EMPLOYMENT TRIBUNALS

Heard at: London South **On:** 24 to 27 July 2023

Claimant: Miss A Fischer

Respondent: London United Busways Limited

Before: Employment Judge Ramsden
Members Mr C Mardner
Mr K Murphy

Representation:

Claimant In person

Respondent Mr Nuttman, Solicitor

JUDGMENT

1. By unanimous decision, the Tribunal finds that the Claimant was not discriminated against on the ground of gender reassignment in relation to an incident which occurred on 9 January 2021 where the Claimant was walking across the Respondent's bus yard.

2. By a majority decision the Tribunal finds that the Claimant's allegation that she was called a "wanker" on 13 January 2021 did not occur, so that allegation of direct discrimination on the basis of the Claimant's gender reassignment fails.

3. By unanimous decision the Tribunal finds that the termination of the Claimant's engagement by the Respondent was not less favourable treatment because of her protected characteristic of gender reassignment.

REASONS

1. These written reasons are provided at the request of the Claimant following oral reasons given on the final day of the hearing.

Background

2. The Respondent operates public passenger transport bus services across central, west and south London, under a contract awarded by Transport for London (**TfL**). TfL regulates how that bus service is to be provided, and a poor performance risks the Respondent losing that contract award upon re-tender. TfL is the Respondent's main client.

3. The Claimant has the protected characteristic of gender reassignment.

4. The Claimant was supplied by an agency, Integrated Solutions, to work for the Respondent as a PCV Bus Driver from some date in November 2020 (there are various dates suggested by both parties) until 16 January 2021 (the **Engagement Period**).

5. The Claimant alleges that she was treated less favourably by the Respondent in the Engagement Period on the basis of her protected characteristic of gender reassignment in relation to three acts:

    a) That, on 9 January 2021, another bus driver (identified as SP40044) drove a bus millimetres from the Claimant while the Claimant was walking across the Respondent's bus yard (the **Near Miss Incident**, described in more detail in paragraph 14 below);

    b) That, on 13 January 2021, the Claimant was called a "wanker" by another bus driver while she was at the Claimant's allocation desk (the **Insult Incident**, described in more detail in paragraph 25 below); and

    c) The termination of her engagement with the Respondent.

6. The Claimant asserts that the Respondent is vicariously liable for the acts of its bus drivers in relation to the Near Miss Incident and the Insult Incident because they were done in the course of the employment of those drivers.

7. The Respondent denies the claim, and says that:

    a) Neither the Near Miss Incident nor the Insult Incident occurred;

    b) If the Tribunal finds that either or both of those incidents did occur, it is not liable for them because it took all reasonable steps to prevent the individuals concerned from:

        I. from doing that thing; or

        II. from doing anything of that description; and

    c) It did not terminate the Claimant's engagement because of the Claimant's gender reassignment, but rather because of her performance and costs incurred as a result of her actions.

8. The issues to be decided in the substantive hearing to determine the Claimant's claims were set out in the Case Management Orders of Employment Judge Wright on **6 October 2022**.

The facts

9. The Claimant was supplied by Integrated Solutions to work for the Respondent as a bus driver at some point in **November 2020**. The first part of the Claimant's engagement was training, and she began driving buses around 30 November 2020. As part of that training, the Claimant was informed of the Respondent's safety procedures, and was introduced, among others, to:

    a) Shakieb Soz, the Respondent's Allocation Supervisor (who schedules drivers' working patterns at both the Hounslow garage, where the Claimant worked, and another garage);

    b) Enrique Parada, the Respondent's Operations Manager (the manager responsible for the day-to-day operation of bus services at the garage at which the Claimant worked); and

    c) Mr Cecil, who was the Claimant's driving instructor during this induction week.

10. The Claimant enquired, during the induction process, about any procedures for reporting any bullying or hostility. (She did so because she has had experience of this at previous places of work.) Mr Cecil informed her that if she had any problems she could come and talk to him, or to any manager, and that it didn't matter how big or little the concern, as the Respondent had a "zero tolerance" approach to any behaviour that offended its Equal Opportunities policy.

11. The Respondent's Equal Opportunities policy was displayed, and its zero-tolerance approach to breaches of that policy was advertised, on noticeboards in the public spaces used by the Respondent's drivers.

12. The Claimant was assigned to the Respondent's "route 111", which was one of the Respondent's so-called "gold routes" because it brings in the most earnings for its Hounslow garage. TfL penalised the Respondent if the 111 route was not completed, with the size of that penalty relating to the mileage lost.

13. The Claimant began to file "occurrence reports" – i.e., notify the management team at the Respondent that something had occurred that may warrant investigation or action (it appears that the first of these was dated 10 December 2020). The Claimant filed a number of such occurrence reports during the Engagement Period. The 10 December 2020 report referred to the Claimant being misgendered by a colleague.

14. On **9 January 2021**, at around 8pm, the Claimant crossed the road in the depot without using the designated crossing. She wore "high vis" as she walked in front of a bus that was looking to exit the depot. The bus stopped for a time, waiting for her to cross, but it started to move around her before she had reached the other side, swerving around her. The front end of the bus, when it had passed her, moved into the lane in readiness for exiting the depot. The rear side of the

bus, on correction of that swerve, moved in towards the Claimant. This was captured by the CCTV camera at the front of the bus (and this footage was shown to the Tribunal). This was the incident which forms the basis of the complaint concerning the "Near Miss Incident".

15. The Claimant was shaken by the Near Miss Incident, and spoke to another member of staff about it. That member of staff filed an occurrence report in relation to the matter, the Claimant did not.

16. On **11 January 2021**, the Claimant was driving her route in the evening when she confronted by some angry passengers while waiting at some traffic lights. It is not disputed that the Claimant had been due to stop at a bus stop on Hounslow High Street before getting to the traffic lights (it was a designated stop for her route), but another bus (the 235) was stopped there. The Claimant did not stop at that bus stop, and when she was waiting at the traffic lights, a group of individuals came alongside the bus expressing anger and frustration that the bus had not stopped. The Claimant indicated to them that she would wait for them at the next bus stop, which she did. Those passengers boarded, and after some initial shouting and swearing, most of them were satisfied by the explanation that the Claimant gave for not stopping. Two of the passengers (a couple) remained angry, and the Claimant came out of her driver's cab to talk to them. The Claimant's evidence is that one of those individuals spoke to the Claimant and then "*continued his behaviour and constantly interrupting [sic] my duties*", "*constantly being verbally abusive to me and swearing at me and… referring to me as mental*". The passenger did not desist, and so the Claimant drove the bus to the garage to seek assistance. This "**Angry Passenger Incident**" was also captured on CCTV, and photographs extracted from that CCTV formed part of the evidence bundle.

17. The Claimant had numerous buttons on the bus's radio to enable her to:

    a) make announcements to the bus;

    b) contact the controller back at the Respondent's garage – the green button;

    c) report non-emergency incidents to TfL's Network Management Control Centre (**NMCC**) – the blue button; and

    d) report emergencies to TfL and NMCC – the red button.

    The protocol for use of these communication buttons – known as the "ibus system" - was well-understood by the Claimant, and the NMCC issued guidance on when and how to contact it.

18. It was agreed by the parties that, at this time, bus drivers were instructed not to use the blue button as it was being over-used on all the routes in London. The NMCC instructed drivers to use the red button in cases of serious emergencies.

19. In connection with the Angry Passenger Incident, the Claimant's evidence was that she pressed the green button to seek assistance from the controller at the

Respondent's garage, but that when she was getting no support she had "*no choice*" but to press the red (emergency) button.

20. Later that day, after the Claimant finished work, she was walking to where she had parked her car when she saw the couple from the Angry Passenger Incident. The Claimant's witness statement says:

"*Upon spotting me they shouted abuse over the road, taunting me by referring to my appearance saying freak and wanker and threatening to end my employment and my life involving my family saying they would hunt my family down. I did not shout back and felt extremely vulnerable.*"

The Claimant reported this to Mr Parada.

