THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr K Szabo	**v**	Templewood Security Services Limited

Heard at: London Central **On**: 20-24 March 2017

Before: Employment Judge Baty

Members: Mr T Robinson
Mr D Carter

Representation:

Claimant: In person
Respondent: Ms G Hirsch (Counsel)

JUDGMENT

1. **The Claimant's complaint of unlawful deduction from wages succeeds in part. An award of £3.50 (gross) is made in this respect, payable by the Respondent to the Claimant, representing half an hour's unpaid wages from 3 March 2015.**

2. **The Claimant's complaints of automatically unfair dismissal under the Employment Rights Act 1996 sections 100(1)(c), (d) and (e) (health and safety), direct race discrimination and victimisation all fail.**

REASONS

The Complaints

1 By a claim form presented to the Employment Tribunal on 18 May 2015, the Claimant brought complaints of automatically unfair dismissal, race discrimination (including harassment and victimisation), for holiday pay and for unpaid wages. The Respondent defended the complaints.

2 At a preliminary hearing on 14 August 2015 before Employment Judge Lewis, the Claimant confirmed that his holiday pay complaint was no longer pursued and, following discussion with EJ Lewis, accepted that he did not have a self standing claim which could go ahead in relation to harassment. In addition, an order was made for him in due course to provide an explanation of the legal and factual basis for his victimisation complaint.

3 As regards the remaining complaints, these were confirmed as being automatically unfair dismissal contrary to Section 100 of the Employment Rights Act 1996 ("ERA") in relation to health and safety grounds, specifically under sections 100(1)(c), (d) and (e), various allegations of direct race discrimination and the unpaid wages complaint. The unpaid wages complaint was identified as being for the Claimant's pay for the date of 3 March 2015 when the Claimant maintains he was sent home. The issues in relation to these complaints were agreed between the parties and EJ Lewis and were set out in her note of that preliminary hearing.

4 In addition, the Claimant duly provided further information regarding the victimisation complaint. In a letter of 27 August 2015 from the Tribunal in response to this, the issues of the victimisation complaint were set out, in terms of the protected acts relied on and the detriment which the Claimant maintains he was subjected to as a result of those protected acts, at paragraphs 2 and 3 of that letter.

The Issues

5 In the light of the above, the Judge at the start of today's hearing went through the issues of the claim with the parties and agreed them. The issues on liability for consideration by the Tribunal were therefore the information set out in EJ Lewis' note of her preliminary hearing at paragraphs 2.2 – 2.4 and 3 – 7, and the last two paragraphs of the Tribunal's letter of 27 August 2015. The issues were therefore as follows.

Background

6 For his race discrimination complaints, the Claimant's race is white and he is of Hungarian/East European Nationality.

7 For his automatic unfair dismissal complaints, the Claimant contends that he was automatically unfairly dismissed contrary to Section 100 of the ERA in relation to health and safety grounds. Sections 100 (1) (c), (d) and (e) are potentially relevant. The health and safety issues and risks relied on are the risk of violence while being on foot in a dangerous dark location; inadequate clothing for a cold night with no shelter; inadequate access to toilets and food if using public transport; and the risk of being held responsible for driving without insurance.

Direct Race Discrimination - Section 13 Equality Act 2010

8 Whether the Respondent treated the Claimant less favourably because he is Hungarian/East European and/or white than it treated or would treat a comparator who was not East European and/or white in relation to the following actions:-

8.1 Disciplining and dismissing the Claimant in part because he said "fucking £3" at the end of the dispute about the Landmark patrol on 1 March 2015. The Claimant says Paul Peterson (a white British patrol officer) said "fuck off" to the control room officer during the argument about cars on 3 March 2015 and no action was taken against him.

8.2 Pressurising the Claimant to use his own car on 3 March 2015 and when he refused, giving the only car to Paul Peterson, and telling the Claimant to use public transport. The car given to Mr Peterson was the one which the Claimant normally used.

8.3 Calling the Claimant to a disciplinary on the two matters one week later, after the Claimant asked what was going on.

8.4 Dismissal.

9 The Claimant's comparator is Mr Peterson, Joshua and Jesus (or someone with a similar name) and/or a hypothetical comparator. The Claimant had reported Jesus on 4 February 2015 and Joshua on 27 February 2015 for sleeping on duty and nothing had been done.

Automatically Unfair Dismissal under Section 100(1)(c) ERA – Health and Safety

10 Whether there was circumstances connected with the Claimant's work which he reasonably believed were harmful or potentially harmful to health or safety.

11 Whether the Claimant brought this to his employer's attention by reasonable means.

12 Whether the reason or principal reason for the Claimant's dismissal was that he had brought this to his employer's attention.

Automatically Unfair Dismissal under Section 100(1)(d) ERA – Health and Safety

13 Whether there were circumstances of danger which the Claimant reasonably believed was serious and imminent and which he could not reasonably have been expected to avert.

14 Whether in those circumstances the Claimant left or proposed to leave or refused to return to his workplace while the danger persisted.

15 Whether the reason or principal reason for his dismissal was that he had left or proposed to leave or refused to return.

Automatically Unfair Dismissal under Section 100(1)(e) ERA – Health and Safety

16 Whether there were circumstances of danger which the Claimant reasonably believed were serious and imminent.

17 Whether in those circumstances the Claimant took or proposed to take appropriate steps to protect himself or others from the danger.

18 Whether the reason or principal reason for his dismissal was that he had taken such steps.

Victimisation – Section 27 Equality Act 2010

19 Did the Claimant carry out a protected act? The acts relied on for this purpose are:-

19.1 The Claimant's statement on 3 March 2015 that he intended to take the issue about health and safety and driving to Court; and

19.2 The Claimant's letter before action dated 23 March 2015.

20 Were the above acts done in good faith?

21 Was the Claimant, because of the protected act or acts, subjected to a detriment? The detriment relied on by the Claimant is his dismissal.

Unpaid Wages

22 The Claimant maintains that he should have been paid for a 7 hour shift on 3 March 2015. It is not disputed that he was not paid. It is agreed that the Claimant's hourly rate of pay was £7 per hour. The Respondent concedes that the Claimant was entitled to be paid for half an hour (in other words £3.50 gross) for the time when he attended prior to his alleged refusal to complete the remainder of the shift. The Claimant maintains he should have been paid for the whole shift. Is the amount claimed by the Claimant due?

The Evidence

23 Witness evidence was heard from the following:-

For the Claimant:

The Claimant himself; and

Ms Monika Juhasz, the Claimant's girlfriend.

For the Respondent:

Mr Charles Offei-Adjei, the Respondent's Security Manager;

Mr Iqbal Khan, a Premises Supervisor at the Respondent;

Mr Mohammed Zia-Al-Hassan, a Premises Supervisor at the Respondent; and

Mr James Soning, a Director of the Respondent.

24 An agreed bundle numbered pages 1-349 was produced to the hearing.

25 In addition, the Claimant provided an additional thick bundle, of which he had only two copies for the Tribunal and which had not yet been given to Ms Hirsch or the Respondent. The Claimant, when questioned by the Judge, said that most of what was in his bundle was contained in the agreed bundle in any event but that about 10% of what was in his bundle was missing and that was why he had produced a further bundle. The Judge asked the Claimant to identify, during the break when the Tribunal would be reading the witness statements, which documents in his bundle he wanted to adduce, to liaise with Ms Hirsch about these and to get copies of them for the Tribunal, Ms Hirsch and for the witness table. The Claimant duly did so and this resulted in a further "Claimant's bundle" being produced of around 28 pages. Ms Hirsch, when the Tribunal reconvened, confirmed that she did not objected to this being put before the Tribunal.

