EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs Louisa Mordew	AND	Park's of Hamilton (Coach Hirers) Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Plymouth **ON** 2 and 3 September 2024

EMPLOYMENT JUDGE N J Roper **MEMBERS** Mrs R Barrett
Ms R A Clarke

Representation

For the Claimant: **In person**
For the Respondent: **Mr J Lewis-Bale of Counsel**

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims for unfair dismissal and for direct sex discrimination are not well-founded, and they are hereby dismissed.

RESERVED REASONS

1. Introduction:
2. In this case the claimant Mrs Louisa Mordew claims that she has been unfairly dismissed because she asserted a statutory right, and that she has been discriminated against because of her sex. The respondent contends that the reason for the dismissal was gross misconduct, that there was no discrimination, and it denies the claims.
3. We have heard from the claimant, and we have heard from Mr Joseph Williams and Mr Neil Dennis on her behalf. For the respondent we have heard from Mr Colin Graham and Mr Graeme Hoggan.

4. Credibility:
5. During the course of this hearing two matters arose in the claimant's evidence which affected her credibility. The first was that the claimant asserted for the first time that the Petition Letter was not her letter. Given the agreed List of Issues and the claimant's claim for asserting a statutory right arising from that letter this came as a surprise to say the least. It was the first occasion upon which the respondent had heard the suggestion that it was not the claimant's letter. For the reasons set out below we find that the claimant did write and send that letter and this subsequent assertion was quite simply untrue. Secondly, she accused Mr Graham of having deliberately and dishonestly concocted and fabricated his manuscript notes of his interviews with the other employees involved on 21 November 2023, solely for the purpose of bolstering the respondent's position in these proceedings. There was not a shred of evidence for this very serious allegation, which Mr Graham strongly denied, and in any event his contemporaneous notes were consistent with the other available documents.
6. On the other hand, the evidence of the respondent's witnesses Mr Graham and Mr Hoggan were both measured and consistent with the available contemporaneous documents.
7. For these reasons where there was a conflict between the claimant and the respondent's evidence, we preferred the evidence of the respondent.
8. Bearing all of this in mind, we found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
9. The Facts:
10. The respondent company is Park's of Hamilton (Coach Hirers) Ltd. The respondent is a private company which provides coach services across the UK and Europe. It has two depots, one is in Plymouth, and the other is in Blantyre, in South Lanarkshire, in Scotland. The two depots provide different services in that the Plymouth depot has contracts for coach services from Plymouth to London, Plymouth to Birmingham, and Penzance in Cornwall to London. In Blantyre the services are from Glasgow to Aberdeen, Glasgow to Inverness, Edinburgh to Inverness, Glasgow to Dundee and others. In addition, in Blantyre the respondent undertakes more private contracts.
11. The claimant Mrs Louisa Mordew commenced employment with the respondent as a coach driver on 3 April 2023. She was summarily dismissed on 14 November 2023. The reason for dismissal was gross misconduct for the reasons set out below, but which in short related to insubordination and refusal to follow reasonable management instructions.
12. The claimant had been issued with a written statement of the terms and conditions of her employment, which included reference to a written disciplinary procedure. This procedure explained that: "During the first two years of employment, the company may at its sole discretion bypass any of the provisions outlined in this policy." In other words, the disciplinary policy was non-contractual, and the respondent reserved the right not to have to follow its provisions during the first two years of any employee's employment.
13. The respondent's operations manager in its Plymouth depot was Mr John Smith. His line manager and the overall Operations Manager for the respondent is Mr Graeme Hoggan, from whom we have heard. The respondent's Group HR Manager is Mr Colin Graham from whom we have also heard. Mr Hoggan and Mr Graham are both based in Scotland.
14. There was an incident in July 2023 some three to four months after the claimant commenced employment in which she raised a concern with Mr Smith about an alleged sexual assault and harassment amongst the Plymouth-based employees. It is not relevant for this claim, save to mention that Mr Graham was concerned that the claimant had not followed due HR processes and appeared to have carried out her own investigation and had used insensitive language. The claimant had also resorted to posting information on social media. Mr Graham observed that the claimant's concerns were genuine. Nonetheless he made it clear that in the future it would be important to follow the appropriate processes. The claimant's view is that the matter was not investigated properly and that she felt bullied and intimidated by management.

