



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE MJ Downs
MEMBERS: Mrs RC Macer
Miss B Brown

BETWEEN:

Claimant

Mr Ibrahim Sesay

AND

Respondent

London United Busways Ltd

ON: 30th & 31st August 2018

APPEARANCES:

For the Claimant: In person

For the Respondent: Mr Edward Nuttman (Solicitor)

WRITTEN REASONS FOR JUDGMENT GIVEN ON 31ST August 2018

On 31st August 2018, the Tribunal gave Judgment that the claim for unlawful discrimination on grounds of race was not well founded.

REASONS

1. This is a claim for a declaration and an award for unlawful discrimination because the Claimant is black African. It was brought by way of an originating application received on 29th August 2017.
2. The Applicant was at all relevant times a bus driver and the Respondent is a reasonably large concern operating public buses across central, south and west London.

3. The Tribunal had the benefit of an agreed bundle of papers and admitted an additional three documents handed to it by the Claimant at the beginning of the hearing and one at the end of the hearing.
4. The Tribunal heard sworn evidence from the Claimant, Mr Saunders under summons, Ms Gill and Mr Bulmer (Colonel Retd).
5. The background is to be found in decision of EJ Baron of 1st December 2017 – and most especially the case management summary contained therein.

The Issues

6. The Parties agreed the issues that the Tribunal needed to address
Unlawful Direct Discrimination- section 13 Equality Act 2010 (EqA)
7. Was the Claimant subjected to the following treatment:
 - a. Mr Gumbley, Service Delivery Manager (who investigated allegations brought against the Claimant by Mr Joshua) preferring Mr Joshua Saunders's version of events over the Claimant's.
 - b. Being subjected to the disciplinary process.
 - c. Suspension from work
 - d. Being issued with an indefinite final written warning by Miss Gill, on the instructions of Mr Gumbley
8. Was the treatment less favourable than that afforded to his comparator, Clive Collacot, (white English) a fellow bus driver, in the same or similar circumstances? *The Claimant contends that between January and June 2017, his comparator swore at Nick Pearson, a radio controller, but was not suspended or subjected to disciplinary action. Instead, he was simply spoken to by management.*
9. Was the Claimant subjected to the said treatment because of his race?

Unlawful Harassment – section 26 EqA
10. Did Mr Joshua Saunders subject the Claimant to the following unwanted conduct:
 - a. September 2016 – instructing the Claimant to get off the bus and to use his personal mobile to ring him. When the Claimant refused, he was given a report for attitude and demeanour. *The Claimant claims that this conduct occurred after he had contacted*

the control room from the bus radio and informed Mr Joshua that there was something wrong with the vehicle.

- b. 10.6.17 – Mr Joshua instructing the Claimant to hold the bus for 6 minutes in an unsafe place.
- c. 11.6.17 – Mr Joshua constantly calling the Claimant from the control room for no good reason other than to wind him up.

11. Did the unwanted conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him; and if so

12. was it reasonable for it to have that effect taking into account the Claimant's perception and the other circumstances of the case?

The Applicable Law

13. The Tribunal considered the Equality Act 2010 and, in particular, the provision concerning direct discrimination: section 13 (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.”

14. Section 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—
 -
 - race

15. Section 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.

16. The Tribunal also had regard to the Equality and Human Rights Code of Practice at paragraph 3.23 concerning Comparators:

“The Act says that, in comparing people for the purpose of direct discrimination, there must be no material difference between the circumstances relating to each case. However, it is not necessary for the circumstances of the two people (that is, the worker and the comparator) to be identical in every way; what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator.

17. The Tribunal had regard to the ACAS Code of Practice Disciplinary and Grievance procedures 2013 which provides at, Paragraph 9 as follows:

If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

Discrimination - Overview

18. The Tribunal heard legal submissions from the Respondent at their election which were not disputed and largely adopted by the Tribunal (after the relevant consideration) and appear below.

19. The Tribunal noted that it was for the Claimant to establish facts from which, in the absence of an adequate explanation from the Respondent, the Tribunal can infer discrimination (see *Igen Limited and Others v Wong* [2005] IRLR 258).