26 The Judge also asked the Claimant whether or not there were any specific pages in the Claimant's bundle which the Tribunal needed to read in advance, given that the Tribunal would not read the whole of the bundle and would not necessarily see the pages unless it was taken to them in cross examination. However, the Claimant confirmed that there were no pages in the Claimant's bundle which the Tribunal needed to read in advance.

27 At the start of the hearing, the Claimant objected to the inclusion of various documents at pages 334 ff of the main bundle, which the Respondent stated where disciplinary letters in relation to a variety of other employees. He objected on the basis that the Respondent had redacted the names of the individuals. However, these letters had been in the original bundle since September 2015 and no objection had been made by the Claimant to the Tribunal. The Tribunal therefore decided that they should remain in the

bundle and that, if the Claimant wanted to make any submissions as to the authenticity of them, which it appeared was his point, he was free to challenge them with the Respondent's witnesses in cross examination.

28 The bundle contained transcripts of recorded events on 3 March 2015 and on 16 March 2015. There was some dispute about the accuracy of the transcripts, an issue which was raised by both parties. In the end, Ms Hirsch said that she would like to have the original recordings of both incidents played to the Tribunal and it was agreed that this could be done and duly was. Ms Hirsch had them played at particular points when she was cross examining the Claimant.

29 The Tribunal read in advance the witness statements and any documents in the bundle to which they referred.

30 A timetable for cross examination and submissions was agreed between the Tribunal and the parties at the start of the hearing. The Judge reminded both parties of how they were getting on regarding timing as they went through their cross examination. However, although (with the consent of Ms Hirsch), the Tribunal offered the Claimant the opportunity to extend his time allocation for cross examination in anticipation that he would not have enough time to cross examine the Respondent's last witness (Mr Soning), both parties in fact broadly complied with the agreed timetable.

31 During Ms Hirsch's cross examination of the Claimant there were several occasions when the Claimant did not answer the question that was put to him and the Judge had to intervene to ask him to do so. Similarly there were several occasions when the Claimant kept interrupting the question put to him before it was completed and the Judge had to remind him to allow the question to be put before answering it.

32 In addition, Ms Juhasz, the Claimant's girlfriend, repeatedly interrupted and started speaking during the Claimant's evidence. On several occasions, the Judge told her not to do so. However, the behaviour was repeated. Eventually, the Judge had to warn her that, if she continued to do so, the Tribunal would order her to leave the hearing. In the end, however, this was not necessary.

33 On occasion, towards the start of the Claimant's cross examination of the Respondent's witnesses, Ms Hirsch interjected in relation to various questions put by the Claimant. The Judge made it clear to her that, if the Tribunal felt that a question was inappropriate, it would say so and that she should not interrupt the flow of cross examination which just made the hearing more difficult to manage. Thereafter, Ms Hirsch did not interject.

34 During the Claimant's questioning of the Respondent's witnesses, the Judge from time to time had to interject where irrelevant questions were asked and

asked the Claimant to move on as the question or line of questioning was not relevant to the issues for the Tribunal to decide.

35 At one point, during his questioning of Mr Soning, the Claimant embarked on a line of questioning regarding Mr Soning's religion. Although the Judge initially did not disallow the first two questions as it was not clear at that point that they was entirely irrelevant and the Claimant was a litigant in person, it became increasingly clear that the line of questioning was entirely irrelevant and the Judge interjected. The Judge explained to the Claimant that the issues of the claim were about whether he was discriminated against on the grounds of his nationality/colour and not about someone else's religion. The Judge stated that if a line of questioning was relevant, it may be allowed but that a line of questioning which was not relevant and which, in particular, could be offensive to the individual being questioned would not be permitted. The Judge at this point reminded the Claimant that such behaviour could be unreasonable and that this could have consequences for striking out the claim/costs. The Claimant stopped this line of questioning at that point. Mr Soning, however, stated that he would like it to be on the record that he considered that the Claimant's questioning was blatantly anti-semitic.

36 Ms Hirsch in the end chose not to question Ms Juhasz on the basis that she did not consider the contents of her witness statement to be relevant (although she made clear that she was not conceding that the contents of Ms Juhasz's statement were accepted).

37 Both parties provided written submissions which the Tribunal read before then hearing the parties' oral submissions.

38 The Tribunal then adjourned to consider its decision on liability and was due to give its decision with reasons on the final morning of the hearing, 24 March 2017.

39 By email to the Tribunal of 24 March 2017 at 6.46 am, the Claimant stated that he was ill and would not be attending the Tribunal but would like the decision to be delivered in his absence and written reasons sent to him. No medical evidence in relation to his illness was provided with his email.

40 The Claimant did not attend the hearing on the final day. However, the Tribunal nonetheless proceeded, as requested by the Claimant, to give its decision with reasons orally at the hearing. The judge noted afterwards that written reasons would be provided.

The Law

Direct Race Discrimination

41 Under section 13(1) of the Equality Act 2010 (the Act), a person (A) discriminates against another person (B) if, because of a protected

characteristic, A treats B less favourably than A treats or would treat others. This is commonly referred to as direct discrimination. Race is a protected characteristic in relation to direct discrimination.

42 For the purposes of the comparison required in relation to direct discrimination between B and an actual or hypothetical comparator, there must be no material difference between the circumstances relating to B and the comparator.

Victimisation

43 Section 27 of the Act provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done, or may do, a protected act.

44 Protected acts include the bringing of proceedings under the Act; giving evidence of information in connection with proceedings under the Act; doing any other thing for the purposes of or in connection with the Act; or making an allegation (whether or not express) that A or another person has contravened the Act. However, giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

45 Under section 39(2) and (4) (c) and (d), an employer (A) must not discriminate against or victimise an employee of A's (B) by dismissing B or subjecting B to any other detriment. Detriment can be anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. However, an unjustified sense of grievance alone would not be enough to establish detriment.

46 In respect of the above provisions, the burden of proof rests initially on the employee to prove on the balance of probabilities facts from which the tribunal could decide, in the absence of any other explanation, that the employer did contravene one of these provisions. To do so the employee must show more than merely that he was subjected to detrimental treatment by the employer and that the relevant protected characteristic applied. There must be something more. If the employee can establish this, the burden of proof shifts to the employer to show that on the balance of probabilities it did not contravene that provision and the employer must prove that the treatment was "in no sense whatsoever" because of the relevant characteristic. If the employer is unable to do so, we must hold that the provision was contravened and discrimination, or victimisation as applicable, did occur.

Automatically Unfair Dismissal

47 Section 100 (1) (c-e) ERA states as follows:

"**100 Health and safety cases.**

(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—

…

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

48 In Oudahar v Esporta Group Ltd UK EAT/0566/10, the EAT considered a case under Section 100 (1) (e). In its conclusions it set out at paragraphs 24-27 the following:-

"24 In our judgment employment tribunals should apply section 100(1)(e) in two stages.

