EMPLOYMENT TRIBUNALS

Claimant:	**Mr S Fouad**
Respondents:	**Abellio London Limited**
Heard at:	**Croydon**
On:	**13 to 17 August 2018 and 19 September 2018 (in Chambers)**
Before:	**Employment Judge K Bryant QC** **Ms B C Leverton** **Ms C L Oldfield**

Representation:

Claimant:	Mr G Reeds (Counsel)
Respondent:	Mr A Lord (Counsel)

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal was presented out of time and the tribunal does not have jurisdiction to hear it. Even if the tribunal did have jurisdiction it would have dismissed the unfair dismissal claim on its merits.

2. The tribunal does not have jurisdiction to hear those complaints made under the Equality Act 2010 that concern matters post-dating the presentation of the ET1 in this case and in respect of which the Claimant has made no application to amend his claim to add those complaints. Even if the tribunal did have jurisdiction to consider those complaints, it would have dismissed them on their merits.

3. Of those complaints under the Equality Act 2010 that concern matters pre-dating the ET1, the tribunal has jurisdiction to hear one complaint of harassment and one of victimisation, in each case concerning an alleged failure to provide the Claimant with a copy of his full personnel file, but those claims are not well-founded and are therefore dismissed.

4. All other complaints under the Equality Act 2010 that concern matters pre-dating the ET1 were presented out of time and the tribunal does not have jurisdiction to hear them. Even if the tribunal did have jurisdiction to hear them those complaints would have been dismissed on their merits.

5. All of the Claimant's claims are therefore dismissed.

REASONS

Claims and issues

6. The ET1 in this case was presented as long ago as 4 April 2014. The case has a somewhat complicated history but it is unnecessary to set it out here. The Claimant has set out his claims on a number of occasions as has the tribunal at a number of Preliminary Hearings ('PHs'), the last of which was held on 2 October 2017.

7. At the start of this hearing the tribunal spent some time discussing the claims and issues with the parties, including by reference to the record of the October 2017 PH, and some measure of agreement was reached. The tribunal then spent the rest of the first day of the hearing reading the witness statements and the documents to which those statements referred. At the start of the second day of the hearing the tribunal discussed further with the parties those aspects of the claims and issues that had not been agreed the day before, namely the claims for direct discrimination and harassment. Those aspects of the claims were then agreed. The following therefore records the full extent of the Claimant's claims as agreed at the start of the hearing of his case, with some slight further clarification made during the course of the hearing as indicated below.

8. The tribunal notes that the Claimant has raised a great number of allegations both as part of internal grievances during the course of (and after) his employment with the Respondent and in his witness statement for this hearing. Whilst the tribunal takes into account all of the evidence presented to it, its focus will be on the substantive allegations that the Claimant has agreed are the matters the tribunal should determine.

Unfair dismissal

9. The Claimant was dismissed with effect from 24 December 2014 following an accident involving the bus he was driving on 2 September 2014. A claim for unfair dismissal was added by amendment; the circumstances leading to the amendment will be discussed further below. The claim is brought under section 98 of the Employment Rights Act 1996 ('ERA'). The Respondent relies on conduct as the potentially fair reason for dismissal for the purposes of section 98.

Discrimination – protected characteristics

10. The Claimant has raised a number of claims of discrimination of different types under the Equality Act 2010 ('EqA'), relying variously on race (Eqyptian), religion (Coptic Christian), sex (male) and disability.

11. The Claimant relies on three separate disabilities: (a) a left heel injury dating from 2001, (b) a right shoulder injury resulting from a bus accident in October 2012 and (c) depression from November 2011 which he says became worse at some later time.

12. The Respondent accepts the first disability and that it had the requisite knowledge at all times material to this claim. It also accepts the second disability and, although initially it did not accept knowledge of that disability, by the time of closing submissions the Respondent accepted that it had the requisite knowledge from around April 2013 when the Claimant was back at work following an accident in October 2012 but was signed as only fit to work 2 days per week for the following six months. It does not accept the third disability.

Direct discrimination

13. The following detriments (within the meaning of section 39 of the EqA) are relied on:

    13.1 Not allowing the Claimant time off for hospital appointments and giving him a disciplinary warning when he was late; this is said to relate to events in 2011 and 2013 and to be direct disability and/or religion discrimination;
    13.2 Failing to allow the Claimant sufficient flexibility around his working hours in light of his need to attend hospital appointments and care for his elderly parents; this is said also to relate to events in 2011 and 2013 and to be direct disability and/or religion discrimination;
    13.3 Placing the Claimant under surveillance; this was following an accident in October 2012 and is said to be direct disability and/or sex discrimination;
    13.4 Making a report about the Claimant to the Department for Work and Pensions ('DWP'); this followed on from the surveillance and is said to have been in late 2012 or early 2013 and to be direct disability discrimination.

14. The Claimant confirmed that the above protected characteristics are the only ones relied on in respect of the various allegations of direct discrimination and that race forms no part of his direct discrimination claim.

15. The Claimant says that he relies on Ray Curtain, a white British male, as an actual comparator with regard to the first and third of the above allegations and Brisha Ismaili and Karimi Zohar (none of whose characteristics the Claimant has specified save that they are women) with regard to the second.

As necessary the Claimant will rely on hypothetical comparators for all of the above allegations.

Harassment

16. In his ET1 and later documents the Claimant appears to raise harassment allegations against a large number of individuals. As clarified at the hearing his harassment claims are only against the following:

    16.1 Mr Batchelor;
    16.2 Mr Hannam;
    16.3 Ms Murphy;
    16.4 Mr Parker;
    16.5 Mr Wakerley.

17. The Claimant confirmed that there was no harassment claim against Mr Wilson, Mr Maxwell or Mr Sharkey who had been previously named.

18. The allegations against Mr Batchelor are that:

    18.1 He withdrew the shuttle service (as discussed below, there was a shuttle service that transported certain bus drivers from the depot to the start of their route in Putney);
    18.2 He did not give the Claimant an allocated parking space at the depot;
    18.3 There were general difficulties with the Claimant being able to park at the depot;
    18.4 He placed false Genius reports (Genius being an automated system that records aspects of the driving performance of bus drivers);
    18.5 He disciplined the Claimant for lateness in September 2011;
    18.6 He instigated surveillance of the Claimant in October 2012;
    18.7 He reported the Claimant to the DWP; this was clarified during the hearing as meaning not just that Mr Batchelor instigated a DWP investigation but that he also provided information to the DWP;
    18.8 He made fun of the way the Claimant walked between September 2011 and July 2013.

19. All of the above harassment allegations are said to be related to disability. Allegations 4 and 6 are also said to relate to race.

20. The allegations against Mr Hannam are that:

    20.1 The shuttle service remained withdrawn;
    20.2 He changed the Claimant's duties, putting him back on the rota rather than giving him fixed duties for about a month;
    20.3 There were parking issues at the depot;
    20.4 There were issues with the Claimant's holidays over the 2013/14 Christmas period;
    20.5 He made a statement to the DWP.

21. Allegations 1-3 and 5 are said to relate to disability. Allegation 4 is said to relate to race.

22. The allegations against Ms Murphy include all of those against Mr Batchelor and Mr Hannam as set out above, on the basis that she knew of their behaviour but did nothing to prevent it. There are also specific allegations against Ms Murphy that she:

    22.1 Failed to provide the Claimant with his full personnel file on request;
    22.2 Delayed providing him with any part of his personnel file following his requests.

23. All of the allegations against Ms Murphy, including those deriving from allegations made against others, are said to relate to disability and race.

24. The allegations against Mr Parker concern an investigation meeting with the Claimant on 15 September 2014; it is alleged that:

    24.1 He physically assaulted the Claimant;
    24.2 The way in which he otherwise conducted the meeting amounted to harassment.

25. The allegations against Mr Parker are said to relate to disability only.

26. There are two allegations against Mr Wakerley concerning:

    26.1 Parking at the depot;
    26.2 His handling of a grievance raised by the Claimant.

27. Both allegations against Mr Wakerley are said to relate to disability and the second also to race.

Victimisation

28. The Claimant says that he raised oral and written grievances from 2011 until his dismissal in late 2014. He relies on those grievances as protected acts.

29. The Claimant relies on the following as allegations of victimisation:

    29.1 Not allowing him to use a disabled parking space at the depot; this is said to have been an ongoing issue from 2011 to 2014, apart from periods when it was resolved;
    29.2 Mr Batchelor placing a false Genius report on his file in August 2011;
    29.3 Starting the process to dismiss him from 2 September 2014 onwards and ultimately terminating his employment;
    29.4 Recording an accident in October 2012 as a disciplinary issue;
    29.5 Failing to respond appropriately to his requests for documentation from his personnel file; this is said to have been an ongoing issue from 2013 onwards;

29.6 Being humiliated by Mr Batchelor making fun of the way he walked in September or October 2011;
29.7 Mr Parker treating him like a child at a meeting on 15 September 2014.

Reasonable adjustments

30. The Claimant has identified the following provisions, criteria or practices ('PCPs') for the purposes of this aspect of his claim:

30.1 Requiring the Claimant and other drivers to make their own way from the depot to another location to start their shift;
30.2 Not providing the Claimant with an allocated parking space at the depot;
30.3 Allocating bus routes to drivers irrespective of the length of the route.

31. The Claimant says that these PCPs put him at a substantial disadvantage compared with non-disabled persons because (in respect of the first two PCPs) walking caused him considerable pain and (in respect of the third PCP) he was unable to take frequent short breaks from his driving duties.

32. The Claimant contends for the following adjustments:

32.1 Providing a shuttle service from the depot;
32.2 Allocating a parking space to the Claimant;
32.3 Allocating him a short bus route;
32.4 Considering alternative employment for him.

33. The Respondent denies all of the Claimant's claims under the EqA and his claim for unfair dismissal. In respect of a number of the claims the Respondent also raises a time point, ie that the claims were presented out of time and that the tribunal does not have jurisdiction to hear them.

34. The tribunal should say something at this stage about the claim for unfair dismissal. The Claimant was dismissed with effect from 24 December 2014 following an investigation and disciplinary process that started following an accident on 2 September 2014. His ET1 was presented on 4 April 2014 and could not, therefore, have included any claim relating to his dismissal. It was noted in the record of a PH held on 12 December 2016 that the Claimant had been granted permission in correspondence to amend his claim to add a claim for unfair dismissal. Examination of the tribunal file reveals that the Claimant wrote an email to the tribunal on Friday 20 March 2015 at 4.05pm in which he said that he had told an Employment Judge on an earlier occasion, prior to his dismissal in December 2014, that the Respondent was going to dismiss him and that the Employment Judge had said that he should write to the tribunal seeking an amendment to add an unfair dismissal claim. His email was taken by the tribunal as an application to amend his claim and the amendment was granted by the tribunal on 9 April 2015.

35. Given the relevant dates, ie dismissal was with effect from 24 December 2014, the application to amend to add unfair dismissal was made on 20 March 2015 and the application was granted on 9 April 2015, it seemed to the tribunal that there may also be a time point in relation to the unfair dismissal claim. The tribunal had in mind the recent judgment of the Employment Appeal Tribunal in *Galilee v Commissioner of Police of the Metropolis* ([2018] ICR 634) as to when a claim added by amended is to be treated as having been presented to the tribunal. As discussed in more detail below, following conclusion of the evidence the tribunal invited the parties to make submissions on this matter.

36. The tribunal should also say something here about the various allegations raised by the Claimant under the EqA which concern events that took place after the presentation of his ET1. Unlike the unfair dismissal claim which was added by amendment, there has been no application at any stage of these proceedings to amend the claim to add any discrimination complaints that concern matters post-dating the ET1. Therefore, the tribunal considers that such claims are not part of the Claimant's substantive case and are not before the tribunal for determination.

37. As discussed and agreed with the parties at the start of the hearing, the tribunal heard evidence and submissions on liability only at this stage.

Documents

38. The tribunal has been presented with a large amount of documentation by the parties. The Respondent had prepared a hearing bundle in one volume. The Claimant had also prepared a separate hearing bundle running to three volumes. The tribunal made clear to the parties from the outset that it would only read, and take into account, documents in the bundles to which it was referred by one or other party or by one of the witnesses.

39. The tribunal had noted from the file that there had been correspondence concerning the adequacy of disclosure. The tribunal therefore asked the parties whether there were any live issues in this regard that needed to be resolved but no applications were made by either party save as indicated below.

40. The tribunal was also presented with a chronology by the Respondent which was agreed by the Claimant on the second day of the hearing.

41. On the first day of the hearing the Respondent indicated that it intended to ask the tribunal to watch certain passages from CCTV footage from the night of the accident which led to the Claimant's dismissal. The tribunal indicated that it would revisit this matter having read the witness statements. Although proper facilities had not been requested in advance of the hearing, the tribunal agreed to watch the footage and this was achieved by the tribunal, the relevant witness and the representatives watching it simultaneously on different laptops.

42. Also on the first day of the hearing the Claimant indicated that he intended to ask the tribunal to listen to a number of audio recordings that he had made covertly of various discussions and/or meetings. No full transcripts of the recordings had been made. The tribunal again indicated that it would revisit this matter having read the witness statements, following which it agreed to listen to certain of the Claimant's audio recordings as indicated below; this was achieved by the Claimant playing the relevant recordings aloud on a laptop during the course of his evidence. There were 11 recordings that the Claimant asked the tribunal to hear but the tribunal refused to allow the Claimant to play two that were made in 2018, ie some years after the Claimant's dismissal, and two others which amounted to evidence from witnesses who had not provided statements to the tribunal or been called to give oral evidence.

43. On the fourth day of the hearing, having completed his evidence, the Claimant applied to adduce a further document, namely a single page copied from a driver rota from March 2014. The Claimant had handed the document to the Respondent on the second day of the hearing but no application was made at that time. The tribunal allowed the document to be put in evidence, and it was added as page 1696 of the Claimant's bundle, but did not permit the Claimant to be recalled to give further evidence.