15. Shortly thereafter in October 2023 another matter of concern came to light. This largely concerned the right for employees to take holiday, and the manner in which it was calculated and paid. This was a genuine concern because after it had been investigated, the respondent agreed that its HR payroll system had not dealt appropriately with the correct manner of calculation. This was a difficult issue given the number of different shifts and overtime worked by various drivers. After it had investigated the matter, the respondent changed its system and made payments to its drivers to compensate for an earlier under calculation of the correct holiday pay due.
16. On 15 October 2023 the claimant wrote to the respondent's Operations Manager Mr John Smith with an attached petition. Extracts from the letter are as follows: "I am writing to you today to address a matter of utmost importance about our holiday pay policy and the deduction of lunch hours. I believe it is crucial to bring to your attention that both issues have raised concerns among our colleagues, and we find it necessary to seek resolution through a formal process. Firstly, about our holiday pay, there is a prevailing sentiment among our workforce that the current arrangement is not only inequitable but also potentially in violation of applicable legal statutes. I have personally sought legal counsel on this matter and the advice received indicates that the current holiday pay policy could be deemed detrimental to our work environment. Many of us have reservations about taking holidays due to these concerns … Secondly I wish to draw attention to the issue of lunch breaks. While our existing policy mandates a one hour break, it is vital to clarify that, during this time, employees should be entirely free from work related constraints. However, in practice, when seated in crew positions, we are limited in our actions and do not experience the freedom that an hour of genuine break time should afford … In light of the concerns expressed by a significant portion of our workforce, we have collectively decided that addressing these issues as a unified group is the most appropriate course of action. We trust that you appreciate the significance of these matters and share our commitment to reaching a fair and mutually agreeable resolution …"
17. That letter also attached the following document, headed "Park's of Hamilton Drivers' Petition - 15/10/2023" and which is now set out in full: "We the undersigned are employees of Parks of Hamilton and writing this petition to express our collective concerns regarding certain aspects of our employment, including holiday pay and lunch breaks. We believe that these issues need to be addressed promptly and equitably. By signing this petition, we are requesting that management take our concerns seriously and engage in open and constructive dialogue to find resolutions. Concerns: 1 Holiday Pay: we believe the current holiday pay policy is unfair and potentially in violation of legal statutes, affecting our statutory rights. We are hesitant to take holidays due to these concerns. 2 Lunch Breaks: the mandated one-hour lunch break is often impractical, as we are unable to enjoy an hour of genuine respite due to the demands of our duties and other factors." That document was concluded with the phrase "Petition Signatures", followed by eight names, which were the claimant and seven other male drivers (Victor de Oliveira Lima, Gabriel Vanea, Luke Hayward, Evan Marchant, Antony Blight, Neil Dennis, and Jon Tunstall). The document was not signed by the claimant or any of the other male drivers.
18. The claimant's letter and this petition are collectively referred to in this Judgment as the Petition Letter.
19. The claimant sent this Petition Letter to Mr John Smith through the respondent's internal messaging system. It seems to have been assumed by everyone until this hearing that this was the claimant's letter, with the joint Petition attached. The claimant suggested for the first time at this hearing that it was not her letter and that it was written by one of the other employees namely Mr Victor de Oliveira Lima. When subsequently interviewed by Mr Graham on 21 November 2023 (for which see further below) Mr Victor de Oliveira Lima denied writing the letter and said that the claimant had done it. One of the other named employees, Mr Neil Dennis, gave evidence to this hearing and his recollection was that Mr Hayward and the claimant had done it jointly.
20. We do not think it matters greatly for the purposes of this claim given that the letter purports to be a complaint on behalf of eight employees all of whom appear to have the same concerns. However, given that much of the letter is written in the first person, and it was

the claimant who sent it, with her name foremost amongst the list of drivers, we find that it was the claimant who wrote this letter (albeit with the support of the other employees), and that this finding is consistent with both the respondent's belief at the time, and other relevant contemporaneous documents (including the interview with Victor de Oliveira Lima). Nonetheless the claimant's denial that this was her letter affected her credibility for the reasons noted above.