25. Firstly, the tribunal should consider whether the criteria set out in that provision have been met, as a matter of fact. Were there circumstances of danger which the employee reasonably believed to be serious and imminent? Did he take or propose to take appropriate steps to protect himself or other persons from the danger? Or (if the additional words inserted by virtue of Balfour Kilpatrick are relevant) did he take appropriate steps to communicate the circumstances to his employer by appropriate means? If these criteria are not satisfied, section 100(1)(e) is not engaged.

26. Secondly, if the criteria are made out, the Tribunal should then ask whether the employer's sole or principle reason for dismissal was that the employee took or proposed to take such steps. If it was, then the dismissal must be regarded as unfair.

27. In our judgment the mere fact that an employer disagreed with an employee as to whether there were (for example) circumstances of danger, or whether the steps were appropriate, is irrelevant. The intention of Parliament was that an employee should be protected from dismissal if he took or proposed to take steps falling within section 100(1)(e)."

Unpaid wages

49 The parties completed their submissions on the afternoon of the third day of the hearing and the Tribunal adjourned to deliberate on its decision on the following day. However, on the evening of the third day of the hearing, Ms Hirsch forwarded to the Tribunal the case of Agarwal v Cardiff University UK EAT/0210/16, the judgment for which had only been handed down that day. She did so because the case was authority that the Tribunal did not have jurisdiction to "construe" a contract for the purposes of an unlawful deduction from wages claim as opposed to merely identifying the terms of the contract. In her submission the previous day, she had, in relation to the unpaid wages complaint, suggested that the Tribunal might explore whether there was an implied contract or implied terms and she now wished to make clear that that was impermissible. She copied the Claimant into her email to the Tribunal attaching the case and the Claimant was therefore given the opportunity to respond to it, which he did on the same day.

50 However, as it happened, the Claimant had at no stage himself suggested that the Tribunal should imply any terms into his contract nor was there any evidence before the Tribunal which might lead to the implication of any such term, regardless of whether the Tribunal had jurisdiction to do so. Therefore, the principles in the case of Agarwal did not in practice impact upon the Tribunal's task in relation to this complaint.

Findings of Fact

51 We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.

52 The Respondent company offers various security services to different entities. This includes mobile security services, which include patrols of sites, responding to alarm activations, and contractor escorts for clients. It also provides security guards for retail shops. Its workforce around the time that this claim was brought in 2015 was around 100 employees.

53 The Claimant was employed by the Respondent from 29 January 2015 to 1 April 2015.

54 The Claimant signed a contract of employment on 29 January 2015. The contract gives his job title as "Security Officer". However, we have also seen a job description for the role of "Mobile Driver". Although the Claimant maintains that he did not see the job description at the time of his employment, he responded to an advertisement on behalf of the Respondent for a "Mobile Driver" before getting the job. There does not appear to be any dispute that the Claimant was employed as effectively a "Mobile Driver", which is what he claims to have been employed as, and we therefore find that that was his role.

55 The Claimant was employed on a zero hours contract and the Respondent was not therefore obliged to provide him with any work. However, in practice, the Respondent had plenty of work for the Claimant to do.

56 The contract contains the following provisions:-

> "2.3 Probationary period
>
> 2.4 The first three months of your employment will be probationary.
>
> 2.5 Your employment may be terminated by one week's notice given in writing by the Company or by you at any time during or at the end of this period.
>
> 2.6 The probationary period can be extended by agreement in which case the notice period referred to above will apply.
>
> …
>
> 6. Normal Hours of Work Regular schedule
>
> 6.1 This is a zero hours contract, you will be required to work allocated hours set out in your availability matrix. Once you have agreed to these hours either verbal or by contract, failure to attend work will be dealt with under the disciplinary procedures.
>
> 6.2 You will be provided with notice of your hours of work; however, there may be occasions where you will be required to work at short notice.
>
> 6.3 Any overtime agreed either verbally or contracted, you will be required to work, and failure to attend would be dealt with under the disciplinary procedures."

57 The Claimant was therefore at all times during the totality of his employment still on his probationary period.

58 Furthermore, the Claimant was only entitled to be paid for the hours which he worked.

59 According to the job description, employees in the Claimant's position were expected to take instruction from the call centre supervisor. Essentially, the

call centre supervisor lets the mobile drivers know what they are to do on a particular shift they are working. The call centre, otherwise known as the control room, effectively controls the operations. This is what happened in practice. Both Mr Iqbal Khan and Mr Mohammed Zia-Al-Hassan were call centre supervisors, notwithstanding their other job title of "premises supervisor".

60 The Claimant was also provided on 29 January 2015 with a copy of the Respondent's employee handbook. It contains the following:-

> "**16.10 Personal Standards**
>
> All employees are expected to conduct themselves in the course of their employment with due regard to the normal standards of courteous and polite behaviour towards fellow employees and all clients or other persons having dealings with the Company."

61 In addition, the job description (which, as noted, the claimant maintains he did not receive) requires mobile drivers to be polite and well behaved at all times.

62 The Respondent's security manager, Mr Offei-Adjei, who had interviewed the Claimant for the job, carried out a two to three hour induction with him on 29 January 2015. This included issues concerning health and safety.

63 From as early on as 11 February 2015, the Claimant periodically used a piece of software called "getnotify.com" when emailing individuals at the Respondent. This software enables the sender of the email to know when the email he sends is opened/read by the recipient. The recipient does not necessarily know that the sender knows that the recipient has opened/read the email and, in this respect, the software is different to, for example, read receipt programmes which ask the recipient whether he wishes the sender to be informed that the recipient has opened/read the email.

64 Although the Claimant initially maintained that he only started using getnotify.com in relation to the Respondent after the incident of 1 March 2015, he agreed, when shown the 11 February 2015 email in cross examination, that he had in fact been using it earlier.

65 By an email of 11 February 2015, the Claimant complained about his hours. His email then included the following:-

> "But I cannot and I do not want to do this all the time. I have my own life and I not live for a company only. The life is more than short.
>
> So if I cannot have private life because I have to be in alert always, then please terminate my employment and inform me about this. …"

66 The Respondent's reply to this email, and its replies to other emails of the Claimant, was measured and polite.

67 The Claimant maintains that he saw two other employees of the Respondent, on different occasions, sleeping on duty. He took photographs of them. He did not wake them up or write a report/email to management, as he should have done.

68 He made a brief note on a "duty completion sheet" of having seen one officer (Joshua) sleeping. However, this was not a document seen by management. He did not give the photographs to management at the time.

69 The first time the Claimant raised the issue with management was in his letter before action of 23 March 2015, in a small paragraph at paragraph 83, without giving details, and which is contained within an extensive 14 page letter. By management we mean either Mr Soning or Mr Offei-Adjei.

70 Management did not therefore become aware of this allegation until much later, and at a time when the Claimant had ceased actually working (i.e. attending the Respondent's premises) at the Respondent. As its procedures had not been followed, and in the absence of further detail, the Respondent did not investigate these allegations further.

71 The Claimant has alleged that "Joshua", one of the officers, is black and that the other officer was called "Moses" and was also black.

72 On 1 March 2015, the Claimant was doing a 12 hour shift. He was asked to do a patrol known as "Landmark" towards the end of the shift. This was a normal and reasonable request. The Claimant did not want to do it as he thought it would take him over his 12 hour shift. Mr Khan, who was the control room duty supervisor that night, pointed out this was a routine patrol and was always carried out by the long shift driver (who, that night, was the Claimant). The Claimant claimed not to know this and said that it was a "lazy shift". He was told that he would be paid for any extra time if he went a bit over his 12 hour shift. He then said "I don't need the fucking £3 extra" and stormed out of the control room.