21. On **13 January 2021** at 12:52 the Claimant met with Mr Parada to discuss the Near Miss Incident, and they looked at photographs taken from the CCTV footage, and watched the filmed CCTV footage, together (the notes of this meeting appear at page 107 of the hearing bundle). Mr Parada expressed the view that the driver "*didn't do anything wrong*", and referred to incident "*not [being] as alleged*". Mr Parada said "*I cannot agree with the report. I sent this outside to be seen for a second opinion. The answer was that it wasn't close. The driver didn't put you in danger. There is a big gap. You caused it by walking in front. You aren't in a safe place.*"

(The "outside" person to whom this was sent was Ian May, who was both the trade union representative on site and the site Health & Safety representative.)

22. In that same meeting, when the Claimant asked about her other occurrence report about the Angry Passenger Incident, and in particular whether the Respondent was going to act in response to the behaviour of the couple the Claimant encountered on her way him after work, Mr Parada said:

"*We will pass [the CCTV footage covering the Angry Passenger Incident] to police if they require it. We can take you of [sic] the 111 route if you need. The police will request footage. If you feel unsafe and there's harassment out of work. We can take you off the route but you'd also need to report the incident to the police.*"

The notes of that conversation show that the Claimant was clearly very upset. When asked by Mr Parada what she would like to do, she said:

"*I've had second thoughts. I feel like I'm not allowed to have a job… I was so happy when I first came. Some people don't want me to work.*"

Mr Parada asked if the Claimant needed time off, and advised her to have a think about what she wanted to do, including about changing routes and reporting the behaviour of the couple involved in the Angry Passenger Incident to the police. The meeting ended at 13:31.

23. Later that day, at around 14:50, a passenger on the Claimant's bus was injured when the Claimant braked hard to avoid driving into the back of a car in front of the bus (the "**Hard Braking Incident**"). The CCTV footage of this incident, taken

from the front of the bus, was shown to the Tribunal several times in the course of the hearing. The Claimant and Mr Parada take very different views of the fault to be ascribed to this incident, but it is not disputed that the passenger was injured and subsequently brought a claim for which the Respondent accepted liability and incurred a cost, and it upset the Claimant.

24. Again, the Claimant said that she pressed the green button but only had a response from the Respondent around 20 minutes later. The Claimant pressed the red button again, because she felt that she had no option other than to do so.

25. The Claimant returned to the garage without completing her full route. The Claimant was talking to, or waiting to talk to, Mr Soz about the Hard Braking Incident and the fact she had not completed her route when she alleges that the Insult Incident occurred. The Claimant says that Mr Soz invited her to fill-in an occurrence report about the Insult Incident, but she was so upset that she had to go home, and she took a blank occurrence report form with her, promising to fill it in and hand that in the next day.

26. However, the next two days were the Claimant's rest days. She was told on the second of those, **15 January 2021**, that her engagement with the Respondent was terminated. Sonia Pais at the Respondent telephoned the Claimant to inform her of that fact, and a letter from Mr Parada explaining the reasons for that termination was sent to her on the same date. The reasons set out in that letter were:

    a) the Hard Braking Incident which:

        I. raised concerns about the quality of the Claimant's driving;

        II. resulted in a financial claim from the passenger;

        III. caused the passenger to complain about poor and dangerous driving to TfL; and

        IV. raised concerns about the Claimant's failure to report the incident to the Respondent;

    b) the Claimant's failure to complete the full bus route (known as "self-curtailing"), at financial cost to the Respondent, as TfL penalised the Respondent for this, when she made an unfounded complaint about a colleague (this was a reference to the Insult Incident);

    c) the Claimant made constant "unfounded" complaints about colleagues at work;

    d) the Angry Passenger Incident, in connection with which the Claimant breached the Respondent's applicable policies by:

        I. failing to serve a bus stop on her route; and

II. leaving her cab to speak to irate passengers, putting herself and the passengers in a vulnerable position and leading to a delay in service; and

which resulted in the Claimant "self-curtailing") with the related financial cost for the Respondent;

e) a report from TfL that, "on many occasions", the Claimant had misused the ibus system by using the emergency code for minor disputes; and

f) a complaint from a Service Controller that the Claimant was very rude on the radio and not willing to take the feedback given by the NMCC regarding use of the correct codes.

The hearing

27. The Claimant presented her own case, and the Respondent was represented by Mr Nuttman.

28. The Respondent served a hearing bundle, the contents of which had been agreed with the Claimant, of 437 pages. Subsequent to that bundle being agreed, the Claimant sought to admit a further 24 pages of evidence. It was confirmed at the start of the hearing that the Respondent did not object to the inclusion of that further evidence. The Tribunal agreed to admit that documentation as pages 438 to 461 of the Bundle.

29. The Tribunal was then shown two pieces of CCTV footage, which had been disclosed in advance to the Claimant. That footage concerned:

a) the Near Miss Incident; and

b) the Passenger Incident.

30. The Claimant then sought to admit two further documents:

a) additional medical evidence, which the Claimant asserts is relevant to understanding the impact of the events complained of upon her mental health; and

b) a report of the Hard Braking Passenger Incident, which the Claimant says she wrote on the evening of 13 January 2021 attempted to submit to Mr Soz the following day, on 14 January 2021. The Claimant's evidence is that Mr Soz refused to accept it, saying that he would submit his own report of his understanding of the Passenger Incident from the Claimant.

After a short break to provide the Respondent an opportunity to review those documents, the Respondent did not oppose the inclusion of the further medical evidence, which was admitted (as pages 462 to 467 of the Bundle), however it did object to the inclusion of the Claimant's occurrence report about the Hard

Braking Incident. The Respondent objected to the inclusion of this document on the following bases:

I. The Respondent says it was not written at the time. Contemporaneous email correspondence from the time from Mr Soz noted that the Claimant did not put in an occurrence form as she was too stressed;

II. Mr Soz's witness statement denies that the Claimant ever tried to submit a report to him;

III. The Claimant's account of events in the report is inaccurate, and does not match what the CCTV footage shows occurred;

IV. The Claimant did not disclose this as required by EJ Wright's case management orders, on or before 24 November 2022; and

V. The key point that the Hard Braking Incident goes to is what was in the mind of the person who took the decision to terminate the Claimant's engagement at the time. That person was Mr Parada, who has never seen that document before, and so it is of limited if any value.

The Tribunal noted the Respondent's objections but considered that even if the report was not submitted at the time, it could be a contemporaneous record of the Claimant's perspective of events, akin to a diary. Furthermore, if the document is admitted into evidence, that does not prevent the Respondent calling into question the accuracy of that report, or whether the Claimant attempted to submit it, and indeed, the witness evidence of both Mr Soz and Mr Parada is expected to engage this point in any event. The Claimant's occurrence report about the Hard Braking Incident was admitted to the Bundle as page 468.

31. The Claimant gave evidence in support of her case, and Mr Parada and Mr Soz, at the time Traffic Manager of the Hounslow Garage and Allocations Supervisor, respectively, gave evidence in support of the Respondent's resistance of those complaints.

Law

<u>The relevant legislative scheme</u>

32. The list of "protected characteristics" for the purposes of the Equality Act 2010 (the **2010 Act**) includes "gender reassignment" (section 4 of the 2010 Act), which is defined in section 7 of that Act.

33. Section 41 of the 2010 Act provides:

"*(1) A principal must not discriminate against a contract worker—*

…

(b) by not allowing the worker to do, or to continue to do, the work;

…

(d) by subjecting the worker to any other detriment.

…

(5) A "principal" is a person who makes work available for an individual who is—

(a) employed by another person, and

(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

(6) "Contract work" is work such as is mentioned in subsection (5).

(7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b)."

34. The meaning of "employed" for section 41(5)(a) purposes is derived from section 83(2):

"*"Employment" means—*

(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work".

