EMPLOYMENT TRIBUNALS

Claimant:	**Mr N. Didi**
Respondent:	**London Underground Ltd**
Heard at:	**East London Hearing Centre (by video (CVP))**
On:	**26-28 April 2022; and 16 May 2022 (in chambers)**
Before:	**Employment Judge Massarella**
Members:	**Mr K. Rose Ms S. Jeary**

Representation

For the Claimant:	Mr J. Hitchens (Counsel)
For the Respondent:	Ms V. Brown (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

1. **the claim of trade union detriment at Issue 8.1 of the agreed list of issues is dismissed on withdrawal;**

2. **the Tribunal lacks jurisdiction in respect of the claims of trade union detriment at Issues 8.2, 8.3 and 8.5 because they were presented outside the statutory time limits in circumstances where it was reasonably practicable to present them in time;**

3. **the Tribunal lacks jurisdiction in respect of the claim of harassment related to race at Issue 10.1, and the claims of victimisation at Issues 14.1 to 14.3 and 14.5, because they were presented outside the statutory time limits and it is not just and equitable to extend time;**

4. **the claims of trade union detriment at Issues 8.4 and 8.6 are not well-founded and are dismissed;**

5. **the claims of victimisation at Issues 14.4 and 14.6 are not well-founded and are dismissed.**

REASONS

This has been a remote hearing, by video, which has not been objected to by the parties. A face-to-face hearing was not held, because all the issues could be determined in a remote hearing.

Procedural history

1. The claim was presented on 2 October 2020. The ACAS early conciliation period took place between 18 August and 2 September 2020. A preliminary hearing was held on 11 February 2021 before EJ Reid, who approved an agreed list of issues (see the appendix to this judgment). The Respondent lodged amended grounds of resistance on 28 April 2021.

The hearing

2. By agreement, the hearing took place by video (CVP). A lack of judicial resources meant that it was reduced from four days to three. Counsel agreed that evidence and submissions could be completed within that time. The Tribunal listed an additional day for deliberations.

3. We had a bundle of over 900 pages, which was disproportionate to the issues. We asked Counsel to remind instructing solicitors of the importance of producing a manageable bundle of documents, tied strictly to the issues in the case and without duplication. We emphasised that, unless we were specifically asked to read a document, we would only consider documents to which we were taken in cross-examination or closing submissions.

4. Mr Hitchens (Counsel for the Claimant) confirmed that all allegations were made solely against Ms Sue Lofthouse, the Respondent being vicariously liable for any acts or omissions found to have been done by her.

5. We heard evidence from:

    5.1. the Claimant;

    and for the Respondent from:

    5.2. Ms Lofthouse (Head of Circle, Hammersmith and District Line Customer Services);

    5.3. Ms Mary North (Head of Resource and Capability Planning for TfL Engineering at the time).

6. Before hearing evidence, I reminded witnesses of the importance of focusing on the question asked and giving reasonably concise answers.

7. Both Counsel made oral submissions, which we considered carefully in reaching our conclusions below.

Findings of fact

The Claimant's employment

8. The Claimant commenced employment with the Respondent on 28 October 1988 and he remains employed. From January 2014 he worked as an area manager ('AM') for Turnham Green, based at Chiswick Park station. His area also included Gunnersbury, Kew Gardens and Stamford Brook; none were classified by the Respondent as large stations.

9. The Claimant was elected as a Unite the Union ('Unite') representative in 2015. In around September 2017, Ms Lofthouse became his line manager.

10. The Claimant was released to full-time union duties between November 2017 and July 2018 to work on a consultation exercise on a restructure.

Performance rating

11. Performance appraisal usually took place in February for the previous 12 months. The Respondent graded employees' performance with scores of 1-5, with 3 as the default ('met expectations'); scores of 4 ('exceeded expectation') or 5 required exceptional performance in the relevant year. Scores of 3-5 led to an enhanced pay increase: the higher the score, the more the enhancement, although all pay rises in the material period were modest. The score was not confirmed until it had been moderated and finalised.

12. In 2015 the Claimant negotiated a funding arrangement with the local authority to the value of £500,000, with a further £50,000 if required, to help rearrange platform furniture for safety reasons. This was acknowledged by the Respondent as an exceptional achievement on the Claimant's part; he was the only AM to get such funding. The Claimant told colleagues about this success in an email sent on 2 July 2015.

13. The Claimant was given a 4 for 2017/18. However, that cannot have been because of this funding, which was secured two years earlier. Ms Lofthouse explained in her witness statement (para 27) that she awarded the 4 in 2017/2018 because the Claimant had been working hard with external stakeholders, including at Kew Gardens; he had delivered a number of things which she felt constituted exceptional performance.

14. In March 2018 Ms Lofthouse became Chair of the Managers Functional Council (MFC), the forum in which management and unions discussed specific issues relating to managers across the whole of London Underground. The Claimant attended on behalf of members.

Loss of operational license

15. Most AMs held what were called operational licences. Holding such a licence was not a requirement of the AM role, but it entitled AMs to open and supervise stations. It was occasionally useful for the Respondent, for example, to enable AMs to supervise stations during strikes. The requirement to maintain the license was strictly enforced, but the criteria were not onerous: the AM had to cover two shifts a year for a station supervisor and record them in a logbook; s/he also had to attend the Continuing Development Programme (CDP) each

year. The decision as to who should be permitted to hold a licence was in the hands of the Skills Development Team; it was not in the gift of Ms Lofthouse.

16. On 23 March 2018 an MFC, at which the TU representatives highlighted the need for AMs to have a training needs analysis. Mr Lofthouse agreed to take that forward. That resulted in a review of AMs' operational licences.

17. On 17 April 2018, Ms Lofthouse sent an email to all AMs, including the Claimant, reminding them of the training requirements. She wrote:[1]

> 'Currently there is a number of you who are sitting on expired CMS plans because no logbook evidence has been provided. Your CMS coordinator will contact you next week explaining what evidence is outstanding on your plan. Can I please ask that you provide them with the evidence that is required.'

18. On 9 July 2018, Mr Chris O'Leary (CMS coordinator, Skills Development) informed the Claimant that he was no longer licensed and should not carry out any operational duties. He was required to follow the 'Ambassador SS route' if he wished to reinstate his licence. This required him to enrol on a programme, consisting of a three-day training course, followed by a two-year probationary period. After the course, he would be required to supervise a station under the supervision of another manager, after which he could supervise smaller stations without supervision, recording the shifts in his logbook. At the end of two years, the operational licence would be restored. Similar restrictions were placed on other area managers; the Claimant was not singled out.

19. There were two differences between this and the Claimant's former position under the operational licence. Firstly, he could not supervise larger stations; this was not an issue because none of the stations in his area fell into this category. Secondly, he could not assess others; although this was not a core part of his role, the Claimant had chosen to do it as a matter of good leadership.

20. Later the same day the Claimant objected, stating that he had been released to undertake TU duties for the previous six months and that he had intended to go on CDP and do the shifts when he returned. He argued that it was 'part of the agreement offered to all the TU reps alongside me who undertake TU duties that whatever relicensing activities were required these would-be afforded'.

21. Mr O'Leary replied on 11 July 2018, suggesting that he contact Ms Lofthouse, which he did, saying that he would like to maintain his operational licence and asking her to advise what he should do. Ms Lofthouse replied, agreeing with Mr O'Leary's position, which was that the Claimant would have to go down the Ambassador route.

22. On the same day Ms Sue Joyce, another area manager (who is white and was not a trade union representative), wrote to Mr O'Leary, complaining about the same decision. She copied the Claimant into her email; he knew that Ms Joyce was being treated in the same way as he was.

[1] Original format retained in quotations from contemporaneous documents; corrections for sense are shown in square brackets

23. The Claimant wrote again to Ms Lofthouse on 17 July 2018, saying that in the last three years he had done the CDP and provided the logbook evidence required. Ms Lofthouse replied on 18 July 2018 that, if this was correct, he should be fine; she asked him to follow up with Mr O'Leary.

24. On 24 July 2018, Ms Lofthouse wrote to Mr O'Leary, asking him to look again at the Claimant's case in the light of the information he provided. Her email was supportive of the Claimant.

25. Later the same day Mr O'Leary replied to Ms Lofthouse, copying in the Claimant, saying that he was happy to take another look, and asking the Claimant to forward on the relevant documentation. He observed that he could only see two logbook entries on the relevant system. The Claimant replied the same day, confirming that was right and explaining that he had been due to undertake more station coverage, but was then released on full-time union duties. He said he had emailed Mr O'Leary to say that he would complete the other requirements on his return from trade union duties.

26. Mr O'Leary replied saying that he had spoken to his manager about the Claimant's case. The position was as follows:

> 'I have spoken to my manager – As these two records are the only evidence of managing stations over the past three years, ongoing competence has not been demonstrated. As mentioned before, attendance at CDP alone is not demonstrating ongoing competence. The LU safety case states that competence will be managed by CMS, you have not kept your competence up as per the requirements of CMS. As there is no process of renewing your competence via the AM route you need to follow the SS route […]'

27. On 3 August 2018, Mr O'Leary had an email exchange with Mr David Swygart of Employee Relations about the issue. Mr O'Leary explained the position in some detail, which was as follows.