73 The Claimant was talking in a raised voice. Mr Khan considered that he was shouting, that the Claimant was angry and that he was certainly being provocative.

74 Mr Khan felt very uncomfortable and telephoned Mr Offei-Adjei to report the Claimant's behaviour.

75 After going out of the control room, Mr Khan saw the Claimant standing outside apparently making notes. The Claimant accepts that he was making

notes. Mr Khan did not react to this as he regarded it as further provocative behaviour by the Claimant.

76 Mr Khan followed up his telephone conversation with Mr Offei-Adjei with an email at 6.26 on 1 March 2015 to Mr Offei-Adjei, copied to Mr Soning. The email stated:-

> "Good Morning Charles,
>
> I would like to report unprofessional behaviour from Mobile Driver KEVIN SZABO. He was reminded by control at approx 05:20 that he must do the last Landmark Patrol with sufficient time and to collect the keys from BH. Kevin came back to BH at 05.48 and started questioning why he has to do the last Landmark Patrol? As he anticipates he would finish after 07:00 hours which will be going into his personal time and by doing the Pompey site visit, this patrol should be exempt. He was told that this is a routine patrol which is always carried out by the long shift driver. He then stated that had he known this before, as apparently this was not the case on his shift last Saturday he could've planned his time better as it was supposed to be a lazy shift. We told him that we will extend his time if he goes over and his response was "I don't need the f**king £3 extra" and stormed out of the control room.
>
> I and P/C B Manickchand are not willing to accept this attitude as we are all here to do a job in a professionalised manner. Please can this issue be addressed?"

77 As is clear from that email, Mr Khan was not the only individual who was present and who was offended by the Claimant's behaviour.

78 The Claimant duly did the Landmark patrol. He finished it about 15 minutes after the end of his scheduled shift.

79 On 3 March 2015, the Claimant attended the control room for his shift. Mr Zia-Al-Hassan was the control room supervisor that day.

80 Most drivers come to the control room by train or car. They report to the control room and they are allocated a car which belongs to the Respondent, with which to carry out their duties. If for any reason there is not a car available, for example as a result of a last minute breakdown, then there are two ways of dealing with this. The first is to offer the driver petrol to use his own car or, if this is not feasible, then to give the driver an Oyster card to use public transport. An issue may arise, for example, if the driver's insurance does not cover him to carry out the Respondent's business, in which case he would be given the alternative of using a company Oyster card and travelling by public transport. If a driver travels by public transport then his duties are limited to Zone 1 of the underground map. The driver will have a company phone with him at all times and is able to keep in touch with the control room through that phone. Each time a driver locks up a building he will report to the control room and say where he is going. If there is an unexpected emergency a driver travelling by public transport will not be expected to respond; such an emergency will have to be responded to by another driver who has a car. It is not a regular occurrence for a driver to travel by public

transport as normally the vehicles are working. Travelling by public transport is a rare occurrence and a stop gap but it happens. Mr Zia-Al-Hassan cannot recall anybody having refused to take the Oyster card in the past and, as will become clear from what we set out below, he believed that the Claimant was the first person that he could recall having done so. No one has been injured through doing a shift by public transport and others have carried out public transport patrols in the same area and at the same times as those in and at which the Claimant was (as set out below) asked to do such a patrol. The places that such individuals would go to if on public transport, are all within a maximum 30 minute range, in fact more like 20 minutes, even by public transport; this includes Bermondsey, Kings Cross, and Old Bond Street, which are the ones which such individuals are asked to do.

81 When the Claimant came into the control room on 3 March 2015, he covertly recorded what happened. We have had the benefit of listening to that recording which, whilst not always clear, gives a reasonable impression of what was said and the tone of what happened. There were several individuals in the control room at the time.

82 In short, one of the Respondent's vehicles that evening had been found, at the last minute, not to be available because it had not passed its MOT in one respect. There was then discussion about what to do. There were two drivers who ordinarily would have been allocated a car by the Respondent, namely the Claimant and Mr Paul Peterson, who is white British. The remaining car, given that the other car was not available, would be allocated to the driver on the long shift, who needed it more, and who that day was Mr Peterson.

83 The tone of the discussion at that point of the recording is good humoured. At one point Mr Zia-Al-Hassan and Mr Peterson are having a light hearted discussion. Mr Zia-Al-Hassan makes a light hearted dig at Mr Peterson. Mr Peterson replies to him "fuck off". The tone of that is also light hearted. Mr Zia-Al-Hassan did not take any offence. No one reported this incident and there is no indication of anyone taking offence to it prior to the Claimant's later allegation for the purposes of these proceedings.

84 The Claimant was subsequently asked if he would like to use his own car to do his shift. The Respondent's witnesses maintain that the Claimant initially said that he was prepared to do this. The Claimant says that he never said that. However, the Respondent's version is backed up by the contemporaneous report written by Mr Zia-Al-Hassan that day. The recording also appears to back this up as the Claimant says "I can use my car just for tonight or I can go home, its up to you, my car is in the garage". The Claimant, at the start of the Tribunal hearing, maintained that this statement was not said at all, and gave it as his example of why he considered the Respondent's transcript of the recording to be inaccurate. However, it clearly was said on the recording, as was apparent when we listened to it.

85 The Claimant then maintained that what he said was in fact a reference to the remaining duty car of the Respondent. In the context of the recording this seems to us to be unlikely. However, what is clear is that Mr Zia-Al-Hassan thought, quite reasonably, that the Claimant had initially offered to use his own car.

86 However, prompted by a comment by Mr Peterson about insurance, the Claimant then declined to use his own car as he considered that he would not be insured. Mr Zia-Al-Hassan accepted this and it is clear from the recording that no pressure was placed on the Claimant to use his own car.

87 It was then suggested that the Claimant should do his shift using the company's Oyster card and public transport. The Claimant said he did not want to do this. There was no further discussion about this. In particular, there was no discussion about the fact that, if the Claimant did this, he would only have to visit Zone 1 (and not other locations that might have been on his route by car, such as Walthamstow, which the Claimant has submitted at this Tribunal would be dangerous to visit on foot).

88 Furthermore, the Claimant did not give any reason why he did not want to do the on foot shift, although he had the opportunity to do so if he wished. Specifically, he said nothing about: any perceived risk of violence if he did a patrol on foot; inadequate clothing for a cold night with no shelter; or inadequate access to toilets and food.

89 The Claimant of his own free will chose not to do the shift by foot. As he left the control room, he stated that he must be paid for the shift. No confirmation of whether he should or should not be paid was given to him.

90 The whole tone of the incident was friendly and jovial.

91 The Claimant was present at the control room for no more than half an hour.

92 As the Claimant left, he also asked if he needed to come in for a shift the next day. He was told to contact Mr Offei-Adjei about this.

93 Mr Zia-Al-Hassan did, however, email Mr Offei-Adjei, copying Mr Soning, on 3 March 2015 as follows:-

> "As discussed with Charles, Kevin has refused to use his own car even though petrol was offered, than was asked to use the oyster card due to only one car being available but he refused, so has been sent home.
>
> Paul shall be doing his normal Landmarks/Westmoreland etc and to help out I shall do his first Manchester Sq/Kings Ex and lock up and Bermondsey around 22:30 hrs."