44. Neither party produced skeleton arguments or written submissions at the hearing. However, towards the end of the fifth day of the hearing neither party had yet addressed the potential time point concerning the unfair dismissal claim as outlined above. Given the late hour, both parties were given permission to present written submissions limited to that point by 31 August 2018. The Respondent did present written submissions on that point on 31 August 2018 which the tribunal has taken into account. The Claimant did not present any written submissions within the time limit or at any time before the tribunal met in Chambers to deliberate and reach its judgment. However, by email sent on the afternoon of 27 September 2018 (which was before the tribunal had promulgated its judgment and reasons) the Claimant sent in written submissions and a number of accompanying documents. Notwithstanding their lateness, the tribunal has revisited the unfair dismissal time point and has considered the content of the Claimant's further submissions in so far as they concern that point. In so far as the Claimant's submissions concern other matters which do not go to that point (and the tribunal notes that in large part the submissions and accompanying documents are an attempt to rerun arguments and/or give further evidence on the substantive claims) the tribunal has not taken them into account.

Witnesses

45. The tribunal heard from the following witnesses on behalf of the Claimant, each of whom gave evidence by reference to a written witness statement:

    45.1 The Claimant himself;

45.2 Ms Maureen Watts, a friend of the Claimant who has helped him with various oral and written communications both before and since his dismissal.

46. The tribunal also heard from the following on behalf of the Respondent, each of whom again gave evidence by reference to a written witness statement:

46.1 Jon Batchelor, the Operations Manager at the Battersea bus depot from July 2011 until July 2013;
46.2 Mark Parker, Staff Manager at the material time;
46.3 Lorna Murphy, Operations Manager at Battersea from early 2014;

47. The Respondent also relied on a witness statement from Mark McGuinness, Performance Director, although he was not called to give oral evidence.

Evidence and findings of fact

48. The tribunal should say something here about the way in which the Claimant gave his evidence. The Claimant's spoken English is accented but his understanding and the quality of his spoken English is, the tribunal finds, very good. It was, however, very difficult to get the Claimant to answer questions, even when put to him in simple terms by the tribunal members or the Employment Judge. He consistently went off at a tangent without dealing with the question at hand and regularly talked over the person trying to ask him a question. Nevertheless, the tribunal gave the Claimant every opportunity to give his evidence on the matters relevant to his claims. It is true to say that the Employment Judge intervened during the Claimant's evidence rather more than during that of the Respondent's witnesses, but that was to attempt to steer the Claimant back to the relevant issues.

49. Another feature of the Claimant's case before the tribunal is that large parts of his allegations were simply not put to the Respondent's witnesses. For example, it was not put to Mr Parker that he had any knowledge of any protected act, even though one of the specific allegations of victimisation is against Mr Parker. By way of further example, it was also not put to Ms Murphy that anything she did or did not do was related to race or disability, even though a number of allegations of harassment related to race and disability have been raised agains her.

50. In light of all the evidence heard and read by the tribunal, it has made the following unanimous findings of fact:

50.1 The Respondent is a company which operates bus routes in London and Surrey. It took over a bus depot in Battersea in around 2009, together with the bus routes operating from, and the employees based at, that depot.
50.2 The Claimant was employed as a bus driver based at the Battersea depot from 25 September 2006. His employment was initially with Travel London (which the tribunal understands was part of National

Express) but transferred to the Respondent pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 when it took over the depot and the routes operated from that depot.

Events in 2011

50.3 Mr Batchelor took over as Operations Manager at the Battersea depot in July 2011. One of the reasons he had been brought in was because of a problem of poor attendance at the depot.

50.4 At the time of Mr Batchelor's arrival the Claimant was on sick leave.

50.5 Shortly before the start of his sick absence the Claimant had been invited, by letter dated 29 March 2011, to attend a fast track Stage 1 hearing on 5 April under the Respondent's Attendance at Work policy to discuss his unsatisfactory attendance. In the previous 4 months or so the Claimant had been late for duty on 6 occasions and absent from work on 2.

50.6 The Claimant raised a grievance against the manager who had invited him to the Stage 1 hearing and it seems that this led to postponement of the Stage 1 hearing.

50.7 A grievance meeting was arranged for 20 April 2011 but on that day the Claimant commenced a period of sick leave which continued until about 19 August 2011.

50.8 As well as his sick absence of nearly 4 months' duration, since the letter inviting him to a Stage 1 hearing the Claimant had been late for work on three further occasions in April 2011 and was late once in September 2011.

50.9 On 12 September 2011 the Claimant went to see Mr Batchelor. His union representative had said to Mr Batchelor that the Claimant wanted to see him. The Claimant and his union representative went to Mr Batchelor's office. Mr Batchelor took the opportunity to complete the Stage 1 process which had been outstanding for some time. Mr Batchelor explained the purpose of the meeting. His union representative did not suggest at that stage that the meeting should not continue.

50.10 Mr Batchelor would not normally deal with Stage 1 of the attendance procedure but the manager who would, and who had originally sent the invitation in March 2011, had told Mr Batchelor that he was having trouble getting the Claimant to attend a meeting. Mr Batchelor therefore took the opportunity while he had the Claimant and his representative in his office. He did not give the Claimant advance warning that he intended to hold the postponed Stage 1 hearing on that day; he accepts with hindsight that he should have done but says that he was not familiar with the Respondent's procedures at that time. The meeting lasted between 45 minutes and an hour. Having discussed the Claimant's attendance record with him Mr Batchelor gave him a Stage 1 warning.

50.11 During their discussion the Claimant asked Mr Batchelor whether there was any office work available or whether it was possible for him to do permanent late duties. Mr Batchelor made enquiries but there was no office work available. He said that if the Claimant wanted to do late shifts then he should try to swap shifts with other drivers.

50.12 The next day, 13 September 2011, the Claimant presented a written appeal against the warning including as one of his grounds: *'Bullying, harassment and discrimination'*. He also raised a written grievance on the same date including an allegation of *'Harassment, Bullying and Disability Discrimination'*.

50.13 The Claimant then raised a further written grievance dated 26 October 2011. The first issue he raised concerned holidays, specifically that the Claimant said it had been agreed *'with the company and the disability department'* that he could always take his holidays in a one month block. The second issue concerned parking, specifically that he had parked in a disabled bay at the depot as usual but someone (not Mr Batchelor) said that he had been told that the Claimant could not park there.

50.14 Both the appeal against the written warning and the Claimant's grievances were assigned to Nick Bland, Operations Director.

50.15 An appeal hearing took place on the afternoon of 2 November 2011. The outcome, which was confirmed in a letter dated 4 November 2011, was that although the Claimant's attendance record was extremely poor, the appeal was allowed and the warning overturned because the correct procedure had not been followed.

50.16 During the course of the appeal the Claimant had said to Mr Bland that if allowed to start his duties at around 4.30pm he would be in a better position to provide the required level of attendance. Mr Bland noted in his outcome letter that the allocations team had for some time swapped duties on a daily basis to try to accommodate the Claimant but the Claimant would now be removed from the rota and given a permanent fixed duty with a late start time.

50.17 A grievance hearing was also held by Mr Bland later on the same afternoon. Following that hearing Mr Bland undertook an investigation, including interviews with a number of relevant witnesses.

50.18 The outcome of the Claimant's grievances was set out in a letter from Mr Bland dated 8 November 2011. Mr Bland found that there was no evidence that Mr Batchelor had singled the Claimant out or that he had bullied, harassed or victimised the Claimant as alleged. With regard to the specific matters raised in the grievance, he confirmed that the Claimant was allowed to park in the disabled bays at the depot and, if they were full, in the nearby visitors' bays. With regard to holiday, Mr Bland confirmed that no guarantees could be given that the Claimant would always be allowed to take all his holiday in one block but on this occasion arrangements would be made to accommodate his request.

50.19 In fact, the tribunal finds that the Claimant had always been allowed to park in the disabled bays with his blue badge. At around this time Mr Batchelor also introduced a system of coloured permits for other (non-disabled) drivers so that someone parked in the wrong place could easily be identified, but this did not affect disabled drivers who had blue badges and were already allowed to park in the disabled bays.

50.20 The tribunal has been shown a number of letters addressed to the Claimant with the subject heading 'Genius Journey Management System'. Genius is an automated system which measures such matters as acceleration and braking which affect the smoothness of ride on the Respondent's buses. Its aim is to help drivers to give passengers a smoother ride. The system is monitored regularly and letters addressed to those drivers whose driving is measured as being towards the bottom of the list for smoothness of ride are generated automatically.

50.21 Letters addressed to the Claimant were generated automatically on occasions by the Genius system; the tribunal has been shown one dated 7 November 2011. The letters say that on a review of the statistics from the Genius system the Claimant's scores were in the bottom 10 of the depot for smoothness of ride. The letters invite the Claimant to discuss this with Mr Batchelor.

50.22 The Claimant says that he did not see any Genius letters at the time. He says that he only saw the letters when he received his personnel file (incomplete as the Claimant would put it) some years later. Mr Batchelor says, and the tribunal accepts, that he did not generate the letters or put them on the Claimant's file; they were generated automatically and if they were on the Claimant's file then someone else put them there. The tribunal finds that the letters (or Genius reports to adopt the phrase used in the Claimant's allegations) produced in respect of the Claimant were not produced by Mr Batchelor, were not false, and were similar to letters produced in respect of a number of other drivers who were also in the bottom 10 for smoothness of ride at various times.

50.23 The tribunal notes that the Claimant has alleged that Mr Batchelor made fun of the way he walks. When this is said to have happened varies depending on which part of the Claimant's claim is under consideration: under the harassment claim it is said to have been from September 2011 until July 2013 whereas under the victimisation claim (and in the Claimant's witness statement) it is either September or October 2011. The only evidence in support of this allegation is an assertion from the Claimant with no particularisation of what happened or precisely when or in what context. Mr Batchelor denies the allegation. In all the circumstances the tribunal finds that Mr Batchelor did not make fun of the way the Claimant walks either in late 2011 or at any other time.

50.24 The Claimant alleges that in 2011 he was not allowed time off for hospital appointments. It seems that the Claimant had regular hospital appointments at this time which often overran and he found it difficult to attend work at the allotted time for the start of his shift. The difficulty for the Respondent was that if a driver was more than a few minutes late for his shift then they had to try to find another driver to cover his or her bus route so that the buses could stick to their timetable. If the Respondent's buses did not run in accordance with their schedule then the Respondent could be fined by Transport for London and, if there was a persistent problem, could lose the bus

route. On occasions the Claimant would arrive late for his shift but by then his bus had already been assigned to someone else and there was no work for him to do.

50.25 In any event, the evidence shows that the Claimant had been allowed to swap shifts to accommodate his hospital appointments and, when he raised the matter formally by way of a grievance, he was given a fixed route with a permanent late start in November 2011. The route in question was C3 which is a short route, running from Clapham Junction to Earls Court and back. The route takes about 30 minutes each way and the driver is allowed to take a break at either end.

2012

50.26 The next matter in respect of which the Claimant has raised a substantive allegation in this case is in October 2012. There is no live allegation in this case about anything between November 2011 and October 2012.

50.27 The Claimant had an accident on 13 October 2012. There is no suggestion that it was in any way his fault. He was stationary at traffic lights when a recycling truck collided with the front of his bus.

50.28 The accident was entered onto the Claimant's accident record card. The details were recorded as *'Van Hit Bus'* and there is an entry *'NTB'* which all parties agree stands for 'Not To Blame'. Materially the same entry was made on what seems to have been the reverse side of the same card which is headed 'Discipline Record', including the entry *'NTB'*. It is unclear who made these entries but it seems likely that the entry on the discipline side of the card was simply made by mistake. In any event, the entries on both sides of the card show clearly that the Claimant was not to blame for the accident and he accepts that no further action was taken, whether disciplinary or otherwise.

50.29 Following the accident the Claimant was referred to the Respondent's Occupational Health provider ('OH'), Cotswold Medicals Limited. The Claimant was examined by Dr Thornley, from OH, at the depot on 26 October 2012 and a report dated 29 October 2012 was sent to the Respondent. The report is highly critical of the Claimant. The Claimant points out, correctly, that the report refers to a collision with a van rather than a truck but the tribunal notes that the accident record referred to above also refers to 'Van Hit Bus'; again this was probably a simple mistake made by whoever made the entry in the accident record which was then copied across into the OH referral. The report concludes, amongst other things, that the injuries reported by the Claimant were not consistent with any type of collision that did not cause his neck to collide forcibly with solid objects on both left and right, that it was difficult to imagine how he could have sustained bruising to both sides of the neck, that the doctor was unaware of any structure in the design of a bus cab that could cause impact to both sides of the neck in that way and that *'I have never seen that pattern of bruising before in 30 years of medical practice.'* The opinion expressed in the report was that, on balance, it was very unlikely that the Claimant's alleged injuries caused major

pain or restriction to his right shoulder, neck and back or that they affected his walking ability or caused major bruising as the Claimant had reported. The doctor said, in terms, that there were significant questions concerning the genuineness of the Claimant's reported injuries.

50.30 Having received the OH report the tribunal finds that it is unsurprising that Mr Batchelor asked for surveillance to be carried out on the Claimant to see if his behaviour was consistent with the degree of injury he had reported. The evidence clearly shows that this was the Respondent's standard practice when it received an OH report of the type it received in respect of the Claimant.

50.31 The Claimant was also subject to an investigation by the DWP. The tribunal has seen little documentation concerning that investigation. However, the available evidence establishes to the satisfaction of the tribunal that whoever instigated the DWP investigation it was not anyone from the Respondent.

50.32 One of the Claimant's allegations concerns Mr Batchelor providing information to the DWP. It is unclear what, if any, information was provided by Mr Batchelor but, in any event, he would have been under a legal duty to assist with their investigation if asked to do so. It seems that representatives from the DWP arrived at the depot unannounced some time in first half of 2013 and asked Mr Batchelor to answer certain questions. He gave honest answers to the best of his ability.

50.33 Similarly, the Claimant criticises Mr Hannam for providing a statement to the DWP which, the Claimant says, is misleading; the statement was in fact dated 4 September 2013 but it is convenient to deal with it at this stage of the tribunal's fact-finding. It is not entirely clear to the tribunal what is said to be misleading about Mr Hannam's statement but it seems that it relates to the fact that the statement does not mention or give details of the Claimant's first disability, ie the heel injury from which he had suffered for some years. However, the statement was written by a DWP representative based on answers Mr Hannam gave to their questions. The information it records is, the tribunal finds, accurate. The fact that it does not record other information is simply because the DWP did not ask other questions that would have elicited that information.