21. In any event the Petition Letter raised a genuine concern about holiday pay and rest breaks on behalf of eight employees which was clearly justified, not least because the respondent amended its holiday pay processing system after a detailed investigation.
22. Immediately upon receipt of the letter Mr Smith shared its contents with Mr Hoggan, Mr Graham and another director Mr Andrews. The respondent's managers thought it was important to investigate the matter and to seek to resolve the problem. It was agreed that Mr Hoggan would discuss the matter with the claimant in the first instance, and they had a telephone conversation on 19 October 2023. It is clear from the respondent's phone records that this call took 21 minutes commencing at 1351 hrs.
23. The claimant's evidence is that Mr Hoggan was immediately abusive to her and criticised her for "going straight to a stage 4 level" which she understood to mean involving ACAS and potential litigation. The claimant claims that Mr Hoggan continued to swear at her in a bullying manner and that she felt undermined and singled out.
24. Mr Hoggan denies this. He accepts that does not have an accurate recollection of the contents of the telephone call but he denies shouting at the claimant or being verbally abusive towards her. He explained that the purpose of the call was to try and find information as to the background to the concerns and to seek to agree a way forward to resolve them. His evidence is that is not his style to behave aggressively or shout at employees when seeking to resolve a problem, not least because to do so would merely inflame matters. The respondent also makes the point that the claimant did not raise any complaint or grievance at the time, and she does not suggest that she denied being the author of the Petition Letter at that time.
25. For the reasons set out at the start of this Judgment, we prefer the evidence of the respondent on this matter and we unanimously find that Mr Hoggan did not shout at the claimant and was not abusive to her.
26. It seems that that when the claimant had originally sought assistance from ACAS, they had suggested writing some form of letter of grievance, and then allowing 28 days for the respondent to investigate and respond. The claimant seems to have taken this advice as some form of self-imposed deadline within which she was determined to issue proceedings absent any satisfactory resolution within that 28 day period. This appeared to coincide with delay on the part of the respondent in concluding their investigations into the matter, although Mr Graham has explained that the investigations involved all of the Plymouth drivers, and not just those named on the Petition Letter, and resolving the exact holiday entitlement was very complicated because it involved calculations of individual rotas, pay rates, overtime shifts, length of service and residual holiday entitlement.
27. Meanwhile Mr Luke Hayward, who was one of the eight employees named on the Petition Letter, resigned his employment on 20 October 2023. This appeared to be on good terms because he confirmed how much he had enjoyed his time working for the respondent, and that he was pursuing an opportunity elsewhere which "better aligned with his career goals".
28. The respondent's investigations continued, and it took them to nearly mid-November before they understood how to resolve the issues. Mr Graham and Mr Hoggan decided to travel from Scotland to the Plymouth depot to speak to the relevant employees, and to seek to resolve the issues, and they asked Mr Smith to make the necessary arrangements locally. A dispute then arose as to whether there should be a group meeting, or individual meetings. The claimant asserts that all of the employees had agreed that they would not meet with the respondent individually, but wanted to do so as a group, and with a representative present. The claimant also asserts that she insisted that a representative would be present with her. The respondent's position is that the other employees did not take this stance, and had no objection to meeting individually, and that the claimant failed to follow a reasonable management instruction to attend a meeting on her own.