    27.1. The Claimant's AM CMS plan had, in fact, expired on 5 July 2017, several months before his release on full-time union duties in November 2017.

    27.2. There was a requirement to attend CDP twice in the two-year plan; the Claimant had only attended once.

    27.3. There was a requirement carry out at least four operational shifts and to record this in a logbook; only two logbooks were provided by the Claimant out of the required four.

28. He acknowledged that there was an agreement for seconded union representatives to be given time to return to the business to have the required assessments carried out so as to maintain own operational competence, but the Claimant's plan had already expired before his secondment began. We observe that the Claimant's evidence in his witness statement that 'I had not been able to complete the requirements because I was carrying out full-time trade union duties' was, therefore, factually incorrect.

29. It later emerged that the Claimant had been reminded by Mr O'Leary in May 2017 that his licence would expire in July 2017.

30. On August 2018, Mr Swygart sent an email to Mr O'Leary and others, copying in Ms Lofthouse, giving his view about the requirement that the Claimant go through the Ambassadors process:

> 'I will be open and express that this seems excessive given the individual in no less competent than they were prior to cancellation of the AM licence and by restricting the activities they can undertake we appear to be creating our own resourcing challenge. Having said that I respect the decision [and] will communicate as much to Nawal.'

The Claimant's grievance in August 2018

31. The Claimant raised a grievance on 13 August 2018. He sent it to Mr Marc Whitworth, who asked Ms Lofthouse to deal with it. The Claimant explained in the email the steps he had taken to try and resolve the situation and concluded by saying that he was being disadvantaged for undertaking his duties as a trade union representative.

32. The Claimant and Ms Lofthouse discussed the issue at a meeting on 15 August 2018. Ms Lofthouse said she would look into it again.

33. On 3 September 2018, the Claimant sent an email to his TU branch secretary, in which he stated that: 'I am the only Rep that is being treated differently. I am the only Rep who is non-white'. Ms Lofthouse did not see this email at the time; it is not relied on as a protected act.

34. By email dated 6 September 2018, Ms Lofthouse wrote to Bernie Moran of Skills Development to ask for an exception to be made for the Claimant because he had been under the impression that he did not have to complete the requirements until he returned from TU release at the end of summer. We find that Ms Lofthouse was being supportive of the Claimant.

35. Her request was not acceded to and, by email dated 26 September 2018, Ms Lofthouse confirmed to the Claimant that he would have to go through the Ambassador process. She set out the chronology which Mr O'Leary had clarified to her, which showed that the Claimant's licence had expired before his assignment to full-time TU duties.

The protected act on 2 October 2018 (Issue 12.1)

36. The protected act relied on by the Claimant is his email of 2 October 2018, appealing this decision. At the end of the email he wrote:

> 'I remain currently the only rep involved in the consultation, who was previously licensed and is now NOT.
>
> I also am the only rep involved in transformation, who this has been done to.
>
> I am the only rep who is non-white.
>
> I am the only one who has had to submit a formal grievance.'

37. The Claimant agreed that when he wrote this, he knew that Ms Joyce, who is white, was being treated in the same way.

38. By email dated 23 October 2018, Ms Lofthouse confirmed that the position had been reviewed in relation to all AMs. She identified four managers, including the Claimant, who had completed and submitted some logbooks and CDP, and specified what each of them would have to do to renew their licence without going through the Ambassador process. In the Claimant's case (and one other AM), he had to undertake CDP by 4 December 2018 and he would be enrolled onto a plan once completed. By the time this decision had been taken, the Claimant had contacted ACAS with a view to commencing Tribunal proceedings. However, in the event he did not pursue that route and withdrew his internal grievance.

39. Ms Lofthouse's evidence was that these discussions about the operational licence had no impact on her relationship with the Claimant and that she had forgotten about the issue until reminded of it much later.

Further periods of release for TU duties

40. In November 2018, the Claimant was given two days per week release so that he could represent Unite in a further consultation about reorganisation. This lasted until mid-March 2019. From 25 March 2019 until 13 January 2020, the Claimant was released on full-time union duties. Ms Lofthouse agreed to both releases.

The email exchange with Mr Howard in November 2018

41. From 20 November 2018, and over the next few days, there was an email exchange between the Claimant and Mr Stuart Howard (Lead Operational Delivery Manager) about a safety issue at Kew Gardens station underpass. Mr Howard thought there were some dangerous, slippery tiles at the bottom of the steps.

42. The tone of Mr Howard's emails was courteous and professional, indeed at times quite jovial. He finished one of them:

> 'I apologise if I am infringing on your role as the Area Manager here, but I am very concerned about this risk and would like to support you in resolving this issue in any way I can.'

43. The Claimant's tone during exchange had been equally pleasant and professional, until it suddenly changed in response to this email. In a reply dated 28 November 2018, he wrote:

> 'Stuart
>
> I find your actions demeaning and insulting and frankly undermining. I have taken the actions that I have. Do what you must.
>
> Nawal Didi.'

44. The Claimant explained in cross-examination that this was a long-running issue, and that he had previously organised for the tiles to be replaced and tested. He had explained this to Mr Howard in their exchange and could not understand

why Mr Howard was intervening in this way. He accepted that, in hindsight, he might have expressed himself differently, although he denied that he had lost his temper.

45. There were then follow-up emails between the Claimant and Mr Howard, which they copied to Ms Lofthouse. Mr Howard's emails remained courteous and restrained, although the Claimant found them condescending. He told Mr Howard that he thought he was stirring and asked Mr Howard not to contact him again. Mr Howard replied again, at which point the Claimant ended the exchange as follows:

> 'Stuart
>
> Which part of: 'on this matter, I suggest you do not contact me again – my comments made earlier to you still stand'.
>
> Would you for me to explain to you further.
>
> Nawal Didi.'

46. In cross-examination, the Claimant agreed that, in hindsight, this email was unprofessional.

47. On 3 December 2018, he emailed Ms Lofthouse, complaining further about Mr Howard's intervention, ending as follows:

> 'putting aside any issues with Stuart, and what potentially may be seen as bias from me, can I suggest you ask Phil Flint to attend, preferably on a wet day so that he can independently advise if he sees it as "an accident waiting to happen."'

48. Mr Flint was the safety adviser for the District line. The next day Ms Lofthouse wrote to the Claimant saying that she had emailed Mr Flint and asked him to undertake an independent assessment. She had also spoken to Mr Howard and told him that they were taking his concerns seriously. She asked Mr Howard to direct future concerns to her.

49. The Claimant's evidence to the Tribunal was that the only reason he had suggested bringing in Mr Flint was because, when they had had a conversation earlier, Ms Lofthouse did not believe him when he told her that there was no safety risk, whereas she appeared to believe Mr Howard, who is white. We note that there was no reference to this in his email of 3 December 2018.

50. This was a difference of opinion between two managers, which Ms Lofthouse could not resolve herself. The Claimant made a sensible suggestion as to how a third-party (Mr Flint) might help to resolve it, which Ms Lofthouse gratefully adopted. On the balance of probabilities, we do not accept that the Claimant suggested bringing in Mr Flint because Ms Lofthouse disbelieved him, nor that her response was tainted by considerations of race. What did emerge from this incident, is that the Claimant was very status-conscious and responded to a perceived slight in a volatile, and somewhat inappropriate, way, a pattern which was repeated just over a year later, as we will go on to describe.

The email exchange with Mr Hatch in January 2020 (alleged protected act, Issue 12.2)

51. On 21 January 2020, Mr Hatch (a member of the Community Partnership team for TfL) contacted the Clamant regarding attendance at a station action group meeting in Gunnersbury. Councillors and members of the public had raised some concerns about the station, some of which had been raised in writing in November 2019; the Claimant had forwarded them to Mr Simon Mudd (Customer Service Manager, Turner Green area) to deal with. Shortly before the meeting, Mr Mudd wrote to Mr Hatch saying that he would not be attending the meeting, essentially because it was not convenient for him.

52. Mr Hatch sent the following email to the Claimant and Mr Mudd:

> 'Morning Simon
>
> I invited you to this months ago, on 18 November! At no point have you indicated you wouldn't or couldn't attend.
>
> Nawal: I asked you for LU support at this meeting months ago too. I find it unacceptable that I will now be going in alone to answer LU Operational queries on your behalf… and that I'm finding this out to days before.
>
> Kind regards

53. Mr Mudd replied in a conciliatory manner and said that he would attend the meeting with Mr Hatch, although he would have to rearrange his schedule. Mr Hatch responded that he appreciated Mr Mudd moving things around and explained 'there will just be questions I can't satisfactorily answer, which would have only made the stakeholders angrier'.

54. Just over an hour later, the Claimant wrote to Mr Hatch, copying Mr Mudd in:

> 'Andrew just reading this message now, you[r] accusations on asking me months ago is rather hollow as you will no doubt be aware that I was doing other things in the organisation, I returned last week.
>
> From what I have seen in regards to exchanges between yourself and Simon I observed that all the questions that have been directed have been answered satisfactorily. I'm not sure what else the expectation would be?
>
> The main gripe that these folk have and stem from are the lack of the platform improvements that were promised and never materialise[d], which I was getting done 2 and half years ago, and which sadly LUs internal bureaucracies impeded – these stakeholders have been promised, that it'll happen tomorrow, then tomorrow, then tomorrow, then tomorrow; tomorrow sadly has never come.
>
> I have personally given those assurances to the stakeholders, and on that last occasion I received assurances from the customer services director himself that this would proceed – now I'm led to believe that this won't happen either. So in reality what do you expect from us? LU/TFL has specifically your roles in place to address matters such, so lets just let it rest there.