2013

50.34 Another of the Claimant's allegations concerns the withdrawal of a shuttle service which the evidence suggests was in around March 2013. This involved bus drivers being driven from Battersea to the start of their bus route. However, the shuttle service was never provided for the benefit of the Claimant. It was to take drivers from Battersea to the location in Putney where they collected their buses for the start of their shift. If there was spare space then the Claimant and/or others who did not start from Putney would hop in and the shuttle would drop them off somewhere closer to the start of their shifts, which in the Claimant's case was usually a bus stop a few hundred yards from the depot, where they could catch a bus to the

start of their route. The tribunal notes here that because the Claimant was working permanent late shifts there was no issue with his return to the depot; he would always drive the C3 bus back to the depot at the end of his shift.

50.35 The shuttle service was stopped because the vehicles being used were old and subject to problems and there were problems with drivers turning up late. Mr Batchelor proposed that the shuttle be stopped and, instead, additional travel time be incorporated into drivers' shifts to allow them to get to and from the start of their route. The proposal was subject to union consultation and was ultimately accepted by unions and by more senior management.

50.36 Further, the Claimant's evidence was to the effect that when the shuttle service stopped, colleagues would then drive him to the bus stop to catch the bus to Clapham Junction to collect his bus.

50.37 Mr Batchelor left Battersea in July 2013 and had no further dealings with the Claimant. Mr Hannam took over his role.

50.38 Other than the withdrawal of the shuttle in around March 2013 there do not appear to be any allegations concerning matters in 2013 prior to Mr Hannam's statement to the DWP (September 2013, as noted above) and then events in October 2013 concerning the rota.

50.39 By email dated 3 October 2013 George Baker (who dealt with duty allocation at Battersea) informed the Claimant that there had been a change in the schedule of the C3 route such that the latest duty would now start at 4.28pm.

50.40 Mr Baker wrote to the Claimant again by email on 8 October 2013 saying that his duties for the following week would start at 4.20pm on Monday 14 and at 3.20pm on Tuesday 15 October. The tribunal notes that at this time the Claimant had been signed as fit only to work two days per week following his accident the previous year.

50.41 The Claimant replied by email at 10.55am on 11 October 2013. He said that *'there is harassment going on because* [of] *my disability, race, sexually, …'*. The matter was referred to Mr Hannam who wrote by email at 1.50pm changing the Claimant's duties for the following Monday and Tuesday to a 4.28pm start on each day.

50.42 The Claimant said in evidence that at around this time he was put back on the rota, ie he did not have fixed late starts, for about a month although he was unable to give the tribunal any dates and accepted that it could have been more or less than a month. In fact, the only specific evidence is that concerning the email exchange outlined above where the Claimant was given the late starts he wanted within a few hours of his complaint that he had been allocated earlier duties. The tribunal also reiterates that the Claimant was only working two days (or rather two afternoons and evenings) per week at this time, and there has been no suggestion that he had hospital appointments that could not have been fitted around those two working days.

50.43 It is with regard to this aspect of his case that the tribunal understands the additional document adduced by the Claimant (page 1696 of his bundle) is said to be relevant. It is a copy of a document showing duty allocation for a week in early March 2014. It shows

that two female drivers, Karimi Zohair and Berisha Ismail, were given fixed duties in that particular week. It is unclear what time their fixed duty started in that particular week or whether those duties were permanently assigned to them. However, even on the Claimant's case he too had been given a fixed duty, starting at 4.28pm, by March 2014.

2013/2014 holiday

50.44 As already noted above, the Claimant had raised an issue concerning his desire to take his annual leave in one block of one month over the 2011/2012 Christmas period and, although he was accommodated on that occasion, he was told in clear terms that it could not be guaranteed that he would always be allowed to do so.

50.45 There appears to have been no issue concerning the 2012/2013 Christmas period.

50.46 In a handwritten memo dated 16 December 2013 the Claimant asked his managers to swap his duties from Monday 6 and Tuesday 7 January 2014 because this was his Coptic Christmas. The tribunal notes here that although drivers were allowed to swap duties amongst themselves it was not management's responsibility to arrange such swaps for them.

50.47 It is not clear who, if anyone, received the Claimant's handwritten memo but he reiterated his request in an email on the afternoon of 30 December 2013 to Mr Baker. Mr Baker replied the next morning saying that he was away. The Claimant wrote by email to Mr Hannam just before noon on 31 December 2013 asking to change his duties from Monday 6 and Tuesday 7 to Wednesday 8 and Friday 10 January 2014. Mr Hannam replied about 40 minutes later to say that he could not change the Claimant's work days as there was no work available for 8 or 10 January. He also said that if the Claimant wanted to take 6 and 7 January off he could do so but would have to take it as leave. He asked the Claimant to let him know what he wanted to do.

50.48 The Claimant replied shortly before 2pm on the same day saying, amongst various other things, that he considered Mr Hannam's response to be victimisation and race discrimination and also pointing out that he is a Coptic Christian.

50.49 Mr Hannam replied, at 2.21pm, reiterating that there was no work available for 8 or 10 January but repeating the offer that he could take 6 and 7 January off as annual leave.

50.50 On 3 January 2014, ie the Friday before Monday 6 January, the Claimant copied his correspondence with Mr Hannam to HR and asked Mr Sharkey, HR Manager, to reply urgently because *'I still can't get my holiday for my Christmas, I am a Coptic Christian.'*

50.51 The tribunal notes that Mr Hannam was not preventing the Claimant from taking his Christmas holiday; in fact he was encouraging him to take holiday on 6 and 7 January. The reason the Claimant did not want to take those days as annual leave was because he wanted to keep his entire annual leave because he might have to return to

Egypt where he was involved in some legal dispute that may require his attendance later that year.

50.52 The Claimant says, and the tribunal accepts, that he spoke with Mr Sharkey by phone on 3 January 2014 and Mr Sharkey said that he should take the time off on 6 and 7 January and they would sort out on what basis afterwards. The Claimant said to him that that was not satisfactory.

50.53 As matters transpired the Claimant did manage to swap his duty for 6 January with another driver. It is not entirely clear what happened with regard to 7January.

Personnel file

50.54 The specific harassment complaints concerning Ms Murphy (in addition to those derived from complaints against others) concerns the Claimant's personnel file. He says that he asked for a copy on a number of occasions and there was an initial delay in sending him anything and then what he was sent, each time he asked, was incomplete and not in a proper order.

50.55 The Claimant had asked for a copy of his file in around October 2012 and had written again later that year to ask that the requisite £10 fee be taken from his wages. His request was not in fact actioned at that time.

50.56 In late June 2013 the Claimant raised the fact that he had not yet received a copy of his file and he was asked to provide a cheque for the fee which he did in early July 2013.

50.57 The Claimant was provided with a copy of his personnel file in around October 2013. He complained a number of times about the order of the documents and that various items were, he said, missing.

50.58 Ms Murphy only arrived at the Battersea depot in early 2014. One of her first tasks was to hear a grievance the Claimant had submitted in December 2013. She invited him to a meeting in January 2014 and again in March 2014 but he did not attend either. At least part of his reasons for not attending was that he said he wanted a full and proper copy of his personnel file. This is what brought the issue of the personnel file to Ms Murphy's attention; she had no previous knowledge of or involvement with it.

50.59 The Claimant was sent a further copy of his personnel file in March 2014 and another was prepared in July 2014 for his collection although it is not clear whether he ever collected it. Each time the file was in materially the same form and (apart from updating with documents post-dating the previous copy and, at the Claimant's request, an index being prepared) it had the same contents.

50.60 Ms Murphy accepts that, although she had not been involved at that stage, there had been an initial delay in responding to the Claimant's request for a copy of his file. This was the result of a simple administrative error and was not related in any way to race or disability.

50.61 As for the form and completeness of what was provided to the Claimant, the tribunal finds that the Claimant was sent everything that was present on his personnel file and in the order in which it was

held. In terms of completeness, one specific matter raised by the Claimant is that the surveillance report from October 2012 was not present on his file and was only disclosed to him at a later date. The explanation is that Mr Batchelor kept such reports in a separate locked filing cabinet in his office rather than in the general files to which many others would have had access. This was Mr Batchelor's usual practice, and a sensible one in the view of the tribunal, and neither the form or completeness of the personnel file as sent to the Claimant on a number of occasions was in any way related to race or disability.

September 2014 accident

50.62 The Claimant was driving his usual C3 route on the evening of 1 September 2014. He was an experienced bus driver and had been driving for the Respondent and its predecessors at the Battersea depot since 2006. He knew, the tribunal finds, that the safety of his passengers and of other road users was of key importance. He knew of the importance of proper and prompt reporting of any accidents involving his bus.

50.63 For example, the tribunal has seen a notice which was displayed at the depot introducing a new incident reporting procedure with effect from July 2012. The procedure required all collisions to be reported via the bus radio at the time of the incident. The driver must then report the incident to the Service Delivery Officer on his or her return to the depot and must then telephone the Abellio Accident Management Helpline, before leaving the depot, to report the accident to the Respondent's insurer.

50.64 The importance of reporting collisions immediately is, the tribunal considers, obvious. Although a driver may not think there has been any significant damage to his or her bus that may not necessarily be the case and the bus may not be safe to continue on its journey. Further, the timing and precise location of the collision and the positions of the bus and other vehicles may be of considerable importance for any police or insurance investigation. Immediate reporting of a collision and its circumstances will also provide protection for the driver if someone later suggests that the circumstances were different.

50.65 The tribunal is satisfied on the evidence that the Claimant was aware that he must report any collision immediately over the radio and must then report it as soon as he returned to the depot, including to the Respondent's insurer. There was, in fact, a dedicated phone in the depot for reporting accidents to the insurer.

50.66 At about 12.10am on 2 September 2014 the Claimant was driving his bus towards and across Wandsworth Bridge heading south from Fulham towards Wandsworth and Battersea. The tribunal has seen CCTV footage of the events thereafter which, in the tribunal's judgment, clearly shows the circumstances leading up to and immediately after the accident. The bus in question had a number of CCTV cameras recording continuously and so events can be seen from a number of positions inside the bus.

50.67 As the bus drove onto the bridge a black London taxi can be seen on the left side of the road more or less at the apex of the bridge. It is some distance away when it can first be seen from the bus. The taxi had its left indicator flashing and it was pulled over, stationary, against the left hand kerb.

50.68 The bus continued to drive across the bridge towards the taxi. There is no sign as the bus approached the taxi that the bus was attempting to slow down or to overtake. Only at the very last minute did the bus swerve to the right but it was too late to avoid a collision. The front nearside corner of the bus collided with the rear of the taxi. There was extensive damage to the taxi, including its rear bumper which had fallen off.

50.69 The tribunal has no doubt that the accident was entirely avoidable. The taxi was visible, and clearly stationary, from some distance away. There was plenty of time to slow down and either stop or, if safe to do so, overtake the taxi.

50.70 The tribunal notes the version of the accident given in the Claimant's witness statement for this hearing. He says that *'The road is on a hill so it is not possible to have a full clear view of the road until you pull out of the bus stop and then the road ahead becomes more fully visible. I saw a black taxi on the bridge and I immediately slammed on my brakes and I swerved my bus to try to avoid him … the accident was unavoidable.'* The bus stop to which the Claimant refers is on the Fulham side before the start of the bridge. The tribunal accepts that the route over the bridge is not fully visible until the bus pulls out from the bus stop, but it is then fully visible for some considerable distance before the location of the accident. In so far as the Claimant's statement attempts to convey that the Claimant only saw the black taxi at the last minute and could not have avoided a collision, then that is clearly false.

50.71 The bus stopped next to the taxi and the Claimant opened the front passenger door, left his cab and stood inside the bus but facing out. At no time before he drove off did the Claimant leave the bus. Also, the Claimant did not report the collision by radio either before he drove off or at any other time.

50.72 The Claimant says that when he opened the bus door the taxi driver, who had by then left his taxi, was aggressive and threatening and swearing. That description does not seem to the tribunal to be consistent with the demeanour of the taxi driver as seen in the CCTV footage although there is no sound on the footage and so the tribunal cannot know what the driver was saying. In any event, the Claimant did not obtain the taxi driver's details and nor did he give the driver his details.

50.73 It is also clear that there were passengers on the bus at the time of the collision and there was also a passenger in the rear of the taxi. The Claimant made no attempt to ascertain whether any of the passengers was injured.

50.74 The Claimant then drove off. Even if he had genuinely felt threatened by the taxi driver, as to which the tribunal need make no specific

finding, he could have driven a short distance and then stopped to report the collision over the radio and to see if his bus had been damaged. He did not do that. Instead, he continued on his bus route, dropping off and picking up passengers, until he reached the end of the route at Clapham Junction.

50.75 The Claimant did then leave the bus for a short break. He walked past the front of the bus. The CCTV footage shows the Claimant walking past the front rather than pausing to inspect any damage to the bus. He says that there was only a crack to the front offside panel of the bus. Having seen photographs of the damage to the bus when it returned to the depot the tribunal finds that it is more likely, on balance, that the damage to the front of the bus had already happened by the time the bus arrived at Clapham Junction.

50.76 The front of the bus was badly damaged. A large part of the front offside panel was missing. The nearside headlight was missing. The nearside indicator was missing. However, the Claimant did not report the accident at this time or take the bus back to the depot. After his short break he continued on his bus route, including driving past the scene of the accident on at least two occasions, only returning to the depot at the end of his shift.

50.77 There is some dispute as to whether the Claimant reported the accident to the Service Delivery Officer and/or otherwise complied with end of duty procedures when he returned to the depot. The tribunal notes that as part of his appeal investigation Mr McGuinness spoke with the Service Delivery Officer who had been on duty that night and she confirmed that she had in fact been looking out for the Claimant because the police wanted to speak with him but she had not seen him and he had not reported the accident to her as he should have done. It is also clear, and undisputed, that the Claimant did not ring the dedicated insurance helpline before leaving the depot although he did ring some time later on 2 September 2014 from home.

50.78 As noted above, the Claimant did not at any time report the accident over the bus radio. However, the taxi driver did report the accident, and the fact that his passenger had been injured, to the Respondent before the Claimant returned to the depot at the end of his shift and this information was passed on to the radio controller. The controller contacted the Claimant over the radio but he denied being involved in any accident.

50.79 When the Claimant rang the insurer on 2 September 2014 Ms Watts spoke for him on the telephone and conveyed information about the accident as given to her by the Claimant. A form was completed by the insurer based on the information provided by the Claimant and Ms Watts. The tribunal finds that it is more likely than not that the information recorded in the form is the information provided by the Claimant. Of particular note is that the entry for the circumstances of the accident is recorded as *'Bus was proceeding normally, third party was travelling at offside the bus, and then a collision'*. That does not reflect the actual circumstances of the accident. The third

party (the taxi) was not travelling at all and certainly not on the offside of the bus.