35. Different forms of "detriment" are set out in Chapter 2 of Part 2 of the 2010 Act. One kind of detriment is direct discrimination, defined in section 13(1) as follows:

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

<u>The burden of proof</u>

36. Section 136(2) of the 2010 Act sets out the burden of proof applicable to proceedings under that Act:

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

37. In other words, an examination of whether gender reassignment discrimination has occurred involves a two-stage enquiry:

a) Firstly, the claimant must establish, on the balance of probabilities, facts from which the inference could properly be drawn by the tribunal that, in the absence of any other explanation, an unlawful act was committed; and then

b) Secondly (if the claimant has made out a *prima facie* case for discrimination, as per the first stage), the burden of proof shifts to the respondent to prove, on the balance of probabilities, that the treatment in question was in no sense whatsoever on the ground of the claimant's gender reassignment

(*Igen Ltd (formerly Leeds Careers Guidance) v Wong* [2005] ICR 931).

38. The Court of Appeal in that case endorsed the following guidelines when applying that two-stage test:

(1) It is for the claimant to prove on the balance of probabilities such facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of unlawful discrimination against the claimant.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases, the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could". At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw from an evasive or equivocal reply to a questionnaire or any other questions.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of the protected characteristic, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

39. The first stage of that test has been considered in a number of subsequent cases, including by the Court of Appeal in *Madarassy v Nomura International plc* [2007] ICR 867, where Lord Justice Mummery observed that:

"*the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*", and

as per the *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865, EAT:

"*There does not have to be positive evidence that the difference in treatment is race or sex in order to establish a* prima facie *case.*

The mere fact, however, that a claimant is a black woman who was not appointed, and the others are white men, does not constitute sufficient primary facts to justify an inference of discrimination. The suggestion in Dresdner Kleinwort Wasserstein Ltd v Adebayo *that an employee would be able to establish a prima facie case if he were black, was not promoted and was at least as well qualified as the white comparator would be agreed with where there were only two candidates, but the case becomes weaker where there are a number of candidates and the black candidate is rejected with a number of equally well-qualified white candidates. There is then no distinction between all the unsuccessful candidates and the justification for inferring a prima facie case is significantly weaker.*"

40. As to what evidence is considered at stage one, the then-President of the EAT, Elias J, opined in the decision of the EAT in *Laing v Manchester City Council* [2006] ICR 1519 that:

"*it is for the employee to prove that he suffered the treatment, not merely to assert it, and this must be done to the satisfaction of the tribunal after* ***all*** *the evidence has been considered*" (my emphasis).

In other words, the facts presented by the respondent are also relevant to the stage one assessment. What is not relevant to that first stage is any explanation from the respondent.

41. Sometimes the reason for a person acting in the way the claimant now complains of may not, on-the-face-of-it, seem discriminatory but, as Lord Nicholls reminded us in *Nagarajan v London Regional Transport* [1999] ICR 877:

"*All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim, members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did.*"

42. As illustrated by the case of *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010, it is the mental process of the actor involved in the particular act that is relevant, not the mental processes of those who provided the actor with information.

The failure of a party to call a witness relevant to the matter complained of

43. Express evidence of discrimination is rarely available, and so while documentary evidence is likely to be important, the evidence of the decision maker(s) is likely to be key.

44. In the case of *Efobi v Royal Mail Group Ltd* [2021] ICR 1263 - which concerned allegations of race discrimination in the respondent's recruitment process - the respondent did not call any of the recruiters or managers involved in assessing the claimant's job application. The Supreme Court held that:

"*tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense; that whether any positive significance should be attached to the fact that a person had not given evidence depended entirely on the context and particular circumstances; that relevant considerations would include such matters as whether the witness was available to give evidence, what relevant evidence it was reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence and the significance of those points in the context of the case as a whole…*".

45. The EAT considered this issue further in the case of *Bennett v Mitac Europe Ltd* [2022] IRLR 25 in the context of the second stage of the burden of proof analysis – when the claimant had proven a *prima facie* case of discrimination and the respondent was looking to prove that the act in question was in no sense whatsoever because of a discriminatory act. HHJ Tayler, sitting alone, noted the challenge that a respondent may face in looking to discharge that burden if the relevant decision-maker is not available to give evidence on that subject:

"*The fact that a decision taker is not called to give evidence does not necessarily mean that the required cogent evidence cannot be provided. There may be compelling documentary evidence or others might be able to give convincing evidence that they know the reason why the decision was taken. However, there should be a reasoned analysis of such evidence.*"

The "all reasonable steps" defence

46. Section 109 sets out that:

"*(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or

(b) from doing anything of that description.

(5) This section does not apply to offences under this Act (other than offences under Part 12 (disabled persons: transport))."

47. The burden of proving this defence sits with the respondent, and for an employer to establish that they have taken all reasonable steps is a high threshold (*Allay (UK) Ltd v Gehlen* [2021] ICR 645). Whether all reasonable steps have been taken is a fact-sensitive question, that involves three stages:

a) determining what steps the employer did in fact take to prevent the treatment;

b) determining whether there were any further preventative steps that the employer could have taken; and

c) determining whether those further steps were reasonable.

48. Although it is permissible to take account of the extent to which the step would in fact have made a difference when determining whether it was a reasonable one to take (*Croft v Royal Mail Group plc (formerly Consignia plc)* [2003] ICR 1425), the question as to whether that step would in fact have been successful in preventing the act of discrimination is not determinative (*Canniffe v East Riding of Yorkshire Council* [2000] IRLR 555). Steps which require time, trouble and expense may not be reasonable steps if, on assessment, they are likely to achieve nothing.

49. In the *Gehlen* case, the EAT found that the tribunal was entitled to find that the training that had been delivered two years prior to the harassment the claim was concerned with was "stale".

50. Section 15(4) of the Equality Act 2006 provides that where the Equality and Human Rights Commission has issued a code of practice in connection with any matter addressed by the 2010 Act:

"*A failure to comply with a provision of a code shall not of itself make a person liable to criminal or civil proceedings; but a code—*

(a) shall be admissible in evidence in criminal or civil proceedings, and

(b) shall be taken into account by a court or tribunal in any case in which it appears to the court or tribunal to be relevant".

51. The Code issued by the Equality and Human Rights Commission under that 2006 Act, its 'Employment Statutory Code of Practice' (the **EHRC Code**), states, in paragraph 10.51 that:

"*An employer would be considered to have taken all reasonable steps if there were no further steps that they could have been expected to take. In deciding whether a step is reasonable, an employer should consider its likely effect and whether an alternative step could be more effective. However, a step does not have to be effective to be reasonable.*"

52. Paragraph 10.52 continues as follows:

"*Reasonable steps might include:*

- *implementing an equality policy;*
- *ensuring workers are aware of the policy;*
- *providing equal opportunities training;*
- *reviewing the equality policy as appropriate; and*
- *dealing effectively with employee complaints.*"

Undisputed and disputed matters

53. The Claimant was engaged, via Integrated Solutions, to work for the Respondent for the Engagement Period. It is not disputed that the Claimant was employed by Integrated Solutions for the purposes of section 83 of the 2010 Act, and that:

    a) the Claimant was a "contract worker" for the purpose of section 41 of the 2010 Act;

    b) the Respondent was a "principal" within the meaning of section 41;

    c) the Claimant had the protected characteristic of gender reassignment; and

    d) the individuals whom the Claimant asserts were responsible for the Near Miss Incident and the Insult Incident were employees of the Respondent, and if these incidents in fact took place, they occurred in the course of their employment.

    Nor is it disputed that the Respondent terminated the Claimant's engagement for Contract Work at the end of the Engagement Period.

54. What is disputed is:

    a) whether the Near Miss Incident occurred;

    b) whether the Insult Incident occurred;

    c) if either or both of them did, whether it/they occurred because of the Claimant's gender reassignment – in other words, whether they would have happened to a hypothetical bus driver who did not have the Claimant's protected characteristic of gender reassignment;

    d) if either or both of the Near Miss Incident and the Insult Incident occurred, whether the Respondent avoids liability because it took all reasonable steps to the prevent the individual person involved:

        I. from doing that thing; or

        II. from doing anything of that description; and

    e) why the Claimant's engagement was terminated by the Respondent. The Respondent says it was ended for the reasons set out in paragraph 26 above, and that it would have terminated the engagement of a hypothetical bus driver who did not have the Claimant's protected characteristic of gender reassignment. The Claimant says the reason was her gender reassignment, and therefore that that hypothetical comparator would not have seen their engagement terminated by the Respondent.