> Happy to further clarify any points that I'm in a position to answer but don't start swinging accusations, I'm not your coolie.
>
> Nawal.'

55. The Claimant's evidence at Tribunal was that it was Mr Hatch's use of the term 'unacceptable' which was the trigger for his use of the term 'coolie'. The Judge observed that the term 'unacceptable' seemed to be directed at both the Claimant and Mr Mudd: Mr Hatch was criticising both of them for not attending the meeting, leaving him to hold the fort alone. The Claimant acknowledged this.

56. Mr Hatch responded with an email later the same day which began:

> 'I don't know what a 'coolie' is, but I do not appreciate receiving such an unprofessional email.'

He continued:

> 'Simon has indeed provided answers to all of the queries and complaints so far – and for this I am grateful and have never hid my gratitude – but the stakeholders we will be meeting on Thursday will expect to speak about these in more detail than has been provided. We – LCP – are here to engage meaningfully with TfL's Borough stakeholders. We are not here to act as body armour to shield areas of the business which are not prepared to account for their own performance. I wouldn't expect you to attend a meeting to defend TfL's road safety record.
>
> I suggest you think before you send another emotional email – it's hardly asking too much to expect the manager of the staff at Gunnersbury station to turn up to a meeting to account for the poor behaviour of those same staff.'

57. Later the same day Mr Hatch wrote to Mr Iain Killingbeck to say that he had just looked up the word 'coolie' and discovered that it was regarded as a racial slur in some parts of the world. He expressed anger at being accused of racism and asked for the matter to be 'officially raised'.

58. Absent any independent evidence before us as to the precise meaning of the term 'coolie', and with the agreement of parties, the Tribunal consulted the Oxford English Dictionary definition, which (so far as is relevant) is as follows:

> '1.a. In India and (later also) China: a hired labourer (esp. one employed by a European); a porter (now esp. in a railway station). Hence also: an Asian labourer working abroad (now chiefly *historical*).
>
> […]
>
> b. O*ffensive* (chiefly *derogatory*). An Asian person, a person of Asian descent; *spec. (a) U.S.* a Chinese person; an East Asian; *(b) South African* and *Caribbean* an Indian; a South Asian.
>
> […]
>
> 2. *slang*. A person of low (social) status. Also: a soldier. *Obsolete*.'

59. We concluded that the word is capable of being used in several different senses: as a racial slur; to suggest low social status, without reference to race; and, without any racist or derogatory connotations, to describe a worker. All depends on the context and the intention of the speaker.

60. Ms Lofthouse phoned the Claimant on 6 February 2020 to say that Mr Hatch's manager had contacted her to complain about the Claimant's use of the word 'coolie': Mr Hatch considered that he was being accused of racism.

61. There was a sharp conflict of evidence between the Claimant and Ms Lofthouse as to what the Claimant said in reply.

62. The Claimant's evidence was that he confirmed that he was indeed suggesting that Mr Hatch had treated him in a racist manner: he told Ms Lofthouse that Mr Hatch's email 'made him feel as if he was a luggage carrier in the days of the Raj.'

63. Ms Lofthouse's evidence was that she specifically asked the Claimant if he was suggesting that Mr Hatch was being racist and he said no; indeed he wanted to clarify that he was not calling Mr Hatch a racist; he explained that he was accusing Mr Hatch of talking down to him and treating him 'like a lackey'. He did not mention the Raj. Ms Lofthouse says that she fed that back to Mr Hatch's manager.

64. Both agree that Ms Lofthouse suggested that the Claimant apologise to Mr Hatch and that the Claimant refused to do so. For obvious reasons, they disagree as to what precisely she was asking him to apologise for.

65. On the balance of probabilities, we accepted Ms Lofthouse's account. We find that the Claimant was using the word 'coolie' to mean someone of a lower social station, without racial overtones. We reached that conclusion for several reasons.

66. Firstly, and most significantly, the Claimant drafted an email the same day to send to Ms Lofthouse, summarising their discussion. In the end, he decided not to send it to her but sent it to his own email account. It was thus a private document, in which he had no reason to be anything other than frank. He wrote:

> 'I reasserted that, that is how it made me feel and the content of his email was directive of someone chastising an underling and I responded to Andrew on how he was projecting himself to me, and that I do not retract the use of the word […] I continue [to] maintain my professional dialogue and interaction but will challenge again any unreasonable behaviour to me.'

There was no reference to racism in the email, and no reference to the Raj.

67. Secondly, although the Claimant raised this incident in his written grievance of July 2020, he did not allege then that Mr Hatch's email had been racist and did not mention the Raj. He wrote:

> 'There was even an occasion where I was told by Sue Lofthouse to apologise to another TfL employee because I had asked them to stop

> treating me like an underling/lackey and specifically not to treat me like a 'coolie' – an unskilled labourer/luggage carrier.'

68. Thirdly, in his appeal against the grievance outcome, dated 4 June 2021, the Claimant did not allege that Mr Hatch was motivated by race.

69. Finally, Mr Hatch did not take his counter-complaint about the Claimant any further; they continued to work with each other without antagonism. Given the vehemence of Mr Hatch's initial response, when he thought he was being accused of racism, we are certain that this would not have been the case, had Ms Lofthouse confirmed that the Claimant was indeed accusing Mr Hatch of racism. We also accept Ms Lofthouse's evidence that she would have proceeded very differently, if the Claimant had said he was making an allegation of racism; apart from anything else, she would not have suggested that he apologise.

<u>The performance ratings for 2018/19 and 2019/2020 (Issues 8.2, 8.3, 14.2 and 14.3)</u>

70. On 18 March 2020, Ms Lofthouse had a meeting with the Claimant, at which she notified him of his performance ratings for 2018/19 and 2019/20. He was scored a 3 for both years. He was unhappy with these scores and asked what the rationale was. The delay in providing the rating for the first of those years was because there had been ongoing pay discussions at a higher level, which the Claimant was aware of, which prevented scores being finalised and communicated in the usual way.

71. As for 2018/19, the Claimant had been on part-time trade union release for some of the year, but his score was based on the work he had undertaken. The Claimant's evidence was that he had provided Ms Lofthouse with a 'pack in March/April 2019 detailing my successes'. There was no evidence of such a pack: the Claimant did not provide it to Ms North when she was investigating this issue as part of the Claimant's grievance, nor were we taken to it in the course of the hearing.

72. As for 2019/2020, Ms Lofthouse told the Claimant that his score of 3 was because he had been on full-time TU release for that year (bar one month). Her evidence was that 3 was the default score for anyone absent from the organisation for the relevant year, whatever the reason (maternity leave, long-term sickness absence, full-time trade union release etc.). That position was reflected in an email dated 10 December 2020 from Mr Martin Boots (Head of Employee Relations) to Ms North, who later investigated this issue:

> 'It's my understanding (certainly in TfL) that any rep on full time release would get a 3 performance rating, and that any release less than full-time would be based on their delivery of their substantive role, but that a rep should not suffer a detriment because of being on union release and not performing their substantive role in full or in part during the year.'

<u>The pandemic and the first lockdown: arrangements for working from home (Issues 8.4 and 14.4); alleged delay in dealing with concerns raised by the Claimant (Issues 8.5 and 14.5)</u>

73. In February 2020, concerns about the Covid-19 pandemic became widespread. The first national lockdown in the UK was announced on 23 March 2020 and

started on 26 March 2020. We remind ourselves that, although we are now accustomed to the idea of lockdowns and mass working from home, at the time these were unprecedented events; government guidelines, which were not always easy to interpret (apparently even for those in government) were changing all the time. It was an exceptionally challenging time for employees, but also for employers and senior managers, such as Ms Lofthouse, who had to implement the guidelines.

74. The Claimant's mother has lived with the Claimant since his father died. On 28 February 2020, he had a conversation with Ms Lofthouse, in which he mentioned her. In his witness statement he states:

> 'I raised concerns with Sue Lofthouse regarding the well-being of my mother, who has a number of serious medical concerns […], and who I lived with'.

We note that the Claimant does not state that he asked Ms Lofthouse if he could work from home because of those concerns. We accept Ms Lofthouse's evidence that he made a general enquiry as to whether working from home was an option at that stage but did not specifically ask if he could do so. In any event, this was nearly a month before the first lockdown and the Respondent was not offering the option of working from home at that stage.

75. On 17 March 2020, by which time the pandemic was gathering pace, the Respondent issued its first guidance for line managers. It contained the following passage:

> 'Reasons to self-isolate
>
> - Employees who can work from home should do so. They should let you know that they are doing this.
>
> - Employees over 70 years old, or who are vulnerable – currently defined as anyone whose doctor asks them to have a flu jab annually and anyone who is pregnant – should speak to you to let you know about their health conditions as soon as they're able to do so. Please note this is the current definition of a 'vulnerable person' and is subject to further clarification. This will help make sure we can support them when Government advice around shielding these individuals from all non-essential contact comes into effect on the weekend of 21 March 2020
>
> - If you live with someone who is vulnerable, current arrangements continue to apply. Please refer to the relevant time off for dependent arrangements.'