20. The Tribunal agreed that it can take into account the Respondent's explanation for the alleged discrimination in determining whether the Claimant has established facts which even require an explanation from the Respondent (see *Laing v Manchester City Council and Others* [2006] IRLR 748) and confirmed by the Court of Appeal in *Madarassy v Nomura International PLC* [2007] IRLR 246. The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status (e.g. sex, race, age) and a difference in treatment. Those bare facts only indicate the *possibility* of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination (*Madarassy v Nomura International PLC* [2007] IRLR 246).

21. The Tribunal notes that in *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865 the EAT clarified that:

"it would be inappropriate, however, to find discrimination simply because an explanation by the employer for the difference in treatment is not one which the tribunal considers objectively to be justified or reasonable. Unfairness is not itself sufficient to establish discrimination".

"...that a claimant is a black woman who was not appointed, and the others are white men, does not constitute sufficient primary facts to justify an inference of discrimination."

22. The Tribunal accepted the submission of the Respondent that unlike the pre-Equality Act 2010 discrimination legislation, section 136(2) of the Equality Act 2010 does not expressly place a burden on the Claimant. Nevertheless, the Court of Appeal has explicitly confirmed the continued application of the two-stage in the case of *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913 which accords with the view set out in the Equality Act 2010's explanatory notes where, the note to section 136 states:

"This section provides that, in any claim where a person alleges discrimination, harassment or victimisation under the Act, the burden of proving his or her case starts with the claimant. Once the claimant has established sufficient facts, which in the absence of any other explanation point to a breach having occurred, the burden shifts to the respondent to show that he or she did not breach the provisions of the Act. The exception to this rule is if the proceedings relate to a criminal offence under this Act". (Our emphasis.)

23. Shortly before the Court of Appeal's decision in *Ayodele*, the EAT had come to a different conclusion. It decided that, contrary to past case-law, the Equality Act 2010 had altered the burden of proof (*Efobi v Royal Mail Group Ltd* UKEAT/023/16). However, the Court of Appeal expressly disapproved *Efobi*, and so the Tribunal will apply the two stage test

Relevant Facts

24. The Claimant commenced employment on 13th April 2015 as a bus driver (his employment lasted until August 2018 when he volunteered the information to the Tribunal that he has just been dismissed – this does not form part of this claim). Until the facts with which we are concerned, his employment had been reasonably unremarkable with his performance being looked on both positively and negatively. The Tribunal concluded that his employment history was unexceptional.

25. The originating application discloses a certain preoccupation with Mr Saunders and that was central to this hearing. Mr Saunders was employed as a controller with the Respondents – one of his responsibilities being to maintain “headway” (explained below).

26. The Tribunal turned first to the question as to whether Mr Joshua Saunders subjected the Claimant to unwanted conduct in **September 2016** at a time when the Claimant was on duty driving a bus and Mr Saunders was the controller of that route amongst others (he tends to cover 3 routes at any one time).
27. Mr Saunders first made contact as he was concerned about Headway i.e. a phenomenon by which buses become bunched up along a route creating an unreliable service for the public.
28. The Claimant reported a problem with his vehicle. Mr Saunders contacted an engineer but, he asked that the Claimant carry on driving in the meantime, whilst on an amber light. The Claimant was very irate saying, "it's my license."
29. Mr Saunders was trying to communicate with the Claimant over the radio but Mr Saunders found that he was becoming inaudible. Mr Saunders asked the Claimant to get out of the cab and call him on his mobile. Mr Saunders then spoke to the engineer who confirmed that the Claimant could carry on the journey and ignore the light. Mr Saunders sought to forward this information to the Claimant but the Claimant indicated he was not going to continue the conversation Mr Saunders asked to see him on his return to garage/depot. In evidence, the Claimant said he could not say whether this was an issue of race or not.
30. On arrival back at the garage, the Claimant rang Mr Saunders from his mobile and asked, "Why are you upsetting people all the time?" They had a disagreement on the phone and the Claimant talked over Mr Saunders and so the latter finished the call. Mr Saunders concluded that the Claimant had a bad attitude and was aggressive over the radio and over the phone.
31. The following day – the Claimant came into the garage to see Mr Saunders who told him he was being put on report for his attitude and demeanour for the previous day. The Claimant got upset and lost his temper and was threatening towards Mr Saunders at which point two senior controllers interceded to separate them.
32. The matter was resolved by Management arranging for the Claimant to be spoken to regarding his attitude to Mr Sanders. The Claimant felt that people were trying to get at him because they were racist.
33. **November 2016:** There was a further confrontation with Mr Joshua Saunders on 2nd November 2016 (an episode which is dealt here by way of background only). Mr Saunders was again seeking to give the Claimant instructions over the radio – which the Claimant ignored and on his return to the garage he reported to Mr Saunders as requested and became aggressive when he was told he was being put on report for his attitude and demeanour over the radio. Mr Sesay

