This has also been followed by the Employment Appeal Tribunal in ***Law Society and others v Bahl*** **[2003] IRLR 640** where it was held that mere unreasonableness is not enough as it tells us nothing about the grounds for acting in that way. Unreasonable behaviour can go to the credibility of a witness who is trying to argue that their actions were not motivated by the characteristic in question. If there is unreasonable treatment then a Tribunal will more readily reject the employer's explanation for it than it would if the treatment had been reasonable. In any event, a Tribunal must also take into consideration all potentially relevant non-discriminatory factors which could realistically explain the conduct of the alleged discriminator.

Direct Discrimination

204. Section 13 Equality Act 2010 provides:

Direct discrimination

(1) 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.

…

205. There are two aspects to direct discrimination that must be considered by the Tribunal. The first is the alleged less favourable treatment, and the second is the reason for the treatment complained about with a causal link between the two.

206. As above, less favourable treatment does not mean unreasonable treatment, but it also does not mean detrimental treatment or unfavourable

treatment or simply different treatment. There must be a comparison either actually or hypothetically that shows less favourable treatment. It is the treatment rather than the consequences of the treatment that are the subject of the comparison - ***Balgobin v Tower Hamlets London Borough Council*** **[1987] ICR 829.**

207. As regards what may amount to less favourable treatment, this does not require a Claimant to show that objectively they are less well off as a result of the conduct complained of. It may be sufficient for a Claimant to reasonably say that they would have preferred not to have been treated differently - ***Chief Constable of West Yorkshire Police v Khan*** **[2001] UKHL 48.** In that case it was held:

"It cannot, in my opinion, be enough… simply to show that the complainant has been treated differently. There must also be a quality in the treatment that enables the complainant reasonably to complain about it." [76]

208. It is insufficient for a Claimant to argue that the Respondent would have treated them less favourably in certain circumstances. The alleged less favourable treatment must actually have occurred in order for liability to arise - ***Baldwin v Brighton and Hove City Council*** **[2007] IRLR 232.**

209. Whether less favourable treatment is proven requires a comparison to a suitable comparator. The comparators do not need to be identical, however there is a general requirement that there be no material difference between the people being compared either actually or hypothetically. It was held in ***Macdonald v Ministry of Defence*** **[2003] ICR 937** that:

"The sex of the comparator must, of course, be different. But, if the relevant circumstances are to be same or not materially different, all characteristics of the complainant which are relevant to the way his case was dealt with must be found also in the comparator. They do not have to be precisely the same. But they must not be materially different." [64].

210. Whereas ***Macdonald*** above was a sex discrimination claim, the principles are equally applicable to complaints of race discrimination.

211. Section 23 Equality Act 2010 provides:

Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

…

212. In cases where there is no actual comparator it is permissible for a Tribunal to concentrate on asking why a Claimant was treated in the way he was. A Tribunal may ask the question was the Claimant treated in this way it because of the proscribed grounds? Where it was on the basis of the proscribed grounds then there will need to be an examination of the facts of the case. Where it is for some other reason then the application will fail - ***Shamoon v Chief Constable of the Royal Ulster Constabulary***

(Northern Ireland) **[2003] IRLR 285.** It may therefore be appropriate for the Tribunal to ask what is known as the "reason why" question, essentially did the Claimant receive less favourable treatment than others because of the protected characteristic?

213. For direct race discrimination to occur, the less favourable treatment must be "because of" race rather than something related to it. However whilst the protected characteristic needs to be a cause of the less favourable treatment it "*does not need to be the only or even the main cause"* - paragraph 3.11 of the Equality Human Rights Commission Employment Statutory Code of Practice ("the EHRC Code"). Therefore where there is more than one reason put forward for why the Respondent treated the Claimant how they allegedly did, the discriminatory reason need not be the sole or even principal reason for the actions - it only needs to have had "a significant influence on the outcome" - ***Owen & Briggs v James*** **[1982] IRLR 502 (CA)**.

214. The Tribunal will need to consider the reason why the Claimant was treated less favorably – ***Nagarajan v London Regional Transport and others*** **[1999] IRLR 572**. Generally motivation of the alleged discriminator is irrelevant to a direct discrimination claim. It was held here that if the protected characteristic had a *"significant influence on the outcome"* then discrimination was made out.

215. In ***Macdonald*** the court applied the "but for" test which was identified in ***James v Eastleigh Borough Council*** **[1990] ICR 554**, and held that *"the issue is whether the complainant would have received the same treatment from the employer "but for ... her sex.""* [65]. Further consideration of the but for test was provided in ***Ahmed v Amnesty International*** **[2009] IRLR 884** where it was held:

"if the discriminator would not have done the act complained of but for the Claimant's sex (or race), it does not matter whether you describe the mental process involved as his intention, his motive, his reason, his purpose or anything else—all that matters is that the proscribed factor operated on his mind." [37].

216. However in ***R v The Governing Body of JFS and the Admissions Appeal Panel*** **[2009] UKSC 15** it was confirmed that where it is self-evident that discrimination is taking place because there is reference made to the protected characteristic, it is not necessary to analyse the motives of the discriminator as they are irrelevant. However where discrimination is not immediately apparent, it is necessary to analyse the motivation (both conscious and unconscious) of the alleged discriminator but only for determining whether the characteristic played any part in the alleged discriminatory behaviour.