76. It is clear from the third bullet point that, at this point, no additional arrangements had yet been put in place for employees who were shielding vulnerable relatives.

77. On 18 March 2020, the Claimant emailed Ms Lofthouse, asking about shielding:

> 'I have a query that was posed to me yesterday, what happens to those staff that have elderly (parents) over 70s who they take care of in their own

> homes and also have pre-existing conditions? Should the staff be allowed to self-isolate?'

78. The Claimant says that he was talking about his own situation in this email; Ms Lofthouse says she did not read it in that way. We find that he was not. The language of the Claimant's email clearly suggests that he was passing on a query on behalf of someone else. Further, he had had a meeting with Ms Lofthouse the same day (to discuss his end of year review scores). There is no reason why he could not have brought up his own situation then; nowhere in his statement does he say that he did so.

79. Ms Lofthouse replied later the same day:

> 'We are waiting for guidance on that. We've been getting a lot of those queries across the network about those living with over 70s or those with underlying medical conditions. Hopefully we'll get something soon.'

80. About an hour and a half later, there was a meeting of the MFC, chaired by Ms Lofthouse and attended by the Claimant. The Claimant is recorded as saying:

> 'ND stated that there would be some managers that will not agree with working from home. What is the position on that? SL confirmed that the expectation is to work from home if you can do this. ND stated that Endeavour Square was 80% full on Monday and people are not wanting to work from home. There are some managers that have said this is not allowed and is also perceived as being weak. What if people have not got the facility to work from home? SL stated that employees are able to request laptops if they do not have the facility to work from home.'

81. We find that the Claimant did not say anything about his own situation at this meeting, nor did Ms Lofthouse respond dismissively or say that the Respondent would not allow managers such as himself to work from home. On the contrary, Ms Lofthouse was encouraging home working.

82. The Claimant's evidence was that the availability of working from home was confined to managers working at head office (Endeavour Square). We do not accept that evidence. If that were the position, and the Claimant was dissatisfied with it, we would have expected him to raise it. He did not do so; he raised an entirely different, more general, concern.

83. Ms Lofthouse's attitude remained the same at the next MFC meeting on 20 March 2020, offering to follow up personally on the case of an employee's line manager who was not being responsive about arrangements for working from home. Towards the end of the meeting, the Claimant asked for further clarification for those employees living with/looking after vulnerable people at home. Ms Lofthouse accepted in cross-examination that the Claimant probably had his own situation in mind, but she did not make the connection at time. We accept that evidence.

84. Later the same day, the Claimant sent Ms Lofthouse an email, reminding her ('for reference and response') of two issues raised at the earlier meeting, of which the second was the need for specific guidance for employees who had vulnerable dependents in their households who required active care. He suggested that there was inconsistency between the Respondent's current

position and Public Health England guidance. Again, he did not mention his own situation. The communication was temperate and professional; no one reading it would understand from it that the Claimant was raising the alarm on his own account.

85. On 24 March 2020, Ms Lofthouse responded by inserting responses into an email received from Mr Wood, a TSSA representative (who had raised essentially the same issue), copying in the Claimant. She explained that those who were extremely vulnerable should not leave their homes and should minimise non-essential contact with other members of their household, who should stringently follow PAG guidance on social distancing. She concluded:

> 'if an employee needs time to deal with unforeseen circumstances for a dependent at home who is elderly or vulnerable, they can apply for paid leave of up to 5 days.'

86. The Claimant accepted that this was a reasonably prompt reply to a query which he had raised four days earlier. He did not apply for paid leave. At an MFC meeting the same day, the notes confirm that TU representatives had received the response to the enquiry about staff living with vulnerable family members and would refer it to their full-time officers for further discussion.

87. The notes also record a more general discussion about working from home. Ms Lofthouse again emphasised that the Respondent was very flexible about working hours and understood that staff would be balancing childcare, schooling and work. The notes record that middle-managers were working from home 'in unprecedented numbers.' The Claimant continued to maintain that this only referred to managers at Endeavour Square. However later in the same notes, there is a specific reference to managers such as himself, who were referred to as 'Centurion Managers':

> 'TU reps asked what proportion of Centurion Managers we have working from home at present and what is being done to facilitate them working from home. SL explained that on Stations she has been working with Brian Woodhead and the HoCs to establish more specific guidance on working arrangements can be shared within the next few days she can touch base with Nick Dent to ensure there is consistency with Line Operations as well. CAL said the guidance is clear and that if an individual's job can be done from home they should have a discussion with their Line Manager.'

88. The agreed action resulting from this discussion was:

> 'SL to ensure there are clear guidelines for Centurion managers working from home.'

89. It is implicit in this that at least some Centurion Managers were working from home; if that were not the case, both the original question and the agreed action would have been differently framed.

90. On or around 28 March 2020, the Claimant moved out of his home to reduce the risk of infection to his mother. He included this in his witness statement, without explaining that he had moved next door - to an unoccupied property, which he owned. He did not tell Ms Lofthouse that he had moved out until nearly two months later.

91. A further MFC meeting took place on 31 March 2020, when further guidance on Centurion Managers working from home was given:

> 'Centurions should balance the need to be in work and working from home to ensure that they are aligning with government advice. There are certain tasks involved in leading a team that need to be done from the workplace which are especially critical from a reassurance perspective during this time and/or when there is a need to fill in operational role, however there are also tasks that can be done remotely at home – this should be managed by the individual in line with the government advice. If there are any concerns, then they should speak to their Head of [*sic*].'

92. The Claimant accepted that it was clear by this point that Centurion managers should work from home whenever possible. He did not do so.

93. On 31 March 2020, the Claimant forwarded on to Ms Lofthouse the email he had sent on 20 March 2020, asking about shielding. Ms Lofthouse replied, apologising, and saying that she thought she had already answered the query. She asked the Claimant if he wanted her to respond in writing. He replied:

> 'You did answer, though the advice on the high-risk relative has now changed, but it was more to say that the FTO was expecting a written response to the questions posed.'

94. Ms Lofthouse replied:

> 'The latest management guidance now covers those living with people who fall into vulnerable category who are not able to work from home. The guidance has been updated today.'

95. Ms Lofthouse copied in the updated guidance on shielding, which was as follows:

> '- if the employee is well and able to work from home because their role allows it – they will receive contractual salary as normal.
>
> - if the employee is unable to work from home they should social distance and following discussion with you and evidence that someone at their home addresses is shielding, they can request Special Leave with Pay for a minimum of 12 weeks …'

96. The Claimant knew at this point that he could either work from home, if appropriate, or request special leave with pay for a minimum of 12 weeks. We find there was no unreasonable delay in dealing with this. Ms Lofthouse was consistently responding in a timely fashion to multiple issues in difficult circumstances.

97. On 9 April 2020, the Respondent published further guidance about shielding in the following terms:

> 'If your employee is living with someone who falls into the extremely vulnerable group, then you should discuss the situation with them to find out if they can work from home during the 12-week period. If they are unable to do so, and if requested by them, you can agree special leave with pay while the period of shielding is ongoing (currently this is for a

> minimum of 12 weeks). You will need to explain to the employee that this is subject to ongoing review as advice from the Government and Public Health England is updated regularly and is subject to change.'

98. It was suggested to Ms Lofthouse that she did not follow this guidance, because she did not approach the Claimant individually and explore these options with him; rather, she raised it with the team as a whole. We regard that criticism as unfair: in our view, the guidance did not put the onus solely on the line manager to initiate a dialogue; in any event, Ms Lofthouse had sent the guidance to the Claimant on 31 March 2020; there was nothing to prevent him asking for a meeting.

99. The Claimant's evidence was that he asked to work from home, but Ms Lofthouse would not agree; he said that he felt 'shunned and ignored'. We do not accept that evidence. If he had made a request to work from home which had been refused, and he was dissatisfied with that, the logical next step would have been to request special leave with pay, which he knew he was entitled to. He accepted that he did not do so. Moreover, the Claimant gave no evidence as to when exactly he made the request to work from home, nor what reasons Ms Lofthouse was said to have given for turning it down. We accept Ms Lofthouse's evidence that he had, in fact, told her that he felt it was important for him to continue coming in, as part of his leadership role. That is consistent with what we know about the Claimant: that he was a conscientious manager, with a highly developed sense of responsibility.

100. The Claimant's evidence in his statement was that he asked for a laptop, but that Ms Lofthouse denied the request. However, the documents to which the statement referred us do not contain such a request/denial. On the contrary, they relate to new arrangements for securing home delivery of laptops, with the Claimant emailing Ms Lofthouse on 3 April 2020 asking her for her cost centre and Ms Lofthouse providing it.

101. Having regard to the totality of the evidence, we are not satisfied that there was any substantial delay by Ms Lofthouse in dealing with queries raised by the Claimant in his capacity as a Unite representative between January and March 2020.