Investigation meeting

50.80 The Claimant was off sick from the day of the accident until 15 September 2014. On his first day back he was invited to an investigatory interview with Mr Parker. Mr Parker was accompanied by a notetaker. The notes of the meeting are clearly not, and were never intended to be, a verbatim record but they are an accurate record of the main points discussed during the meeting.

50.81 Mr Parker started the meeting by saying that it was a fact finding interview and not a disciplinary hearing although depending on its outcome it could lead to a disciplinary process. He told the Claimant that he wanted to talk to him about the accident on 2 September 2014.

50.82 There was then a discussion, which became rather heated on the Claimant's side, in which the Claimant repeatedly said that he had had no letter about the meeting and that he needed his union representative present. Mr Parker said a number of times that it was only a fact finding interview not a disciplinary and as such the Claimant did not have a right to a union representative. During the course of this initial part of the meeting the Claimant accused Mr Parker of bullying him, of a lack of respect for him and of 'stitching him up'. The Claimant asked to speak with Mr Parker's manager, Ms Murphy, but Mr Parker persevered in trying to calm the Claimant down and to ask him about the accident.

50.83 It is this meeting that has given rise to the allegations against Mr Parker. The Claimant accuses him of physically assaulting him, of treating him like a child and of conducting the meeting in such a way as to amount to harassment. The tribunal has heard, at the Claimant's request, the Claimant's covert recording of this meeting. The Claimant says that this proves his allegations. The tribunal has concluded that it does rather the opposite. It is clear from the recording that it was the Claimant who raised his voice, talked over Mr Parker and failed to answer his questions; this in fact largely mirrors the conduct of the Claimant during the course of his evidence to this tribunal. Mr Parker was firm in trying to get answers from the Claimant to his perfectly reasonable questions but his conduct was fair and measured throughout and he did not physically assault the Claimant. In fact the tribunal considers that Mr Parker showed remarkable patience during the meeting.

50.84 Eventually the Claimant calmed down and Mr Parker was able to ask him questions about the accident and the answers are noted in the record of the meeting. As part of the meeting the Claimant was shown the CCTV footage of the accident. Mr Parker showed the footage frame by frame. During this part of the meeting Mr Parker pointed out that the taxi was parked on the side of the road. The Claimant said that the taxi *'stopped suddenly and* [I] *couldn't avoid him'* and that *'he broke suddenly'*. This version is different from what the Claimant had told the insurer and is also significantly different

from what had in fact happened, as clearly shown on the CCTV footage.

Disciplinary hearing

50.85 In a letter dated 23 September 2014 the Claimant was invited to a disciplinary hearing on Monday 29 September to answer a number of allegations concerning the accident and the reporting of it.

50.86 A disciplinary hearing took place on 29 September 2014 which was chaired by Ms Murphy. The Claimant was accompanied by a union representative.

50.87 The Claimant had emailed the previous Friday (ie the working day before the hearing) asking for a number of documents. This was discussed at the start of the hearing and Ms Murphy undertook to find as many of them as she could and adjourned the hearing to do so.

50.88 It is clear from the notes of the disciplinary hearing, which the tribunal accepts are an accurate summary of the points discussed, that Ms Murphy and the Claimant's union representative had some difficulty keeping the Claimant on the subject at hand. The union representative said a number of times that the Claimant should answer the allegations and give his side of the story.

50.89 The tribunal notes that the hearing, including adjournments, lasted for nearly four hours. The Claimant had every opportunity to put his side of the story and to put forward any mitigation that he wished to.

50.90 At one point the Claimant said that there was *'this slow moving car that suddenly brakes. He broke harshly …'*. Later the Claimant said *'I did not expect him to be there as it is not normal to stop there … I expected him to move until I got close to him.'* This latter version is significantly different from the former and from the earlier versions given to the insurer and to Mr Parker.

50.91 The Claimant's representative confirmed at the end of the hearing that it had been a 'fair enough hearing'.

50.92 In light of a grievance submitted by the Claimant about one working day before the disciplinary hearing, and which raised allegations against Mr Parker and Ms Murphy, the disciplinary process was then put on hold pending the outcome of the grievance process.

Grievance process

50.93 The Claimant submitted an undated grievance on or about 26 September 2014. It raised a number of allegations against Mr Parker, principally arising from their meeting on 15 September 2014. It also alleged against Ms Murphy that Mr Parker had acted on her instructions.

50.94 By letter dated 7 October 2014 the Claimant was invited to a grievance hearing on 13 October 2014. He replied the next day saying that he needed more time to arrange a new union representative because he was unhappy with the representative he had had at the disciplinary hearing. He then failed to attend the grievance hearing on 13 October 2014.

50.95 The grievance hearing was then rescheduled for 15 October 2014. The Claimant replied to the invitation to the rescheduled meeting

complaining that the Respondent was denying him his choice of representative. The tribunal notes that there is no allegation concerning a failure to allow the Claimant to be represented at the grievance hearing by his choice of representative, either under the EqA or under section 10 of the Employment Relations Act 1999 ('the 1999 Act') (although the Claimant was clearly aware of the possibility of such a claim since he intimated the same, including reference to the relevant statutory provisions, in an email on 12 October 2014).

50.96 The Claimant did not attend the grievance hearing on 15 October 2014 which was chaired by Richard Gilmore, Fleet Engineer. The hearing proceeded in the Claimant's absence and the outcome was set out in a letter dated 3 November 2014. The grievance was not upheld for the reasons set out in the letter.

50.97 The tribunal notes that Mr Gilmore's handling of the grievance, including his decision to hold the grievance hearing in the Claimant's absence and his decision not to uphold the grievance, are not the subject of any complaint in this case.

50.98 The Claimant appealed against Mr Gilmore's decision by email on 10 November 2014. By letter dated 25 November 2014 the Claimant was invited to a grievance appeal hearing on 4 December 2014.

50.99 The Claimant attended the grievance appeal hearing, which was chaired by Mr Wakerley, Operations Director, without a representative. It seems from the outcome letter that there had been a dispute in advance of the hearing between the Claimant and HR as to whether a particular representative, whom the Respondent had barred from its premises, could accompany the Claimant. HR had said that he (or his brother who was also barred from the premises) could not attend but any other union representative could attend. The tribunal notes again that there is no claim in this case under the 1999 Act and although there is an allegation of harassment against Mr Wakerley concerning his conduct of the grievance appeal, he was not involved in the decision not to allow a representative who was barred from the premises to accompany the Claimant.

50.100 In fact, the Claimant attended the grievance appeal hearing accompanied by Ms Watts. Mr Wakerley said that it was unusual to allow a friend, who was not a work colleague, to attend such a hearing but on this occasion he would allow it.

50.101 When the Claimant arrived with Ms Watts for the meeting he appeared to Mr Wakerley to be extremely agitated and he demanded that Mr Wakerley go outside the office and rearrange the car parking so that the Claimant could park in one of the disabled bays, which it appears were full. Mr Wakerley said that he was not usually based at Battersea and that the Claimant would therefore need to speak with the Duty Manager about parking.

50.102 When the hearing commenced the Claimant was given the opportunity to set out the substance of his appeal. The points he raised in the hearing, and Mr Wakerley's conclusions on those points, may be summarised as follows:

50.102.1 The Claimant said that he had not been given the most recent copy of his personnel file. Mr Wakerley arranged for a copy to be provided to the Claimant although noted that he had had three copies already.

50.102.2 The Claimant said that various emails were missing from his file. Mr Wakerley said that not every email would be printed and put on an employee's file since they are stored electronically. The Claimant was unable to provide any evidence that anything had been put on his file but then removed.

50.102.3 The Claimant said that he should have been allowed to have a representative at the fact finding interview with Mr Parker. Mr Wakerley concluded that he had no right to representation at such a meeting.

50.102.4 The Claimant said that Mr Parker had 'talked down' to him. Mr Wakerley found this contention unproved although he acknowledged that it was a tough situation in which the Claimant found himself.

50.102.5 The Claimant said that Mr Parker had physically pushed him into a chair. Mr Wakerley had asked Mr Parker the and the notetaker present at the investigation meeting whether this had happened and both said that it had not. Mr Wakerley had asked the Claimant why they would both lie about this and the Claimant said that they were racists and, although the notetaker is not British, it was a 'whites issue' rather than anything to do with country of origin.

50.103 Mr Wakerley, having discussed the Claimant's concerns further, including in particular his allegation of racism against Mr Parker and the notetaker, dismissed the Claimant's grievance appeal. He confirmed the outcome and the reasons for it in a letter dated 5 December 2014.

50.104 The Claimant wrote to Mr Wakerley by email on 15 December 2014 seeking to appeal against his decision. Mr Wakerley replied the same day saying that his decision had been the final stage of the grievance process and there was no further right of appeal.

50.105 The Claimant then took the matter to HR who replied on 18 December 2014 pointing out that the Claimant had had a copy of his personnel file on the day of the appeal hearing and it was unreasonable for him to expect another one (he had by now had four copies at various times) and that Mr Wakerley had given very careful consideration to the points raised by the Claimant during the appeal hearing, which had lasted for about four hours. HR said that they considered the matter closed.

Conclusion of disciplinary process

50.106 Following the outcome of the grievance appeal Ms Murphy then proceeded, in light of the available evidence including that given by the Claimant at the disciplinary hearing, to reach a conclusion on the allegations made against the Claimant.

50.107 Ms Murphy concluded that the accident on 2 September 2014 was entirely avoidable. She found that the Claimant had left the scene and continued to drive the bus without checking for damage, even when he stopped for a break at Clapham Junction. She found that on his return to the depot he had failed to report the accident to management or to the accident helpline as the procedures required. She also noted that the version of events given by the Claimant at various times was very different to that clearly shown by the CCTV footage and that he had at no point accepted any blame for the accident. She concluded that in all the circumstances the allegations were proven and the appropriate penalty was summary dismissal.

50.108 Ms Murphy's decision, and a summary of the reasons for it, were set out in a letter dated 24 December 2014.

50.109 By email dated 31 December 2014 the Claimant appealed against the dismissal decision. By letter dated 8 January 2015 the Claimant was invited to an appeal hearing initially scheduled for 15 January 2015 and then rescheduled (at the Claimant's request) for 27 January 2015.

50.110 The Claimant attended on 27 January 2015 and the appeal hearing was due to be chaired by Mark McGuinness, Performance Director. Mr McGuinness had no direct dealings with the Claimant before the appeal against dismissal. The Claimant said that he wanted to be represented by one of the two brothers who were barred from the Respondent's premises. He was told, as he had been on a number of occasions before, that this would not be permitted but that he could be represented by any other union representative. Mr McGuinness postponed the meeting to allow the Claimant to arrange union representation.

50.111 The appeal hearing took place on 25 February 2015, again chaired by Mr McGuinness. The Claimant was accompanied by a union representative. The hearing lasted, including breaks, for over 4½ hours.

50.112 The Claimant raised a number of allegations of discrimination and victimisation during the course of the appeal which Mr McGuinness considered but concluded played no part in the decision to dismiss.

50.113 In terms of the events of 2 September 2014 one point raised by the Claimant was that the accident was not serious and therefore did not warrant dismissal. Mr McGuinness concluded that the Claimant had hit a stationary object visible from some distance away and causing substantial damage. He concluded that the Respondent had a responsibility to protect the safety of staff, customers and other road users and that the Claimant's driving had fallen well below the expected standard.

50.114 The Claimant said that he was not aware of the correct reporting procedures. Mr McGuinness investigated this and concluded that notices had been provided that clearly set out what was required, including reporting by radio at the time of the incident and then, on return to the depot, to the Service Delivery Officer and to the accident helpline before leaving the depot. He concluded that the Claimant

had failed to do any of those things. As for reporting on the radio the Claimant had not reported the accident and Mr McGuinness listened to a recording of the call from the controller to the Claimant, following the taxi driver's report of the accident to the Respondent, during which the Claimant denied being involved in an accident at all. As for reporting to the Service Delivery Officer Mr McGuinness had spoken to the person on duty that night who said that she did not see the Claimant at the end of his shift even though she had been looking out for him because the police wanted to interview him about the accident. As for reporting to the accident helpline the Claimant accepts that he did not do this before leaving the depot.

50.115 Mr McGuinness concluded that the accident on 2 September 2014 was serious and avoidable, that it caused substantial damage to the bus and the taxi, that the Claimant failed to report it at the time, that he failed to check his bus for damage before continuing his route in an unroadworthy bus and that he then failed to report the incident on his return to the depot. In the circumstances, he dismissed the appeal.

50.116 Mr McGuinness's decision and his reasons for it were set out in a letter dated 23 March 2015.

Applicable law

51. The most relevant provisions of the ERA, as applicable to the claim for unfair dismissal, are as follows:

> *'**98 General***
> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
> *(2) A reason falls within this subsection if it—*
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
> *(b) relates to the conduct of the employee,*
> *(c) is that the employee was redundant, or*
> *(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*
> *…*
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

…

111 Complaints to employment tribunal

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

…'

52. The most relevant provisions of the EqA, as applicable to the Claimant's various discrimination claims, are as follows:

'13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

…

20 Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

…

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

…

23 Comparison by reference to circumstances

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

(2) The circumstances relating to a case include a person's abilities if—

(a) on a comparison for the purposes of section 13, the protected characteristic is disability;

…

…

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

age;
disability;
gender reassignment;
race;
religion or belief;
sex;
sexual orientation.

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) 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.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

…

39 Employees and applicants

…

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

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

…

(4) An employer (A) must not victimise an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

…

40 Employees and applicants: harassment

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

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

…

…

123 Time limits

(1) Subject to section 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

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

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

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

…

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

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

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

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

…

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

…

…

Schedule 8 Work: Reasonable Adjustments

…

Part 2 Interested Disabled Person

…

4 Preliminary

An interested disabled person is a disabled person who, in relation to a relevant matter, is of a description specified in the second column of the applicable table in this Part of this Schedule.

5 Employers (see section 39)

(1) This paragraph applies where A is an employer.