217. There is no justification defence for a direct race discrimination claim. Unintentional direct discrimination done with or without good intention is therefore just as unlawful as intentional direct discrimination, - ***Khan v Royal Mail Group*** **[2014] EWCA Civ 1082** and ***Ahmed v Amnesty International*** **[2009] IRLR 884** which reaffirmed that a benign motive is irrelevant.

Harassment

218. Section 40 of the Equality Act 2010 provides that an employer must not, in relation to employment by him, harass an employee. The definition of harassment is set out in section 26(1) of the Equality Act 2010 which provides:

"Harassment

(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.

…

(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.

(5) The relevant protected characteristics are—

…

race;

…

219. The Tribunal is required to reach conclusions on whether the conduct complained of was unwanted and, if so, whether it had the necessary purpose or effect and, if it did, whether it was related to race. Unwanted conduct means the same as unwelcome or uninvited, and specifically unwanted by the Claimant – ***Thomas Sanderson Blinds Ltd v English*** **UKEAT/0316/10**.

220. It is clear that the requirement for the conduct to be "related to" race needs a broader enquiry than whether conduct is "because of race" like direct discrimination ***Bakkali v Greater Manchester Buses (South) Limited*** **UKEAT/0176/17**. Protection from such behaviour only arises if it is related to the protected characteristic - ***Warby v Wunda Group Plc*** **UKEAT/0434/11/CEA**. In assessing whether it was related to race, the form

of the conduct in question is more important than why the Respondent engaged in it or even how either party perceived it.

221. It can be appropriate to consider the motivation and thought processes of alleged harassers when considering whether their conduct amounts to harassment - ***Unite the Union v Nailard*** **[2018] IRLR 730**.

222. As to whether the conduct had the requisite effect, there are both subjective considerations – the Claimant's perception of the impact on him – but also objective considerations including whether it was reasonable for it to have the effect on this particular Claimant, the purpose of the remark, and all the surrounding context - ***Richmond Pharmacology Ltd v Dhaliwal*** **[2009] ICR 724**. Conduct which is trivial or transitory is unlikely to be sufficient.

223. Mr. Justice Underhill, as he then was, said in that case:

"A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That…creates an objective standard … whether it was reasonable for a Claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt …" [15].

and

"…Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…" [22].

224. In ***HM Land Registry v Grant*** **[2011] EWCA Civ 769**, Elias LJ said:

> *"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."*

225. If something was said or done innocently by the Respondent that may be relevant to the question of reasonableness under section 26(4)(c).

226. As regards the words "violating and intimidating" these are strong words and will usually require evidence of a serious impact or marked effects. An "environment" can potentially be created by an isolated comment but the effects must be lasting. The identity of the person who made the comment,

and whether it is heard by others can be relevant factors. Where there are several instances of alleged harassment, the Tribunal can take a cumulative approach in determining whether the statutory test is met ***Driskel v Peninsula Business Services Ltd*** **[2000] IRLR 151**. In ***GMBU v Henderson*** **[2015] 451** Simler J said, "..*although isolated acts may be regarded as harassment, they must reach a degree of seriousness before doing so."*

227. If it was not reasonable for the conduct to be regarded as violating the Claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so - ***Pemberton v Inwood*** **[2018] ICR 1291**.

Time Limits under the Equality Act 2010

228. Section 123 Equality Act 2010 provides:

> **Time limits**
>
> *(1) Subject to section140B proceedings on 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.*
>
> *…*
>
> *(3) For the purposes of this section—*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
>
> *…*

229. The Employment Tribunal has a wide discretion to allow an extension of time under the 'just and equitable' test in s.123, however it does not necessarily follow that exercise of the discretion is a foregone conclusion in a discrimination case. In ***Robertson v Bexley Community Centre t/a Leisure Link*** **[2003] IRLR 434, CA**, the court held that when tribunals consider exercising the discretion under what is now S.123(1)(b):

"there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule." [25]

230. As to the approach in cases where it is alleged that there is a course of conduct or a continuing act, the EAT in ***Concentrix CVG Intelligent Contact Ltd v Obi*** **[2022] EAT 149** held:

"The tribunal should consider first whether, taking all of the incidents as a course of conduct extending over time together, it is just and equitable to extend time, taking into account any issues of forensic prejudice by reference to the earlier incidents that are said to form part of the overall conduct. The Tribunal may conclude, having done so, that it is just and equitable to extend time in relation to the whole compendious course of conduct. But if, because of issues of forensic prejudice in relation to earlier incidents, the tribunal concludes that it is not just and equitable to extend time in relation to the whole of the compendious conduct over time, it may then need to give further consideration to whether it is alternatively just and equitable to extend time in relation to the most recent incident in its own right, standing alone, on the basis that the same forensic difficulties might not arise, or arise so severely, in relation to it." [72]

Conclusions and analysis

231. We will deal with each of the Issues in turn, however we will first address the issue of the Respondent not calling Mr Wozniak as a witness.

232. Whereas we did not have the benefit of Mr Wozniak as a witness in these proceedings, we have not drawn any inference by the decision of the Respondent not to call him. This is because the Respondent was unaware of the specific allegations against it until the preliminary hearing of 6 October 2022 at which point the issues were clarified. Mr Wozniak had already left the Respondent's employment seven months earlier.