Application of the law to the facts

55. Section 136(2) and the related case law cited above directs the Tribunal to take a staged approach to the question of whether the Claimant's complaints of direct discrimination on the basis of gender reassignment succeed.

56. Firstly, in relation to each of the three acts complained of, has the Claimant established, on the balance of probabilities, facts from which the inference could properly be drawn by the Tribunal that, in the absence of any other explanation, an unlawful act was committed?

57. If the Claimant has done that, can the Respondent to prove, on the balance of probabilities, that the treatment in question was in no sense whatsoever on the ground of the Claimant's gender reassignment? (i.e., would a hypothetical bus driver who did not have the Claimant's protected characteristic of gender reassignment have been treated in the same way?)

58. If the answer to the question above is "no" in relation to either the Near Miss Incident or the Insult Incident, that prompts a further question: can the Respondent rely on the defence that it took all reasonable steps to prevent the individual bus driver concerned from doing that thing, or from doing anything of that description?

59. The analysis below records the Tribunal's thinking in that regard.

Complaint 1: the Near Miss Incident

60. The first question: In relation to the Near Miss Incident, has the Claimant established on the balance of probabilities facts from which the inference could properly be drawn by the Tribunal that, in the absence of any other explanation, because of the Claimant's gender reassignment, the Respondent treated the Claimant less favourably than the Respondent treats or would treat others?

61. The Near Miss Incident is described in paragraph 14 above.

62. The Claimant's position is that driver SP40044 physically threatened her with the rear of the bus. In her witness statement she said that:

"*The after effects of this incident triggered anxiety about all those working around me as I was convinced that I was at risk of harm especially being killed for who I was.*"

63. In the course of an investigatory meeting held on 13 January 2021 with Mr Parada, the Claimant viewed this same CCTV footage with Mr Parada. The Claimant (who agreed in oral evidence that the minutes in the bundle of meetings involving her were accurate) said:

"*He was millimetres away [from me]… It was close. I was distressed and I'm not good at maths. I can see it's not millimetres but it was close*".

64. This is a position the Claimant maintained in oral evidence, where she said:

"*he [the driver] didn't avoid the closeness of it. If that was me driving that bus, I would have sounded my horn and gone out a bit further so the back wouldn't come near that person – I know the exit isn't that large, but the bus is going to do a sharp right, the length of the bus would mean you would far over to the left, so*

the back wouldn't engage with anything on the right hand side – what you saw yesterday is something completely opposite".

65. When asked if it was possible that the driver was simply annoyed that someone was walking in front the bus, rather than it being connected to her gender reassignment, the Claimant replied:

"*No – he obviously saw what I was, and he didn't approve of that, and he took the opportunity to scare me - and he did.*"

66. The Claimant went on to say that she believed Mr Parada "*[sided] with*" the driver of the bus because he was a permanent employee whereas she was an agency worker.

67. The investigation of the Near Miss Incident by Mr Parada was prompted by a report from a colleague of the Claimant's, to whom the Claimant had said that she believed the bus driver had deliberately driven the bus towards her. While the Claimant approached her cross-examination of Mr Parada on this point defensively – criticising him for not investigating the other driver shown in the footage to have been walking other than on the designated pedestrian walkway – the fact was that the Respondent's investigation was prompted by a report made to them expressing the Claimant's concern with what had happened.

68. The Claimant agreed under cross-examination that her concerns had been taken seriously, and that they were thoroughly investigated by Mr Parada.

69. The Tribunal viewed the footage of the Claimant crossing the road in the Respondent's depot several times, until we were satisfied that we understood clearly what occurred. As the parties agree, she was wearing a "high vis" jacket, and there is no question that the driver on the bus saw her, and stopped to wait for her to cross, despite her crossing at a place where there was no pedestrian crossing.

70. (We make no comment on whether there was an alternative place for the Claimant to cross, as the Respondent took no disciplinary action against the Claimant for crossing where she did, so that does not appear to us to be relevant. Nor does the Respondent's treatment of another bus driver who the CCTV footage briefly shows walking from his bus on a path that is not a designated pedestrian pathway – whether the Respondent did, or did not, discipline him is not relevant to the Claimant's claim. The reason the Respondent investigated this incident at all is because of an oral complaint the Claimant made about it to a colleague, who in turn properly reported it to the Respondent's management. The investigation was not initiated by the Respondent bringing or considering bringing disciplinary proceedings against the Claimant.)

71. The Tribunal observed that the Claimant stepped out in front of the bus, and that as the Claimant was nearing the other side of the roadway, the driver starts to move again, manoeuvring the bus outwards – away from her, into the other lane, so as to avoid her. As the Claimant notes, the bus then subsequently corrected

that move, swerving back into the correct lane, with its rear following its front. The rear of the bus does come closer to the Claimant than the front, but:

a) The Claimant slowed her pace as she neared the other side of the road; and

b) While the rear did get a bit close to the Claimant, but it was not going to hit her, even as she stood still rather than complete her crossing to the walkway.

72. In the Tribunal's view, if the Claimant had been scared that she was going to be hit by the bus, she would have run or jumped onto the pedestrian walkway, but she didn't – her pace in fact slowed as she nearer the other side of the walkway, as she stopped, turned and gestured and called to the driver.

73. We can see from the Claimant's written and oral evidence that she interpreted the occurrence differently – she was visibly upset, and described how the incident caused her tremendous fear and anxiety. We do not doubt the truth of the Claimant's evidence of her reaction, but we are unanimously of the view that the footage we saw did not show her in danger of being hit by the driver, and nor does it suggest any malicious intent on the part of the driver.

74. The vantage point of the CCTV does not display the driver, so it is possible that he gestured to express any frustration he may have felt in having to wait for the Claimant to cross the roadway so as to get on with his driving route, but the Claimant has not suggested in any of her evidence about this incident that he did.

75. The Claimant's evidence is that she had never met the driver before. There appears to us to be no evidence of malicious intent or, crucially for the purposes of the legal test, any less favourable treatment of the Claimant than would, in our judgement, be afforded to a hypothetical bus driver without the Claimant's protected characteristic of gender reassignment. The driver waited for the Claimant to cross most of the roadway and then manoeuvred around her to continue on his route. She was not at risk of harm from his actions, and we find no fault with his behaviour.

76. We do not consider that the Claimant has established, on the balance of probabilities, facts from which the inference could properly be drawn by the tribunal that, in the absence of any other explanation, an unlawful act was committed. Consequently, the burden of proof does not shift to the Respondent and this complaint fails.

<u>Complaint 2: the Insult Incident</u>

77. The first question to ask and answer is whether the Claimant has made out a *prima facie* case in relation to this complaint, i.e. has she proven - on the balance of probabilities - facts from which the Tribunal could decide, in the absence of

any other explanation, that the Respondent discriminated against her on the ground of gender reassignment, in relation to the Insult Incident.

78. Despite the Respondent's position, the Tribunal does not consider the insult "wanker" to be a gender-neutral term. The panel members' own experiences of use of that term is that it is applied to men, and that there are equivalent but different swear words that are specifically used in common parlance to insult women. If the term "wanker" was said to the Claimant, we consider it would be sufficient to establish a *prima facie* case of gender reassignment discrimination (meeting the "*more*" referred to in the case of *Madarassy* and being sufficiently connected to the Claimant's birth sex to satisfy the standard described in the *Griffiths-Henry* decision). We therefore consider that we can frame the "*prima facie*" case question as: has the Claimant proven, on the balance of probabilities, that another driver called her a "wanker" on 13 January 2021?

79. There are two competing witness accounts on this point:

a) The Claimant says that the driver said it to her when she was stood at the Allocations Counter, and that Mr Soz was present when this occurred.

b) Mr Soz's evidence is that he did not witness any exchange between the Claimant and the driver, though he wasn't paying attention, but also that when he asked the driver concerned about it, the driver denied having spoken to her. Unfortunately, there is no account from the driver in question in evidence, as Mr Soz says that he cannot now recall who it was.

As per *Laing*, the Tribunal must take account of Mr Soz's evidence of what factually happened in this first-stage analysis.