Relevant matter	***Description of disabled person***
…	…
Employment by A.	… *An employee of A's.*

Part 3 Limitations on the Duty

20 Lack of knowledge of disability, etc

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

…

(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

…'

53. The tribunal has also reminded itself of relevant guidance from the Employment Appeal Tribunal and the higher appellate courts; that guidance will be discussed in the Discussion and Conclusions section further below.

Submissions

54. As noted above, neither party produced a skeleton argument or written submissions, save, with the permission of the tribunal, as to the unfair dismissal time point as outlined above. Both parties made oral submissions.

55. The Respondent first addressed the question of disability. In respect of the second disability relied on by the Claimant, arising from the October 2012 accident, the Respondent said that at the time surveillance was instigated it did not know and could not reasonably have known that the Claimant's injury from the accident amounted to a disability. It accepted, however, that it had acquired knowledge from about April 2013 when the Claimant was back at work but signed as only fit to work two days per week for the next 26 weeks.

56. With regard to depression, the third disability relied on by the Claimant, the Respondent said that there is no evidence of any effect on his ability to carry out normal day to day activities. The burden is on the Claimant and he has failed to discharge it. Even if there was a disability arising from depression the Respondent had no knowledge of it.

57. The Respondent then turned to the Claimant's dismissal. It was said that the CCTV showed that the accident in September 2014 was entirely avoidable

since there were at least 7 seconds when the taxi was visible and stationary and at least 5 seconds when its left indicator was clearly visible. Further, the Claimant failed to follow the clear reporting procedures. He should have reported the accident at the scene, again when back at the depot and he should then have called the helpline from the depot. He did none of those things. The Claimant left the scene without exchanging details or checking whether his bus was damaged. He drove to Clapham Junction but the CCTV does not support his suggestion that he checked for damage at that point. The bus had significant damage yet the Claimant put it back into service and continued to drop off and pick up passengers.

58. When the Claimant did eventually report the accident to the helpline what was said did not correlate with the CCTV or what he later explained to Mr Parker and then Ms Murphy. What he reported was either inaccurate or deliberately false.

59. Mr Parker, in his investigatory meeting, went through the CCTV footage and also the requirements of the reporting procedure. The Claimant was able freely to put his version. He was not allowed to be accompanied but he had no right to be. The Claimant then had ample opportunity to prepare for the disciplinary hearing where he had another chance to put his version of events and to respond to the allegations fully and freely.

60. The Respondent submitted that the Claimant's dismissal was fair. What he was accused of was clearly gross misconduct. Further, the Respondent invited the tribunal to find, if necessary, that the Claimant contributed to his own dismissal to the extent of 100%.

61. The Respondent then turned to the EqA claims. Reference was made to *Madarassy v Nomura International plc* ([2017] ICR 867, CA) and it was submitted that it was necessary for there to be more than just a difference in treatment and a difference in protected characteristic to reverse the burden of proof.

62. The Respondent then went through each of the allegations of direct discrimination, harassment, victimisation and failure to make reasonable adjustments contending either that the allegation was not made out on the facts or that the requirements for the relevant cause of action were not established.

63. The Claimant then made oral submissions. It was said that an overarching approach would be taken. The tribunal had heard the evidence and the Respondent's submissions and the Claimant would simply address some key points.

64. The first was the personnel file. It was said that there had been selective choosing as to what went onto the file. It was not in a proper order. File-keeping was in a terrible state.

65. The Claimant's position was that he had no problems before the Respondent took over the depot. John Batchelor, the Claimant said, had made his mind up before meeting with the Claimant. He must have known about the Claimant's grievance to Mr Bland and there was 'no love lost'.

66. Turning to the accident of October 2012 the Claimant was signed off sick but Mr Batchelor was suspicious and asked the Claimant to see OH. It seems that OH did not get the full picture and saw the Claimant as a liar. There was total suspicion and then the surveillance.

67. With regard to depression, the third disability relied on by the Claimant, the tribunal was asked to look at the evidence.

68. With regard to the accident in September 2014 it was accepted that it was potentially an avoidable accident but ultimately the driver's view was more accurate than CCTV.

69. During Mr Parker's meeting with the Claimant, it was said, the whole manner in which the Claimant was treated was demeaning and belittling. Mr Parker could have defused matters, perhaps by showing the Claimant the CCTV in advance of the meeting, but he had already made his mind up.

70. It was said that the investigation was not fair. No consideration or flexibility was shown to the Claimant in the investigation or disciplinary process. This was, the Claimant said, the perfect opportunity to get rid of him.

71. It was accepted, as was demonstrated in his evidence to the tribunal, that the Claimant may come across as aggressive and as though he is challenging people, but one should be able to challenge an employer.

72. Turning to the period of a month or so when the Claimant went back onto the rota, this had never happened before the Respondent took over. Yet when the Claimant raised concerns they were either dismissed or he received a sarcastic response.

73. It was said that the DWP investigation was discriminatory. Within days of the October 2012 the Claimant was under surveillance and then being investigated by the DWP. It was said that it was improper for Mr Batchelor to keep the surveillance report separate from the Claimant's personnel file.

74. On balance it was said that the DWP would not have started an investigation 'off their own bat'. It must have been instigated by Mr Batchelor and Mr Hannam's statement did not give the full picture about the Claimant's existing disability.

75. The Claimant then summed up the arguments in relation to harassment and failure to make reasonable adjustments. It was also said that the Claimant's dismissal was unfair.

Discussion and conclusions

Jurisdiction

76. A number of jurisdictional issues arise in this case, namely (a) whether the unfair dismissal claim was presented in time, (b) whether there is jurisdiction to hear EqA claims concerning matters that post-date the ET1 and (c) whether any of the EqA claims that concern matters that pre-date the ET1 were presented out of time. Since these matters go to the tribunal's jurisdiction, it is appropriate to deal with them before turning to the substantive merits of the various claims.

77. **Unfair dismissal – time point**
As noted above, the Claimant was dismissed with effect from 24 December 2014. The primary time limit under section 111 of the ERA for the presentation of a claim for unfair dismissal expired on Monday 23 March 2015. The Claimant applied to amend his existing claim to add unfair dismissal by email sent at 4.05pm on Friday 20 March 2015. The application was granted on 9 April 2015.

78. Adopting the guidance of the EAT in *Galilee*, the unfair dismissal claim is treated as having been presented on 9 April 2015, the day on which the amendment was granted. That was outside the primary time limit.

79. The burden of proof in respect of an extension of time rests on the Claimant. There has been no evidence on this point from the Claimant and no submissions until the Claimant's email of 27 September 2018; as noted above that was considerably after the deadline given by the tribunal but it has nevertheless considered the content of that email in so far as it goes to this point. In that email the Claimant says that the Respondent agreed to 'amalgamate' his unfair dismissal claim with his existing claims. That may be so but the parties cannot give the tribunal jurisdiction by consent; if a claim is out of time such that the tribunal has no jurisdiction then that cannot be overridden by agreement between the parties. He also says that he was awaiting the outcome of his appeal against dismissal before presenting his claim and that he did not receive the appeal decision until 25 March 2015, but that of itself cannot render it not reasonably practicable to present a claim in time: see, for example, *Palmer v Southend-on-Sea Borough Council* ([1984] ICR 372, CA).

80. Finally, the Claimant says that he had no legal assistance, his barrister (Mr Reeds) only representing him in court, but the tribunal notes that Mr Reeds was already representing the Claimant at PHs, presumably having discussed with the Claimant the nature of his claims, as early as August and October 2014. The Claimant therefore clearly had access to legal advice. He also had access to union representation (from a number of different unions) for a long time before his dismissal.

81. The tribunal has considered carefully the fact that the Claimant's amendment application was sent by email on the afternoon of Friday 20 March 2015, ie within the time limit. However, the Claimant, who had been dealing with the tribunal for nearly a year by that time, cannot reasonably have anticipated that the tribunal would determine his amendment application within one working day, ie by the last day of the time limit which was the following Monday. If nothing else, the Claimant must have been aware from his previous experience of the tribunal process of its standard practice of referring such applications to the other party and giving them some time to respond. The tribunal also notes that the Claimant said in his amendment application that he had been advised by an Employment Judge before his dismissal that he could apply to amend his existing claim to add an unfair dismissal claim; he must therefore have been aware of the possibility of an amendment application for more than three months before he finally made that application.

82. The tribunal is not satisfied that the Claimant has discharged the burden of showing that it was not reasonably practicable for him to have presented his claim for unfair dismissal in time. The tribunal therefore finds that it has no jurisdiction to hear it.

83. Nevertheless, in case the tribunal is wrong in that conclusion, it has also considered the unfair dismissal claim on its merits as discussed further below.

84. **Discrimination – post-ET1 allegations**
Unlike the unfair dismissal claim which was added by amendment, there has been no application at any stage of these proceedings to amend the claim to add any discrimination complaints concerns matters that post-date the ET1. Such claims are therefore not part of the substantive claims in this case and are not before the tribunal for determination.

85. However, having made relevant findings of fact and having heard submissions on such claims, the tribunal will also consider those claims on their merits as discussed further below.

86. **Discrimination – time points**
The ET1 in this case was presented on 4 April 2014. The Early Conciliation provisions of the EqA which give an extension of time in certain circumstances do not apply to this case since they were only brought into effect from 6 April 2014.

87. The primary time limit under section 123 of the EqA is three months from the date of the act or omission about which complaint is made. Therefore, in this case any complaint about events before 5 January 2014 would be out of time unless it was part of conduct extending over a period (commonly also referred to as a continuing act) where the period ended on or after 5 January 2014.

88. Even if claims were presented outside the EqA primary three month time limit, the tribunal would still have jurisdiction to hear them if it thought it just and

equitable to extend time under section 123(1)(b) of the EqA. The tribunal reminds itself that the burden in respect of a just and equitable extension of time rests on the Claimant (see *Robertson v Bexley Community Centre* [2003] IRLR 434, CA) but that the hurdle is somewhat lower than under the unfair dismissal reasonable practicability test; the tribunal has a broad discretion in this regard.

89. The tribunal notes at this stage that the Claimant did not engage with this issue in his evidence or his submissions. The tribunal also notes that the Claimant has had the support of union representation (albeit the identity of the union and of the representative changed at various times) throughout the period from 2011 to 2014. Further, the Claimant was clearly aware at all material times of his rights in terms of protection against unlawful discrimination and of his right to complaint by way of internal grievance and by way of formal legal proceedings. As noted above and also below in the context of protected acts, the Claimant raised a number of grievances during the course of his employment with the Respondent including allegations of discrimination of various types. The earliest grievance to which the tribunal has been referred dates from June 2010 (ie more than a year before the first substantive allegation in this case) and in that grievance the Claimant refers in detail to specific domestic and European anti-discrimination provisions concerning disability discrimination and says at one point *'I do not want to Sue the Company, but …'*. This is not a Claimant who was ignorant of his rights or the means, both internal and external, by which he could complain when he felt they had been breached.

90. As noted above, the key date when considering whether the Claimant's various discrimination claims are in time is 5 January 2014. All of the allegations of direct discrimination, as clarified by the Claimant at the start of the hearing, took place in or before 2013.

91. Turning to the harassment allegations, Mr Batchelor left Battersea in July 2013 and had no further interaction with the Claimant thereafter. Mr Hannam took over Mr Batchelor's role in around July 2013. The first and third of the harassment allegations against Mr Hannam seem to the tribunal to amount to allegations that he failed to resolve matters that had been left by Mr Batchelor concerning the shuttle service and parking at the depot; at the latest they must, pursuant to section 123(3)(b) and (4) of the EqA, be treated as having been done within a reasonable period, say a few weeks, of Mr Hannam taking over. The second allegation against Mr Hannam concerns the events of October 2013 when the Claimant says he was put back on the rota for about a month. The fourth allegation concerns issues with the Claimant's holiday over the 2013/14 Christmas period but Mr Hannam's involvement with that, as outlined in the findings of fact above, ended on 31 December 2013. The fifth and final allegation of harassment against Mr Hannam concerns his statement to the DWP which is dated 4 September 2013.

92. The tribunal notes that although the Claimant identified dates in respect of his various allegations against Mr Batchelor and Mr Hannam, it appeared during the course of the Claimant's evidence that he only became aware of some of the matters of which he now complains some time after the dates he has given. In particular, he says that he only became aware of a number of matters, for example the existence of what he says are false Genius reports, when he received a copy of his personnel file (or an incomplete copy on his case). However, even if one takes the date of receipt of the relevant documents on his file, ie October 2013, rather than the date given by the Claimant at the start of the hearing that would still be some months before 5 January 2014.

93. The harassment allegations against Ms Murphy cover all of those against Mr Batchelor and Mr Hannam, which predate 5 January 2014, and also the initial delay in providing a copy of the Claimant's personnel file and then an alleged failure to provide him with a full copy of his file. The Claimant was provided with a copy of his file in October 2013, ie the initial delay was over well before 5 January 2014. In any event, Ms Murphy did not arrive in Battersea, and had no involvement in issues relating to the Claimant's file, until early 2014.

94. However, from January 2014 there was interaction between Ms Murphy and the Claimant, including concerning his personnel file. He was then provided with a further copy in March 2014 (and another was made available in July 2014 but that was after the presentation of the ET1).

95. The harassment allegations concerning Mr Parker and Mr Wakerley all post-date the presentation of the ET1 in this case.

96. Turning to the allegations of victimisation, a number of these post-date the ET1 and the dates of a number of others, as identified by the Claimant, are long before January 2014. The only two that do not fall into one or other of those categories are the allegation that the Claimant was not allowed to use a disabled parking space at the depot which is said to have been ongoing from 2011 to 2014 (apart from periods when it was resolved) and the allegation of a failure to response appropriately to requests for his personnel file. As to the former, the tribunal has neither seen nor heard any evidence to suggest that the Claimant was not allowed to use the disabled bays at the depot at any time after 2011. As to the latter, this ties in with the harassment allegation against Ms Murphy concerning the Claimant's personnel file as discussed above; part of this did take place on or after 5 January 2014.

97. Finally, the tribunal has considered the claim for failure to make reasonable adjustments. The third of the adjustments contended for, ie allocating him a short bus route, clearly fails on the facts; the Claimant was provided with a short bus route, the C3, throughout the relevant period of his employment. In any event, on the Claimant's case, as the tribunal understands it, all four adjustments raised by the Claimant are things he says should have been put in place long before 2014.