29. Mr Smith then sent various messages on the respondent's internal messaging system. A message to Mr Marchant on 13 November asking for a meeting resulted in confirmation from Mr Marchant that he would be away, but that it was his opinion there was "more than one name on the letter and it should be a group meeting not one-on-one". A message to Mr Tunstall requiring him to attend a meeting did not appear to meet with a response. A message to Mr Victor de Oliveira Lima met with the response: "We were instructed not to attend any meetings alone about that topic". Mr Vanea confirmed that he would attend a meeting when next available in the office.
30. The only other messages we have seen are between Mr Smith and the claimant. The claimant messaged Mr Smith to this effect: "Your message to Evan [Mr Marchant] has just been shared within our group. Could it please be relayed that we won't be attending any meetings alone from now on. The deadline for Parks to get back to us was 5th November. As stated proceedings have now begun and the tribunal and ACAS have already started their process and will be in contact with you and the company." Mr Smith responded: "Hi Louisa your meeting with our senior management is on Wednesday 15 November at 1300. You will be able to go home after returning to the yard at approximately 0200. You have been taken off duty 125 to facilitate this post. Please attend." The claimant responded: "I will not be attending any meetings alone. Why has no one informed me that I have been taken off my shifts. Please inform HR that protocols must be followed, and we should be informed every step of the way as we need to confirm that our representatives can attend … I'm not attending so can I have my shift back please. And my overtime day on 15th please." Mr Smith replied: "your 215 will finish when you return to the yard from the 504 you will be paid full shift". The claimant complained: "I've lost my overtime then" Mr Smith replied "to enable you to attend the meeting yes". The claimant then stated "but I'm not attending like the rest of the gentlemen. We will not be attending on Wednesday. Do you think calling us in one by one is going to stop this … Kindly pass the message on that not one of your drivers will be attending individual meetings without our representatives present. So they will have a wasted journey which I don't wish on anyone." On the following morning the claimant messaged: "we have all discussed tomorrow and we would all be willing to meet altogether at a time of your choosing."
31. Mr Smith passed these various messages to the respondent's head office in Scotland, and Mr Graham and Mr Hoggan decided not to travel down to Plymouth. They discussed the matter between themselves. They had already formed the view that it was necessary to have individual discussions with each of the drivers because each meeting would involve discussing personal details about each driver's personal situation and wages. They formed the view that there was only one person attempting to speak on behalf of the others, namely the claimant, and that she had point-blank refused to attend the meeting which had been arranged. She said that the respondent had missed her 28 day deadline and that proceedings had already begun with both ACAS and the Employment Tribunal. The respondent felt that the messages from the other drivers were not the same as those of the claimant. Mr Hoggan discussed the matter in detail with his colleagues, and he decided that he had no choice other than to dismiss the claimant because of a complete lack of willingness to attend. He formed the view that the claimant had been completely disruptive and was ignoring a reasonable request by management to attend the meeting. He decided that it was not an acceptable way to behave and that the claimant was unwilling to engage in any meaningful conversation. He felt that the claimant was disrupting the rest of the workforce and misleading them. Other drivers had suggested that they were "instructed" not to meet, and Mr Hoggan believed it was the claimant who was giving this instruction. He had tried to speak to the other drivers, but only managed to speak to two of them, but nonetheless these two did not support what the claimant was saying and were willing to meet. He decided to dismiss the claimant for these reasons.
32. Mr Hoggan telephoned the claimant on 14 November 2024. He informed the claimant that because of her remaining unwilling to meet or to discuss the matter he was left with no option other than to dismiss her summarily. The claimant replied words to the effect "I knew that this was coming" and that the Tribunal papers were ready to be issued and then ended the conversation.

