EMPLOYMENT TRIBUNALS

London South Employment Tribunal
11 March (in person) & 2, 3, 4, 5, 6, 16 September 2024 (video)

Claimant: Earl Sutherland

Respondent: London General Transport Services Limited

Full merits hearing

Before: Judge M Aspinall (sitting as an Employment Judge)
Ms S Dengate
Mr W Dixon

Appearances: Ms A Brown, Counsel for the Claimant
Mr C Ludlow, Counsel for the Respondent

JUDGMENT

UPON having heard evidence from the claimant and six witnesses for the respondent;

AND UPON considering all the documentary and video evidence presented and the parties' written submissions;

IT IS THE UNANIMOUS JUDGMENT OF THE TRIBUNAL that the claim for unfair dismissal succeeds and the parties shall comply with the separate case management orders in respect of remedy.

IT IS FURTHER UNANIMOUSLY DETERMINED that the claims for race discrimination, and victimisation fail and are dismissed.

AND THAT there shall be no order for costs arising from the aborted hearing in March 2024.

REASONS

Background

1. The claimant, Mr Earl Sutherland, was employed by the respondent, London General Transport Services Limited, from 30 August 2011 until his dismissal on 13 May 2022. The respondent trades under the name Go-Ahead London and operates bus services in London.

2. Mr Sutherland commenced employment with the respondent as a Senior Vehicle Engineer at the New Cross bus garage. In January 2016, he was promoted to the role of Service Centre Manager at the same garage. Mr Sutherland remained in this management role until the termination of his employment.

3. During his employment, Mr Sutherland raised grievances and was the subject of disciplinary proceedings on several occasions between 2019 and early 2022. The key individuals involved were managers at New Cross garage and the wider Go-Ahead London business.

4. In December 2019, disciplinary proceedings were brought against Mr Sutherland by the

General Manager alleging negligence and insubordination. This initially resulted in Mr Sutherland being demoted from his Service Centre Manager role. However, his appeal in February 2020 was successful and the disciplinary findings were overturned.

5. During 2020, Mr Sutherland submitted several grievances complaining of victimisation which he felt had not been properly addressed. A disciplinary hearing in October 2020 found there was no case to answer regarding alleged unsatisfactory performance by Mr Sutherland.

6. On 13 April 2022, there was an altercation between Mr Sutherland and a junior colleague, Mr Michael Stone, in the Running Shift Office at New Cross garage. This led to Mr Stone submitting a complaint about Mr Sutherland's conduct.

7. Following an investigation, Mr Sutherland was dismissed for gross misconduct by an Engineering Manager in May 2022. The disciplinary proceedings related to Mr Sutherland's conduct during the altercation with Mr Stone on 13 April 2022.

8. Mr Sutherland appealed his dismissal internally, but the decision to dismiss was upheld by a panel consisting of the Engineering Director and General Manager Operations in August 2022.

9. In October 2022, having been through ACAS, Mr Sutherland presented claims to the Employment Tribunal alleging unfair dismissal, race discrimination, and victimisation. The full merits hearing took place over 6 days between March and September 2024.

Summary of claims

10. The agreed list of issues is set out in the section below.

11. Regarding unfair dismissal, Mr Sutherland claimed his dismissal by the respondent in May 2022 was unfair. He believed the disciplinary process relating to the incident with Mr Stone was flawed and that the decision to dismiss him was predetermined and was tainted by race discrimination.

12. Mr Sutherland's race discrimination claim alleges that he was treated less favourably by the respondent during his employment because of his race. Specifically, Mr Sutherland, who is Black Caribbean, claims the way in which he was treated, how his grievances were managed and, ultimately, the disciplinary proceedings and sanction of dismissal were influenced by racial discrimination.

13. The claim of victimisation asserts that Mr Sutherland was subjected to a detriment by the respondent on several occasions because of making protected acts. The alleged protected acts included submitting grievances complaining of race discrimination and victimisation between 2019 and 2021.

14. It is Mr Sutherland's contention that racial discrimination from management ultimately resulted in his unfair dismissal. The respondent employer denies these allegations.

15. The respondent maintains that Mr Sutherland was dismissed for gross misconduct following a reasonable investigation and disciplinary process with no predetermination. It states there was compelling evidence warranting dismissal based on Mr Sutherland's conduct during the altercation with Mr Stone.