98. In the circumstances, the tribunal has concluded that the complaint concerning the alleged failure to provide the Claimant with a full copy of his personnel file (which is said to be harassment and victimisation) was presented in time and the tribunal therefore has jurisdiction to hear it.

99. The tribunal has next considered whether any of the complaints about earlier matters can be tied into the personnel file complaint under the continuing act provision of section 123(3)(a) of the EqA so as to bring them in time. However, it seems clear to the tribunal that the issue concerning the Claimant's personnel file is of a different nature from, and is unconnected to, his other allegations. Further, as noted above, the Claimant has not in his evidence or submissions sought to persuade the tribunal that this issue is linked with any earlier matters as part of a continuing act.

100. That being so, the tribunal has concluded that the only complaints that were presented within the primary time limit are those concerning the alleged failure to provide the Claimant with a full copy of his personnel file. All other discrimination claims were presented outside the primary time limit.

101. The final question with regard to the discrimination time point is whether it would be just and equitable to extend time to allow some or all of the out of time complaints to be heard. The tribunal has concluded that it would not be just and equitable to extend time. The burden is on the Claimant but he has not put forward any evidence or submissions on this point. The tribunal has nevertheless considered such evidence as has been presented that may be relevant to this question, but, as noted above, the Claimant was clearly aware of his rights in terms of protection against unlawful discrimination and of his ability to bring legal action if he felt those rights had been breached. He also had access to union assistance throughout the relevant period. He has not explained to the tribunal why it would be just and equitable to extend time in this case, which in respect of many aspects of the Claimant's claim would require an extension of months if not years.

102. The tribunal has therefore concluded that it does not have jurisdiction to hear any of the EqA claims arising in this case, save for those concerning the alleged failure to provide the Claimant with a full copy of his personnel file, which is said to amount to harassment by Ms Murphy and to victimisation.

103. Notwithstanding the above conclusion on the discrimination time point, as with the unfair dismissal claim and the post-ET1 discrimination claims, the tribunal will consider below all of the pre-ET1 discrimination claims on their merits.

Discrimination

104. The Claimant has raised a large number of allegations of various types of discrimination as outlined above. The tribunal will deal with each of these below under separate sub-headings.

105. **Protected characteristics – disability**
As part of his discrimination claims the Claimant relies on a number of protected characteristics. Of these, disability is the only one that is in any way contentious; there is no issue as to whether the Claimant is Egyptian, Coptic Christian and male.

106. The Claimant relies on three disabilities: (a) a left heel injury dating from 2001, (b) a right shoulder injury resulting from a bus accident in October 2012 and (c) depression from November 2011 which he says became worse at some later time.

107. The Respondent accepts that the first of these amounted to a disability at all material times and that it had the requisite knowledge at all material times.

108. The second disability is also conceded but knowledge is not conceded prior to April 2013 when the Claimant was signed as fit to work but only two days per week for the following six months. The question is whether the Respondent had actual or constructive knowledge of the second disability at any time between October 2012 and April 2013. The evidence presented to the tribunal establishes that shortly after the accident in October 2012 the Claimant was referred to OH. The report from OH suggested that the Claimant was not as injured as a result of the accident as he was claiming to be. In fact it suggested that he had not been significantly injured at all. The tribunal has not seen any further evidence to suggest that the Respondent was told or should reasonably have known that he was sufficiently injured to give rise to a further disability at any time prior to April 2013. Whether or not the OH opinion ultimately proved to be correct, it was reasonable for the Respondent to rely on it at the time. In the tribunal's judgment, therefore, the Respondent did not have actual or constructive knowledge of the Claimant's second disability at any time before April 2013.

109. The third disability relied on is depression. The Claimant says that this dates from November 2011 and that it worsened some time later, although he has not said when or to what extent. Other than the Claimant's assertion, which is itself somewhat vague and gives no detail as to adverse impact on ability to carry out normal day-to-day activities, the only evidence to which the tribunal has been referred concerning depression is a pre-employment questionnaire from 2006 and a medical letter from 2017. The 2006 questionnaire refers to the Claimant suffering from depression in the past following an accident. There is no date given for that accident or any indication of ongoing or long term symptoms. Also, this predates the period relied on by the Claimant in this case, ie from 2011 onwards. The 2017 letter does refer to a recent deterioration in recurrent depressive symptoms and to a history of depression from 2012 (not 2011). This may be enough to satisfy the long term element of the EqA definition of disability but it gives no indication of the extent of any effect on the Claimant's ability to carry out normal day-to-day activities at any time prior to the Claimant's dismissal in late 2014. That being so, the evidence is insufficient to warrant a finding that

the Claimant was disabled as a result of depression at any time material to this case.

110. **Direct discrimination**
The Claimant has raised four allegations of direct discrimination as noted above.

111. The first allegation is not allowing the Claimant time off for hospital appointments and giving him a disciplinary warning when he was late. The Claimant has said that this relates to events in 2011 and 2013. He relies on the protected characteristics of disability and religion.

112. The first part of this allegation fails on the facts. There is no evidence to suggest that the Claimant was not allowed time off for hospital appointments at any time during his employment with the Respondent.

113. The second part of this allegation concerns the Stage 1 warning given to the Claimant by Mr Batchelor in late 2011. There was no warning given in 2013. The question on a direct discrimination claim is whether the Claimant was given a warning because of disability or because of religion, they being the two protected characteristics relied on by the Claimant. There is, in the tribunal's judgment, no evidence to support a finding of less favourable treatment than a relevant comparator because of either protected characteristic. The Claimant relies on someone called Ray Curtain, who he says is a white British male, as an actual comparator in respect of this allegation. The tribunal has heard no evidence as to Mr Curtain's disability status or his religion. In any event, the reason Mr Batchelor gave the Claimant a Stage 1 warning was because of his attendance record and the fact that the Stage 1 interview had been outstanding for some six months or so by the time the Claimant and his union representative attended Mr Batchelor's office. It was not because of disability (either the Claimant's or anyone else's) or religion (again, the Claimant's or anyone else's).

114. The second allegation is of failing to allow the Claimant sufficient flexibility around his working hours in light of his need to attend hospital appointments and care for his elderly parents; this is said also to relate to events in 2011 and 2013 and to be direct disability and/or religion discrimination.

115. It is not entirely clear from the way the Claimant's claim has been presented, but the tribunal presumes that this relates to the period in 2011 following his return from long term sick leave but before Mr Bland's grievance appeal outcome gave him fixed late shifts in November 2011 and then the period of about a month (or possibly less or more) in around October 2013 when the Claimant says that he was put back on the rota, ie did not have fixed late shifts.

116. As to the earlier period, the tribunal has been presented with no evidence as to which shifts the Claimant was working before Mr Bland's grievance appeal outcome. In any event, there is nothing to suggest that the shifts being

allocated to the Claimant at that time were because of disability or religion. The tribunal notes that the Claimant relies on two comparators in respect of this allegation, namely Brisha Ismaili and Karimi Zohar. The tribunal has been told nothing about those comparators other than an assertion (not contradicted by the Respondent) that they are both women. However, the tribunal knows nothing about their disability status or their religion.

117. As to the later period, 2013, the tribunal has already noted above that this was a time during which the Claimant was working only two days per week. He has provided no explanation as to why he could not arrange his hospital appointments for the days when he was not working. Further, the evidence shows that the reason for the short period in about October 2013 during which the Claimant may have been taken off fixed late duties was because the C3 schedule changed and the fixed duty that the Claimant had previously been doing no longer existed. The reason was nothing to do with disability or religion. The Claimant has produced and relied on a rota (the extra document added to the bundle on the fourth day of the hearing) which appears to show that his two comparators were assigned fixed duties but (a) again the tribunal knows nothing about their disability status or religion and (b) the rota is from March 2014 when the Claimant, even on his own case, was on a fixed duty with which he had no complaint.

118. The third allegation of direct discrimination concerns the surveillance under which the Claimant was placed following the October 2012 accident. The Claimant says that this was because of disability and/or sex. The reason the Claimant was placed under surveillance at this time was the content of an OH report that suggested that he was exaggerating the effect of the injuries he sustained in the accident. It was nothing to do with disability or sex.

119. The fourth and final allegation is of making a report about the Claimant to the DWP. The Respondent did not instigate the DWP's investigation into the Claimant. Mr Hannam gave a statement to the DWP (in September 2013) but it was written by the DWP and recorded the answers he gave to questions they asked him. Similarly, there is evidence to suggest that the DWP attended the Respondent's premises earlier in 2013 and spoke with Mr Batchelor but their visit was unannounced and whatever Mr Batchelor told them would have been in response to their questions. There is nothing to suggest that either Mr Batchelor or Mr Hannam instigated contact with the DWP or provided them with any false information about the Claimant or that whatever they did say was because of disability (that being the only protected characteristic relied on for this allegation).

120. Therefore, even if the tribunal had jurisdiction to hear them the allegations of direct discrimination would have failed on their merits.

121. **Harassment – introduction**
The definition of harassment under section 26 of the EqA, as set out above, engages a number of questions. These may be summarised as follows:

121.1 Was there unwanted conduct?
121.2 If so, was it related to a relevant protected characteristic?
121.3 If so, did it have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?
121.4 The third question above is a mixed subjective / objective question in that the tribunal must take into account not only the Claimant's perception (the subjective element) but also whether it was reasonable for the conduct to have that effect (the objective element).
121.5 The tribunal also reminds itself that the second question asks whether conduct is 'related to' rather than 'because of' a protected characteristic; the test in that regard is broader than under section 13 of the EqA.

122. **Harassment – Mr Batchelor**
As noted above, Mr Batchelor left the Battersea depot in July 2013 and had no further dealings with the Claimant. The tribunal has already found that all of the claims concerning him are out of time. Nevertheless the tribunal has considered the substance of the claims.

123. The Claimant has raised 8 harassment allegations against Mr Batchelor.

124. Allegations 4 and 8 fail on the facts. Mr Batchelor did not make fun of the way the Claimant walked and nor did he place false Genius reports. As noted above, Genius reports were generated automatically by the Genius system and any reports that were generated in respect of the Claimant and/or that found their way onto his personnel file were not false.

125. Allegations 2 and 3 concern parking at the Battersea depot. Allegation 2 is that Mr Batchelor failed to allocate the Claimant a parking space at the depot. Allegation 3 is that there were 'general difficulties' with parking at the depot. The tribunal has already found that the Claimant was always allowed to park in the designated disabled bays at the depot. If those bays were full then he was allowed to park in the visitors' bays. Mr Batchelor introduced a system of coloured parking permits so that anyone parked in a place they should not have been could easily be identified.

126. In so far as a failure to allocate the Claimant a specific parking space amounted to unwanted conduct related to disability which had one or more of the effects set out in section 26(1)(b) of the EqA, and the tribunal makes no specific findings in that regard, then the tribunal finds that it was not reasonable for it to have had that effect. The Claimant was allowed to use the disabled bays and, if they were full, to use the visitors' parking which was more convenient than the general car park. The Claimant only needed to park there for his duties which were generally from late afternoon onwards and latterly were only two days per week. There were hundreds of drivers based at the depot. It would not have been reasonable to expect the Respondent to give the Claimant an allocated parking space at the depot. It

would have been unreasonable for the Claimant to feel that his dignity was violated or that his environment had been made intimidating etc as a result of the lack of an allocated parking space.

127. The tribunal has reached the same conclusion in respect of the allegation concerning parking difficulties in general. This was (and is) a busy bus depot with hundreds of drivers. There are dedicated disabled bays which the Claimant was allowed to use. He was also allowed to use alternative parking, also convenient for accessing his workplace, if the disabled bays were full. It is not clear what more he expected the Respondent to do, other than give him a specific allocated parking space, but if he felt that the parking situation violated his dignity or created an intimidating environment then such a feeling was not, in the tribunal's judgment, reasonable.

128. Allegation 1 concerns the shuttle service. This service was never intended for the Claimant's use. It was intended for those drivers who started their duties in Putney which was some distance from the Battersea depot. It was withdrawn following consultation with, and agreement by, the unions. It was replaced by the affected Putney drivers being given extra (paid) time at the start and end of each shift to travel between the depot and Putney. The Claimant (and others, it seems) were sometimes taken by the shuttle and dropped off at a convenient place on its route so that they were closer to the start of their shifts if there was a spare space. In the Claimant's case the tribunal heard evidence that he would sometimes be dropped off at a bus stop some 300 yards or so from the depot and he would then catch a bus to Clapham Junction where his C3 route started. Following the shuttle's withdrawal the Claimant's colleagues would instead drop him off at a convenient place. It seems clear that the Claimant was unhappy at the withdrawal of the shuttle service, and it therefore amounted to unwanted conduct. It is debatable whether it was related to disability; the shuttle was never intended as a service for disabled drivers and nor was its withdrawal anything to do with disability. In any event, as with the previous allegations, if (and the tribunal again makes no specific finding on this) the withdrawal of the shuttle had the necessary effect under section 26(1)(b) of the EqA then it was not reasonable for it to have had that effect; the Claimant went from taking advantage of one service (the shuttle, which was not intended for him) to another (being given lifts by his colleagues) the effect of which, the tribunal finds, was much the same in terms of assisting the Claimant to reach the start of his bus route.

129. The fifth allegation against Mr Batchelor concerns the Stage 1 warning in September 2011. Again, this was clearly unwanted by the Claimant. It was probably, the tribunal agrees, related to disability in that a significant cause of the Claimant's lateness for work, which in part triggered the warning, was his attendance at hospital appointments which overran which in turn were to do with the injury that gave rise to the first disability. The tribunal also accepts that a Stage 1 warning may well have been felt by the Claimant to have violated his dignity or created a hostile environment for him at work; indeed, it prompted him to appeal and to raise a grievance against Mr Batchelor.

However, the tribunal finds that this allegation, even if it had been in time, would have fallen at the objective stage of the test under section 26 of the EqA. The Claimant's attendance record was, on Mr Batchelor's unchallenged evidence, one of the worst at the Battersea depot. The Claimant was regularly late for work which often had significant consequences for the Respondent; an alternative driver would be sent to undertake the Claimant's bus route and there would often be no other work for the Claimant to do. A Stage 1 warning is just that: it is the first stage of a process with many later stages and which is designed and intended to encourage good attendance. It was not reasonable, in the tribunal's judgment, if the Claimant felt subjectively that the warning had the effect under section 26(1)(b) of the EqA.