<u>Reduction of LUCC duties (Issues 8.6 and 14.6}</u>

102. On 26 May 2020, the Claimant's position changed dramatically. He emailed Ms Lofthouse as follows:

> 'Hi Sue
>
> I want you to know that I'm finding it difficult to cope with my current circumstances.
>
> As you know, I have raised with you my domestic situation, not only in the MFC but also during telephone conversations. I have advised that my mother is not only over 70, but also that she has a respiratory and heart condition. Previously you advised that special leave and use of AL was available – I took AL last week for that reason. At that time, as you could not provide any further support, I took the option to move out of my home to safeguard her health.

> As you know I also requested the use of a laptop at the time, because where I am living, I have no access to a computer – this is the reason why I have been repeatedly asking the people previously issued with laptops and who TfL has now furloughed should be asked to return them for use by those that are still working.
>
> This is the reason why up to now I have been continuously having to come to work.
>
> I would appreciate to know what options are available to me.'

103. We have no doubt that the Claimant was genuinely struggling at this point. He was under pressure in unprecedented circumstances, with the additional responsibility of looking after, and trying to protect, a vulnerable parent. He was right to tell his manager how he was feeling.

104. However, we make the following observations about this email. It is clear to us from the way the first sentence is phrased that the Claimant was telling Ms Lofthouse for the first time that he was struggling. Although he referred to having discussed with her his concerns about his mother's health, he did not say that he had asked to work full-time from home in order to shield her. The email gives the impression he had moved out of his family home the previous week, when he had done so nearly two months earlier. In the penultimate sentence, he explained that he had continued to come to work because of the lack of a laptop; he did not say that he had continued to do so because Ms Lofthouse had refused to allow him to work from home. By this stage, three of Ms Lofthouse's AMs were already working completely from home. The anomalies in the email caused us to approach it with caution.

105. The Claimant and Ms Lofthouse had a meeting later the same day, and she wrote to him early in the evening to confirm the position:

> 'Thank you for your email and for speaking to me earlier today. I'm really sorry that you are finding it difficult to cope with your current circumstances and I'm sorry to hear of your worry for your Mother and that you have had to move out of your home.
>
> In terms of working from home please do work remotely/from home from now. I have checked about access on the iPad and you should be able to get access to your desktop via Citrix workspace, you can download the app. This will mean you can use sharepoint etc […] I will follow-up on the surface pro/laptop tomorrow.
>
> With regards to the balance of TU and AM workload, hopefully, as you said, working away from the office will help give you space and structure but if there are any specific tasks that can't complete that you need assistance with please let me know and I will see what options there are to assist you.
>
> You did sound very stressed on the phone and, as discussed, if you feel that you are not well enough to be at work please do talk to me and you can take some time away. I know that you are very aware of counselling services and other support in place so do consider this too.'

106. The Claimant agreed that her response was prompt. He replied later the same evening:

> 'Thank you for your response. I appreciate that you have now allowed for homeworking to take place which was not previously made available.
>
> Just for clarity within our conversation, we discussed my current workload and the exponential escalation in the TU duties that I am also trying to balance, currently unsuccessfully. You stated that for you to go back to HR I would need to quantify what levels this was that. I cited to you that TSSA have 3 reps on the MFC, Unite, I am the only one. So work distribution to consider TU items and impact related to Covid are disproportionate on me. Furthermore, of the 3 reps, two are furloughed allowing them the breadth and spectrum of time to focus on what is required of them as TU reps. This currently which I am denied, and which you suggested rationale for.
>
> You are also aware that not only am I currently undertaking the MFC workload but I am also tasked by the FTO to the LUCC issues as well. You will know, that most if not all attending the LUCC are full time release reps, if not furloughed, you suggested that it might be an option to draw back on some of those duties. I have written to my FTO following our call and asked to be withdrawn from the LUCC involvement.
>
> […]
>
> You are correct, I feel and am under a great deal of stress, you have offered time if necessary. I think that will be of great benefit to me currently. Can you advise on what you mean by that.'

107. In relation to the first sentence of the Claimant's email, he accepted in cross-examination that, in fact, he had known that homeworking had been available for several weeks before this exchange of emails.

108. At the meeting on 26 May 2020 the Claimant had asked to be released on full-time TU duties. Ms Lofthouse said that she would look into this. The reference in the email to LUCC is to the London Underground Company Council. In their conversation Ms Lofthouse had indeed suggested to the Claimant that he might draw back from the LUCC duties. Representatives of any grade could attend these meetings, whereas MFC attendance was by representatives of manager grade (such as the Claimant) only.

109. As 09:23 the next day, 27 May 2020, Ms Lofthouse emailed Mr Montgomery (Systems Solutions) asking him to prioritise a laptop for the Claimant. She had already emailed him on 18 May 2020, before the Claimant told her he was struggling, asking if laptops could be redistributed from those who were on furlough to those still working, particularly AMs. She chased Mr Montgomery again on 29 May 2020 (twice) and on 31 May 2020 (a Sunday). By 1 June 2020, Mr Montgomery had agreed to assign one of the laptops which were on order to the Claimant.

110. Later the same day, the Claimant sent Ms Lofthouse a further email, summarising their discussion, reiterating his wish to be released on full-time TU duties and stating:

> 'Currently there are 2 [TU] meetings a week, nearly back to back, with very little time in between to assess the impact of discussions or to identify. I am not able to balance the requirements/need to undertake both TU and normal jobs at the same time. You suggested that I drop some of the TU duties, can I please ask why I am being asked to withdraw from these and release to undertake TU duties isn't being afforded, I am not aware of other reps having to justify their release during this time.'

111. Ms Lofthouse replied to him a couple of hours later. She explained that she had been chasing a laptop for him. She told him that she had emailed Mr Cheryl Bramich and Mr Terry Dellar about the possibility of full-time release for TU duties and was waiting to hear back from. On 1 June 2020, Ms Lofthouse informed the Claimant that Mr Dellar had refused the request because there was very little MFC/LUCC work between the meetings at that time and it was likely to reduce further. Consequently, in his view, full time release was not warranted.

Absence from work

112. The Claimant was off work from 27 May 2020, initially on special leave for five days, then on sickness absence, signed off by his GP. He was prescribed sleeping tablets on 20 July 2020; he undertook six sessions of counselling over an eight-week period from August 2020, arranged by his GP.

The grievance

113. The Claimant submitted a grievance on 19 July 2020. Initially, Mr Alan Scott (Head of Asset Systems and Reliability) was appointed to investigate under the grievance procedure. He conducted a fact-finding meeting on 6 October 2020, which resumed on 13 October 2020.

114. Because the grievance was clarified as containing allegations of harassment, Ms Mary North was later appointed on 19 October 2020 by Mr Warren McVeigh (Employee Relations Partner) to deal with it. Ms North was an accredited manager for harassment and bullying complaints and had received specific training. Since 2017 she had dealt with three or four such investigations each year.

115. Ms North met with the Claimant on 3 December 2020. At the beginning of the meeting he suggested to Ms North that she was 'doing this for a legal purpose. I think that you are being led possibly by the legal team – in terms of what the issues were'. Ms North explained that she was independent. The Claimant was reluctant to answer any further questions, even in respect of quite basic background matters, such as his working environment at Turnham Green. At one point he said that he did not want to answer questions because he found it 'demeaning'. Thereafter on several occasions he simply said: 'I do not see the relevance of this question, so I am not going to answer it'. He also declined to provide email evidence which Ms North asked for. His TU representative observed that the Claimant was under considerable stress, the clear implication being that this was affecting the way the Claimant was answering questions. In retrospect, the Claimant agreed.

116. Ms North conducted interviews with the following:

116.1. Mr Stephen Capewell (Employee Relations Risk and Governance Adviser) on 17 December 2020;

116.2. Ms Naomi Smith (Head of Customer Service for Metropolitan Line) on 5 January 2021;

116.3. Ms Lofthouse on 8 January 2021;

116.4. Mr Malcolm Bate (TSSA trade union representative) on 20 January 2021;

116.5. Mr Alan Wood (TSSA representative) of 22 February 2021;

117. The Claimant attended a case conference meeting on 8 February 2021. His company sick pay expired on 6 March 2021. Ms North provided to her grievance report, dated 29 March 2021, and sent it to the Claimant on 9 April 2021. She did not uphold his complaints.

118. The Claimant appealed the grievance outcome on 14 April 2021, asking for it to be reviewed. The Claimant was provided with a response to his grievance appeal on 23 July 2021. The appeal was not upheld.

The current position

119. The Claimant subsequently moved to Hatton Cross, where he has continued to work since November 2021.

The law

Victimisation

120. S.27 Equality Act 2010 ('EqA') provides as follows:

> **(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 all the allegation is made, in bad faith.**

121. The Tribunal must determine whether the relevant decision was materially influenced by the doing of a protected act. This is not a 'but for' test, it is a

subjective test. The focus is on the 'reason why' the alleged discriminator acted as s/he did (*West Yorkshire Police v Khan* [2001] IRLR 830).