was pointing his finger at Mr Saunders in a confrontational way and said, "I'm going to resign now and sue you racists for all you are worth [74]."

34. The Claimant was asked to go home and there was an investigatory interview on 4th November 2016 [80] that was undertaken by Ms Gill in which the Claimant denied accusing Mr Saunders and Mr Pearce of being racist [81] and maintained that he did not say he would, "sue you racists for all you're worth." Indeed he denied he had even mentioned race [81]. The other controllers were interviewed and their accounts tended to corroborate that of Mr Saunders. Ms Gill then arranged a disciplinary hearing for 23rd November 2016 [83].
35. The hearing was undertaken by Mr Robertson (Garage Operations Manager). We have been provided with the notes of that meeting. Mr Robertson never arrived at any conclusions and it is understood he has been off work sick ever since, so no further action was taken.
36. On 25th May 2017 the Claimant was sent on a conflict management/avoidance course [95]. It is not clear that this was by way of a sanction for anything that the Claimant had done and the Tribunal proceeded on the basis that it may well have been made available to drivers generally.
37. **On 10th June 2017** there was a further incident on 10th June 2017 when the Claimant was driving the Number 81 bus and Mr Saunders was – again – the controller.
38. Mr Saunders sought to address the necessity for headways by asking the Claimant to pull up at the next available stop. The Claimant indicated he would not hold back for him and would not answer the radio again. Mr Saunders indicated that the Claimant was to hold for at least 5 minutes over the next three stops but this was ignored.
39. Mr Saunders then sought to contact the Claimant a further 2 – 3 times over the next 20 minutes. This was not for the purposes of "winding him up" but because he wanted to ensure he had been clear and understood. A Senior Controller, Mr Etheridge then tried to speak to the Claimant about ignoring headways subsequently but the Claimant did not pay attention to him either. When interviewed, he was clear he did not hear Mr Saunders whistling down the radio.
40. When the Claimant came to the garage at the end of his route he banged on the window of the IBUS office. Mr Saunders invited him in but the Claimant wouldn't go into the office. He wanted the conversation to be in public. The conversation then became heated between the Claimant and Mr Saunders.
41. Mr Etheridge (who was the senior controller) went out to speak to the Claimant – the Claimant was upset. The Claimant was waving his Duty Card at Mr Etheridge on the basis that this document would prove that he was right. Mr Etheridge tried to explain to the Claimant that the maintenance of headways are

a TFL matter and that the duty card times are outside the TfL area. In due course the Claimant said, "I don't have to listen to you – you are nothing" to Mr Etheridge. Mr Etheridge then said that, "if you are not going to follow instructions there is no point you being out on the route." Mr Sesay's reply was to say, "fine – I will go home then.