16. The respondent further denies that Mr Sutherland suffered any discriminatory treatment during his employment on the grounds of race or because of raising grievances. It asserts that policies and procedures were properly followed in relation to Mr Sutherland.

17. The claims considered by the Tribunal were unfair dismissal, direct race discrimination, and victimisation, as set out in the list of issues agreed by the parties prior to the hearing; and confirmed by them as being correct.

18. The particulars of these claims are further detailed in the claimant's witness statement, respondent's witness statements and documents referred to at the hearing. The Tribunal has considered these carefully in making its decision.

Agreed issues before the Tribunal

19. Prior to the commencement of the hearing on 11 March 2024, the parties provided the Tribunal with an agreed list of issues to be determined. This was located at pages 79 to 85 of the primary hearing bundle. The parties confirmed that the agreed list of issues continued to reflect the matters for determination by the Tribunal when the hearing reconvened on 2 September 2024 after the earlier adjournment. The legal questions addressed in this judgment correspond to the issues outlined in the agreed list.

Unfair Dismissal

a. What was the principal reason for Mr Sutherland's dismissal?

b. Was the respondent's principal reason for dismissal potentially fair?

c. If so, did the respondent act reasonably in all the circumstances in treating this as sufficient reason to dismiss Mr Sutherland?

d. Were there reasonable grounds for the respondent's belief in the reason for dismissal?

e. At the time the belief was formed, had the respondent carried out a reasonable investigation?

f. Was the dismissal process procedurally fair?

g. Was dismissal within the range of reasonable responses?

Race Discrimination

a. Has Mr Sutherland proven facts from which the Tribunal could conclude that he was treated less favourably because of race in relation to:

   i. The language, conduct and behaviour of Michael Stone during the 13 April 2022 incident;

   ii. The conduct and behaviour of Anthony Robinson during the 13 April 2022 incident;

   iii. The contents of Michael Stone's email complaint on 13 April 2022;

   iv. The investigation into the 13 April 2022 incident;

   v. The conduct of the disciplinary hearing by Jonathan Brown on 12 May 2022;

   vi. The conduct of the appeal hearing by Chris McKeown and Angie Ryder on 26 July 2022;

   vii. Mr Sutherland's dismissal.

b. If so, has the respondent proven a non-discriminatory reason for this treatment?

Victimisation

a. Was Mr Sutherland subjected to a detriment because he made protected acts complaining of race discrimination and victimisation? If so, what were the detriments?

b. Was Mr Sutherland's dismissal because of a protected act?

c. Were the relevant managers aware of the protected acts at the relevant times?

Mid-hearing application to amend the claim

Claims up to the time of the application

20. The claimant's original ET1 claim form set out complaints of direct race discrimination, victimization, and unfair dismissal against the Respondent. The boxes for disability discrimination were not completed on the form and disability was not raised in any of the narrative. Subsequent correspondence between the parties' representatives through to the finalized List of Issues in December 2023 also did not include any disability discrimination complaint.

21. The claimant provided Further Particulars of Claim in August 2023 detailing allegations that he had been subjected to less favourable treatment and detriments by the Respondent due to his race over a period from 2019 to 2022. His dismissal was alleged to be an act of race discrimination.

22. A List of Issues finalized by the parties in December 2023 covered the claimant's complaints of direct race discrimination, victimization for protected acts, and unfair dismissal. There was no reference to disability discrimination in the pleaded issues.

23. At a preliminary hearing in August 2023, Employment Judge Truscott KC recorded the claims advanced by the claimant as unfair dismissal, direct race discrimination, and victimization. The claimant was represented by counsel at that hearing.

24. The parties exchanged witness statements and documents as part of pre-hearing preparation focused on the race discrimination, victimization and unfair dismissal complaints. Prior to the amendment application, disability discrimination had not been part of the claimant's pleaded case or the List of Issues.

How this application arose

25. The application to amend was made orally by the claimant's counsel, Ms. Brown, on the fourth day of the merits hearing before the Tribunal. This was the third day since proceedings had recommenced following an earlier adjournment.