80. It therefore falls to the Tribunal to determine which of these two accounts is the more credible: the direct evidence of the Claimant, or the second-hand account from Mr Soz.

81. The Claimant has given a few accounts of this incident:

a) In the details she attached to her Claim Form the Claimant wrote:

"*When I retuned back from my first half of my duty, I approached the reception counter and spoke to the allocation manager, Mr Soz Shakieb about an incident I had on the road as I was a victim of road rage. While I was talking to Mr Shakieb, a tall Asian man driver was standing with two other drivers giving out uncomfortable stares. The tall driver approached me and said "wanker" I immediately told Mr shakieb who saw how upset I was and asked me if I wanted to go home.*"

b) In the Claimant's witness statement, at paragraph 33, she describes this incident:

"*On 13TH January 2021, while I was talking to Mr. Soz about the braking incident, a tall man who was also an existing employee of London United, approached me calling a "WANKER". His facial expression was very*

serious, and I never knew him from before. He said move, then pushed my upper right arm with his left shoulder. I was very upset by the hostility he exhibited towards me."

c) The Claimant's oral evidence before the Tribunal was that this driver was with two other people, that he stepped forward and called her a "wanker" "*because he didn't like the look of me*". According to the Claimant, that was the only word the driver said to her.

d) Under cross-examination, the Claimant asserted that the incident occurred on 12 January 2021. She also said that:

"*he [the other driver] came up to me and knocked me in my shoulder… he came up to me, told me to get out of the way, and knocked me… he deliberately walked up to me and knocked me in my shoulder on the way. I saw he didn't accept my gender because in the workplace we have different cultures, different religions, and he is standing there with two other drivers in the middle, and looking at me in a very serious way, because he didn't like what he could see in front of him – and basically it was frightening for me*".

e) When responding to questions from the Tribunal, the Claimant said:

"*He [the driver] was with two other people. He stepped forward. He called me a swearword because he didn't like the look of me.*"

The Claimant was then asked: "*Nothing else was said – only that single word?*"

The Claimant confirmed that only that single word was said.

82. As for Mr Soz:

a) His witness statement says that:

"[The driver] denied being rude to Miss Fischer at all and, In fact, said that he had not spoken to her or about her. He was surprised and confused. I said there must have been a misunderstanding."

b) His oral evidence was that:

I. He not paying attention to conversations going on around him, and that he did not witness any exchange between the driver and the Claimant. Mr Soz was clear that he was not saying that the exchange the Claimant alleges did not occur, more that he was focused on the work he was doing, and would not have observed if such an exchange took place.

II. After the Claimant told him that a driver had called her a "wanker", he asked the Claimant to point out which driver it was. Mr Soz then went

and called the driver into his office and asked him what had happened. Mr Soz said:

"*The other driver was surprised and shocked. He said 'I was talking to my bus driver friends. I have never met that driver. I didn't say anything to that driver.' Before he left, he told me he would gather his witnesses.*"

(It turns out that the process of gathering witnesses or a formal investigation did not happen because, according to Mr Soz and Mr Parada, the Claimant did not want to raise it further.)

III. At 17:30 that day, Mr Soz emailed Mr Parada and others about the Claimant:

"*Hi all*

Amanda fishcer [sic] has now gone non complete because she is stressed out, on 3 occasions on the same day.

1: meeting with Enrique

2: RTC on bear road, hitting a car from behind

3: a driver talked rudely with her, she asked me to speak to him, I called him in the office and had a private chat, the driver mentioned he didn't even speak to her. He will now gather witnesses, we now going lose mileage on 111 duty 105 4 hours and 15 mins."

83. The Respondent has pointed to:

a) The inconsistencies in the Claimant's account of this incident as to whether:

I. the other driver only called her a "wanker", or whether (as the Claimant said under cross-examination) that driver also told her to get out of the way; and

II. the other driver verbally insulted her, or whether he also physically assaulted her by pushing her in her shoulder.

b) Mr Parada's evidence that the Claimant was regularly inconsistent in her accounts when discussing complaints about other drivers with him. Mr Parada said twice in oral evidence that he had discussed several occurrence reports with the Claimant, and that often the Claimant's description of events did not match the CCTV footage of what had happened, which he and the Claimant watched together. He described her as "*consistently inaccurate*", and said that what they viewed on the CCTV on the subject of the occurrence reports did not tie in with the Claimant's version of events. When asked about how he responded to that, Mr Parada said that he was sufficiently concerned about these inaccuracies to check with the agency that had supplied her as to whether "*anything was going*

on", but they said no, and the DVLA did not notify him of any illness affecting the Claimant, so he did not take it further, until 13 January.

c) The fact that the Claimant did not make a formal complaint about this Insult Incident at the time, when she did make formal complaints about numerous other matters. This would suggest, the Respondent avers, that it did not occur, as this is not a person who was reluctant to report complaints.

d) The Claimant's mental health diagnosis. The Respondent noted that:

I. the Claimant was diagnosed with depressive personality disorder in April 1998 (i.e., before her engagement by the Respondent);

II. the Claimant was diagnosed with a personality disorder in October 2019 (again, before her engagement by the Respondent);

III. a letter from a community mental health practitioner to the Claimant's GP on 1 October 2021 observed that, as at that time she reported "*demeaning voices in her head and paranoia. This appears to be in line of her EUPD diagnosis*". The Respondent acknowledges that this letter post-dates her engagement with it, but notes that the paranoia and demeaning voices are associated with a diagnosis that pre-dated her engagement.

The Respondent contends that the Claimant was suffering from paranoia at the time of her engagement, and that this explains the "unfounded complaints" made by the Claimant during that engagement.

The Respondent also referred to the fact that the Claimant has raised, in her Claim Form, that she "*had similar treatments*" with five other bus companies before commencing her engagement with the Respondent, and that she has another claim pending against the employer which followed the Respondent. This, the Respondent says, supports its contention that the Claimant was suffering from paranoia at the time of the acts complained of here.

e) The Claimant's approach, both at the time and in this hearing, to the Near Miss Incident. The Respondent says that the Claimant's contention that the driver in that incident deliberately targeted the Claimant because of her gender reassignment illustrates that the Claimant's perception is not rational, and supports its contention that she was paranoid at the time of these events.

84. The Tribunal notes that:

a) There are inconsistencies with the Claimant's position on the Insult Incident, both as to what was said and whether there was a physical assault also involved. This is unsurprising given that two-and-a-half years have passed since the events concerned, but those inconsistencies

reduce the confidence we can have in the accuracy of the Claimant's recollections, and the burden of proof sits with her at the first stage of our inquiry.

b) The Respondent has provided no evidence whatsoever from the driver concerned. The Respondent's position is that Mr Soz cannot remember who the relevant driver was. As per *Efobi*, we are to use our common sense to assess whether it is appropriate to draw any inference from that fact.

   I. Mr Soz said that he cannot remember who the driver was, and Mr Nuttman, on behalf of the Respondent, said that was the reason for the lack of direct evidence on this point.

   II. The Claimant raised the Insult Incident in the supplementary information she sent after the submission of her Claim Form, and this supplementary information was provided to the Tribunal on 5 March 2021, and to the Respondent thereafter. The Respondent has been on notice of the relevance of this driver's evidence for more than two years. However, the Tribunal appreciates that, in a workplace where over 300 drivers are in and out, some of whom are agency workers, it is not unreasonable that Mr Soz cannot recall who that driver was, especially as he also manages the allocations for a second site, and so deals with around 450 drivers at any one time.