42. The Claimant agreed that he got cross and upset – he threatened to resign but was talked out of it. The Claimant recorded the discussion and it was played at the disciplinary interview and everybody appears to agree the factual matrix at that point.
43. Addressing the allegation that Mr Saunders instructed the Claimant to hold the bus for 6 minutes in an unsafe place, it would appear rather that the Claimant was invited to hold up the bus over the following three stops. The instruction was not as specific (as alleged) and left it to the discretion of the Claimant as to how it was to be effected and was, in any event, motivated by a desire to effect traffic management.
44. On **11th June 2018**, the Claimant was driving the Number 111 bus and once again, Mr Saunders was the controller who sought to enforce headway adjustments by way of radio instruction. The Claimant agrees that he ignored these.
45. It was alleged by the Claimant that Mr Sanders was constantly calling the Claimant up from the control room for no good reason other than to *wind him up*.
46. The Tribunal finds that to the extent that he contacted him a number of times, this was because the Claimant was refusing to acknowledge instructions given to him. The workload of Mr Saunders was such and the fact that such communications were monitored in any event meant that the Tribunal concluded that it was unlikely that Mr Saunders sought to contact him as many times as the Claimant's suggests.
47. The purpose of the contact that was made was to establish effective communication. Mr Saunders even got the forecourt controller of one of the garages *en route* to check if the Claimant's radio was working (so as to ensure that he could be taken as having understood his headway instructions) – it was. The Claimant's riposte was to say, "My radio works fine but I am not talking to him."
48. The Claimant arrived back at the depot and Mr Saunders asked to see him. This was ignored and so Mr Saunders went out to speak to the Claimant and asked him for his duty card and told the Claimant that he was being sent home and was to be paid on a *time worked basis* because he was not following instructions.

49. Mr Saunders then turned to return to the office. The Claimant walked behind him and then overtook him and blocked his way with his arm and leaned into Mr Saunders and said something to him (in his witness statement, Mr Saunders had said, "I just have to say I am going to pull your fucking teeth out"). The CCTV appears to show Mr Saunders facial expression (by way of a reaction) as being one of shock or alarm. Mr Saunders challenged the Claimant who appeared to adopt a mocking tone in asking whether anyone had heard anything. He then rang the Police claiming he had been threatened. The Claimant waited for 20 minutes and then went home.
50. Mr Andrew Gumbley (who is currently working out of the country), Service Delivery Manager investigated the allegations brought against the Claimant and interviewed the Claimant, Mr Sanders and Mr Etheridge.
51. The Claimant walked out of the Respondent's premises on 11th June before he could be told that he was suspended. In the event he was formally suspended from duty on 12th June 2017 at the conclusion an investigatory interview with him which was undertaken by Mr Gumbley. He was suspended at a time when the Respondent had determined that there was a prima facie case against him and against a backdrop where it was said he was refusing to comply with reasonable management instructions and had threatened a Controller. This was a step that was provided for in the Respondent's disciplinary policy in serious cases while a matter was being investigated. In this case, it was related entirely to the alleged failure of the Claimant to follow a reasonable instruction – amounting to the misconduct of the Claimant and threatening Mr Saunders.
52. As concerns the **Claimant being subjected to a disciplinary process**, the tribunal has been provided with the relevant papers. Although the precise nature of the instructions are not clear, the Claimant appears to concede that he did not comply with such instructions as were given to him. The Claimant was suspended at the end of his interview with Andrew Gumbley. In the course of the interview the Claimant said that as concerns the incident on 11th June, towards the end of his confrontation with Mr Saunders, he had tried to follow him but subsequently changed his mind and said that Mr Saunders had challenged the Claimant for threatening to knock his teeth out to which the Claimant had replied by asking, "Did I say that?"
53. Mr Gumbley interviewed a series of relevant witnesses including the Claimant in the course of his investigation. After his interview with the Claimant on 13th June 2017, Mr Gumbley concluded that he preferred the account of Mr Saunders over that of the Claimant as to the alleged threat because of what he had observed on the CCTV footage. It was apparent from his oral evidence that the decision to prefer the evidence of Mr Saunders irritated the Claimant – most especially about the alleged threat. The Claimant felt there was no conclusive evidence and in oral evidence said, "there is no sound" ... Why believe one person over me?"

54. The Claimant was notified that he was to attend a disciplinary hearing on 15th June 2017 and that this was to be undertaken by Ms Manpreet Gill (the Garage Risk Manager) for failing to follow reasonable instructions on both days and failing to maintain headway on 10th June and threatening behaviour on 11th June 2017. He was warned that he potentially faced dismissal.

55. In the course of the disciplinary hearing, the Claimant addressed the various allegations made against him. He appeared to apologise for the incident on 10th June 2017.

56. As concerns the incident on 11th June, the Claimant appears to concede he did not pick up the radio so as to avoid confrontation and that he was trying to avoid him [115]. Additionally, the Claimant said that he did not do anything on purpose and was sorry and that next time he would deal with the situation better [117].