233. We were not informed what steps, if any, were taken to engage with Mr Wozniak, however it appeared to the Tribunal that the grievance interviews conducted with Mr Wozniak, and the notes of the meetings, gave us a sufficient understanding of his response to those allegations. We of course accept that they were responses given to an employer and not the Employment Tribunal, and we have borne that in mind when dealing with allegations against Mr Wozniak.

234. Nevertheless, we did not feel that the absence of Mr Wozniak impeded our consideration of the substantive issues in any way, nor was there any particular prejudice to the Claimant who had not sought to challenge this in advance of, or during the hearing. It appeared us to that the documents spoke for themselves and the Claimant was able to question the Respondent's witnesses who had interviewed Mr Wozniak.

235. We therefore did not draw any negative inference from the absence of Mr Wozniak at this hearing. We will now deal with each of the Issues in turn.

A On 31st October 2019 Mr Wozniak (a Polish employee of the respondent and another bus driver) punched the claimant's can of drink and acted aggressively and dismissively when the claimant asked him to apologise

236. We had before us the Claimant's occurrence report where he complained about this. The Claimant did not allege that the incident was an act of race discrimination at the time.

237. The matter was investigated by Mrs Tkaczyk and we have read the notes of interview with Mr Wozniak who admitted punching the can. The issue is therefore not whether the can punching incident occurred, but the reason for doing so.

238. We have paid close attention to the Claimant's own evidence and the contemporary documents where he said that Mr Wozniak was behaving in this way to everyone. The meaning of this is clear – Mr Wozniak was allegedly doing things like this to other people, including to people who were not Asian Pakistani.

239. It was only during the final hearing when it was put to the Claimant that if Mr Wozniak was doing this to everyone, then it could not be less favourable treatment, the Claimant then sought to argue that he intended the word "everyone" to mean just people of Asian Pakistani background. We reject that submission as it was not what the Claimant said at the time and it was clear what he meant – namely that Mr Wozniak was behaving inappropriately towards everyone.

240. It follows from this that we find that the Claimant has not shifted the burden of proof to the Respondent, and we find that the behaviour complained of, comprising the can punching and the alleged response from Mr Wozniak when challenged, had nothing whatsoever to do with the Claimant's race. We find no evidence of less favourable treatment.

241. We dismiss this complaint of direct race discrimination.

242. As regards harassment, we find that this was unwanted conduct by Mr Wozniak as there is no evidence that the Claimant consented to this sort of behaviour. However, for the reasons already given above, we cannot find that this related to the Claimant's race. Whilst the behaviour complained of was unwanted, we dismiss the complaint of harassment as the conduct did not relate to the Claimant's race.

B On 2nd March 2020 Mr Wozniak was taking pictures/filming him at a bus stand (which the claimant then reported to management);

243. As indicated above, we did not have the benefit of Mr Wozniak as a witness in these proceedings.

244. We had before us the Claimant's grievance where he complained about this. The Claimant did not allege that the incident was an act of race discrimination at the time.

245. We note that during his interview with Mr Wright, the Claimant agreed that he was saying that Mr Wozniak had issues with everyone and purposely created issues for others.

246. We have read the notes of interview with Mr Wozniak about this incident. We will need to decide if Mr Wozniak was filming or taking photographs of the Claimant, and if so if this was less favourable treatment on grounds of race, or harassment related to race.

247. Mr Wozniak denied filming the Claimant and said that he was making a video or a FaceTime call to his wife. This appeared to us to be a plausible explanation as both acts (using FaceTime and taking photographs/videos of the Claimant) would have involved Mr Wozniak holding the phone in front of him. We note that whilst Mr Wright did not view the CCTV footage, he interviewed Mr Morrison who had done so and had identified that Mr Wozniak had his phone out in front of him, however this could have been done for either of the purposes identified.

248. We noted that Mr Wozniak had made a complaint that day about the Claimant not wearing his hi vis jacket and using his mobile phone, however he did not submit photographs or a video with it. It appeared to us that had Mr Wozniak been photographing or videoing the Claimant as alleged it could have been to evidence his subsequent complaint against the Claimant, however given that he had not provided such material it was more likely that he was using his mobile phone to video call his wife.

249. We note that the Claimant has provided no evidence whatsoever to substantiate the allegation that he was being photographed or filmed – the most he is able to say is that Mr Wozniak was holding his mobile phone in front of him. That falls far short of demonstrating what he was doing it for. The CCTV footage of Mr Wozniak doing so would not show what was on his screen.

250. In any event the Claimant bears the burden of proof and he has not satisfied us to the level that we need to be satisfied (balance of probabilities) that Mr Wozniak had taken photographs or videoed him. The Claimant has not shifted the burden of proof to the Respondent.

251. Given that we do not find that Mr Wozniak was photographing or videoing the Claimant the factual premise of the complaint is not made out. Accordingly, we do not need to go on to consider the issue of whether this was less favourable treatment on grounds of race, nor do we need to consider whether this was unwanted conduct related to race nor the remainder of the test under s. 26 Equality Act 2010.