122. In a leading case on the current law of direct discrimination and victimisation (in s.13(1) and s.27 EqA), *Chief Constable of Greater Manchester v Bailey* [2017] EWCA Civ 425, Underhill LJ held (at [12]):

> **"Both sections use the term "because"/"because of". This replaces the terminology of the predecessor legislation, which referred to the "grounds" or "reason" for the act complained of. It is well-established that there is no change in the meaning, and it remains common to refer to the underlying issue as the "reason why" issue. In a case of the present kind establishing the reason why the act complained of was done requires an examination of what Lord Nicholls in his seminal speech in Nagarajan v London Regional Transport [2000] 1 AC 501, referred to as "the mental processes" of the putative discriminator (see at p. 511 A-B). Other authorities use the term "motivation" (while cautioning that this is not necessarily the same as "motive"). It is also well-established that an act will be done "because of" a protected characteristic, or "because" the claimant has done a protected act, as long as that had a significant influence on the outcome: see, again, Nagarajan, at p. 513B.'**

123. As for the issue of bad faith, this was considered by the EAT in *Sadd v Southampton University Hospitals NHS Trust* [2019] ICR 311, *per* HHJ Eady QC, from whose judgment the following principles emerge:

123.1. bad faith involves a two-stage test: (1) is the evidence, information or allegation true or false; and (2) if so, was it given or made by the employee in bad faith (at [47])?

123.2. Whether something was given or made in bad faith means whether the employee has given the evidence or information or made the allegation honestly; bad faith has a core meaning of dishonesty (at [47]);

123.3. the more obviously false the allegation, the more an ET might be inclined to find that it was made without honest belief (at [50]);

123.4. in answering stage two of the test, while an employee's motive might play a role in that analysis, the primary focus is honesty (at [50]).

<u>Time limits in discrimination cases</u>

124. S.123(1)(a) Equality Act 2020 ('EqA') provides that a claim of discrimination must be brought within three months, starting with the date of the act (or omission) to which the complaint relates.

125. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated and ending with the day of the early conciliation certificate does not count (s.140B(3) EqA). If the time limit would have expired during early conciliation or within a month of its end, then the time limit is extended so that it expires one month after early conciliation ends (s.140B(4) EqA).

126. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. The leading authority on this provision is *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530, in which the Court of Appeal held that Tribunals should not take too literal an approach to determining whether there has been conduct extending over a period: the

focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs in which an employee was treated in a discriminatory manner.

127. The Tribunal may extend the three-month limitation period for discrimination claims under s.123(1)(b) EqA where it considers it just and equitable to do so.

128. Time limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified; quite the reverse (*Robertson v Bexley Community Centre* [2003] IRLR 434 at [23-24]. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. There are statutory time limits, which will shut out an otherwise valid claim unless the Claimant can displace them. Whether a Claimant has succeeded in doing so in any one case is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the Tribunal of first instance which is empowered to answer it (*Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 *per* Sedley LJ at [31-32]).

Trade union detriment

129. S.146 of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULR(C)A') provides:

> **146.— Detriment on grounds related to union membership or activities.**
>
> **(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—**
>
> **…**
>
> **(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so,**
>
> **…**
>
> **(2) In subsection (1) "an appropriate time" means —**
>
> **(a) a time outside the worker's working hours, or**
>
> **(b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union…;**
>
> **and for this purpose "working hours", in relation to a worker , means any time when, in accordance with his contract of employment …, he is required to be at work.**

130. The focus is on the employer's purpose, and not on the effect of its action or omission: *Department of Transport v Gallacher* [1994] IRLR 231, CA at [25-28] (this case dealt with predecessor provisions but has been confirmed to apply to s.146 TULR(C)A in *Bone v North Essex Partnership NHS Foundation Trust* [2016] IRLR 295). The Court held (*per* Neill LJ at [27]):

> **'In my judgment in this context 'for the purpose of' connotes an object which the employer desires or seeks to achieve. As Dillon LJ pointed out in *Associated British Ports v Palmer and others* [1993] IRLR 336 at p.339, 15, there is a close link between 'purpose' in s.23 and 'reason' in s.58 of the 1978 Act. Furthermore, it is to**

> **be remembered that the 'purpose' envisaged in s.23(1) is an illegitimate purpose which contravenes the statute.'**

131. The question of the employer's 'sole or main purpose' is a subjective question, to be judged simply by enquiring into what was in the mind of the employer at the time. More particularly, it must be the 'sole or main purpose' of the person or persons within the employer organisation who have committed the 'act' or 'deliberate failure to act' complained of (*University College London v Brown* [2011] IRLR 200 EAT).

132. The burden is on the employer to show its sole or main purpose for the impugned act or failure to act (s.148 TULR(C)A). However, the onus of proof should only pass to the employer once the claimant has established a *prima facie* case of unfavourable treatment on prohibited grounds which requires an explanation. The EAT set out a 'sensible structure' for tribunals approaching s.146 claims in *Yewdall v Secretary of State for Work and Pensions* UKEAT/0071/05/TM *per* Burton J at [23], as follows:

> **'(i) Have there been acts or deliberate failures to act by an employer? On this, of course, the employee has and retains the onus;**
>
> **(ii) Have those acts or deliberate failures to act caused detriment to the employee?...**
>
> **(iii) Are those acts in time?**
>
> **(iv) In relation to those acts so proved which are in time, where detriment has been caused, the question of what the purpose is then arises… there must be establishment by a claimant at this stage of a *prima facie* case that the acts or deliberate failures to act which are found to be in time were committed with the purpose of preventing or deterring or penalising i.e. the illegitimate purpose prohibited by s146(1)(b).'**

Time limits in trade union detriment cases

133. S.147 TULR(C)A provides that a Tribunal shall not consider a complaint under s.146 unless it is presented within three months of the act or failure complained of, or the last of a series of similar acts/failures, or the last day of an act extending over a period. Where the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, but it was presented within such further period as it considers reasonable, it may accept jurisdiction.

134. The 'reasonably practicable' provision for extending time has been considered in the context of unfair dismissal cases, where the same test applies. The Court of Appeal in *Palmer v Southend-on-Sea Borough Council* [1984] ICR 372 at [34] held that to construe the words 'reasonably practicable' as the equivalent of 'reasonable' would be to take a view too favourable to the employee; but to limit their construction to that which is reasonably capable, physically, of being done would be too restrictive. The best approach is to read 'practicable' as the equivalent of 'feasible' and to ask: 'was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?'

135. In *Walls Meat Co Ltd v Khan* [1979] ICR 52 at p.56, Denning LJ held that the following general test should be applied in determining the question of reasonable practicability.

> **'Had the man just cause or excuse for not presenting his complaint within the prescribed time limit? Ignorance of his rights – or ignorance of the time limit – is not just cause or excuse, unless it appears that he or his advisers could not reasonably have been expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences.'**

136. In the same case (at p.61), Brandon LJ drew a distinction between a Claimant who is ignorant of the right to claim, and a Claimant who knows of the right to claim but is ignorant of the time limit:

> **'While I do not, as I have said, see any difference in principle in the effect of reasonable ignorance as between the three cases to which I have referred, I do see a great deal of difference in practice in the ease or difficulty with which a finding that the relevant ignorance is reasonable may be made. Thus, where a person is reasonably ignorant of the existence of the right at all, he can hardly be found to have been acting unreasonably in not making inquiries as to how, and within what period, he should exercise it. By contrast, if he does know of the existence of the right, it may in many cases at least, though not necessarily all, be difficult for him to satisfy an industrial Tribunal that he behaved reasonably in not making such enquiries.'**

Conclusions: protected acts

Issue 12.1: 'In an email of 2 October 2018 appealing his grievance outcome, point out that the Claimant was "the only rep who is non-white", and all other representatives had been given support to maintain their licence and that he was left "with no other option but to escalate, with the possibility if not internally resolved then externally"'

137. The email plainly contains an allegation of discrimination and suggests that the Claimant might bring Employment Tribunal proceedings. Subject to the bad faith argument, it is a protected act.

138. The Claimant knew, when he made the allegation, that Ms Joyce, who is white, had been treated in the same way as him (para 22). In cross-examination, he confirmed that he had been alleging that Ms Lofthouse had treated him in this way because he was not white. Asked whether he maintained that allegation, in view of Ms Joyce's treatment, he replied 'I'm not sure'.

139. Ms Brown (Counsel for the Respondent) submitted that the allegation was false and made in bad faith. She argued that, in circumstances where the Claimant no longer alleged that the reason for the treatment was union-related, and he knew that at least one other AM (Ms Joyce) was treated in the same way as him and was white, he knew that his allegation that he was being discriminated against because of his race was false. Of course, that argument is predicated on the allegation being understood to be one of direct race discrimination.

140. Mr Hitchens relied on *Waters v Commissioner of Police of the Metropolis* [1997] ICR 1073, in which the Court of Appeal held:

> **'The allegation relied on need not state explicitly that an act of discrimination has occurred – that is clear from the words in brackets in section 4(l)(rf). All that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer within terms of s.6(2)(b).'**

141. He also relied on a passage in *Monaghan on Equality Law*, 2nd edition 2013, 6.557, which states that a protected act under s.27(2)(d) Equality Act 2010 covers:

> 'the making of allegations which, whilst they need not identify the EA 2010, asserts facts which are capable of constituting a contravention of the EA 2010'.

142. Mr Hitchens submitted that there was 'no requirement for the Claimant's email to have included an express or implicit allegation of direct race discrimination in order to qualify for protection under s.27 EA 2010.' He submitted that the factual assertion made by the Claimant was also capable of amounting to an allegation of indirect discrimination and/or failure by the Respondent to have due regard to the public sector equality duty.