   III. In light of the number of drivers specifically, we do not think it appropriate to draw any inference from the failure of the Respondent to provide direct evidence from the driver concerned – it is credible that the Respondent is simply not able to identify who that would be.

c) The fact that a claimant did not make a formal complaint may not be reflective of whether it happened or not – employees, particularly victims of discrimination, are often concerned about speaking up. However, in this instance, the Claimant had filed a number of reports before about poor treatment. In that situation, it could be seen as surprising that she did not in relation this one, though we recognise it happened on the same day as the Hard Braking Incident, which undoubtedly caused the Claimant a great deal of distress. If her engagement had continued beyond 13 January 2021, she may well have filed an occurrence report about this matter after that time, but the termination of her engagement may have meant she had other things on mind. We therefore place no weight either way on the fact that she did not file an occurrence report in relation to the Insult Incident – the fact neither supports nor undermines her contention that it occurred.

d) The Claimant was undoubtedly very upset when speaking to Mr Soz on 13 January 2021 – both she and Mr Soz agree on this. One reason for this upset could be that the Insult Incident had just occurred, another could be that the Hard Braking Incident had occurred only a little earlier that day

(the email from Mr Soz to others in the Respondent's organisation about the Insult Incident was at 17:30, and the hard Brake Incident occurred around 14:00), or it could have been the combination of the two. They also occurred on the same day as the Claimant's meeting with Mr Parada about the Angry Passenger Incident, and so it must have been a very difficult day for the Claimant all round.

e) Another factor that heavily influenced the thinking of the majority of the Tribunal Panel is the Claimant's considerably different perception of the Near Miss Incident footage than that of the (unanimous) Tribunal's. The Claimant referred to that footage as clearly showing that she was in real danger from the driver of that bus deliberately seeking to harm her. She also proceeded to assume that that understanding was shared by all in the tribunal hearing. That is far from the Tribunal's assessment of that footage, and we were careful to express no view either way in the course of the proceedings. The Claimant's entirely different perception of that footage, and of what had been discussed and apparently agreed upon by the Tribunal, leant considerable weight to Mr Parada's evidence of the inaccuracy of the Claimant's memory and interpretation of events for the majority of the Tribunal. This - again, for the majority of the Tribunal - detracted from the credibility of her evidence about the Insult Incident.

85. The analysis of the Tribunal proceeded as follows:

a) As per the guidance in *Igen*, it is unusual to find direct evidence of discrimination.

b) In the case of this complaint, whether the Insult Incident occurred can only be determined by weighing one person's word against another's, albeit that one side's evidence is "first hand" and the others is "second hand".

c) We need to determine what inferences it is proper for us to draw from the primary facts, as found by us.

d) The burden of proof sits on the Claimant to prove a *prima facie* case. If she fails to discharge that burden, her case fails.

86. The majority of the Tribunal considered that:

a) While the evidence from Mr Soz that the Insult Incident did not occur is second hand, and we have no means of testing the credibility of Mr Soz's source information, we do have reasons to doubt the credibility of the Claimant's evidence.

b) We do not doubt the Claimant's honesty – but we have observed that the Claimant can perceive events differently to others, including the Tribunal when it came to interpreting the video evidence of the Near Miss Incident, and the Claimant's contention that "we had all agreed" what that footage showed.

c) We note that the Claimant was observed by a medical professional to be suffering from paranoia and demeaning voices in 2021 – which post-dates the Insult Incident, and pre-dates this hearing. Therefore the Claimant's different perception may not have been evident at the time the Insult Incident is alleged to have occurred – but Mr Parada's evidence is that even at that time, it was, and we have no reason to doubt Mr Parada's credibility on this point. Furthermore, as Mr Nuttman has noted, the observation of paranoia and the fact the Claimant has heard demeaning voices was identified in 2021 as connected to her diagnoses of EUPD, which pre-dated the Claimant's engagement. The Claimant said that she was not suffering with that paranoia and those demeaning voices at the time of these events, but her mental health was clearly in a poor state at that time, given her medical notes in evidence refer to suicide intent 16 days after the date of the alleged Insult Incident.

d) These facts, together with the agreed evidence from both sides that the Claimant was considerably distressed at the time of the Insult Incident due to the earlier Hard Braking Incident, mean that the majority of the Tribunal do not believe that the Claimant has proven, on the balance of probabilities, that the Insult Incident occurred. We find that it did not.

87. For the minority of the Tribunal:

a) The fact that the Claimant has described the environment inside the garage as "hostile and upsetting", together with the fact that she had previously made complaints about incidents of gender reassignment discrimination;

b) The fact that, by the Respondent's evidence as well as the Claimant's, the Respondent's Hounslow depot was a male-dominated environment;

c) The Claimant has a protected characteristic that was visibly displayed in her dress and presentation;

d) The fact that the parties agree that the Claimant was considerably upset at the time of the Insult Incident is suggestive that something proximate had happened to her to cause that upset;

e) The fact that no bus driver, when questioned by Mr Soz about whether they called the Claimant a "wanker" would admit to it; and

f) The fact that Mr Soz has taken a position that the Tribunal does not find credible – that "wanker" is a gender-neutral term - goes to and reduces his credibility, as does the fact that, when asked by the Claimant to explain the distinction between "road traffic collision" and "near miss", he appeared not to remember. That is implausible given his driver training and experience,

lends sufficient credibility to the Claimant's account that that Tribunal member does find that the Claimant has, on the balance of probabilities, proven that the Insult Incident occurred, i.e., that a *prima facie* case has been established.

88. As this Tribunal determines these matters preferably unanimously, but if required, by a majority, the majority's view that the Insult Incident did not happen wins out, and consequently that complaint fails.

Complaint 3: the termination of the Claimant's engagement

89. As for the other two complaints, the first question to ask and answer is whether the Claimant has proven - on the balance of probabilities - facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent discriminated against her on the ground of gender reassignment, in in relation to the termination of her engagement.

90. The contemporaneous documentary evidence – i.e., an email from Mr Parada to the Claimant's agency, and a letter from Mr Parada to the Claimant – indicate that the Claimant's engagement was terminated for the reasons set out in paragraph 26 above. The Respondent's position is that Mr Parada was the person at the Respondent who took the decision to terminate the Claimant's engagement, and his reasons for doing so were those he put in writing in those two documents. As per the case of *Reynolds*, it is Mr Parada's mental process that is the focus of the Tribunal's examination, and not the mental processes of those who provided him with information, e.g. rebutting the Claimant's complaints.

91. The Claimant's position on why her engagement was terminated is not clear-cut. She avers that it was:

"*because of who I was. I was reporting too many times. My performance had dropped because of the impact of the treatment I was getting from other drivers. They saw me as a problem and wanted to get rid of the problem.*"

92. On the one hand this is connecting the termination of her engagement to who she was, i.e., her gender reassignment, but she also:

a) acknowledged on a number of occasions when giving oral evidence that her work performance had deteriorated – she says because of her treatment by the Respondent; and

b) in oral evidence asserted that Mr Parada would not have treated a bus driver in her position in the way that he did if that bus driver was a permanent member of the Respondent's staff rather than being an agency worker. In other words, the Claimant gave her agency worker status as the reason for any difference in her treatment by Mr Parada, rather than her gender reassignment:

> "*he [Mr Parada] wanted to take one side – that of his employee. I was not believed because I am an agency worker… I have seen that right through – it's because I am the agency worker, and these people [the people whose behaviour she had complained about] have been here longer than me – they have more power over me – they can get away with their excuses and their lies*".

93. In any event, it is clear that she is asserting that her gender reassignment was an operative reason in Mr Parada's decision to terminate her engagement, albeit she considers that there were some other reasons that played a part in that decision.

94. The evidence relevant to answering the question of whether the Claimant has proven facts from which a *prima facie* case of discrimination could be found is evidence about the rationality and truthfulness of the reasons given by Mr Parada for the termination of her engagement.

95. Taking each of those in turn:

The Hard Braking Incident

96. Mr Parada's clear evidence is that the CCTV footage (which was shown to him after his meeting with the Claimant on 13 January 2021 about the Near Miss Incident):

    I. raised concerns about the quality of the Claimant's driving;

    II. resulted in a financial claim from the passenger;

    III. caused the passenger to complain about poor and dangerous driving to TfL; and

    IV. raised concerns about the Claimant's failure to report the incident to the Respondent.

97. There has been clear evidence provided in relation to II, which the Claimant does not contest, and nor does she contest that the passenger made a complaint to TfL. The Claimant firmly disagrees with I, and considerable time was spent in the hearing on this subject. The Tribunal was shown CCTV footage of the incident (and watched it several times over), and the Claimant and Mr Parada in their oral evidence gave accounts of what that footage showed.