252. We therefore dismiss the complaint of direct race discrimination and also the complaint of harassment.

C The respondent via Ms Anna Tkaczyk (who is also Polish) the Operations manager, failed to properly deal with his complaints about Mr Wozniak between 31 October 2019 and 5 March 2020

253. We have reviewed the handling of the Claimant's first grievance on 31 October 2019. It was clear to us that Mrs Tkaczyk thought that the Claimant's complaint about the can of drink was petty. Mrs Tkaczyk confirmed this in her evidence. We note that this complaint was made in an occurrence report rather than formal grievance document and there was no mention of race discrimination within it.

254. We have already identified procedural failings in the conduct of that grievance investigation. Mrs Tkaczyk took three months to issue the Claimant with an outcome which we find was excessive for a grievance of this nature, however she could not recall why there was such a delay. Mrs

Tkaczyk also did not inform the Claimant of the outcome as she said that it was confidential, and she did not inform the Claimant of his right to an appeal. Mr Wright and Mr Faichney have also agreed that these were failings, although Mr Faichney said that the delay was excessive, whereas Mr Wright said that it was long but not excessive.

255. We did not find that the decision of Mrs Tkaczyk not to interview witnesses to the can punching incident was a procedural failure as there would have been nothing to have been gained from doing so as the conduct was admitted by Mr Wozniak. Interviewing witnesses would not have told Mrs Tkaczyk anything she did not already know – moreover Mr Wozniak as the perpetrator had been interviewed.

256. We have gone on to consider whether the time taken to deal with the October 2019 grievance, the failure to inform the Claimant of an outcome, and the failure to notify him of his right to appeal, was less favourable treatment on grounds of race. We do not find that it was.

257. We find that Mrs Tkaczyk formed the view that the behaviour complained about was a petty incident and she therefore did not deal with it in the way that she would have been expected to if the Claimant brought this as a formal grievance and specified that he was complaining of race discrimination. We find that these were errors on the part of Mrs Tkaczyk, however we have not identified any facts from which we could infer that these were in some way connected with the Claimant's race. It appeared to us that Mrs Tkaczyk was influenced by her view that this was a petty matter and that race played no part in her conduct.

258. As regards Mrs Tkaczyk's decision to allocate the investigation into the Claimant's grievance of 5 March 2020 to Mr Morrison, we have found the Claimant's argument here to be inconsistent as he appeared to complain that Mrs Tkaczyk had mishandled the first grievance investigation but he still wanted her to deal with the second grievance.

259. In any event we find that it was entirely reasonable of Mrs Tkaczyk to have allocated the investigation to a colleague to undertake. The Claimant did not have a right to insist on who would be allocated his grievance. We could not find any facts from which it might be inferred that asking Mr Morrison to investigate the grievance would amount to less favourable treatment on any grounds, including race.

260. The Claimant has not shifted the burden of proof to the Respondent with respect to the handling of his grievances of 31 October 2019 and 5 March 2020.

261. We therefore dismiss this complaint of direct race discrimination.

D The (General Manager) Yvonne Dawson threatened to transfer the claimant to another garage on 5 March 2020

262. The Claimant has not provided us with evidence that it was only he who Mrs Dawson had threatened to transfer, and although he suggests that this was witnessed by his trade union representative Mr Gill, he did not call him as a witness to substantiate this allegation.

263. Mrs Dawson's evidence was she threatened to transfer both the Claimant and Mr Wozniak if they persisted in making complaints against each other.

264. The Claimant bears the burden of proof in this regard, and it is for him to persuade us that Mrs Dawson only threatened to transfer him, and that this was less favourable treatment on grounds of race. The Claimant has failed to do so. There are no facts from which we could infer that less favourable treatment had taken place.

265. Whereas the burden of proof has not shifted to the Respondent, we have accepted the Respondent's explanation, and we have found that Mrs Dawson had concluded that Mr Wozniak and the Claimant were engaging in "tit for tat" complaints which was taking up management time, and as such she threatened to transfer both of them.

266. We have also found that this was Mrs Dawson's normal practice where drivers could not get along, and she treated both the Claimant and Mr Wozniak equally and consistent with her usual approach to such matters.

267. We therefore dismiss the complaint of direct discrimination.

268. As regards the complaint of harassment, we find that the threat to transfer the Claimant was also made with respect to Mr Wozniak, and that it was unwanted conduct. However, we find that it was applied equally to both the Claimant and Mr Wozniak, and as such race could not have been the reason for the treatment. We therefore do not need to deal with the remainder of the test under s. 26 Equality Act 2010.

269. We therefore also dismiss this complaint of harassment.

E From 10 March 2020, after a further grievance was submitted about Mr Wozniak's treatment of him, the managers at West Perivale allegedly did not deal with this complaint properly either.

270. The Claimant's further grievance was issued on 23 August 2020 and concerned the allegation about Mr Wozniak blocking the road on 22 August.

271. We have looked carefully at the long and complicated chronology of this complaint. The Claimant passed the complaint to Mrs Tkaczyk on 23 August 2020 who then asked HR for guidance as to who should deal with it. Mrs Dawson then directed Mrs Tkaczyk to deal with the grievance however the Claimant challenged this on 7 September 2020 following which Mrs Tkaczyk then passed the grievance back to HR for another manager to be appointed to deal with it.