143. The flaw in Mr Hitchens' argument is that the Claimant's email *did* include an express allegation of direct race discrimination. We have no doubt that this is what he had in mind and nothing else; the Claimant confirmed it in oral evidence; it is also evident from the way the protected act has been pleaded in these proceedings (see the subheading at the top of this section). The guidance in *Waters* and the commentary in *Monaghan* was directed towards situations where the allegation is *not* spelt out; it does not give us licence to treat the Claimant as having alleged something different from what he obviously was alleging. That would be wholly artificial.

144. In any event, the possibility that the Claimant might have been alleging some other form of discrimination formed no part of the Claimant's evidence and was not put to any of the Respondent's witnesses.

145. We accept Ms Brown's submission that the allegation that the Claimant made was false, for the reasons she gave. The only remaining question is whether, in making the allegation, the Claimant was acting dishonestly. We have concluded that he was not, rather that he was acting impulsively, without thinking through whether there was a sound basis for what he was alleging. We have reached that conclusion in part because such impulsiveness was not uncharacteristic of him (see his responses to Mr Howard (paras 43-46) and Mr Hatch (para 54)), and in part because the information contained within the allegation was technically correct: he *was* the only non-white TU representative to be treated in this way; Ms Joyce was not a TU representative. To borrow the language of HHJ Eady in *Sadd*, while the allegation was false, it was not obviously false. The fact that the Claimant was prepared to concede in oral evidence that he was no longer sure whether race played a part in the events says more about Ms Brown's skill as a cross-examiner than it does about the Claimant's honesty.

<u>Issue 12.2: 'in an email of 21 January 2020 to Andrew Hatch, [did the Claimant] state "I'm not your 'Coolie'"?'</u>

<u>Issue 12.3: 'in a conversation with Sue Lofthouse, [did the Claimant] explain that he had used the word 'Coolie' because Andrew Hatch's emails had "made him feel as if he was a luggage carrier in the days of the Raj"?</u>

146. We have already found (paras 65-69) that the Claimant used the word 'coolie' without any racial connotations, and that he confirmed that this was the case to

Ms Lofthouse when they spoke on 6 February 2020. We have also found that he did not mention the Raj in his conversation with Ms Lofthouse.

147. Because we have found that the Claimant did not make an allegation of race discrimination, in either the email or the conversation, there was no protected act.

Conclusions: detriments

148. The parties agree that claims relating to acts or omissions that occurred on or before 18 May 2020, i.e. the majority of the claims, were presented out of time. Two claims are clearly in time (Issues 8.6 and 14.6); two are arguably in time (8.4 and 14.4) and we accept jurisdiction in relation to them.

149. However, in case the earlier matters might form part of an act extending over a period/a series of similar acts or are relevant background to the in-time complaints, we have considered all the allegations on their merits, before finally determining the jurisdictional issue.

Issues 8.1, 10.1 and 14.1: 'On 6 February 2020, [Ms Lofthouse] telling C to apologise for use of the word "Coolie"'

150. The Claimant withdrew the allegation of TU detriment in relation to this incident.

151. Because we have concluded that the Claimant did not do a protected act in the email or in his conversation with Ms Lofthouse, it follows that Ms Lofthouse's suggestion that he apologise for the use of the word 'coolie' cannot have been an act of victimisation (there was no suggestion that it was linked to the protected act which we have found the Claimant did do).

152. For the avoidance of doubt, the sole reason why Ms Lofthouse suggested that the Claimant apologise was because he had clarified that he was *not* alleging that Mr Hatch was being racist. She considered that an apology might help to de-escalate a disagreement between colleagues, based on a misunderstanding on Mr Hatch's part.

153. As for the claim of harassment related to race, because we have found that the Claimant did not use the term in a racial sense, neither his use of the word, nor Ms Lofthouse's suggestion that he apologise for using it, were 'related to race' and the harassment complaint is not well-founded.

Issues 8.2 and 14.2: a "met expectations" grade for his 2018/19 End of Year appraisal, first communicated to C on 28 February 2020

154. We note that it was the Claimant's case that he had been 'marked down' by being given a 3 in this year. That, of course, depends on his belief that his default score should have been a 4. There was no evidence to support that assertion. He had scored 4 in one year, but not in others; he did not complain in those years. He referred to a 'pack of evidence' he had provided relating to his achievements in 2018/2019 but did not disclose it in these proceedings. Nor did he go into any detail about its contents in his witness statement.

155. In dealing with the score for 2018/2019, and considering what the Claimant relied on as raising a *prima facie* case that the sole or main purpose of Ms Lofthouse's grade was to prevent or deter him from taking part in union

activities, or to penalise him for doing so ('the proscribed purpose'), we took into account the fact that there was a lack of contemporaneous documentation in relation to the appraisal process that year, both in terms of the process followed and the reasoning by which Ms Lofthouse arrived at her score, and an apparent failure to follow the usual process. Mr Hitchens characterised it as an 'unfair process' and invited us to draw an inference that the Claimant's trade union activities played a part in the decision. We were not satisfied that it was an unfair process; it was an undocumented process, at least for our purposes, but that is not the same thing. In any event, we reminded ourselves that unfairness is not, in itself, sufficient to raise a *prima facie* case of trade union detriment, and on the evidence before us we did not consider that a Tribunal could reasonably conclude from this alone that Ms Lofthouse's sole or main purpose was the proscribed purpose. The burden did not shift because of this.

156. We considered what other evidence there was which might assist the Claimant to shift the burden. In his statement (paragraph 46) he wrote:

> 'the reason for the lower scores was because of my trade union activities. Specifically, I was released for two days a week for my union activities in 2018/2019 and I appear to have been marked down because of this'.

157. We note that the Claimant does not report Ms Lofthouse saying anything which suggested he had been 'marked down' in this year because he was on TU release for two days a week; he merely says it 'appeared' to be the case. We were not taken to any evidence that her purpose was to penalise him for the release (nor was that put to Ms Lofthouse); we have concluded it is no more than speculation on the Claimant's part.

158. What Mr Hitchens put to Ms Lofthouse in cross-examination was that she had assigned the score of 3 because the Claimant had been on the other side of some 'contentious negotiations' with the unions. It was suggested that this gave rise to the potential for conflict between her role as a negotiator and her role as the Claimant's line manager. She rejected that suggestion. We regarded it as tenuous: the discussions to which we were taken in evidence (for example, minutes of the MFC meetings) appeared to us to be marked by a high degree of cooperation and professionalism on both sides. Concerns were raised and criticisms made, we were not taken to anything which might plausibly have triggered Ms Lofthouse to seek to penalise the Claimant for his involvement in the discussions. There was a single observation by a colleague to the Claimant that he thought Ms Lofthouse had been 'curt' towards the Claimant at a meeting in March 2018. Even if she was, it might have been for any number of reasons. With that exception, all the evidence suggested that she conducted herself professionally and conscientiously and maintained appropriate boundaries between these two strands of her work.

159. In our judgment, the Claimant has not established a *prima facie* case that Ms Lofthouse was motivated in any way by the proscribed purpose in scoring him 3 in this year.

160. As for victimisation, the decision post-dated the only protected act we have found occurred, but it was not put to Ms Lofthouse in cross-examination that she was materially influenced in scoring the Claimant a 3 because he had alleged that race was a factor in the loss of the Claimant's operational licence. In her

witness statement, Ms Lofthouse was clear that that matter of the operational licence was soon forgotten (at least by her) and that it had no effect on her ongoing relationship with the Claimant. We accept that evidence and conclude that there was no connection whatsoever between the protected act and the 2018/2019 score.

161. On the balance of probabilities, we are satisfied thar Ms Lofthouse assigned the score of 3 because it was her genuinely held view that, while the Claimant had met expectations, he had not exceeded them in that year and a higher score would not have been appropriate.

Issue 8.3 and 14.3: a "met expectations" grade for his 2019/20 End of Year appraisal, first communicated to C on 28 February 2020

162. As for the 2019/2020 year, we note that it was not put to Ms Lofthouse that she was motivated in assigning the score by the proscribed purpose. For the reasons we have out above, we consider that there was no sound basis for that proposition.

163. We have concluded that Ms Lofthouse assigned the score of 3 to the Claimant because he had been absent that year on full-time union duties, and that this was the default score for any employee absent in a relevant year for whatever reason. It is consistent with the email from Mr Boots of December 2020 (para 72). There was no challenge to that.

164. Insofar as the purpose of the underlying practice is relevant (which it is not, because the allegation was made solely against Ms Lofthouse, not the person/people who devised the practice), we infer that it was to achieve fairness and consistency, albeit in a fairly rough-and-ready fashion. We reminded ourselves that 3 is a good score. In circumstances where the individual was not working in their substantive role - and so was not in a position to demonstrate that they were exceeding expectations - it is difficult to see how a higher score could be justified.

165. As for the victimisation claim, again this was not put to Ms Lofthouse and for the reasons we have already given in relation to the previous year's grade (para 160), we conclude that it is not well-founded.