98. The Tribunal Panel could see that the Claimant was speeding, driving at between 26 and 22 mph in a 20 mph zone before slowing for the vehicle in front. The Claimant did not slow down for speed humps in the road or when approaching a zebra crossing. We could also clearly see the brake lights lighting up on the car in front some noticeable time before the speedometer on the bus indicated the Claimant slowing. In short, Mr Parada's account was entirely consistent with what we saw.

99. The Claimant noted that the car in front of her had "cut her up", by overtaking her bus, and then speeding off. This did not appear to us to be relevant to whether her driving was of a good quality – but it was relevant to her, because it annoyed her, and that accounted for her speeding as she sought to catch up with it, and why she did not brake when that car slowed.

100. No evidence was presented by the Respondent that the passenger complained to TfL, but given the passenger did bring a claim against the Respondent it would not be surprising if a complaint had not also been raised with TfL.

101. The Claimant agreed that she did not file a report with the Respondent about the incident – but her evidence was that she attempted to do so and this was refused by Mr Soz. As Mr Soz said in his evidence, there was no reason offered by the Claimant as to why Mr Soz would resist receipt of such a report – he did not deal with themself, but rather passed those on to the relevant driver's manager. Accepting receipt of that report would cause him no more trouble than passing it on. Furthermore, Mr Parada said that there were many ways in which occurrence reports could be filed, Mr Soz was not the only means to do so (not least because the Claimant could have sent it via her agency), and the Claimant did not disagree with that.

102. While the Claimant was inconsistent about the dates on which she tried to file the occurrence report relating to this incident, she agreed that the two days following the Hard Braking Incident were her "rest days", and given she went home early that on the day itself due to distress, the Tribunal finds it improbable that she returned on either of the next two days to try to hand in the occurrence report to Mr Soz. Her engagement was terminated before she returned to work. We find that she did not attempt this, and consequently this criticism of the Claimant by Mr Parada is legitimate.

103. We find that the Hard Braking Incident and the criticisms made by the Respondent connected to it were justified and were operative reasons in Mr Parada's decision to terminate the Claimant's engagement. We find that this reason was not related to the Claimant's gender reassignment.

The self-curtailment on 13 January 2021 following the Claimant's allegation of the Insult Incident

104. The parties agreed that self-curtailment resulted in a financial penalty for the Respondent, and Mr Soz and Mr Parada gave cogent evidence about the particular importance of the Claimant's 111 route.

105. The Tribunal was initially surprised that an agency worker was assigned such an important route, but it was clear when we asked about it that it is a very busy route, with a high number of drivers on it each day, and at the time, the Respondent was very short-staffed due to covid. The value of the route, and the Claimant's performance issues, also explains why Mr Parada (before he knew of the passenger complaint in relation to the Hard Braking Incident and saw the

CCTV footage) would offer to explore whether the Claimant's route assignment could be changed.

106. We find that this self0curtailment was an operative reason in Mr Parada's decision to terminate the Claimant's engagement, and given that the Tribunal (by a majority) find the Insult Incident did not occur, it was reasonable for Mr Parada to have reached that view and to have been vexed that the self-curtailment occurred. This is not a reason that indicates gender reassignment discrimination – the Respondent had a legitimate financial reason for wishing to terminate the Claimant's engagement because of this.

The "constant" and "unfounded" allegations against colleagues

107. The Claimant agrees that she made numerous complaints against colleagues, and that Mr Parada did not uphold any of them (thought he placed notes on the files of the individuals involved to the effect that a complaint had been made by the Claimant).

108. Not all of the complaints made by the Claimant were the subject of this litigation, and so the Tribunal has not made findings of fact on each of them. However, we think it reasonable to assume, given conduct at any point in the entire period of the Claimant's (relatively short) engagement with the Respondent would have been within the primary time limit for a discrimination complaint, that in selecting the complaints to bring before this tribunal the Claimant selected the best of them. Those two – the Near Miss Incident and the Insult Incident – have been found by this Tribunal not to have occurred (by a majority, in the case of the second of those).

109. While it is concerning that, given allegations of verbal discrimination often come down to one person's word against another's, the making of allegations of discrimination could form a reason contributing to the decision to dismiss an agency worker (not least because that is likely to strongly deter others from raising complaints that could be legitimate), we can see that in the short period the Claimant worked for the Respondent, there were numerous complaints that Mr Parada looked into, and on each occasion he concluded they were unfounded. The question for the Tribunal is not whether we think that should have been responded to in a different way, but is rather whether that being a factor in the decision to terminate the Claimant's engagement is evidence of discrimination on the basis of her gender reassignment. We have asked ourselves whether a hypothetical bus driver who did not have the Claimant's characteristic of gender reassignment who made a series of (as Mr Parada saw it) unfounded complaints about other matters involving colleagues would have been treated in the same way. In our view, they would have been. Mr Parada's written and oral evidence was that:

"*The whole point of agency staff is to have someone available to provide cover, quickly and competently*".

The distraction, as he saw it, created by the Claimant's unfounded complaints was the problem – not the subject-matter of those complaints. We do not consider this reason to be related to the Claimant's protected characteristic of gender reassignment.

110. The Claimant herself expressed the view in cross-examination that she was not believed by Mr Parada because she was an agency worker, not because of her gender reassignment.

The Angry Passenger Incident

111. Mr Parada's evidence was definite, clear and convincing that the Claimant breached applicable policies (though those were not provided to us) by not serving a bus stop on her route, and leaving her cab to speak to the angry passengers. While the Claimant offered explanations for why she acted as she did, she did not appear to dispute that the applicable policies were breached – she considered those breaches justified.

112. Again, we find these credible reasons to operate in the mind of Mr Parada when determining to terminate the Claimant's engagement. These are reasons unconnected to the Claimant's gender reassignment.

TfL report of ibus system misuse

113. It is unfortunate that, again, no written or contemporaneous evidence was supplied by the Respondent (besides the email and letter terminating the Claimant's engagement) that TfL had reported that the Claimant had, "on many occasions", misused the ibus system, but the Claimant did not contest this point. Rather, her argument was that her use of the ibus system was appropriate (i.e., that TfL's complaint was unfounded).

114. The Claimant averred that she had tried, repeatedly, at the times of each of the Angry Passenger Incident and the Hard Braking Incident, to contact the Respondent's depot by the correct procedure to seek assistance, but none was forthcoming. Her logic was that the only option left to her was to use the "red" emergency button given the TfL dictat that the "blue" button to contact them in non-emergency scenarios was being over-used. That struck the Tribunal as an odd conclusion to reach – we would have thought it better to break protocol regarding use of the blue button than to indicate a pressing emergency when the Claimant appeared to agree the situation would not otherwise warrant use of the red button, but in any event, given the fact that TfL complained is unchallenged, a complaint from TfL in these terms would reasonably be a serious concern for the Respondent given its financial dependence on contracts with TfL to operate its business.

115. The Claimant did not assert that the failure by the Respondent to respond to her use of the "green" button was connected to her gender reassignment, but in any event, she agreed with Mr Parada that, at least in relation to the Hard Braking Incident, the garage did contact her within the 20 minute protocol for them doing so.

116. The Tribunal again finds that the TfL complaint was an operative reason for Mr Parada's decision to terminate the Claimant's engagement, and that it was unrelated to the Claimant's gender reassignment.

A complaint from a Service Controller that the Claimant was very rude on the radio and not willing to take feedback given by NMCC regarding use of the correct codes

117. Again, besides the email and letter terminating the Claimant's engagement, no evidence was provided for this by the Respondent – but it is credible that the Claimant, who expressed in oral evidence how cross she was that her green button calls made in connection with the Angry Passenger Incident and the Hard Braking Incident were not responded to sooner, would have behaved in this way.

118. When asked about whether she agreed she had done so in oral evidence, the Claimant said:

"*I went into the garage – I was seeking help. It wasn't over the radio. I couldn't get help. This is why I felt very unsupported after everything that was said previously.*"

119. Mr Parada said that it happened in connection with the Claimant self-curtailing. He explained that the Controllers can see where each bus is on its designated route, and they can tell if the bus disappears from that route. If that happens, the Service Controller will try to contact the driver to find out what's going on. He described that process, and said that the Service Controller will not know who each driver in fact is, but will rather only know them by their employee number, running number and location.