33. Mr Hoggan then wrote to the claimant by letter dated 17 November 2023 confirming her summary dismissal. Extracts from the letter read: "… Following our telephone conversation on Tuesday, 14 November 2023, we believe that we are left with no alternative other than to summarily dismiss you on the grounds of gross misconduct with immediate effect. The reasons for this decision are as follows: wilful insubordination by way of your unacceptable behaviours and impregnable refusal to follow our reasonable management instruction. This is despite our futile attempts to engage in purposeful conversation with you … Your deliberate actions taken in order to undermine the authority of senior management, you premeditatedly attempted to instruct your colleagues not to speak with Michael Andrews Director, Colin Graham Group Human Resources Manager, John Smith Operations Manager or myself directly. You clearly set out to incite organisational disruption and endeavoured to encourage others to defy our reasonable management instruction thus clearly striving to derail any attempts at meaningful dialogue and resolution … The complete breakdown of trust in you as an employee following the questionable statement you have made in relation to the professional counsel you claim to have received, specifically from ACAS … We believe that you have provided a gross misrepresentation of the truth while quoting ACAS and their intermediary early conciliation advice … your colleagues' admissions - our significant concerns regarding your misleading communications were given substantiated grounds when some colleagues shared that they have never claimed that they would not meet with us individually. It has been stated that some may not have even been aware of the communication sent on their behalf by you to John Smith Operations Manager. … In summary for the reasons outlined above our trust and confidence in you has been diminished to the extent that the decision has been taken to terminate your employment. Furthermore, based on the evidence it is our reasonable belief that it was never your intention to resolve this matter via a fair and proper process." The letter confirmed that the claimant was dismissed without notice, and that the respondent was exercising its discretion not to rely on in the provisions of its non-contractual disciplinary policy.
34. The claimant accepted in her cross-examination that as at that stage there was a complete breakdown in trust and confidence between her and the respondent, as asserted by the respondent in this dismissal letter.
35. The claimant acknowledged the dismissal letter and replied to the effect: "Unsure some of the comments you have made are okay as this was after you dismissed me. And by law I am allowed a representative present during any meeting, something you clearly didn't like hence the dismissal. It quite clearly states that I/we were willing to attend". Mr Hoggan replied: "Can you clarify if this is a statement of personal observations or sets out the ground for you as formal appeal?". The claimant chose not to exercise that appeal, and she responded: "It will all go as evidence in the tribunal."
36. Mr Graham subsequently attended the Plymouth depot and interviewed the remaining drivers who had supported the Petition Letter (with the exception of Mr Hayward who had already resigned). He made notes of these various meetings in a notebook at the time. He did not prepare formal minutes within an HR process for the simple reason that he felt that each of the employees had effectively confirmed that their concerns were now met and resolved. The claimant has asserted today that Mr Graham has deliberately and dishonestly fabricated these contemporaneous minutes in order to bolster the respondent's defence of this claim. There is not a shred of evidence to support that serious allegation, which Mr Graham denies. In addition, certain of the entries are consistent with the contemporaneous documents. For these reasons we unanimously accept Mr Graham's evidence to the effect that his contemporaneous notes are accurate.
37. The following entries are relevant from these extracts. Mr Dennis confirmed that the claimant's claim was "her doing" and that he just wanted the holiday dispute "explained and resolved". He confirmed he was happy with the outcome which he considered to have been resolved and that there were no remaining issues. He confirmed that it was the claimant's idea to write the Petition Letter and to sue the respondent and that she had set up the WhatsApp group for that purpose. Mr Marchant confirmed that he had always been happy to have an individual meeting and that it was the claimant who was encouraging the

drivers not to agree to that and he agreed that he did not want his personal wages being discussed in a group and that it was better to meet individually. He confirmed that he had always been happy to discuss the matter individually. He agreed that the matter "could have been sorted resolved and addressed better without the claimant's involvement and influence".