Issues 8.5 and 14.5: 'between January and March 2020, [Ms Lofthouse] not responding promptly or with due seriousness to C's concerns raised in his capacity as Unite representative'

166. Ms Lofthouse did not fail to respond promptly or with due seriousness to the Claimant's concerns, raised in in his capacity as a Unite representative between January and March 2020 (paras 73-101). The claims fail on their facts.

167. Insofar as Mr Hitchens put to Ms Lofthouse that the time taken to resolve the operational license issue was an instance of not dealing with concerns raised by the Claimant in his capacity as a Unite representative, we reject that submission. Firstly, and fatally, it occurred long before the period identified in the pleaded allegation. Secondly, the Claimant did not raise the problem in his capacity as a trade union representative; he raised it in a personal capacity. As a matter of fact, the problem had not arisen out of his trade union activities: he had allowed his licence to lapse at a time when he was not on release. As for

the victimisation claim, it cannot reasonably be argued that the protected act caused delay in resolving that issue; if anything, the Claimant's grievance appeal appears to have prompted a change of approach on the part of the Respondent, which benefited the Claimant.

Issues: 8.4 and 14.4: '[the Claimant] not being permitted [by Ms Lofthouse] to work from home during the Covid-19 pandemic'

168. We have found that the only occasions on which the Claimant asked about working from home were by way of general enquiries, rather than a specific request on his own behalf. He did not ask Ms Lofthouse if he could work from home until 26 May 2020, when Ms Lofthouse permitted him to do so. There was no occasion on which she refused him permission for him to work from home, nor did she deliberately fail to do so. The claims fail on their facts.

169. If we are wrong about that, and the Claimant did ask to work from home, he has led no evidence at all as to the reasons advanced by Ms Lofthouse for refusing the request. It was not put to her in cross-examination that her purpose (whether implicit or explicit) in refusing the request was to prevent or deter the Claimant from taking part in union activities, or to penalise him for doing so. The Claimant has not established a *prima facie* case of trade union detriment.

170. Nor was it put to Ms Lofthouse that she was motivated, in part at least, by the fact that the Claimant had made an allegation of discrimination some two years earlier.

171. In our judgment, there was no cogent evidence that Ms Lofthouse was motivated at any stage in her treatment of the Claimant by either of the unlawful considerations, and the claims are dismissed.

Issues 8.6 and 14.6: 'On 26 May 2020 [Ms Lofthouse] telling C to reduce his involvement in union activities'

172. Ms Lofthouse did not 'tell' the Claimant to reduce his involvement in union activities. That is the language of instruction; she gave no instruction. Ms Lofthouse merely suggested that one of the things he might consider doing was drawing back from his activities on the LUCC; whether he did so was entirely a matter for him.

173. Even if we were to take a broader view of the allegation than is justified by the way it is framed and ask ourselves what Ms Lofthouse's purpose was in making the suggestion, the answer, in our view, is obvious. The Claimant, whose line manager she was, had come to her to tell her that he was feeling extremely stressed. He specifically stated that he was struggling on all fronts, including his trade union activities. She suggested a number of steps, including taking time off work, working from home and focusing on those union activities which required input from a manager such as him. The LUCC duties did not require a manager's input. We conclude that her sole purpose was to propose ways of reducing the pressure on the Claimant. It was in no sense whatsoever to prevent or deter him from taking part in trade union activities, or to penalise him for doing so. Apart from anything else, it is inconsistent with the fact that she made enquiries, on his behalf, as to whether he might be released for full-time TU duties (i.e. increase his union activities).

174. As for the victimisation claim, this was not pursued in cross-examination or closing. There was not a scrap of evidence that there was a link between this suggestion and the fact that the Claimant had made an allegation of discrimination in 2018.

175. The claims are not well-founded and they are dismissed.

Conclusions: time limits

176. Because we have dismissed the claims which are in time, or arguably in time (Issues: 8.4 and 14.4 and Issues 8.6 and 14.6), we decline jurisdiction in respect of the earlier claims of trade union detriment, since it is no longer arguable that they might be linked to an in-time claim. We are satisfied that it was reasonably practicable for the Claimant to bring those claims in time. He led no evidence to the contrary, and as an experienced trade union representative, he must have known about his rights; in the unlikely event he did not, he had access to advice and assistance throughout the material period.

177. As for the victimisation claims, the burden is on the Claimant to persuade us to exercise our discretion to extend time. He was professionally represented throughout these proceedings. No evidence was led, and no submissions made, in support of an argument that it would be just and equitable to do so. No explanation was advanced for the delay. In the circumstances, we do not extend time.

178. Consequently, with the exception of the four issues we have identified above (para 148), the Tribunal has no jurisdiction hear the remaining claims, and they are dismissed.

Employment Judge Massarella

30 May 2022

APPENDIX: PARTIES' AGREED LIST OF ISSUES

Introduction

1. The Claimant brings claims of:

   1.1. detriment on the grounds of trade union membership or activities (s.146(1) Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA 1992"));

   1.2. harassment (s.26 Equality Act 2010 ("EqA 2010")); and

   1.3. victimisation (s.27 EqA 2010).

Jurisdiction: TULR(C)A 1992

1. Are any of C's detriment claims out of time per s.147 TULRCA 1992?

2. For any claims outside the primary limitation period (i.e., after 18 May 2020), do they form part of a series or similar acts ending with an act that is in time?

3. For any claims not in time, was it not reasonably practicable for the claim to be brought within 3 months of the act or last act in any series of similar acts or failures?

4. If so, was the claim brought within such further period as was reasonable?

Jurisdiction: Discrimination

5. Are any of the Claimant's discrimination claims out of time per s.123 EqA 2010?

6. For any claims outside the primary limitation period (i.e., after 18 May 2020, do they form part of conduct extending over a period of time ending with a discriminatory act that is in time?

7. For any claims not in time, is it just and equitable to extend time?

Trade Union Detriment (s.146(1)(a) and (b) TULRCA)

8. Was C subjected to the following detriments by Sue Lofthouse on behalf of R:

   ~~8.1. on 6 February 2020, telling C to apologise for use of the word 'Coolie';~~ [withdrawn]

   8.2. a "met expectations" grade for his 2018/19 End of Year appraisal, first communicated to C on 28 February 2020;

   8.3. a "met expectations" grade for his 2019/20 End of Year appraisal, first communicated to C on 28 February 2020;

   8.4. not being permitted to work from home during the Covid-19 pandemic;

   8.5. between January and March 2020, not responding promptly or with due seriousness to C's concerns raised in his capacity as Unite representative;

   8.6. on 26 May 2020 telling C to reduce his involvement in union activities?

9. For any proven detriment, was it done for the sole or main purpose of:

9.1. preventing or deterring C from being a member of an independent trade union or penalising him for doing so? or

9.2. preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so?

Harassment (S.26 EqA 2010)

10. Did Sue Lofthouse engage in unwanted conduct related to C's race by:

10.1. telling C to apologise for use of the word 'Coolie';

11. Did the alleged conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

Victimisation (S.27 EqA 2010)

12. Did the Claimant do the following, and were any of the following protected acts:

12.1. in an email of 2 October 2018 appealing his grievance outcome, point out that the Claimant was "the only rep who is non-white", and all other representatives had been given support to maintain their licence and that he was left "with no other option but to escalate, with the possibility if not internally resolved then externally";

12.2. in an email of 21 January 2020 to Andrew Hatch, state "I'm not your 'Coolie'";

12.3. in a conversation with Sue Lofthouse, explain that he had used the word 'Coolie' because Andrew Hatch's emails had "made him feel as if he was a luggage carrier in the days of the Raj"?

13. Were any of those acts [*false and*] made in bad faith so that they do not amount to a protected act within the meaning of s.27(2) EqA 2010?

14. Was C subjected to the following detriments by Sue Lofthouse on behalf of R:

14.1. On 6 February 2020, telling C to apologise for use of the word 'Coolie'?

14.2. A "met expectations" grade for his 2018/19 End of Year appraisal?

14.3. A "met expectations" grade for his 2019/20 End of Year appraisal?

14.4. Not being permitted to work from home during the Covid-19 pandemic until the start of his sick leave on 27th May 2020 (which act the C says continues to date, if he were to return to work from sick leave)?

14.5. Between January and March 2020, not responding promptly or with due seriousness to C's concerns raised in his capacity as Unite representative?

14.6. On 26 May 2020 telling C to reduce his involvement in union activities?

15. Did R subject C to any proven detriment because C did, or R believed C had done or may do, a protected act?

Remedy for discrimination or victimisation

16. Should the Tribunal make a recommendation that the R take steps to reduce any adverse effect on the C? What should it recommend?

17. What financial losses has the discrimination caused the C?

18. What injury to feelings has the discrimination caused the C and how much compensation should be awarded for that?

19. Has the discrimination caused the C personal injury and how much compensation should be awarded for that?

20. Should interest be awarded? How much?

Remedy for detriment on grounds related to trade union membership or activities

21. If the claim is well founded the Tribunal will make a declaration to that effect.

22. How much compensation should be awarded as is just and equitable having regard to the infringement complained of and the C's loss attributable to the act or failure which infringed his right?

23. Was the act or failure caused or contributed to by the action of the C such that his compensation should be reduced under s149(6) TULR(C)A 1992?

24. If so, by how much as is just and equitable?