130. The sixth allegation is that Mr Batchelor instigated surveillance against the Claimant in October 2012. The surveillance was instigated following an OH report which suggested that the October 2012 accident had not caused significant injuries as the Claimant was suggesting. It was clearly unwanted conduct but the tribunal is not satisfied that it was related to disability. Rather, it was related to a perceived lack of disability. The Claimant was already suffering from his first disability, as the Respondent accepts, but the surveillance was nothing to do with that. It was instigated because of a concern that the Claimant was not suffering from any further significant injury as a result of his latest accident. At that time the Respondent did not know, and could not reasonably have been expected to know, that the Claimant was suffering from a second disability. The surveillance was not related to disability.

131. This allegation is also said by the Claimant to be harassment related to race. There is no evidence whatsoever of any link between the instigation of surveillance and the Claimant's or anyone else's race.

132. The final allegation to be considered as against Mr Batchelor is that he instigated the DWP investigation and/or provided information to them. The tribunal has already found that Mr Batchelor did not instigate the investigation. Mr Batchelor did provide information to the DWP when they arrived, unannounced, at the Battersea depot. However, the provision of information in response to their questions was not related to disability. As with the surveillance allegation, if anything it was related to a concern on the part of the DWP as to lack of disability.

133. Therefore, even if the tribunal had jurisdiction to hear the allegations against Mr Batchelor they would have failed on their merits for the reasons given above.

134. **Harassment – Mr Hannam**
As with the allegations against Mr Batchelor, the tribunal has already found that the allegations against Mr Hannam are out of time but will consider them on their merits in any event.

135. The tribunal has not heard live evidence from Mr Hannam but his involvement in the matters of which the Claimant complains is well documented in the extensive contemporaneous documents set out in the bundles.

136. The first allegation against Mr Hannam is that the shuttle service remained withdrawn. For the reasons given above the tribunal has already found that the withdrawal of the shuttle did not amount to harassment within the meaning of section 26 of the EqA. The same reasons apply, in the tribunal's judgment, to the fact that the shuttle was not reinstated by Mr Hannam when he took over from Mr Batchelor in July 2013.

137. The second allegation is that Mr Hannam put the Claimant back on the rota rather than giving him fixed duties for about a month. The first point to note here is that the Claimant's evidence as to what exactly happened is somewhat vague; the best he could do was say that he thinks he was put back on the rota for about a month but it could have been more and could have been less and he is unable to give any specific dates. What the contemporaneous evidence shows is that what prompted a change in the Claimant's duties in around October 2013 was a change in the schedule of the C3 route. That was not something over which Mr Hannam had any control. The subsequent change in duties allocated to the Claimant was not at Mr Hannam's instigation; rather, it was Mr Baker who dealt with duty allocation. When the Claimant raised the matter with Mr Hannam he replied the same day reassigning fixed duties starting at 4.28pm (as opposed to his previous duties starting at 4.30pm) for the following week.

138. The difference between a 4.30pm and 4.28pm start is, in the tribunal's judgment, immaterial. If there were occasions during a period of a month or so when the Claimant was given duties that started earlier than 4.28pm (and it is far from clear that there were: the tribunal notes, for example, that when given such duties in early October the Claimant complained vociferously and they were changed but there is no suggestion of any other complaint at around this time) and the Claimant felt that this was unwanted and that it had the effect set out in section 26(1)(b) of the EqA then the tribunal would find that such effect was not reasonable in the circumstances. The reason the Claimant wanted fixed late shifts was to accommodate hospital appointments during the day which could overrun. At this time the Claimant was only working two shifts per week. There is no evidence that he was not able to organise his hospital appointments so that they did not clash with his two working days per week for a period of a month or so.

139. The third allegation against Mr Hannam is that there were parking issues at the depot. The answer to this is the same as for the equivalent allegation against Mr Batchelor as discussed above.

140. The fourth allegation concerns the Claimant's holidays over the 2013/14 Christmas period. The tribunal notes that this is the only allegation against Mr Hannam that is not said to relate to disability; this one is said to relate to race. The tribunal also notes that it is not said to relate to religion; the tribunal

reiterates that the nature of the Claimant's claims was discussed extensively at the start of the hearing and the Claimant was given every opportunity to put his case as he saw fit.

141. The events leading up to Coptic Christmas in early January 2014 have been the subject of findings of fact as set out above. The Claimant asked in late December 2013 if he could swap his shifts so he did not have to work on 6 and 7 January 2014, ie over Coptic Christmas. Mr Hannam's only involvement in this was on 31 December 2013; he said that he could not swap the Claimant's shifts because there was no other work for the Claimant to do on the days he wanted to swap to, but that the Claimant could take those days as holiday. To that extent, there was no issue with the Claimant's holidays over the 2013/14 Christmas period; rather, the issue was that the Claimant did not want to take holiday over that period but wanted the days off in any event. The issue for the Claimant was that he wanted to save up his holiday for later in 2014 in case he had to return to Egypt to sort out some legal problems.

142. Mr Hannam's refusal to agree to swap shifts for the Claimant was clearly unwanted conduct but it was not in any way related to the Claimant's race. Mr Hannam's refusal was simply because there was no work for the Claimant to do on the days he wanted to swap to. Further, in so far as Mr Hannam's refusal had the effect under section 26(1)(b) of the EqA that effect was not reasonable; it was not reasonable for the Claimant to feel that effect given that he had asked Mr Hannam less than a week in advance and Mr Hannam had replied that he could take the time off as annual leave.

143. The final allegation against Mr Hannam is that he made a statement to the DWP. The answer to this allegation is the same as for the similar allegation against Mr Batchelor as set out above. Mr Hannam did not instigate contact with the DWP and he was simply answering their questions. Nothing he said, as recorded by the DWP in his statement, was related to disability.

144. All of the allegations against Mr Hannam would therefore fail on their merits even if the tribunal had jurisdiction to hear them.

145. **Harassment – Ms Murphy**
The allegations against Ms Murphy fall into two categories, (a) those based on the allegations against Mr Batchelor and Mr Hannam as already discussed above and (b) specific allegations against Ms Murphy concerning the Claimant's personnel file.

146. With regard to the first category, the Claimant says that Ms Murphy knew of Mr Batchelor's and Mr Hannam's behaviour and did nothing about it. That, the Claimant says, was harassment related to disability and race. One difficulty with this aspect of the Claimant's case is that the tribunal has already found that, even if they were in time, the allegations against Mr Batchelor and Mr Hannam would have failed on their merits. The tribunal accepts that an allegation against one manager that he or she failed to stop the behaviour of

another could amount to unlawful harassment even if the conduct of the second manager did not, but on the facts of this case the findings as set out above do, the tribunal considers, give rise to an evidential difficulty for the Claimant.

147. In any event, Ms Murphy had no involvement with, or knowledge of, the Claimant's issues with his managers before she was asked to deal with one of his grievances in early 2014. There is no evidence that she knew about the matters of which the Claimant now complains against Mr Batchelor and Mr Hannam or, if she did, that anything she did or did not do was related to race or disability.

148. With regard to the second category of allegation against Ms Murphy, the second of those allegations is that there was delay following the Claimant's request for a copy of his personnel file before he was provided with a copy. The Respondent accepts that there was a delay, and Ms Murphy subsequently apologised for it, but it was not something for which Ms Murphy can be held responsible or with which she was involved. The delay was up to October 2013 when the first copy of his personnel file was provided to the Claimant. Ms Murphy did not arrive at the depot until early 2014. In any event, the tribunal has found that the delay was a result of a simple administrative error; it was not in any way related to disability or race.

149. The first allegation concerning the personnel file is that Ms Murphy failed to provide the Claimant with his full personnel file. This fails on the facts since the Claimant was provided with a full copy of what was on his personnel file each time a copy was provided to him. In any event, the way in which his personnel file was put together (and he has complained at various times about its completeness and the order of the documents) was not in any way related to disability or race.

150. Therefore, the first category of allegation against Ms Murphy would have failed on its merits even if the tribunal had jurisdiction to hear it. The tribunal does have jurisdiction to hear the second category of allegation but that also fails on its merits.

151. **Harassment – Mr Parker**
The allegations of harassment against Mr Parker relate solely to the investigation meeting he held with the Claimant on 15 September 2014. As noted above, these allegations post-date the ET1 in this case and there has been no application to amend the claim to include them.

152. In any event, these allegations would fail on their merits. The first allegation is that Mr Parker physically assaulted the Claimant but the tribunal has found as a fact that he did not. The second allegation concerns the conduct of the meeting which the Claimant says amounted to harassment. The Claimant says that Mr Parker conducted the meeting in an aggressive and belittling manner and treated him like a child. As noted above, the tribunal has heard the Claimant's covert recording of the meeting and it is clear that it is the

Claimant whose behaviour at this meeting was unreasonable rather than that of Mr Parker. Mr Parker's conduct throughout was measured and reasonable, even if on occasions he had to be assertive to try to bring the Claimant back to the point under discussion. There is nothing to suggest that Mr Parker's conduct during the meeting was related to disability. Further, even if anything about Mr Parker's conduct of the meeting was unwanted, was related to disability and had the (subjective) effect set out in section 26(1)(b) of the EqA then the tribunal would have found that that effect was not reasonable.

153. For the above reasons, even if the tribunal had jurisdiction to consider the allegations against Mr Fouad they would have failed on their merits.

154. **Harassment – Mr Wakerley**
The last set of harassment allegations concerns Mr Wakerley. As with Mr Hannam, the tribunal has not heard live evidence from Mr Wakerley but his involvement in the relevant matters is the subject of contemporaneous documentation, copies of which are in the tribunal bundles. As with the allegations against Mr Parker, the tribunal has already found that it does not have jurisdiction to hear these allegations since they post-date the ET1 and there has been no application to amend the claim to add them, but the tribunal will nevertheless consider what its findings on the merits would have been.

155. As set out above in the tribunal's findings of fact, the Claimant presented a grievance in September 2014 raising allegations against Mr Parker and Ms Murphy. The grievance was dealt with by Mr Gilmore and was not upheld. There is no claim concerning Mr Gilmore's involvement with, or his finding on, the Claimant's grievance. The Claimant appealed and the appeal was heard by Mr Wakerley on 4 December 2014.

156. The first allegation against Mr Wakerley concerns parking at the depot. The Claimant and Ms Watts arrived at the depot for the appeal hearing. It seems that there was no available parking in the disabled bays. The Claimant was agitated when he arrived and he demanded (rather than asked) that Mr Wakerley go outside and rearrange the parking so that he could park in one of the disabled bays. Mr Wakerley's response was that he was not usually based in Battersea and the Claimant would have to ask the Duty Manager. The tribunal doubts that it would have been reasonable for the Claimant to expect one of the Respondent's Directors to sort out parking for him even if based at the relevant depot, but since Mr Wakerley was not based at Battersea and would therefore have no idea about parking arrangements the Claimant cannot reasonably have expected him to deal with any parking issues. There is also no evidence to suggest that those who were parked in the disabled bays were not entitled to do so. Even if Mr Wakerley's response was unwanted, was related to disability and had the effect set out in section 26(1)(b) if the EqA, then the tribunal would have found that such effect was not reasonable.

157. The second allegation against Mr Wakerley is vague to say the least: it refers to 'his handling of' the Claimant's grievance. Assuming that the substance of the complaint is the outcome of the grievance appeal, ie that Mr Gilmore's decision was upheld, this allegation would also fail on its merits. There is nothing in the evidence to support a finding that the way in which Mr Wakerley dealt with the grievance appeal was related in any way to disability or race. The tribunal would also have found that even if the Claimant felt (subjectively) that it had the effect set out in section 26(1)(b) of the EqA, that effect was not reasonable. The main thrust of the grievance concerned Mr Parker's conduct of the investigation meeting on 15 September 2014; not only had Mr Gilmore reached the same conclusion as Mr Wakerley about that, but the tribunal has also reached much the same conclusion, ie that the Claimant's complaints about Mr Parker and his conduct at the investigation meeting are without foundation.

158. For the above reasons, even if the tribunal had jurisdiction to consider the allegations against Mr Wakerley they would have failed on their merits.

159. **Victimisation**
It is clear that the Claimant did raise grievances on a number of occasions throughout the relevant period from 2011 to 2014 (and even before the start of that period) which covered a range of matters. In many of these he raised specific allegations of discrimination, harassment and victimisation. The Respondent has not suggested that these various grievances do not amount to protected acts.

160. It is not therefore necessary to set out in detail each and every complaint made by the Claimant that amounts to a protected act, but the tribunal notes the following as a representative selection:

    160.1 The Claimant submitted a written grievance dated 1 June 2010 concerning parking at the Battersea depot. In it he made various references to the Disability Discrimination Act 1995, to the Equality Directive (2000/78/EC) and to a number of previous reported cases in the area of disability discrimination. The essence of his complaint was that he wanted to be allowed to park in the disabled spaces outside the depot.
    160.2 In an appeal dated 13 September 2011 against a disciplinary warning one of the grounds given by the Claimant was *'bullying, harassment and discrimination'*.
    160.3 In a written grievance of the same date which appears also to have been principally about the written warning, the Claimant referred to *'Abuse of Power, Harassment, Bullying and Disability Discrimination'*.
    160.4 The Claimant raised a further written grievance on 26 October 2011 concerning a number of matters, including parking at the depot. He referred to discrimination and harassment and, although not put in express terms, it appears to have been an allegation of discrimination relating to his disability.

160.5 In a written grievance dated 19 December 2013 the Claimant raised a number of allegations of disability, race and sex discrimination.

160.6 In response to an email from Mr Hannam concerning changing his days of work, the Claimant sent an email on 31 December 2013 referring to *'victimisation and race discrimination'* and also referring to the fact that he was *'one of the few Coptic Christians employed by the Company'.*

160.7 The Claimant's ET1 in this case was presented in April 2014 and it raised a number of claims under the EqA.

160.8 The Claimant raised an undated grievance on or about 26 September 2014 concerning Mr Parker's investigation meeting on 15 September 2014 and also raising allegations against Ms Murphy. It refers to victimisation and harassment.

161. The Claimant has raised 7 allegations of victimisation. The tribunal has already found that it does not have jurisdiction to hear all but one of those allegations on the basis that they are either out of time or they post-date the ET1 and there has been no application to add them to the claim; the sole exception concerns the allegation about the Claimant's personnel file. However, as with the claims discussed above, the tribunal will consider the allegations on their merits in any event.