94 Mr Zia-Al-Hassan also wrote a contemporaneous incident report of what happened on 3 March 2015.

95 The Claimant also wrote a contemporaneous incident report on 3 March 2015. It includes the following:-

> "Writer refused it due to health and safety and other issues. Furthermore writer does not has knowledge about the London's public transport and also impossible accomplish the shift in time with public transport. Writer informed Control officers as writer can go home in this case but the writer's day must be paid. Control room officer sent writer home and said that writer has to talk to Charles about this.
>
> Writer asked control room officer as *"do I have to come tomorrow night to work or not"*. Control officer said that writer have to contact Charles in respect of this matter. …"

96 The Claimant therefore gave a number of reasons in that report for refusing to do the shift on foot, only one of which was health and safety. He did not specify what his health and safety concern was. The main emphasis of the report as a whole is that the Claimant feels that he should be paid for his shift.

97 The next morning (4 March 2015) Mr Offei-Adjei emailed the Claimant to say that he did not have to come in for his shift that night.

98 The Claimant replied the same day to Mr Offei-Adjei (using his getnotify.com software), and copying Mr Soning, as follows:-

> "Dear Charles
>
> Thank you for your email.
>
> Would you be so kind to inform me, what about the future? Am I still deployed by the TWSS or fired due to my report that I have submitted?
>
> I look forward to your reply."

99 In a further email of the same day to Mr Offei-Adjei, copied to Mr Soning, the Claimant stated:-

> "Dear Charles
>
> Please accept my apology if I disturb you, but I would like to know what is going on right now. I cannot wait for "wonder" and I wish to plan my future days. Therefore it would be really great if you could kindly inform me as:
>
> Am I still employed or I fired due to my report and its contain?
>
> Thank you in advance."

100 The Claimant therefore appeared at this stage to be concerned about his job.

101 Mr Offei-Adjei replied to the Claimant as follows:-

> "I have been very busy today and just returned to the office. You will be receiving a letter from our HR Department regarding the issue."

102 At some point, although it is not clear precisely exactly when he did this, Mr Offei-Adjei had referred the incidents of 1 March and 3 March 2015 to the Respondent's HR Department.

103 The Respondent's practice is that HR then takes a decision as to whether or not matters should be put forward for a disciplinary hearing. HR did so in this case. No one from HR was present at the Tribunal. However, HR is located at a separate site, not at the control centre. It is unlikely, therefore, that the Claimant would up to then have had much, if any, contact with HR.

104 By a letter of 4 March 2015, the Claimant was invited to a disciplinary hearing on 9 March 2015 to be chaired by Mr Soning. He was informed of the right to be accompanied by a fellow worker or Trade Union Representative.

105 The Claimant maintains he did not receive this letter. However, the Respondent re-sent it on 11 March 2015 in any event, this time setting a date of 16 March 2015 for the disciplinary hearing.

106 The Claimant emailed the Respondent's HR Department on 11 March 2015 as follows:-

> "I still did not get anything from HR. It would be great if you or someone could inform/update me what is going on.
>
> Am I employed, fired or "on hold"/"parking"?
>
> The fact is that I have submitted a report and then I did not have to work anymore.
>
> It is pretty disgusting as non one explain me why?"

107 However, the Claimant did then receive the Respondent's letter of 11 March 2015. There was then further email correspondence between the Claimant and the Respondent's HR Department.

108 On 11 March 2015, the Claimant by email stated that:-

> "I would like to inform you that, my wife going to be accompanying me, and I hope you do not mind it".

109 The Claimant was in fact referring to his girlfriend, Ms Juhasz. Ms Juhasz was not a work colleague of the Claimant.

110 Ms Miriam Cambray of the Respondent's HR Department therefore turned down this request by email.

111 The Claimant replied to her on 11 March 2015 as follows:-

"That is a direction only and not a rule or law. Which means that you can allow anyone to be attended. Are you scaring from a woman or what is your problem with my wife?"

112 Ms Cambray replied, politely turning down the request.

113 The Claimant replied on 11 March 2015. His reply included the following:-

"May I suggest you to learn the ACAS code and case law carefully because there is 72 hours time frame. You do not have to keep if you do want to, it is up to you but then you must "pay" the consequences in any Tribunal proceeding if there will be any.

…

Please note that, as you refused my request as my wife to be attended on the meeting therefore the meeting will be tape recorded for evidence purpose.

Before you wish to say that "you are not allowed to do" I would like to mention that I do not need anyone's permission and I have all of the rights to record it in accordance with European Court of Human Rights.

So I am more than happy to attend on Monday.

I look forward to meet with the BIG BOSS!"

114 Ms Cambray replied politely by email. Her email included the following:-

"Recording devices are Not permitted. As an employee, you do not have a right to record the meeting, without the Employer's permission. A note taker will be present and make notes throughout the meeting.

…

On a separate note, for future reference, I would suggest that you approach me in a less threatening/rude manner, as your emails could be deemed that way."

115 The Claimant replied:-

"Thank you for your email.

I know everyone who is exercise his/her right have "threatening/rude manner" in this country. However, I cannot feel that I am rude or threatening.

In respect of the recording device please note and forward the followings:

I do not need to ask permission to record my conversation and I will not ask it, and I have the entire right to do that in accordance with the English law. We can discuss this in Court if you (or anyone else wish) but I can assure that the meeting will be recorded. I have nothing to hide but what about the chairperson of the meeting?

Furthermore, it would be great if you could refer for the law and it section which show that discriminative statement as *"As an employee, you do not have a right to record the meeting, without the Employer's permission."*

If you cannot provide the law and it section then I have no alternative but take this statement as further intimidation.

Please do not worry about me and I do not need help I am fine perfectly. I know the law, I know my rights and my responsibility?

Have a great day,"

116 The Claimant attended the disciplinary hearing on 16 March 2015. He had not done any work for the Respondent since 3 March 2015.

117 Mr Soning chaired the hearing. Mr Offei-Adjei was also present to take notes. The Claimant again recorded the meeting and we have had the benefit of listening to the recording as well as viewing the Claimant's transcript of it.

118 Right at the start of the meeting, the Claimant was asked what he was doing and told Mr Soning that he was recording the conversation. Mr Soning said he did not want the Claimant to do so. The Claimant said he did not need Mr Soning's permission and maintained (erroneously) that he had a right at law to do so. The meeting only lasted a few minutes and the bulk of it concerned the Claimant insisting that he had a right to record the meeting.

119 At one point, Mr Soning again asked if the Claimant was recording the meeting. The Claimant said no. (This was, as the Claimant admitted at the Tribunal, a lie.) However, shortly afterwards he maintained that it was not Ms Soning's business as he had no right to prohibit it and added "we can go to court". The tone of address from the Claimant had become increasingly aggressive, with his voice raised.

120 At that point Mr Soning stated that the meeting was over.

121 Mr Soning's evidence to the Tribunal was that the two incidents (of 1 and 3 March 2015) were not in themselves sufficiently serious to warrant dismissal and that, had the Claimant simply said, in relation to the 1 March incident, that he was sorry and wouldn't behave like this again, that would have been the end of the matter; however, he had become increasingly concerned about the Claimant's confrontational and impolite attitude in the interim emails with HR, as had Ms Cambray, and finally, his attitude at the disciplinary hearing itself with regard to insisting on recording it when he had

no right to and his threatening stance; and that, given that the Claimant was still in his probationary period, he decided at that point not to extend it and therefore to terminate the Claimant's employment (although he did not communicate this to the Claimant at this point).