272. The grievance was then not actioned whilst Mr Wright conducted the grievance investigation into the allegations that the Claimant had made against management on 9 March 2020. This latter investigation did not conclude until on or around 10 February 2021 following which the Claimant appealed that outcome to Mr Faichney who allocated both road blocking grievances of 23 August 2020 and 16 June 2021 to Mr Parry to investigate.

273. Mr Parry undertook interviews during July and August 2021 and issued his outcome on 16 September 2021. In the interim Mr Parry went on leave and had suffered an injury which delayed matters further.

274. During 2020 the Respondent had reached agreement with the unions not to advance formal disciplinary and grievance processes in order to focus on the response to the COVID-19 Pandemic. We did not have the specific dates but the existence of this agreement was unchallenged by the Claimant.

275. We have already found that there was a delay in dealing with the grievance of 23 August 2020. This delay was excessive even leaving aside a pause on dealing with grievances due to the Pandemic. It appears that rather than being progressed, the Claimant's grievance was generally forgotten by the Respondent's HR department once it was passed back to them by Mrs Tkaczyk who could not deal with it as she had recently been named in a grievance by the Claimant.

276. It was only when the Claimant raised a second similar complaint in June 2021 about road blocking, and having complained that the first one had not been dealt with, that Mr Faichney took urgent steps to have the matters investigated and dealt with by Mr Parry.

277. Leaving aside the delays, the Claimant has said the Respondent did not deal with this grievance properly either, however we have found no procedural failings on the part of Mr Parry once the grievance was eventually investigated. The process followed by Mr Parry was thorough and in compliance with the ACAS Code. Mr Parry interviewed the relevant witnesses, both the Claimant and Mr Wozniak, he reviewed four sets of CCTV in the presence of the witnesses, and he provided the Claimant with an outcome.

278. We do not find that Mr Parry was obliged to interview Mr Weresko. The most that the Claimant told Mr Parry was that Mr Wozniak had blocked Mr Weresko as well on 6 July 2021. We found no evidence that the Claimant told Mr Parry that Mr Wozniak apologised to Mr Weresko for intentionally blocking him as he thought that he was the Claimant. Mr Parry agreed in evidence that had the Claimant told him that then it would have been appropriate to have interviewed Mr Weresko, and we concur. Had that information been passed to Mr Parry then we find it would have been incumbent upon him to have made those enquiries, however there is no evidence that the Claimant passed that information to Mr Parry. As such we do not find that this was a procedural failing.

279. Accordingly, the only procedural failing we have identified relates to the time taken to deal with the grievance which, even despite the Pandemic, we find was excessive. The Claimant was entitled to expect that the Respondent would deal with his complaint much more promptly, and it ought not have taken eleven months to deal with it.

280. However, we have examined closely whether this delay amounts to less favourable treatment of the Claimant on grounds of race. We do not find that it was. We are able to take into account the Respondent's evidence at the first stage, before the burden shifts to the Respondent, and we have

identified a number of reasons above why the outcome was delayed, none of which have anything to do with the Claimant's race. We have not found facts from which it could be inferred that the delay was due to the Claimant's race, and the Claimant has not shifted the burden of proof to the Respondent.

281. We therefore dismiss this complaint of direct discrimination.

F On 22nd August 2020 Mr Wozniak intentionally blocking the claimant's vehicle in Norwood road Southall when coming in the opposite direction at a known narrow spot leading to a traffic jam and a road diversion;

282. We have addressed the delay in dealing with this grievance above. We now turn to the subject matter of that complaint.

283. As set out above, we did not have the benefit of Mr Wozniak as a witness to give us evidence. We did have the benefit of the grievance interview notes from the interviews Mr Parry conducted with the Claimant and Mr Wozniak, and Mr Parry attended the hearing to give witness evidence.

284. The most which can be gleaned from the interview notes including the references to the CCTV footage, and the evidence of the Claimant and Mr Parry, is that the buses being driven by the Claimant and Mr Wozniak pulled out at roughly the same time. We were satisfied having heard the witness evidence, that the Claimant most likely pulled his bus out of the bus stop first and in the region of no more than 18 seconds before Mr Wozniak, however this is a very small gap and it is not sufficient for us to draw an inference that Mr Wozniak pulled his bus out intentionally to block the Claimant, or that the reason for doing so was on grounds of race.

285. We find that this would have been an unusual thing for Mr Wozniak to have done as it resulted in him having to then get off of his bus, checking the rear of his vehicle, and then performing a potentially unsafe manoeuvre of reversing whilst carrying passengers, thus putting himself at risk of disciplinary action. That appeared to us to be an illogical thing for Mr Wozniak to have done intentionally, and whilst it is possible that he did so, we find it implausible.

286. We agree with the Respondent that the factual premise of the complaints of direct discrimination and harassment are not made out, and as such both complaints must fail and are dismissed.

G Anna Tkaczyk allocated the grievances to herself on 4 September 2020 (even though she is alleged to have had a potential conflict)

287. The grievance to which the Claimant refers is that dated 23 August 2020 relating to alleged road blocking by Mr Wozniak on 22 August 2020 which has been dealt with above.