162. The first question in respect of each allegation is whether it is made out on the facts. The second is whether, if it is, the Respondent's treatment of the Claimant was because of one or more of the protected acts.

163. The first allegation is that the Claimant was not allowed to use a disabled parking space at the Battersea depot between 2011 and 2014, apart from occasions when he was allowed to use one. This fails on the facts. The tribunal has already found that the Claimant was allowed to use the disabled bays at the depot throughout the relevant period.

164. The second allegation also fails on its facts. It is alleged that Mr Batchelor placed a false Genius report on the Claimant's file in August 2011. The tribunal has already found that any Genius reports on the Claimant's file were not placed there by Mr Batchelor and, in any event, were not false.

165. The third allegation is that the Respondent started the process to dismiss him from 2 September 2014 and ultimately did dismiss him. The tribunal has no doubt that the reason, and the sole reason, for commencing the investigation and disciplinary process that led to the Claimant's dismissal was the events of the early morning of 2 September 2014. It was nothing to do with any previous complaints that the Claimant had raised.

166. The fourth allegation concerns the recording of the October 2012 accident as a disciplinary issue. It was not recorded as a disciplinary issue. It was initially noted on the wrong side of the record card, ie the side for disciplinary matters, but it was clearly recorded as 'NTB', ie not to blame, and so could not reasonably be interpreted as any sort of detriment to the Claimant. In any

event, the fact that it was noted on the wrong side of the card was a simple administrative error and was not in any way because of previous complaints that the Claimant had made.

167. The next allegation is that the Respondent failed to respond appropriately to the Claimant's requests for his personnel file. The tribunal has already found that there was an initial delay in dealing with the Claimant's request but that this was the result of an administrative error. It was not because of any previous complaints. The Claimant was provided with the first copy of his personnel file in October 2013. It was a full copy of what was on his file. The fact that certain documents, such as the surveillance report, were not on the file and the fact that the order in which the documents were kept may not have been entirely chronological were not in any way because of his previous complaints. Thereafter the Claimant was provided with another copy on request in March 2014 and another was made available to him (although it is unclear whether he ever collected it) in July 2014. Again, everything on the file was copied for him and the fact that certain documents were not on the file and the fact that the order in which documents were kept on the file was not to his liking were not in any way because of previous complaints. Indeed, the Respondent went so far as to compile and provide an index to the file so that the Claimant could more easily find documents.

168. The sixth and penultimate allegation of victimisation is that Mr Batchelor made fun of the way the Claimant walks in September or October 2011. The tribunal has already found that Mr Batchelor did not make fun of the way the Claimant walks at any time.

169. The final allegation is that Mr Parker treated the Claimant like a child in their meeting on 15 September 2014. The tribunal has already found that Mr Parker's conduct throughout the meeting was measured and reasonable. In any event, no aspect of Mr Parker's conduct during that meeting was because of any previous complaints by the Claimant; there is no suggestion that Mr Parker even knew about any of the Claimant's previous complaints at that time. The meeting was held because of concerns about the Claimant's conduct on 2 September 2014, and the way it progressed was because of the way the Claimant behaved during the meeting.

170. For the above reasons, the fifth allegation of victimisation fails on its merits and the other allegations would have failed on their merits if the tribunal had jurisdiction to hear them.

171. **Failure to make reasonable adjustments**
The final type of discrimination claim in this case concerns an alleged failure to make reasonable adjustments. The tribunal has already found that it has no jurisdiction to hear these claims, but as above it will consider them on their merits in any event.

172. The Claimant has identified three PCPs.

173. The first PCP is requiring the Claimant and other drivers to make their own way from the depot to another location to start their shift. This, the Respondent accepts, was a PCP which it applied to the Claimant and to other drivers.

174. The second PCP relied on is not providing the Claimant with an allocated parking space at the depot. Again, the Respondent accepts that it applied this PCP to the Claimant and other drivers, in the sense that no driver was given their own dedicated parking space.

175. The third PCP relied on by the Claimant has been formulated as 'allocating bus routes to drivers irrespective of the length of the route'. This PCP was clearly not applied to the Claimant. He was allocated the C3 route specifically because of its length, ie it was a short route between Clapham Junction and Earls Court and he could take breaks at either end.

176. The next question under section 20 of the EqA is whether the first and/or second PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled. The Claimant says that these PCPs did put him at a substantial disadvantage compared with non-disabled persons because walking caused him considerable pain.

177. The tribunal accepts that the first PCP put the Claimant at a substantial disadvantage when compared with non-disabled persons. It does not, however, accept that the second PCP put him at a substantial disadvantage when compared with non-disabled persons; the Claimant was allowed to park in the disabled bays or, if they were full, in the visitors' parking, both of which were closer to the depot office than the main car park where non-disabled persons had to park.

178. The Respondent was therefore under a duty to make reasonable adjustments as a result of the first PCP. The Claimant has put forward four adjustments that he says should have been made:

    178.1 Providing a shuttle service from the depot;
    178.2 Allocating a parking space to the Claimant;
    178.3 Allocating him a short bus route;
    178.4 Considering alternative employment for him.

179. The third of these adjustments relates to the third PCP which the tribunal has found was not applied to the Claimant. In any event, the Claimant was allocated a short bus route.

180. The first adjustment is the provision of a shuttle service for the use of the Claimant. The principal basis for the Claimant's complaint is that it was about 300 yards from the depot to the nearest bus stop and without assistance he would have to walk that distance before he could catch a bus to the start of his route at Clapham Junction; there was also a one minute or so walk at the other end but there is no suggestion that that was a particular problem for the

Claimant. As noted above, the shuttle service that was withdrawn was never intended to be for the use of the Claimant, even though he sometimes hitched a lift on it part of the way to the start of his route. There is no evidence to suggest that any other driver, disabled or otherwise, had any problem with the lack of a shuttle service and it has already been found above that the unions agreed to the withdrawal. In effect, the adjustment for which the Claimant contends would involve a dedicated shuttle service to take him 300 yards or so to the nearest bus stop. The tribunal also notes that following the withdrawal of the shuttle service the Claimant was given lifts by colleagues to a convenient place so that he could more easily get to the start of his route without needing to walk far. The withdrawal of the shuttle service therefore resulted in no material worsening of the Claimant's ability to get to the start of his route. The instigation of a new shuttle service for the Claimant's use would not, in the circumstances, have been a reasonable adjustment.

181. The second adjustment for which the Claimant contends relates to the second PCP which the tribunal has found did not put the Claimant at a substantial disadvantage. In any event, even if it did, the measures taken by the Respondent, ie allowing the Claimant to park in the disabled bays and, if they were full, the visitors' parking, were sufficient to discharge any duty to make reasonable adjustments. It would not have been reasonable to expect the Respondent to go further and to allocate a specific parking space to the Claimant.

182. The fourth and final adjustment raised by the Claimant is considering him for alternative work. Given the adjustments that were made by the Respondent in terms of parking in the disabled bays and allocating a fixed late duty on a short bus route, and given that his colleagues gave him lifts to the nearest bus stop outside the depot so he could reach the start of his route without needing to walk far, the tribunal has concluded that it would not have been a reasonable adjustment for the Respondent to consider finding alternative work for the Respondent. The evidence shows that reasonable adjustments were made to enable him to continue with his driving duties and that, as a result, he was able to do so. In any event, the Respondent did consider whether alternative duties were available when he asked in September 2011 and the unchallenged evidence of Mr Batchelor is that there was nothing available. There is no evidence to suggest that this matter was revisited by the Claimant thereafter or, if it had been, that there would have been any alternative work available for which the Claimant would have been qualified.

183. For the above reasons, even if the tribunal had jurisdiction to hear the claims for failure to make reasonable adjustments those claims would have failed on their merits.

Unfair dismissal

184. The final claim to be considered in this case is that for unfair dismissal. The tribunal has already concluded that this claim was presented out of time but

will consider its merits in any event, in case it is wrong in its finding on jurisdiction.

185. The first question is whether the Respondent has established that dismissal was for a potentially fair reason within the meaning of section 98 of the ERA. The evidence clearly establishes that the reason for the Claimant's dismissal, ie the reason in the minds of the relevant decision-makers, was a reason relating to conduct.

186. The question is then whether the Claimant's dismissal was fair or unfair in all the circumstances of the case under section 98(4) of the ERA. There is a neutral burden of proof on this issue. The tribunal has reminded itself of the well-known guidance from the Employment Appeal Tribunal in *British Home Stores Ltd v Burchell* ([1980] ICR 303) which may be summarised in the following three questions:

    186.1 Did the Respondent have a genuine belief that the Claimant had committed the alleged misconduct?
    186.2 If so, was that belief held on reasonable grounds?
    186.3 Had the Respondent carried out a reasonable investigation?

187. The tribunal will also need to consider whether the overall procedure adopted by the Respondent was fair and also whether dismissal was a fair sanction.

188. Tribunals have been reminded many times by the EAT and higher appellate courts that the tribunal must not substitute its own view for that of the employer. In other words, the question is not what the tribunal would have done in the same circumstances but whether the Respondent's dismissal and the procedure leading to that dismissal fall within the range of reasonable responses of a reasonable employer.

189. The tribunal considers first whether the Respondent had a genuine belief that the Claimant had committed the alleged misconduct and, if so, whether that belief was held on reasonable grounds. The substance of the allegations, as the Claimant well knew, was that he had crashed his bus into the rear of a black taxi in circumstances where the accident was avoidable and he then failed to comply with clear reporting procedures either at the time or on his return to the depot. He compounded this by continuing to drive on his bus route without checking for damage, by denying that he had been involved in an accident when asked by the controller over the radio and then by failing during the investigation and disciplinary process to acknowledge any wrongdoing.

190. The tribunal has no doubt that the decision-makers at both dismissal and appeal stages genuinely believed that the Claimant had committed the alleged misconduct and that they had reasonable grounds for doing so. The events leading up to the accident itself and the Claimant's conduct immediately thereafter are clear, in the tribunal's judgment, from the CCTV footage. Whatever the reason, the Claimant drove his bus into the rear of the

taxi in circumstances where it was, or should have been, clear for some distance that the taxi was stationary and the accident was therefore clearly avoidable. The tribunal also finds, based on the evidence presented by the parties, that the bus suffered significant damage, including losing a headlight and indicator from its front nearside and yet the Claimant did not check for damage at the time and continued on his route, picking up and dropping off passengers, including passing the scene of the accident on at least two occasions before the end of his shift. He also did not report the accident over the radio at the time, even though he knew, or should have known, that the procedures required that. The taxi driver reported the accident to the Respondent even though the Claimant had not exchanged details with him and the controller then radioed the Claimant who denied being involved in any accident. When the Claimant returned to the depot he did not report the accident to the Service Delivery Officer as he knew, or should have known, that he had to and nor did he report it to the dedicated accident helpline as again he knew, or should have known, that he had to before leaving the depot. That the Claimant has not accepted any wrongdoing in relation to these matters is also clear from the evidence; indeed, the Claimant still does not accept culpability for the accident or for the events that followed it.

191. Not only were the Respondent's conclusions in this regard within the band of reasonable responses of a reasonable employer, the tribunal has also reached the same conclusions based on the clear evidence presented during this hearing.

192. The next question is whether the Respondent carried out a reasonable investigation and/or whether other aspects of the procedure adopted were fair. The investigation meeting carried out by Mr Parker was, the tribunal has concluded, fair. It was a difficult meeting but that was because of the Claimant's behaviour during the meeting as discussed above. Based on the evidence available to Mr Parker, including the CCTV footage, the decision to proceed to a disciplinary hearing was also, in the tribunal's judgment, fair.

193. Ms Murphy heard the disciplinary hearing. The Claimant was accompanied by a union representative. He had asked for a number of further documents shortly before the hearing and Ms Murphy arranged for copies of those that could be found to be provided to him. The hearing was lengthy and thorough and the Claimant and his representative were given every opportunity to put their case as they saw fit.

194. Shortly before (in fact the working day before) the disciplinary hearing, the Claimant had presented a grievance concerning Mr Parker's conduct of the investigation meeting and alleging that he was acting on Ms Murphy's instructions. The outcome of the disciplinary process was therefore put on hold pending the outcome of the grievance process. Once the grievance process had concluded (the grievance not being upheld at first instance or on appeal) Ms Murphy reached her conclusion on the disciplinary charges.

195. The Claimant appealed to Mr McGuinness who was due to hear the appeal on 15 January 2015 but it was postponed first to 27 January 2015 at the Claimant's request and then to 25 February 2015 to allow the Claimant to arrange for suitable representation. Mr McGuinness carried out further investigation into matters raised by the Claimant by speaking with a number of individuals mentioned by the Claimant. This included the Service Delivery Officer to whom the Claimant said he had reported the accident on 2 September 2014 on his return to the depot, but she confirmed that she had not seen him even though she had been keeping an eye out for him as the police wanted to speak with him.

196. In all the circumstances the tribunal has been unable to identify any errors in the procedure adopted by the Respondent, and certainly none that would be sufficient to render the Claimant's dismissal unfair.

197. The final question is whether dismissal was, in all the circumstances, a fair sanction. The Claimant had a clean disciplinary record. However, the tribunal has concluded that even for a first offence the matters alleged against the Claimant, and which the Respondent found proven, were clearly sufficient to justify dismissal.

198. The tribunal has no hesitation in finding that if it had jurisdiction to hear the complaint of unfair dismissal then it would have found that the dismissal was fair.

199. Further, even if the dismissal were in some way procedurally unfair the tribunal would have found that a fair procedure could and would inevitably have led to the same result and that a Polkey reduction of 100% would have been appropriate. Yet further, the tribunal would have found that the Claimant's conduct, as found above, was such that a 100% reduction in his basic and compensatory awards would have been appropriate under section 122(2) and 123(6) respectively of the ERA. The Claimant was entirely the author of his own misfortune by his conduct in the early hours of 2 September 2014 and his subsequent failure to acknowledge any wrongdoing.

Conclusions

200. For the reasons set out above, the tribunal only has jurisdiction to consider one complaint of harassment and one complaint of victimisation, in each case concerning the provision of copies of the Claimant's personnel file. It has no jurisdiction to consider any of the Claimant's other complaints.

201. The complaints of harassment and victimisation concerning the personnel file are dismissed on their merits.

202. All other complaints would have been dismissed on their merits even if the tribunal had jurisdiction to hear them.

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Employment Judge K Bryant QC
Date: 8 October 2018