122 There were also training costs associated with taking on new staff at the Respondent and we accept Mr Soning's evidence that commercially it would have been better if the Claimant had become a good employee and he had been able to get him back to work and that he would not therefore have dismissed him for the incidents of 1 and 3 March 2015 alone.

123 In the light of that, and in the absence of anything to indicate that Mr Soning was an unreliable witness, we accept that he took the decision in his own mind not to continue the Claimant's employment at the point when he said he was terminating the meeting.

124 However, after Mr Soning said he was terminating the meeting, the Claimant then made a number of comments before he left the room. As set out in the Claimant's transcript of the recording of the meeting, which is broadly accurate, they are as follows:-

"Claimant: See you in court.

Claimant: Truly, it's a discrimination, race discrimination, it's a harassment, it's a victimisation and intimidation.

Mr Soning: I am just not having my conversation to be recorded.

Claimant: All right. I didn't record anything. If I want to record I record it. You intimidate me, you are racist

Mr Soning: Oh??

Claimant: You are harassing me, you know it's a race discrimination. You invited me for a disciplinary meeting without any investigation

Mr Soning: Ah

Claimant: And you prohibited me to record the conversation.

Mr Soning: Yeah

Claimant: This is discrimination because you have no right. You have no idea about the law.

Mr Soning: All right

Claimant: You have no idea about nothing.

Mr Soning: ???? Please leave the place.

Claimant: Ok, thank you by. See you in Court."

125 The Claimant then left and did not return.

126 Mr Soning contacted HR within an hour of the end of the meeting and instructed HR to prepare a letter confirming the non-confirmation of the Claimant's employment in his probationary period and therefore dismissal on a week's notice. HR did so but did not revert to Mr Soning until just over a week later. The Claimant suggests that that is not credible. However, we accept Mr Soning's evidence that, in an organisation of this size, where HR is separately located, it is not unusual for there to be such delays in the production of letters. We have no reason to doubt his credibility and we accept his evidence in this respect.

127 The Claimant sent a lengthy document headed "Letter before Action" on 23 March 2015 to HR, copied to Mr Offei-Adjei.

128 The document is 14 pages long. As well as addressing the 1 and 3 March 2015 incidents, it contains various allegations, including discrimination, harassment and victimisation. He concludes by threatening to publish his "story" on social media and seeking compensation and settlement and stating that, if the Respondent does not contact him, he will lodge claims.

129 HR duly produced the dismissal letter. This was read to Mr Soning over the phone (although Mr Soning cannot recall exactly when). He agreed to its contents and it was sent on 25 March 2015. It confirmed that the Respondent would not confirm the Claimant's appointment post his probationary period and that his employment would terminate on one week's notice on 1 April 2015.

130 The letter also gave the Claimant the right to appeal. The Claimant did not pursue it.

131 The Respondent has a racially diverse workforce.

132 We have also seen evidence of other occasions when the Respondent has taken disciplinary action against other employees. The examples given indicate that action has been taken against employees of different racial backgrounds.

133 This evidence was provided in Mr Offei-Adjei's witness statement which referred also to various letters in the bundle at pages 334 ff which communicated the outcome of the relevant disciplinary actions. The Respondent redacted the names of the individuals on those letters to protect their identities.

134 The Claimant submitted that the Tribunal cannot therefore take this evidence into account, because these copy documents could have been fabricated and indeed, in his opinion, were fabricated. However, whilst it is of course possible that they were fabricated, we have seen no evidence other than the Claimant's assertion that they were fabricated. They are referred to in Mr Offei-Adjei's sworn statement and we have no reason to think his evidence was unreliable; by contrast he was an open and frank witness. Furthermore, a desire to protect the identity of other employees is an understandable reason for removing names from letters. We therefore find on the balance of probabilities that the letters are genuine. There is nothing in law, contrary to the Claimant's submission (which was not made by reference to any particular legal authority), that prevents us from accepting them as evidence.

Conclusions on the Issues

135 We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

Race Discrimination

136 First we turn to the issue of the Claimant's comparators, and firstly the two individuals whom the Claimant alleges he caught sleeping at work. The question for us is whether their circumstances were materially similar to those of the Claimant such that they can be valid comparators. We find that they were not, for the following reasons.

137 Firstly, we have seen no evidence as to who "Jesus" (the name the Claimant gave in the list of issues) was, or what his race was. It is not possible therefore even to work out what his circumstances were for the purposes of the comparators. At this Tribunal, the Claimant in his witness statement stated that one individual was called "Moses" and was black. However, we have no more information than that and nothing was put to the Respondents' witnesses about either of the alleged comparators.

138 We have seen a photograph which the Claimant alleges was "Joshua" and the references to "Joshua" in the duty completion sheet which the Claimant filled in. Joshua appears from the photograph to be black.

139 However, even if we had further details, there are a number of key differences in the circumstances of the Claimant and these comparators.

140 The incidents of sleeping were not investigated as the Claimant did not write a report/email about them. Therefore it is not even established that they were sleeping at work.

141 Secondly, even if that had been established, the action of sleeping at work is not comparable to the Claimant's actions of being rude and aggressive to his employer.

142 Finally, the Claimant was in his probationary period. We do not know whether Joshua and Jesus/Moses were in their probationary period or if they were established employees who had passed their probationary period or had lengthy service/clean disciplinary records. This too is an important difference as the attitude of an employer to misconduct in an employee before that employee had even finished his probationary period is likely to be different to the attitude to an employee outside that probationary period, particularly if the comparator employee had lengthy service or, for example, a clean disciplinary record.

143 As to Mr Peterson, who was white British, his circumstances are also not comparable to those of the Claimant. As we have found, Mr Peterson's use of the F word was in a light hearted context in a group situation and no offence was caused either to Mr Zia-Al-Hassan or to anyone else. For the avoidance of doubt, we do not consider that the Claimant was offended at the time, as he did not mention anything at the time, whilst he is someone who can and does mention things which bother him when he wants to, as is evident from our findings and the evidence before the Tribunal. Rather, the Claimant only brought this up at a later stage when the relationship had turned sour.

144 By contrast, the Claimant's use of the F word was in a situation where offence was taken by two people, such that Mr Khan felt it necessary to call his manager and to write an email complaining about the Claimant's behaviour.

145 The two situations are not therefore comparable and Mr Peterson is not therefore a valid comparator.

146 Turning to the specific allegations of race discrimination, we start with the allegation about disciplining and dismissing the Claimant for the comment about the "fucking £3" on 1 March 2015.

147 Firstly, the Claimant was not dismissed for this. He was dismissed because of his attitude in his communications to HR and at the meeting of 16 March 2015. Although the 1 March 2015 incident led to the meeting, it was not the reason for dismissal and Mr Soning was clear that he would not have dismissed for that incident.

148 That incident was one of the two reasons why the Claimant was "disciplined" – i.e. invited to the disciplinary meeting. However, firstly, as we have found, there was no valid comparison with Mr Peterson's situation. Any valid hypothetical comparator would have to be someone who was not

Hungarian/Eastern European/White and was still in his probationary period and who had behaved in a similar way.