38. Mr Vanea confirmed that the claimant was still using the WhatsApp group and that he wanted nothing more to do with the matter and that he had never had any "desire for ACAS, letter, or the formal complaint which was the claimant." He agreed that matters were now resolved. Mr Tunstall confirmed that he had never agreed with the letter in the first place, or making contact with ACAS, and that it had been all handled by the claimant. He agreed that an individual meeting was a better way of dealing with it and was thankful that the matter been resolved for him. He commented that the claimant was still trying to "instruct via their WhatsApp group, still trying to cause issues". Mr Blight confirmed that he did have other issues which he wished to be resolved but that it was the claimant who had been inciting everyone not to talk to the respondent and not to engage. He commented that she had given the appearance that she did not want to resolve anything amicably. Finally, Mr Victor de Oliveira Lima confirmed that the Petition Letter was the idea of one person only, namely the claimant, and not the group of employees. (This was despite the earlier allegation from the claimant at this hearing that he had prepared the letter). He stated that he "didn't authorise a complaint, ACAS, suing, WhatsApp group etc" and that it was all the claimant. It was the claimant who had written the letter, and not the other employees.
39. Although these interviews all took place immediately after the claimant's dismissal, the evidence from the other employees is consistent with the respondent's findings and its reasons for dismissal which are set out in the dismissal letter and referred to above.
40. The claimant commenced the Early Conciliation process with ACAS on 5 November 2023 (Day A). ACAS issued the Early Conciliation Certificate on 14 November 2023 (Day B). The claimant presented these proceedings on 14 November 2023. The was then a case management preliminary hearing by telephone on 15 May 2024 which is referred to further below.
41. Having established the above facts, we now apply the law.
42. The Law:
43. The relevant statute for the unfair dismissal claim is the Employment Rights Act 1996 ("the Act").
44. The right not to be unfairly dismissed arises from section 94 of the Act. Under section 108(1) of the Act an employee is not entitled to pursue such a claim where the employee has not been continuously employed for a period of not less than two years ending with the effective date of termination. There are a number of exceptions to this restriction which enable a claim for unfair dismissal to be brought where the employee has less than two years' service. Under section 108(3)(g) this includes a claim brought under section 104 of the Act.
45. Section 104 of the Act provides: "(1) an employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee – (a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or (b) alleged that the employer had infringed a right of his which is a relevant statutory right. (2) it is immaterial for the purposes of subsection (1) – (a) whether or not the employee has the right, or (b) whether or not the right has been infringed; but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith. (3) it is sufficient for subsection 1 to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was."
46. Section 104(4) sets out the relevant statutory rights for the purposes of the section which includes: "(a) any rights conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal … (d) the rights conferred by the Working Time regulations 1998…"
47. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)")

and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").

48. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination. The protected characteristic relied upon is sex, as set out in sections 4 and 11 of the EqA.
49. As for the claim for direct discrimination, under section 13(1) of the EqA 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.
50. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that 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. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
51. We have considered the cases of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL; Igen Ltd v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Nagarajan v London Regional Transport [2000] 1 AC 501; Amnesty International v Ahmed UKEAT/0447/08/ZT; Ayodele v Citylink Ltd [2018] ICR 748 CA.
52. The Issues to be Determined:
53. The issues to be determined in this case were set out in a List of Issues in my Case Management Order dated 15 May 2024 ("the Order"). There are two claims. The first claim is for "automatically" unfair dismissal for assertion of a statutory right under section 104 of the Act. The relevant statutory rights relied upon are the right not to suffer unlawful deduction from wages by reference to sections 13 and 23 of the Act, and the correct entitlement to annual leave under Regulations 13 and 13A of the Working Time Regulations 1998. Although not specifically mentioned in the Order, the Petition Letter also refers to rest breaks which are addressed in Regulation 12. These statutory rights are relevant statutory rights for the purposes of section 104 of the Act (see ss 104(4)(a) and (d)).
54. The second claim is for direct sex discrimination in respect of two issues: the first is an allegation that after receipt of the claimant's letter of complaint, and approximately two weeks before her dismissal, Mr Hoggan of the respondent telephoned the claimant and shouted at her and was abusive; and the second allegation is that of the claimant's dismissal. The claimant relies on actual comparators, namely "the seven other drivers who signed the letter dated 15 October 2023". We deal with each of these two claims in turn.
55. The Unfair Dismissal Claim:
56. The claimant relies upon her Petition Letter as being her assertion of the relevant statutory rights. As noted above, this Petition Letter was concluded with the following paragraph: "Concerns: 1 Holiday Pay: we believe the current holiday pay policy is unfair and potentially in violation of legal statutes, affecting our statutory rights. We are hesitant to take holidays due to these concerns. 2 Lunch Breaks: the mandated one-hour lunch break is often impractical, as we are unable to enjoy an hour of genuine respite due to the demands of our duties and other factors."
57. Although we were surprised to be told at this hearing that the claimant now denies that the Petition Letter was "her letter", we do not think that this matters for the purposes of this claim. In the first place we have held that the claimant did write the Petition Letter, and indeed the respondent understood her to have written it. Even if she were just a co-author of the letter which she helped to prepare jointly, nonetheless it is a clear assertion of an infringement of statutory rights to which she has added her own name.
58. We unanimously find that this Petition Letter qualifies as an assertion of relevant statutory rights for the purposes of section 104 of the Act. It clearly refers to holiday pay and hesitance in taking holidays, and inability to take lunch breaks. As confirmed in section 104(4)(a) and (d) the relevant statutory rights include the right not to suffer unlawful