57. The Tribunal is enjoined to find relevant facts. We don't have to decide the exact words that were used.

58. We note that Ms Gill concluded that the Claimant had said the words set out by Mr Saunders - albeit she took into account the fact that the Claimant had claimed that Mr Saunders had whistled and sung over the radio (Ms Gill did not see Mr Saunders as part of the process and may not have appreciated the significance of the evidence of Mr Etheridge) to him and so had not dismissed him but rather had given him a final written warning of indefinite length and transferred him to a different garage.

59. The foundation of Ms Gill's decision was that she was:

- (i) Concerned he would lose his livelihood;
- (ii) Persuaded the incident wouldn't be repeated; and
- (iii) Noted that this was the first time an allegation of making threats had been made.

In the disciplinary hearing, when asked why he leaned in so close to Mr Saunders, he said, "I'm not going in there" There isn't an explanation as to why this was whispered and it doesn't fit the narrative of somebody who has already been told to go home and has followed Mr Saunders back to the Office. Ms Gill believed it is likely that he subsequently said, "No I didn't say anything. Did I say that?" and that this was probably spoken with a mocking tone.

60. We conclude from all the surrounding circumstances (including the observed reaction of Mr Saunders seen by others on CCTV and that which appears above) that the Claimant threatened Mr Saunders.

61. As with Ms Gill, this means that we have preferred Mr Saunders's version of events over the Claimant's – being corroborated by other sources as it is.

Being issued with an indefinite final written warning by Miss Gill, on the instructions of Mr Gumbley

62. As stated above, the hearing was conducted by Ms Manpreet Gill. She concluded that all of the matters with which the Claimant had been charged were proved. For three of the matters, the Claimant was given a written warning that would expire after 24 months and for the fourth allegation (threatening behaviour), the Claimant was transferred to Hounslow Heath Garage and given a final written warning without limit of time.
63. Ms Gill took account of the fact that the Claimant had shown remorse and fully accepted that he had behaved unreasonably. She provided a fully reasoned decision which concentrated on the most serious incident. It was clear that she was influenced by the shocked reaction of Mr Saunders as observed on the CCTV footage. However, she was prepared to conclude that his conduct was not entirely professional either and hence the decision not to dismiss (she had not spoken to him).
64. We find that the decision at the conclusion of the disciplinary hearing was Ms Gill's own and that there is no evidence whatsoever that Mr Gumbley participated in that process.
65. The decision was subsequently confirmed on appeal, this process having been triggered by an email by the Claimant of 17th June 2017. That email says that the Claimant is appealing the decision of 15th June 2017 because in the investigation, Mr Gumbley stated that he doesn't have to prove what the Claimant said to Mr Saunders, he just has to believe it and he believed Mr Saunders over the Claimant (it seems likely that he was confused by the difference between the investigation and the disciplinary/decision-making part of the process). His "concern" is that it was, "humiliating, victimised, bullied, harassed and discriminating towards me. The reason why believe that is the case because is manners Mr Gumbley go about it and he takes Josh words for granted and he told me indirectly I'm lying" The nub of his complaint appears at the end of his email when he says, "He got believe over me and I don't, I'm not first driver is got problems with more than 20 driver he got issues with but he still got believe over me because he's controller and I'm just a driver. I feel embarrassed and humiliated by this situation and I was forced to move to Hounslow Heath without my consent which I find on inhuman treatment.
66. What is striking about this is that the Claimant's case is set out in pithy terms on one side of A4 and yet there is no mention of unfavourable treatment on grounds of race. To the contrary, the reason given for his treatment is status i.e. the fact that the Claimant is a driver and Mr Saunders is a Controller.
67. The Claimant was notified by letter dated 29th June 2017 that his appeal was unsuccessful. Reasons were given in an accompanying document. It is apparent that the General Manager found the decision to appeal the findings and decision on the allegation of failing to maintain headways and follow

instructions puzzling on the basis that the Claimant had admitted what he had done and apologised in the disciplinary hearing and apologised again in the course of the appeal [128].