149 Secondly, we have seen no evidence of any primary facts which might cause the burden of proof to shift; i.e. evidence from which, in the absence of an adequate explanation by the Respondent, we might conclude that the decision to discipline the Claimant was because he was Eastern European/Hungarian and/or white.

150 Furthermore, the Respondent had an adequate non discriminatory explanation anyway. It is unsurprising that an individual in his probationary period would be invited to a disciplinary hearing for this reason. The fact that it was HR, which was based in a separate building and therefore unlikely to have to have had any contact with the Claimant, who had only been employed by the Respondent for a short time, which took the decision to invite him to a disciplinary hearing backs this up further. There is no reason suggested why HR would chose to discipline a white Hungarian in these circumstances but not others of different races in the same circumstances.

151 This allegation of direct race discrimination therefore fails.

152 The second allegation was that the Claimant was pressurised to use his own car at the meeting of 3 March 2015. However, we have found that he was not pressurised to do so. Therefore the less favourable treatment alleged by the Claimant is not established and this allegation fails.

153 As to the giving of the car on 3 March 2015 to Mr Peterson, Mr Peterson was the employee on the long shift and that was why he was given the car. There is no evidence to shift the burden of proof and in any event the Respondent had provided a completely adequate non discriminatory explanation. This complaint therefore also fails.

154 As to requesting the Claimant to take public transport and use the Oyster card, this was the Respondent's established practice. There is no evidence to shift the burden of proof and the Respondent has provided a completely adequate non discriminatory explanation; whoever was on the short shift that night would have been offered the same options. This complaint therefore also fails.

155 As to inviting the Claimant to a disciplinary meeting a week later on two matters, firstly the Claimant was not invited a week later. He was invited on 4 March 2015; it is just that the Claimant did not receive the letter of 4 March 2015. However, he was invited on that date.

156 In any event, there is nothing to shift the burden of proof and the Respondent has provided an entirely adequate non discriminatory explanation for the treatment; it was an entirely reasonable thing to invite someone to a disciplinary hearing for the two events of 1 and 3 March 2015, in particular

for the event of 1 March 2015 which had resulted in a complaint on behalf of two members of staff, and especially for someone still in their probationary period. This complaint therefore fails.

157 As to the Claimant's dismissal, we have again seen no evidence that might lead us to believe that, in the absence of an adequate explanation, the reason for dismissal might be the Claimant's race. All that is simply the Claimant's assertion. In any case, the Respondent had a perfectly reasonable reason for dismissing him; the Claimant's behaviour, especially in his email correspondence with HR and at the disciplinary hearing, was rude and aggressive. It is particularly understandable that, as the Claimant had not even completed his probationary period, the Respondent would dismiss him for this. This explanation is perfectly adequate and not in any way discriminatory. This complaint therefore also fails.

Victimisation

158 The Claimant relies on two alleged protected acts.

159 First, he maintains that he made a statement on 3 March 2015 that he intended to take the issue about health and safety and driving to Court. Whilst his incident report form of 3 March 2015 refers to health and safety, it does not state that the Claimant intended to take the issue about health and safety and driving to Court. Nor is there such a reference in the recording of the 3 March 2015 incident. Therefore the allegation is not made out and there was no protected act as no such statement was made.

160 Secondly, even if that statement had been made, it is not in itself a complaint about a breach of the Equality Act 2010 (e.g. a complaint about race discrimination); rather it is a complaint about health and safety which is not something within the definition of a protected act.

161 The second alleged protected act is the Claimant's letter before action of 23 March 2015. This contains complaints about alleged race discrimination, harassment and victimisation. Provided it was not made in bad faith, it would therefore be a protected act.

162 Firstly, it should be noted that the allegations of the letter, albeit that they are not very specific, are not true in themselves. As noted above, we have found that all the race complaints at this Tribunal have failed. That in itself is not sufficient to mean that the allegations in the letter of 23 March 2015 were made in bad faith, but it is necessary first part of the assessment set out in the statute of whether something might be in bad faith that the allegations were "false"; in this case, they were false.

163 Turning to the bad faith issue, however, in assessing this, we take into account the following. From early in his employment, the Claimant was surreptitiously tracking the reading of his emails by getnotify.com software

without the recipients of those emails knowing; he was taking photographs (of allegedly sleeping officers) which he did not disclose to management at the time but kept back for future use (eventually at this Tribunal); he took extensive notes of events happening at work, copious amounts of which we have seen in the bundle and which is an action which in itself is highly unusual; he covertly recorded the 3 March 2015 incident; he made aggressive assertions to HR about the law; he insisted on recording the 16 March 2015 meeting and behaved aggressively in it; he threatened to go to court both in his emails to HR and at the meeting of 16 March 2015 before any consideration of the disciplinary matters could take place; only after Mr Soning stopped the meeting did the Claimant declare, rather artificially as if he was determined to get it out before he left the room, that he considered that there was race discrimination, harassment and victimisation; before he had confirmation of his dismissal, he wrote a lengthy "letter before action" threatening proceedings and exposure on social media if the Respondent did not respond with a view to come to a settlement; and he did not take up the appeal offered to him.

164 These are actions which are not indicative of someone wanting his employment to continue. Rather, they are actions of someone who is preparing a case against the Respondent and seeking compensation and not of someone who genuinely believed that discrimination/harassment and victimisation had occurred. We therefore find on the balance of probabilities that the allegations in the 23 March 2015 letter before action were made in bad faith. It was not therefore a protected act.

165 As there were no protected acts, the victimisation complaint therefore fails.

166 Whilst that disposes of the victimisation complaint, we would add nonetheless that, even if the 23 March 2015 letter before action was a protected act, the Claimant was not dismissed because of it. That decision had already been taken by Mr Soning on 16 March 2015 and therefore could not have been because of an act done on 23 March 2015.

167 Furthermore, the Respondent had in any case very good reasons for dismissing the Claimant which were nothing to do with any allegations of discrimination by him; specifically his rude aggressive behaviour in his emails to HR and at the 16 March 2015 hearing.

Automatically Unfair Dismissal

168 We turn first to the complaint under section 100(1)(c).

169 In relation to this (as with sub sections 100(1)(d) and (e)), we consider the four alleged health and safety concerns set out in the list of issues.

170 We turn first to the issue of whether there were circumstances connected with the Claimant's work which he reasonably believed where harmful or

potentially harmful to health and safety (the first requirement under section 100(1)(c)).

171 First, the risk of being held responsible for driving without insurance could not have been believed by the Claimant (reasonably or at all) to have been harmful or potentially harmful to health and safety as it was never the case that anyone on 3 March 2015 was asked to do this. Drivers could refuse to use their own car if they wanted to and certainly if they felt they were uninsured. Once the Claimant said he was concerned his own car was uninsured for his work and declined to use it, there was no question that he would be pressurised or forced to do so.

172 The other three alleged health and safety concerns relate to the request that he do his shift on 3 March 2015 by public transport using the company Oyster card.

173 First, the Claimant's allegation that there was a risk of violence while being on foot in a dangerous dark location was, as he admitted, only in relation to his alleged concern that he would have to do his shift in part in Walthamstow, which he says he considers to be dangerous. He accepted that there was no such risk in Zone 1, which is where he would have to have done the shift were it by public transport.