288. Whereas the Claimant handed this grievance to Mrs Tkaczyk deal, the contemporaneous documents show that she attempted to pass this to HR but it was Mrs Dawson who directed her to deal with it. Mrs Tkaczyk invited the Claimant to a grievance meeting which the Claimant declined.

289. Although Mrs Tkaczyk's witness statement was at odds with her oral evidence as to her knowledge about the Claimant's grievance against management, we have already found that was due to the passage of time and not an intention to mislead.

290. It was clear from the contemporaneous documents that Mrs Tkaczyk did not attempt to allocate this grievance to herself, rather the opposite is true and Mrs Tkaczyk had tried to pass the grievance back to HR for someone else to deal with it.

291. The factual premise of the complaint has therefore not been made out. We have nevertheless gone on to consider the act of Mrs Tkaczyk inviting the Claimant to a grievance interview, however there is no evidence of what detriment this was to the Claimant.

292. Even if we are wrong on that and there was a detriment to the Claimant, there are no facts from which it can be inferred that this amounted to less favourably treatment on grounds of race. The burden of proof has not shifted to the Respondent.

293. We therefore dismiss the complaint of direct discrimination.

H The company's delay in dealing with the grievance hearing and outcome

294. This relates to the Claimant's grievance of 23 August 2020 concerning the allegation that Mr Wozniak intentionally blocked his bus the day before on 22 August 2020. We have already addressed this matter above at Issue E where we found that there was an excessive delay in dealing with the grievance even if we take into account the pause on dealing with formal processes due to the Pandemic. We have already found that this was due to a number of factors, however none of which were related to the Claimant's race and we have already dismissed that complaint.

295. However, there is a separate issue here, which is the time it took for the Claimant to be made aware of the outcome once it had been issued by Mr Parry. It was only when the Claimant contacted Mr Parry on 30 September 2021 that he was made aware that the outcome had been issued on 16 September 2021. It is unknown when the letter was received in hardcopy at the Claimant's garage, it seems likely that it was either Friday 17 September or Monday 20 September. The delay is therefore in the region of ten days.

296. We have heard the reasons for the delay in bringing this to the attention of the Claimant. Mrs Dawson had just returned from annual leave and was busy as two bus routes had closed and this meant that she had to reallocate 145 bus drivers. Upon being informed that the letter had been sent she instructed Mrs Tkaczyk to open the sealed envelope and to leave it out for the Claimant to collect. The Claimant came to collect it on 2 October 2021 but declined to take it then as he had asked the supervisor to sign and date it to show when he had received it but the supervisor declined to do so. The Claimant received it by other means the following day.

297. We have again looked closely to determine whether this delay of ten days amounts to less favourable treatment of the Claimant on grounds of

race. We do not find that it was. We again took into account the Respondent's evidence at the first stage, before the burden shifts to the Respondent, and we have identified the reasons why the letter was delayed by ten days before the Claimant received it. We have not found facts from which it could be inferred that the delay was due to the Claimant's race, and the Claimant has not shifted the burden of proof to the Respondent.

298. This complaint of direct discrimination is therefore dismissed.

I After 22nd September 2020 when the claimant submitted an occurrence report submitted against Mr Wozniak for using a mobile whilst standing next to the bus driver's cab and leaning inside, the Claimant did not receive any reply from the company at all;

299. We have heard evidence that this matter was investigated and dealt with by Mrs Tkaczyk who did not find that Mr Wozniak had done anything wrong but she had given him advice and guidance about using his telephone near the bus. We note that when Mr Wozniak previously reported the Claimant for using his telephone whilst near the bus the Claimant was given advice and guidance from Mr Morrison.

300. We have also heard that the Respondent did not have a practice of acknowledging receipts of Occurrence Reports, and where they were complaints about other drivers there was no requirement to inform the complainant of the outcome unless it was a grievance. The Occurrence Report in this instance was not a grievance as it did not relate to Mr Wozniak's treatment of the Claimant, it was simply a complaint.

301. We have also heard that contrary to the Claimant's assertions that the Respondent would acknowledge customer complaints and send them a reply, these complaints would go to TFL in the first instance who may in limited circumstances ask the Respondent for a response for onward transmission to the customer.

302. We do not find that there was any requirement for an acknowledgment of the Occurrence Report although it may have assured the Claimant that his complaint was not being ignored had he received one. There was also no right to know the outcome of such a report being filed. In such circumstances there are no facts from which we could infer that direct discrimination has taken place. Accordingly, the burden of proof has not shifted to the Respondent.

303. This complaint of direct discrimination is therefore dismissed.

J From 16th June 2021 the company did not deal with the further grievance against Mr Wozniak (regarding him not giving way at the right time (on that day)) and there was an unnecessary and excessive delay in the hearing and outcome);

304. We have already made findings that this grievance was dealt with, therefore the initial factual premise of the allegation is not made out.

305. We have looked closely at the time taken for this complaint to be heard and an outcome issued. The complaint was lodged on 16 June 2021, it was

then allocated to Mr Parry to deal with by Mr Faichney who was already dealing with the Claimant's appeal to previous grievances.