68. As concerns the charge of threatening behaviour, it was noted that the challenge to this was that the Claimant simply did not make any threatening remarks and that the allegation was a fabrication. The General Manager concluded that Ms Gill was entitled to conclude as she did by way of findings on the conduct. The tone of the letter reveals some surprise at the leniency of the outcome (as opposed to dismissal) but noted that Ms Gill's decision was to be respected.
69. The Claimant then sent a further email on 14th July 2017 which the Respondents treated as a referral for a Special Review. The Claimant was dissatisfied with the way he felt Mr Gumbley preferred the account of Mr Saunders to that of the Claimant and the fact that Ms Gill had subjected him to a warning. He said that this was discriminatory because of his race.
70. The Review was dealt with by Mr Maurice Bulmer – whose evidence was unchallenged by the Claimant.
71. Mr Bulmer agreed to look again at this matter because of the fact that an indefinite written warning had been given. Mr Bulmer looked at all the relevant evidence including the CCTV footage. He noted that Mr Saunders appeared alarmed after the incident in which the Claimant leaned into him whereas he had been calm before then. He concluded that the Claimant should have been dismissed but noted that the terms of reference arising from the agreed procedure did not allow for this. He allowed the appeal against the sanction on a technicality. This is because the collectively agreed procedures meant that Ms Gill should have offered the Claimant the *option* of an indefinite warning as an alternative to dismissal rather than imposing it. The sanction was revised and a final written warning with a 24 month expiry period substituted for it.

Was the treatment less favourable than that afforded to his comparator, Clive Collacott, (white English) a fellow bus driver, in the same or similar circumstances. *The Claimant contends that between January and June 2017, his comparator swore at Nick Pearson, a radio controller, but was not suspended or subjected to disciplinary action. Instead, he was simply spoken to by management*

72. The tribunal concluded on the available evidence that this incident occurred in March 2017 and the Comparator, was swearing in the cab of his bus and this could be heard over an open radio channel by his controller. Bearing in mind that the Tribunal has already concluded that the Claimant is not a reliable historian, the Tribunal approached his evidence about this matter with caution. The Tribunal had the benefit of the official and contemporaneous record of this incident and preferred this account.

73. The Tribunal concludes that the driver in question was not swearing **at** the controller but rather was being overheard (swearing) by him. The driver in question was given words of advice [134]. This was very similar to a previous incident in which the Claimant had been spoken to regarding his attitude [71]. This is not comparable with the situation which pertained in relation to the Claimant.

74. The Claimant actions in threatening Mr Saunders on 11th June 2017 were entirely dissimilar from the situation that pertained to the comparator. This is simply a question of not comparing like with like. There is no evidence that the Comparator threatened anybody. This is just not a comparable incident.

Representations

75. The Tribunal received written submissions on behalf of the Respondents and heard oral submissions from both parties.

76. The Respondents stressed the fact that this was not a series of actions and they would contend that the earlier matters are out of time. They say that the Claimant was disciplined either for matters he admitted or for a serious incident in which the evidence supported a finding against the Claimant. There is no evidence that the disciplinary proceedings were in any way influenced by his race.

77. The Claimant contended that three employees of the Respondent had told lies about him and that Ms Gill had her statement fabricated. He never denied refusing to take calls from Mr Saunders, the reason was because every time he spoke to him he ended up on report.

Application of facts to the Law

78. The Tribunal found that the findings of fact that it had made above largely determined these issues. The Tribunal's conclusions were based on multiple accounts corroborated by independent or objective evidence or concessions made by the Claimant himself. It is striking that in submissions, the Claimant was forced by the factual matrix to contend that four employees of the Respondent were lying about him. The simpler conclusion is that they were giving an accurate account and the Claimant was mistaken.

79. The Tribunal concluded that Mr Joshua Saunders gave the Claimant perfectly conventional and reasonable management instructions in September 2016 and on 10th and 11th June 2017. The request for the Claimant to contact the Controller in September 2016 was in the normal course of his duties. It was a wholly unexceptional instruction. The refusal to respond was inexplicable. The Claimant was merely spoken to about his attitude. This response was completely normal. The fact that the Claimant himself could not say whether the incident was an issue of race is a clue that this is simply not a relevant factor.