174 However, the Claimant maintains that he believed the shift would involve Walthamstow. He did not ask any questions about where the shift would be; he just refused to do it. It is therefore possible that he genuinely believed that the shift would have involved Walthamstow.

175 However, he said nothing of this at the time, which is surprising if that was indeed his concern. Even in his incident report of 3 March 2015, he gives several reasons why he did not want to do the shift, including his alleged unfamiliarity with London's transport network and a concern he could not do the shift in time and a simple reference to health and safety, without specifying what that health and safety concern was. The Claimant maintained at this Tribunal that the health and safety concern was obvious but it does not appear obvious to us, nor did it appear obvious to the Respondent's witnesses, all of whom did not consider there was any health and safety concern about the shift.

176 Thereafter, the Claimant only specified his alleged health and safety concerns later when he was clearly about to bring Tribunal proceedings. This lack of specificity in particular, and the fact that the Claimant was clearly trying to build an Employment Tribunal case generally, indicates to us that the Claimant did not have any real specific health and safety concerns at the time. A single reference to health and safety in the 3 March 2015 incident report, in conjunction with the other non health and safety reasons, is more indicative of someone trying to find reasons primarily to get paid for a shift he

did not do and possibly also to find reasons to defend his ongoing employment.

177 We do not therefore consider that the Claimant believed at all that the shift would be harmful or potentially harmful on the ground of personal danger.

178 The same applies, for the reasons above, to the alleged health and safety concern regarding inadequate clothing for a cold night and no shelter. This was not mentioned at the time. Furthermore, the Respondent had supplies of warm clothing at the control room which employees could use. We do not therefore think that the Claimant believed this was potentially harmful to health and safety.

179 The same applies to the allegations regarding inadequate access to food and public toilets and, for the reasons above, we do not consider the Claimant had a belief at all that this was potentially harmful to health and safety.

180 Therefore, in relation to all of the four health and safety related alleged concerns, the Section 100(1)(c) complaint fails at the first stage.

181 Even if it did not, it would fail at the second stage as the Claimant did not bring any of these concerns to the Respondent's attention by reasonable means. The insurance issue was never raised as a health and safety concern at the time. The Claimant simply said he was not insured and therefore the Respondent did not ask him again if he would use his own car. As to the other three issues, they were not specified at all at the time. They were only raised by the Claimant at a much later stage as part of his case against the Respondent. Even if that could be said to amount to communicating them to the Respondent, we consider that the context of his doing so means that it was not done by "reasonable means"; rather it was done not at the time but in the later context of building a tribunal claim.

182 In any event, the section 100(1)(c) complaint would also fail at the third and final stage, as the reason for the Claimant's dismissal was his rudeness and aggression and nothing whatsoever to do with health and safety concerns. Furthermore, the concerns were only specified by the Claimant to the Respondent after the decision to dismiss him on 16 March 2015, so could not have been the reason for the decision.

183 Turning to sections 100(1)(d) and (e), it follows from our findings under section 100(1) (c) that those two must fail at the first stage.

184 For the reasons above, the Claimant did not believe that any of his four examples represented a "serious and imminent" danger.

185 Furthermore, for the purposes of section 100(1)(d), even if the Claimant had a reasonable belief that there was a serious and imminent danger, he certainly could not have reasonably believed that he could not avert it; he plainly did avert it, very easily, by telling the Respondent first that he was not prepared to use his own car and secondly that he was not prepared to do the shift by public transport. He was never pressurised to do either. He could not therefore reasonably have believed that he could not avert these alleged dangers.

186 If these complaints had not failed at the first stage, we accept that it could be said that the Claimant, for the purposes of the second stage of the test, "left his work place while the danger persisted" and "took appropriate steps to protect itself himself from the danger", i.e. by refusing to do the shift and leaving.

187 However, both these complaints would have failed at the third stage anyway, for the same reasons as the Section 100(1)(c) complaint would; the reason for the Claimant's dismissal was his rudeness and aggressiveness and nothing to do with health and safety; and the fact that, at the time Mr Soning had taken his decision to dismiss the Claimant, he was unaware of these alleged health and safety concerns so they could not have been the reason for dismissal.

188 All of the health and safety automatically unfair dismissal complaints therefore fail.

Unpaid Wages

189 Finally, we turn to the complaint regarding the Claimant's wages for the shift of 3 March 2015, which were not paid by the Respondent.

190 The Claimant was on a zero hours contract. There are no terms in the contract to the effect that, if the Claimant attends for a shift but then refuses to do it (whatever the reason for refusal), he should be paid for that shift. In the absence of that, if an employee does not do the work, he is not entitled to be paid.

191 The Claimant attended for almost half an hour before leaving and he is, as the Respondent conceded at the start of this hearing, entitled to be paid for that work. As his hourly rate is agreed to have been £7.00 per hour, he is entitled to £3.50 gross, and the Tribunal makes an award in that amount.

192 We would add that, as it was the Respondent's practice, where a vehicle was not available, to offer the alternatives of an employee using his own car or doing a shift by public transport, these were not unreasonable things to offer the Claimant. The Claimant could have taken them up if he wanted and his decision not to do so was entirely his own. The Respondent cannot be blamed for this.

193 Finally, we note the correspondence sent in by Ms Hirsch and then the Claimant on the evening after submissions were completed on the third day of the hearing. As noted, the case of Agarwal, which Ms Hirsch enclosed, does not impact on our decision in relation to the wages complaint as it has not been argued by the Claimant, nor is there any basis for the proposition that, any term relating to pay should be implied into the Claimant's contract. Therefore, even if we did have jurisdiction to do so, which Agarwal makes clear that we do not, we would not have implied any term which impacts upon the above analysis.

Costs Application

194 Ms Hirsch indicated that she would have made a costs application had the Claimant been present but appreciated that, without him being present, and therefore unable to respond to the application, she could not make the application that day. However, she said that she would be making a costs application in writing in due course. She said that it was her preference that it should be dealt with on the papers without a further hearing.

Further Matters

195 In addition, Ms Hirsch raised a further matter, namely the line of questioning which the Claimant had embarked upon regarding Mr Soning's religion (referred to earlier towards the start of these reasons). Whilst she and Mr Soning were happy with the way that the Tribunal dealt with the matter, she indicated that the Respondent was considering making a complaint elsewhere about the Claimant's behaviour in this respect. She said that her own note was not as full as she wished and discussed the possibility of obtaining a note from the Tribunal in relation to the relevant section of cross examination.

196 The Tribunal adjourned for a brief discussion about this. When it returned, there was further discussion about whether one of the other representatives from the Respondent may have taken a note (there were various different individuals who attended with Ms Hirsch over the course of the hearing). Ms Hirsch said that they needed to contact this individual who was not around at the moment to see if that person had a full note and they would do so.

197 The Judge said that it was not the Tribunal's normal practice to release Judge's notes. He acknowledged that this was a sensitive matter. He said that, if Ms Hirsch wanted the Tribunal to do so, he would go and speak to the Regional Employment Judge about whether, in these unusual circumstances, it might be possible and appropriate to release part of the Judge's notes or a summary of them.

198 However, Mr Soning at this point said that the option that the Respondent would take would be to check with their colleague about their notes rather

than request the Judge to speak to the Regional Employment Judge about the Judge's notes.

Employment Judge Baty
5 April 2017