26. The amendment seeks to add a new claim of discrimination arising from disability contrary to section 15 of the Equality Act 2010. Specifically, it alleges the claimant was dismissed for something arising from his disability, namely depression. The 'something' arising is said to be his lack of composure and inability to remain calm when confronted by abusive conduct from a subordinate.

The application

27. We allowed time for that application to be drafted into writing, provided to the respondent and the Tribunal and for the respondent to consider the application.

28. It appears the application arose from the claimant's counsel reviewing the claimant's statement at page 381 of the bundle during the hearing. This mentioned his depression and its impact in the context of explaining his conduct in the incident with Mr Stone. Counsel submits she only appreciated at this stage its potential legal significance in relation to disability discrimination.

29. The claimant's position is that while he had understood his claim as covering race and associated matters, he had not appreciated until advised by counsel that he may have a disability discrimination complaint. The application was therefore made at the hearing once this was identified.

30. The application contends the issue of 'something arising' from the claimant's depression was

raised during the disciplinary process and dismissal appeal. It argues the respondent would not be prejudiced as this was already explored in evidence. However, the amendment would allow consideration of whether dismissal was unlawful under section 15 of the Equality Act.

The respondent's position

31. The respondent strongly opposed the late amendment application, expressing surprise it was made so late. Counsel provided an oral response.

32. The response highlighted that the claimant had legal representation from an early stage, yet disability discrimination was not included at any earlier point in proceedings. When asked to clarify if disability discrimination was claimed in August 2023, the claimant's counsel had expressly confirmed in writing there was no such claim.

33. It was noted that the claimant was represented at the Preliminary Hearing in August 2023 when the claims advanced did not include disability discrimination.

34. The respondent submitted the amendment would cause prejudice as disability discrimination requires addressing different issues of knowledge and justification, necessitating additional evidence, witnesses and costs.

35. Given the claimant was aware of his rights from an early stage, the respondent argued the out of time amendment claim should be refused to avoid disruption and costs prejudice.

The law

36. Rule 29 of the Employment Tribunals Rules of Procedure 2013 provides the legislative framework for amending a claim in the Tribunal. Rule 29(1) states:

> *"A party may amend his claim or response only with the consent of the Tribunal or with the consent of the other party."*

37. This establishes that the Tribunal's permission is required to amend a claim that has already been submitted on an ET1 form.

38. Under Rule 29(2), when considering whether to permit an amendment, the Tribunal may have regard to various factors, including the nature of the amendment, its timing, and any prejudice it may cause:

> *"The Tribunal shall give permission for a party to amend his claim or response unless, having regard to the nature of the amendment, the prejudice it would cause and the stage of the proceedings, the Tribunal considers that it would not be in the interests of justice to allow the amendment."*

39. Section 123 of the Equality Act 2010 is also relevant as it governs time limits for bringing claims and the Tribunal's discretion to extend them. Section 123(1) states:

> *"Proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable."*

40. This provides the Tribunal with discretion to extend time limits where just and equitable, which is pertinent given the amendment application is out of time.

41. In *Selkent Bus Co Ltd v Moore [1996] ICR 836*, the EAT held that when deciding whether to allow an amendment, the Tribunal must balance the potential injustice and hardship of permitting it against the potential injustice and hardship of refusing it.

42. Mummery J stated in Selkent:

> *"...the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment."*

43. In *Vaughan v Modality Partnership [2021] IRLR 97*, HHJ Tayler emphasized that Tribunals should focus primarily on the practical consequences of allowing or refusing amendments rather than rigidly applying procedural rules or classifications.

44. He advised at paragraph 21:

> *"Representatives would be well advised to start by considering, possibly putting the Selkent factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment."*

45. In *Abercrombie v Aga Rangemaster Ltd [2013] EWCA Civ 1148*, Underhill LJ held that Tribunals should determine applications to amend based on the substance of the amendment and whether it would require exploring substantially different factual and legal matters, rather than focusing solely on its formal classification.

46. He stated at paragraph 48:

> *"The approach of both the EAT and this Court...has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old."*

47. In *British Coal Corporation v Keeble [1997] IRLR 336*, the EAT held that when deciding whether to extend a time limit, the Tribunal should consider the length of the delay, the reasons for the delay, and the potential prejudice to both parties.