306. Mr Parry met with the Claimant on 21 July and 3 August 2021 and he met with Mr Wozniak on 17 August 2021. The CCTV footage from the buses was obtained and viewed by Mr Parry in the presence of the Claimant and then Mr Wozniak. Mr Parry went on a period of annual leave between 21 – 31 August and then suffered an injury and was based at home for some time. The outcome was issued on 16 September 2021. We have already made findings above about the time it took for the outcome letter to reach the Claimant when sent in hardcopy to his garage.

307. The grievance took three months to the day for it to be investigated and an outcome issued. We of course note that Mr Parry was tasked with dealing with two grievances, not simply the one of 16 June 2021 and that this would have involved time spent obtaining and reviewing four sets of CCTV footage and then arranging to meet with the Claimant and Mr Wozniak and conducting those interviews and then drafting an outcome letter. We note that the outcome letter was thorough.

308. In the circumstances we did not find that there had been an unnecessary or an excessive delay in dealing with this matter, however even if we are wrong on that we were able to take into account the Respondent's evidence at this first stage about the steps taken to deal with the grievance. We did not find facts from which it might be inferred that discrimination had taken place. There is no evidence at all that the Claimant's race was a factor in the time taken to deal with his grievance.

309. As regards the time taken for the Claimant to receive the outcome once produced on 16 September 2021, we repeat our findings from Issue H above – namely that there were reasons why the outcome letter was not brought to the Claimant's attention until 30 September 2021, none of which had anything to do with the Claimant's race. The delay in receiving the outcome was because Mrs Dawson had been on leave and upon her return to work she had to allocate 145 bus drivers as two bus routes had closed.

310. This complaint of direct discrimination is therefore dismissed.

L On 15th August 2021 the Operations Manager Anna instructing the allocation team to stop agreeing to informal requests for changes to his working hours, made by the claimant, (which was then part of his grievance);

311. We have already made findings that the decision was not made by Mrs Tkaczyk to remove the preference list, that was a decision of Mr Heracleous and the contemporaneous documents support that finding.

312. The reason for that decision was, as we have found, because the list had become unmanageable and contained the names of one in five drivers, it had gone beyond its original intention, and it had resulted in two grievances.

313. Whereas the letter informing drivers of the decision was signed by Mrs Tkaczyk, she was not the decision maker and she was simply following instructions from Mr Heracleous.

314. The removal of this list impacted a number of drivers and not just the Claimant. Those impacted were those people who had simply expressed a preference for a route as opposed to those with a particular need to remain on the list, for example those with trade union facility time or those on jury service. This would have impacted everyone without such a need, irrespective of race.

315. We are able to take into account the Respondent's evidence at this first stage, including the contemporaneous documents which show how the decision was taken. In the circumstances the Claimant has not proven facts from which we might infer that discrimination has taken place, therefore the burden of proof has not shifted to the Respondent to provide a non-discriminatory explanation. Even if we are wrong on that, the Respondent has demonstrated that the decision had nothing whatsoever to do with the Claimant's race.

316. This complaint of direct discrimination is therefore dismissed.

317. As regards the complaint of harassment, we find that this complaint is misconceived. There is nothing within the letter to the Claimant dated 12 August 2021 which might reasonably be interpreted as harassment generally, nor harassment on grounds of race. This was a standard letter sent to a number of drivers and the language used within it is polite and neutral and it explains in general terms (without reference to grievances) why the individual driver would be removed from the list. The letter specifically states that there is nothing to prevent drivers from agreeing exchanges between themselves, and it advises them that they may make a flexible working request. We note that Mrs Tkaczyk included a copy of the flexible working policy with her letter.

318. Whereas the conduct was unwanted and the Claimant would clearly have preferred not to have been removed from the list, there are no facts from which it might be inferred that this was related to race. We do not therefore need to go on to consider the remainder of the test under s. 26 Equality Act 2010, however we would simply observe that there was nothing within that letter which might reasonably be viewed as having the intention or the effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

319. This complaint of harassment is therefore dismissed.

M On or about a date to be specified management allocated the space of the "90 regular rota" (which is a favourable route and which would have enabled him to avoid Mr Wozniak who he felt was mistreating him) to a new driver; and/or

320. It is unfortunate that this issue was not particularised until the hearing had commenced. It transpired during the hearing that the Claimant was referring to a request from June 2020, as such the relevant paragraphs Mrs Dawson's witness statement did not relate to the specific request.

321. Mrs Dawson was able to deal with this allegation in her oral evidence and she informed us that in the absence of a flexible working request, the allocation of the route at that time would have been on the basis of first come first served. Previously such routes had been allocated on the basis of seniority but this had stopped after the union had complained. It transpired that the route was given to Mr Etienne who is of Afro-Caribbean origin.

322. We were also told that the reason why this route is more favourable was because it had a slightly higher rate of pay.

323. On this particular allegation we find that the Claimant has shifted the burden of proof to the Respondent given that it is accepted that both the Claimant and Mr Etienne had requested Route 90 which carried a higher rate of pay, and it was allocated to Mr Etienne and not the Claimant. There are facts from which it could be inferred that discrimination had taken place.

324. The burden of proof having shifted to the Respondent, we accepted the Respondent's explanation for the treatment. It is unfortunate that the memos where the Claimant and Mr Etienne had both requested this route were not retained by the Respondent, although given the passage of time the Tribunal did not draw any negative inference from this. Had the Claimant brought his claim earlier then it is possible that the evidence would have been preserved and we could have considered the dates of the requests from the Claimant and Mr Etienne. Nevertheless we accepted the explanation provided by Mrs Dawson the allocation of routes was once on the basis of seniority, but it had then changed to "first come first served" following complaints by the union. This was a plausible explanation which we accept.