80. If the background incident of November 2016 shows anything, it is that the Claimant's approach to receiving an instruction in September was not a one-off. The Claimant did not like to be given instruction and was quite capable of being confrontational about it.
81. The relevance of the conflict management course is that this largely rules out ignorance as an explanation for the Claimant's actions.
82. Mr Saunders did not instruct the Claimant to hold a bus for six minutes in an unsafe place but rather to hold for five minutes over the next three stops. Mr Saunders was not *constantly* calling the Claimant on 11th June 2017 and such calls that he made were not because he wanted to *wind him up* but merely because the Controller wanted to make the most normal of contacts to a driver in his role as a Controller. He had to ring a number of times because the Claimant was ignoring him.
83. The problem was rather that the Claimant did not want to follow instructions/engage with his controller over the radio. He did not want to comply with entirely conventional management instructions. The clue that it was because the Claimant did not respond to instruction/authority generally, is the conversation he had with Mr Etheridge. He did not respond to reasonable attempts to engage him in discussion about the issue in hand.
84. This was not conduct that has the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.
85. The sole purpose of the relevant interactions was to provide an efficient bus service to the public.
86. It is correct that subsequently, the Claimant has, on occasion, said that the actions directed at him were based on race but he has equally said that they were motivated by the fact that Mr Saunders is a Controller and he is a bus driver and that this is just a matter of status.
87. The reality is that treatment of him was normal and not in any way related with his race. Furthermore such conduct as he was subject to did not have the purpose or effect of creating an intimidating, hostile or degrading, humiliating or offensive environment. To the contrary, the relevant conduct had the purpose of creating an orderly and efficient work environment.
88. The only person who was made to experience an intimidating environment was Mr Saunders.
89. As a result of the Claimant's wrongdoing – which is largely admitted – the Claimant was then made the subject of a completely ordinary disciplinary

investigation which was conducted with care and admirable speed and with multiple layers of appeal.

90. Mr Gumley arrived at a reasoned conclusion that there was a prima facie case against the Claimant which required resolution at a disciplinary hearing. He preferred the account of Mr Saunders because it was corroborated by what he viewed on the CCTV – not because of the Claimant's race.
91. The Disciplinary Policy provided that an employee maybe suspended from work while a matter is investigated in serious cases. A serial refusal to obey reasonable instructions and a threat to another employee would certainly meet that criteria. The Respondents acted swiftly. This was not a case of a lengthy investigation.
92. On the basis of the evidence that had been gathered, the decision to invite the Claimant to a disciplinary hearing was completely unremarkable.
93. It is apparent that the way that the claim is phrased is that what the Claimant was complaining about in the disciplinary process was the final written warning for the offence of threatening Mr Saunders and the fact that it was given by Ms Gill on the instruction of Mr Gumbley. There is a total lack of support for the allegation that Ms Gill operated under the instruction of Mr Gumbley. It is unsurprising that the Claimant is not complaining about the lesser sanction he received for failing to maintain Headway and reasonable instructions. In fact the Claimant has apologies for this conduct.
94. As concerns the sanction for threatening Mr Saunders, as Mr Bulmer has commented, the most striking aspect of the decision that was eventually arrived at on that charge was it leniency.
95. Standing back from this case, it can be seen that the factual matrix which the Claimant asserted existed to support his claim of harassment did not exist – or has been distorted. As concerns the Claim of unlawful direct discrimination, it is correct that the Claimant was subject to the treatment as alleged (save for the decision to give a final written warning under the instruction of Mr Gumbley – which was not made out). However, these decisions were unremarkable/unexceptional. It is inapt to compare them with the treatment of the Comparator. As has been pointed out above, the Claimant is complaining that the Comparator was not subject of about an investigation, suspension, disciplinary process and sanction in the way that he was. However, the Comparator had only sworn on the open radio. The threats which the Claimant made and the conduct of the Comparator and not the same. This is a matter where he is seeking to compare matters that are simply not alike. Having examined the matter exhaustively, the Tribunal concludes that the actions of the Respondents were occasioned by his conduct and the evidence that was available and was completely unrelated to his race.

96. As a consequence, the Tribunal concludes that the claim of unlawful harassment and discrimination because of his race is not made out

Employment Judge MJ Downs
Date: 31 August 2018