deduction from wages (including holiday pay) under the Act, and alleged breaches of the Working Time Regulations 1998 (which in Regulations 12, 13, and 13A set out the relevant statutory rights for rest breaks and annual leave). The respondent does not assert that the claimant's assertion was not made in good faith for the purpose of section 104(2).

59. We unanimously find therefore that the claimant has engaged the potential right not to be unfairly dismissed for the assertion of a statutory right pursuant to section 104 of the Act.
60. The question to be determined is whether or not the reason for the claimant's dismissal (or, if more than one, the principal reason) was because the claimant had asserted her statutory rights in the Petition Letter. It is effectively a binary question, in that if the assertion of a statutory right was the reason (or, if more than one, the principal reason) for the claimant's dismissal then she was "automatically" unfairly dismissed. If that is not the case, then the claim is not well-founded and must fail. The claimant had less than two years' service, and the burden of proof is on the claimant to prove her case.
61. We have no reason to doubt that the reason for the claimant's dismissal were the multiple reasons set out in the dismissal letter. These are set out in more detail in our findings of fact but in short amounted to a combination of gross misconduct, namely wilful insubordination; undermining the authority of senior management; and a complete breakdown of trust between the parties following what was perceived to be the claimant's confrontational approach to the potential resolution of an otherwise justifiable concern. The respondent's evidence was consistent with this reason, which again was consistent with the relevant contemporaneous documents.
62. We unanimously find that the claimant has failed to prove that the reason (or if more than one the principal reason) for her dismissal, was because she had sent and/or co-authored the Petition Letter.
63. In circumstances where we have found that the reason for the claimant's dismissal was not because she had asserted a statutory right, her claim for unfair dismissal is not well-founded, and it is hereby dismissed.
64. The Direct Sex Discrimination Claim:
65. With regard to the claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of her sex than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have been dismissed and/or suffered the same allegedly less favourable treatment as the claimant.
66. As confirmed in Ayodele v Citylink Ltd, section 136 EqA imposes a two-stage burden of proof. Under Stage 1 the burden is on the employee to prove from all the evidence before the Tribunal facts which would, if unexplained, justify a conclusion not simply that discrimination was a possibility, but that it had in fact occurred. Under Stage 2 the burden shifts to the employer to explain subjectively why it acted as it did. The explanation need only be sufficient to satisfy the Tribunal that the reason had nothing to do with the protected characteristic.
67. For the burden of proof to shift in a direct discrimination claim, the claimant must show that he or she has been treated less favourably than a real or hypothetical comparator ("the less favourable treatment issue"). As confirmed in section 23(1) EqA there must be no material differences between the circumstances relating to the claimant and the chosen comparator. That means they are in the same position in all material respects, except that they do not hold the protected characteristic (Shamoon paragraph 110). "Material" means those characteristics the employer has taken or would take into account in deciding to treat the claimant and the comparator in a particular way (except the protected characteristic) (Shamoon paragraphs 134 to 137).
68. To fall within section 39 EqA it is also necessary to show that the less favourable treatment constituted detriment. A worker suffers detriment if they would or might take the view that they have been disadvantaged in the circumstances in which they had to work. An unjustified sense of grievance is not enough (Shamoon). Furthermore, the unfavourable treatment must be because of the protected characteristic ("the reason why issue").