325. This complaint of direct discrimination is therefore dismissed.

N After the Claimant contacted the regional director Nick (on a date to be specified by the claimant) asking him to revisit the appeal, the employer allegedly refused to comment on it and did not respond further.

326. This Issue concerns the Claimant's grievances of 5 and 9 March 2020 against Mr Wozniak for allegedly filming him, and then the grievance against management. Mr Wright had dealt with those grievances and Mr Faichney dealt with the appeal. Mr Wright and Mr Faichney had also included consideration of the handling of the 31 October 2019 grievance by Mrs Tkaczyk where they made findings about the time taken to deal with it, the failure to notify the Claimant of the outcome, and also the failure to notify him of his right to appeal.

327. The factual premise of this allegation is incorrect. We have made a finding that following the appeal outcome, Mr Faichney did reply to the Claimant after he said that he was dissatisfied with the outcome and Mr Faichney offered to meet with the Claimant to discuss the outcome. The Claimant rejected that offer as Mr Faichney had indicated that he would not revisit the outcome.

328. We have already found that there was no further right of appeal under the Respondent's grievance policy, and whilst there was a potential for a

Director's Review, that must be triggered by a full time recognised trade union officer and only where it is believed that there had been a serious breach of process resulting in an unjust outcome. The Claimant had the benefit of representation by Mr Gill as his trade union representative. Mr Gill did not engage that process, and we have already made findings that the Claimant had access to the grievance policy as he told us that it was outside of the management office. Therefore whilst Mr Gill did not ask for a Director's Review, the Claimant had access to the policy which he could have reviewed and then asked Mr Gill to engage that process for him however he did not do so.

329. There was no formal or automatic right to appeal an appeal decision, therefore there are no facts from which it might be inferred that discrimination had taken place and the burden of proof has not shifted to the Respondent.

330. This complaint of direct discrimination is therefore dismissed.

331. However, we would wish to record our concern that Mr Wright failed to interview Mrs Dawson in connection with the Claimant's allegation against her that she had threatened to transfer him.

332. We find that a reasonable employer would have interviewed Mrs Dawson in dealing with that allegation. We find that the reason Mr Wright did not do so was not because of the Claimant's race, it was in fact because the Claimant had made comments about jungle law, dictatorship and being treated like beggars, which Mr Wright clearly found distasteful and inappropriate especially when combined with the Claimant's comment that Mrs Dawson should not be the Garage Manager.

333. This is reflected in Mr Wright's comments in the grievance outcome which we have included at paragraph 123 of this judgment where he says that the Claimant's response to not getting his desired outcome is to continually escalate and to make accusations without evidence and seeking to discredit management, and that such assumptions were not even factual or relevant. It was clear to us that Mr Wright had formed the view that the manner in which the Claimant had complained about Mrs Dawson as a senior manager was not acceptable, and we find that this was the reason that he did not interview her with respect to the allegation that she threatened to transfer the Claimant.

334. Having failed to interview Mrs Dawson about this allegation, this was then compounded by Mr Faichney who did not seek to do so either. It was also open to Mr Faichney to have recorded that this was a procedural failing and to have taken some form of remedial action, however he did not do so. Again, we do not find that this was influenced by the Claimant's race, we find that the Respondent had formed the view that the Claimant's comments were clearly distasteful and inappropriate about a senior manager, and they were not prepared to accept such behaviour. However, in forming that view both Mr Wright and Mr Faichney had not, in our view, satisfactorily investigated the Claimant's complaint that Mrs Dawson had threatened to transfer him.

335. In any event, the Tribunal had heard live witness evidence from Mrs Dawson when the Claimant put his case to her, and we have already found that Mrs Dawson told the Claimant that she would transfer both him and Mr Wozniak if they did not stop making complaints about each other. We have dismissed the allegations of direct race discrimination and harassment in that regard.

Time limits

336. In the end, it was not necessary to consider time limits in any detail given the findings and decisions made above. As it was, the direct discrimination and harassment complaints all failed, and no further consideration is required.

337. In any event we note that ACAS Early Conciliation took place between 29 June and 26 July 2021. As such we further note that anything allegedly occurring before 30 March 2021 was potentially out of time. The allegations concern a series of alleged acts perpetrated by a wide number of different individuals, and there was an insufficient basis upon which to find any form of continuing act or continuing course of conduct.

338. The Claimant did not put forward any reasons why the Tribunal should have exercised its direction to extend time on a just and equitable basis under s. 123(1)(b) Equality Act 2010. Had any of the matters allegedly occurring before 30 March 2021 succeeded, then it is likely that we would have found that they were out of time in any event.

339. It is the unanimous decision of the Tribunal that all of the Claimant's complaints are dismissed.

340. We were grateful to the Claimant and to Ms Chan for their assistance throughout the hearing, and the quality of their submissions which we have found most helpful.

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Employment Judge Graham

_____

Date 4 January 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
24 January 2024

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FOR EMPLOYMENT TRIBUNALS

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

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