120. This explanation was not disputed by the Claimant.

121. The Tribunal considers it credible that, given this complaint relates to an occasion when the Claimant self-curtailed, that she was in an emotional state, and it is plausible that she would have expressed that to the Service Controller.

122. We consider this to have been an "add on" reason to the more substantive other reasons relied on by Mr Parada when deciding to terminate the Claimant's engagement. We consider this reason to have genuinely played some part in that decision, and we find that reason to be unconnected to the Claimant's gender reassignment.

123. Overall, therefore, we consider that each of the reasons stated by Mr Parada in his letter of 15 January 2021 to have been operative reasons in his decision to terminate the Claimant's engagement, and we do not consider any of them to be because of the Claimant's gender reassignment.

124. The next question to address is whether there was, in addition, another unstated reason Mr Parada took that decision, that being the Claimant's gender reassignment (i.e., taking account of the observation in *Nagarajan* that a decision-maker may not be conscious of a discriminatory motive, but it is open to the tribunal to find as a fact that they had one if that is the proper inference to draw from the evidence). In our view, Mr Parada's oral evidence indicated that he was considerably angered by the Claimant's (as he saw it) poor driving in relation to the Hard Brake Incident, and (again as he saw it) poor judgement in connection with the Angry Passenger Incident. We consider those to be the dominant reasons – and the related complaints from TfL and the passenger injured in the Hard Brake Incident – for the termination of the Claimant's engagement.

125. We have seen no evidence to suggest that the Claimant's gender reassignment contributed to his decision-making, and in fact, the Claimant herself suggested that it was her status as an agency worker rather than as a permanent employee that explained his decision, not her gender reassignment.

126. Consequently, we find that the Claimant has failed to make a *prima facie* case on this complaint – she has not proven, on the balance of probabilities, facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent discriminated against her on the ground of gender reassignment in in relation to the termination of her engagement. Therefore this complaint fails.

<u>"All reasonable steps"</u>

127. As we have concluded - by a majority in one instance - that the Claimant failed to discharge the burden of proof in relation to each of the three acts complained of, it was not necessary for us to consider whether, in relation to the Near Miss Incident and the Insult Incident, the Respondent could rely on the defence in section 109(4) of the 2010 Act.

128. That section, as set out above, provides that:

"*(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—*

(a) from doing that thing, or

(b) from doing anything of that description."

129. However, given the Respondent asserted that it would be able to rely on that defence if necessary to do so, we gave consideration to whether we consider it could.

130. The Respondent pointed to the following steps it had taken before these events:

a) The existence of its Equal Opportunities and Harassment policies from 2007, and that the Respondent emphasises that it has a "zero tolerance" approach to the enforcement of those policies;

b) The fact that those policies were sent to the agencies that supplied contract workers in advance of the start of those individuals' engagements;

c) The fact that the policies were part of the Respondent's induction process;

d) The fact that the message that it was safe to report concerns was reinforced by line managers and those responsible for training at induction (and the latter was agreed by the Claimant, who was encouraged by Mr Cecil to report any concerns); and

e) The fact that Mr Parada investigated every occurrence report and grievance raised by the Claimant to some degree.

131. The Tribunal finds that the following steps could have been, but had not been, taken by the Respondent here:

a) The Respondent could have kept its policies relevant to discrimination up-to-date. The employment policies disclosed by the Respondent appear to date from 2007. The Equal Opportunities policy refers to repealed legislation, and fails to refer to the Equality Act 2010, despite the fact that that Act is more than ten years old.

b) Given that agency workers appear to be, at least at times, a significant feature of the Respondent's workforce, its Equal Opportunities policy should be clear in its terms that it applies to agency workers as well as employees and job applicants – so that there is both an expectation that agency workers are protected by it but also that they are expected to comply with it.

c) Significantly, there is a growing societal recognition that focusing on "equality" alone is insufficient. Equality without inclusion risks members of a workforce who belong to minority groups not bringing their whole selves to work, with the result that the workplace is the poorer for it. One of the Claimant's complaints in this matter is that she didn't feel that she was wanted in the Respondent's organisation (the notes of the meeting of 13 January 2021 record that the Claimant said "*I feel like I'm not allowed to have a job… Some people don't want me to work*"). A policy that sets an expectation of inclusion of people with diverse characteristics, and that sets the tone that their skills, experiences, characteristics and perspectives

will be celebrated would be a start in changing that experience for other transgender people working for the Respondent.

d) While the Respondent pointed to the fact that its Equal Opportunities and Harassment policies were on display on its noticeboards (the Claimant agreed that they were), the Respondent's own evidence is that drivers spent only small portions of their working day at the depot – to sign on and sign off. In that context, regular and refreshed training and communications emphasising the importance of equality, diversity and inclusion are essential. The Tribunal members have experienced such initiatives in other workforces by means of attachments accompanying digital payslips, or printed leaflets or communications being left on the seats of drivers' cabs on buses.

e) In an organisation of this size, it is surprising that the Respondent does not have employee representative groups from some of its minority groups, e.g., a LGBTQ+ representative group, or a minority ethnic representative group. Support from an employer in the formation and operation of such groups could allow ideas for improvement to come from diverse groups so as to enrich and improve the Respondent's approach to issues affecting those groups.

f) While the policy states that "*policies and procedures alone will not ensure the provision of equal opportunities*", and in its areas for action the Respondent, at least in 2007, identified training as an area of focus, it seems more needs to be done, at least as regards transgender awareness. In this hearing, to consider whether the Claimant's complaints of discrimination on the basis of gender reassignment should be upheld, one of the Respondent witnesses did not know the meaning of the terms "cis" or "trans", and also said that he did not know the correct term to refer to a woman attracted to women. In areas such as these, as the Claimant has attested throughout this hearing, language is important, and the Respondent could do more to train its staff in its appropriate use. This individual is a person in daily contact with all drivers – the "face" of the Respondent's management. It is all the more important that that person understands the value of inclusive language.

g) The EHRC Code states that equal opportunities policies will normally:

   I. give examples of what is, and what is not, acceptable behaviour;

   II. identify who is responsible for the policy; and

   III. set out details of monitoring and review procedures,

   (paragraph 18.8) and "*should be drawn up in consultation with workers and any recognised trade unions or other workplace representatives, including any equality representatives within the workforce*" (paragraph 18.11).

h) Mr Parada described a practice of putting a note on the personnel file of any person about whom the Claimant made a complaint, even if he (Mr Parada) found that complaint unfounded, in case a subsequent similar complaint was raised, so as to provide evidence that the individual in question had been warned about such behaviour previously. However, this did not address the wider issue of general awareness of inclusive communications and interactions, which an employer taking all reasonable steps would have done, and could have done by way of a training day or workshop on such inclusive communications. Putting posters up to celebrate Pride is a visible step towards inclusion, but as the Respondent's own policy recognises, equality needs "[active promotion]".

132. The Tribunal finds it was reasonable for the Respondent to take those steps in light of:

a) The size of the Respondent's organisation;

b) The fact that updating its policies need not be an onerous task;

c) Appropriate training of its staff is not an unreasonable expectation in light of the size of its workforce, and its diversity in some respects (so a large number of people could be affected by the Respondent's shortcomings as regards equality, diversity and inclusion) and its lack of diversity in other respects (so that minority could feel acutely isolated in such an environment); and

d) Providing the opportunity and support for representative groups would be of mutual benefit to the individuals concerned and the Respondent (and for others represented by but not participating in those groups) – it need not be a burdensome process.

We consider these steps would make a marked difference to the experience of all the Respondent's workforce – they are not unreasonable to take when considering the relatively limited time, trouble and expense they might be expected to involve measured against the marked positive impact that might be anticipated from taking them.

Conclusions

133. The Claimant's claim for unlawful discrimination by reason of gender reassignment fails. For the reasons set out above, she has failed to establish a *prima facie* case of discrimination in relation to the acts complained of.

Employment Judge Ramsden
Date 28 July 2023