69. The bare fact of less favourable treatment than a comparator only indicates a possibility of discrimination. There must be something more for the tribunal to be able to conclude that there is a probability of discrimination such that the burden of proof shifts to the respondent (Madarassy). The focus should be on the employer's conscious or subconscious reason for treating the worker as they did (Nagarajan). Whilst the test is subjective, in cases where there is not an inherently discriminatory criterion, a "but for" test can be a useful gloss on, but not substitute for, the statutory test (Amnesty International v Ahmed). The protected characteristic needs to "significantly influence" the less favourable treatment so as to be causally relevant (Nagarajan). However, sight should not be lost of the fact that the less favourable treatment and reason why issues are intertwined and essentially two parts of a single question (Shamoon).
70. In Madarassy Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. 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". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in Ayodele v Citylink Ltd.
71. As set out in the Order, there are two aspects to the claimant's claim for direct sex discrimination. The first is: "After receipt of the letter of complaint, and approximately two weeks before her dismissal, Mr G Hoggan of the respondent telephoned the claimant and shouted at her and was abusive." The second aspect is the claimant's dismissal. The claimant relies on actual comparators, namely "the seven other drivers who signed the letter dated 15 October 2023". We deal with each of these aspects in turn.
72. As set out in our findings of fact above, with regard to the telephone conversation with Mr Hoggan, we have preferred the evidence of Mr Hoggan and we have found that Mr Hoggan did not shout at the claimant was not abusive to her. This first element of the claimant's claim is not factually made out and is therefore dismissed.
73. The second aspect of the claimant's claim is that of her dismissal. The respondent concedes that it dismissed the claimant, and it concedes that this was potentially less favourable treatment. We agree with that conclusion, and we so find.
74. The claimant argues that she has been discriminated against on the grounds of her sex because of the eight employees who supported the Petition Letter, she was the only woman, and she was the only employee who was dismissed. The claimant relies on these seven other male employees as her actual comparators.
75. However, applying Shamoon, for the burden of proof to shift in a direct discrimination claim, the claimant must show that he or she has been treated less favourably than a real or hypothetical comparator ("the less favourable treatment issue"). As confirmed in section 23(1) EqA there must be no material differences between the circumstances relating to the claimant and the chosen comparator. That means they are in the same position in all material respects, except that they do not hold the protected characteristic (Shamoon paragraph 110). "Material" means those characteristics the employer has taken or would take into account in deciding to treat the claimant and the comparator in a particular way (except the protected characteristic) (Shamoon paragraphs 134 to 137).
76. We do not accept that any one of the other seven male employees who supported the Petition Letter is a true comparator. They were not in the same position as the claimant in all material respects save for the difference in sex. The claimant was the only one of the eight employees whom the respondent had believed had committed the gross misconduct for which the claimant was dismissed, namely a combination of wilful insubordination; undermining the authority of senior management; and a complete breakdown of trust between the parties following what was perceived to be a confrontational approach to the potential resolution of an otherwise justifiable concern. It was not the case, as has been suggested by the claimant, that each of the seven male employees also refused to meet

with the respondent. Indeed, it is clear that each them did so on 21 November 2023, (albeit shortly after the claimant's dismissal) with the exception of Mr Hayward who had already resigned his employment apparently on good terms. In addition, it could not be said that there was a complete breakdown in trust between employer and employee for any of the other male drivers as there was with the claimant.

77. In short, the claimant was in a different position to each of the other seven male employees, and she was dismissed for reasons which did not apply to her chosen comparators.
78. In this case, we find that no facts have been established upon which the tribunal could conclude (in the absence of an adequate explanation from the respondent), that an act of discrimination has occurred. In these circumstances the claimant's claim of direct discrimination is not well-founded, and it is hereby dismissed.
79. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraphs 2, 52 and 53; the findings of fact made in relation to those issues are at paragraphs 4 to 29; a concise identification of the relevant law is at paragraphs 42 to 51; and how that law has been applied to those findings in order to decide the issues is at paragraphs 55 to 78.

Employment Judge N J Roper
Dated 3 September 2024

Judgment sent to Parties on
18 September 2024 By Mr J McCormick

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