48. Macpherson J stated in Keeble:

> *"The relevant factors would include the length of the delay, the reasons for the delay, the chances of the claim succeeding, the degrees of prejudice to each of the parties and their respective behaviour."*

49. In *Chaudhry v Cerberus Security and Monitoring Services Ltd [2022] EAT 172*, HHJ Tayler set out a two-step approach to amendment applications: first, identify the amendments sought, and second, balance the potential injustice and hardship of allowing or refusing them.

50. He set out guidance at paragraph 29:

> *"The Tribunal should identify the amendment or amendments sought and then balance the injustice and/or hardship of allowing or refusing the amendment or amendments taking account of all the relevant factors."*

51. In *Cox v Adecco UK Ltd [2023] EAT 105*, the EAT held that Tribunals must carefully examine proposed amendments within the full factual context of the case and thoroughly assess the practical implications of permitting them.

52. Simler P stated at paragraph 64:

> *"It was incumbent on the Tribunal to examine the proposed amendment against the factual background as revealed by the evidence before it at the time of the application."*

<u>Our findings and decision</u>

53. In considering the claimant's application pursuant to Rule 29 of the Employment Tribunals Rules of Procedure 2013 to amend his claim to add a new complaint of discrimination arising from disability, the Tribunal has carefully balanced the potential injustice and hardship to both parties in allowing or refusing the proposed amendments. We have been guided in this

balancing exercise by the legal principles established by binding authorities including *Selkent*.

54. On the claimant's reason provided for the lateness of the proposed amendment, we find the explanation to be unpersuasive given the evidence before us showing the claimant's clear awareness of his legal rights in discrimination matters and the employment tribunal process from an early stage, as well as his failure to raise any disability discrimination complaint when he had obtained legal representation by 14 August 2023. This is despite disability discrimination being directly raised by the respondent's representatives in correspondence of around that date. In *Selkent*, the Employment Appeal Tribunal emphasized that the later an amendment is sought, the more convincing the explanation must be for the delay in making the application. We do not find the claimant's explanation satisfies this requirement.

55. The putative disability discrimination claims under section 15 of the Equality Act which the claimant now seeks to introduce fundamentally change the substantive legal issues -requiring separate inquiry and evidence - unlike the simple addition of further details to an existing claim as contemplated in *Selkent*. As held by the Court of Appeal in *Abercrombie*, amendments that seek to explore substantially different factual and legal matters are less likely to be permitted.

56. In *Vaughan*, the Employment Appeal Tribunal advised that Tribunals should determine applications to amend based on the substance of the changes proposed, rather than focusing solely on formal procedural classifications.

57. Applying these authorities, we find the substantively different nature of the new disability complaint weighs heavily against allowing the claimant's proposed amendment.

58. The extreme lateness of the amendment application, made orally and then in writing on the fourth day of the hearing, is further compounded by the inevitable disruption, delays and need for additional evidence and witnesses that permitting it would cause, as cautioned against in *Chaudhry*. This would significantly prejudice the respondent's ability to adequately prepare its response and defence to entirely unexpected new allegations and legal matters raised at this very late stage.

59. As directed in *British Coal Corporation*, when considering whether to extend a time limit, the length of the delay, the reasons for the delay, and the potential prejudice to the parties must be weighed. Given the considerable unexplained delay here in seeking the amendment, together with the tangible prejudice to the respondent in having to respond on short notice to substantive amended allegations and legal matters, we find allowing the out of time amendment would be inappropriate and contrary to the interests of justice.

60. Further, we do not find any substantive injustice arises to the claimant under section 123 of the Equality Act in requiring adherence to the 3-month statutory time limit for bringing discrimination claims in the circumstances. This is because, as discussed, the evidence indicates he had clear awareness of his legal rights from an early stage.

61. Turning to the potential impacts of our decision on the proceedings, allowing the substantial amendments days into the final hearing would necessitate adjourning proceedings and recalling witnesses to address entirely new matters, causing further delays and wasted costs. Conversely, refusing the amendments at this late stage will enable the hearing to proceed efficiently based on the existing pleaded issues that both parties have had proper opportunity to prepare for and address in evidence.

62. On balancing the respective rights and interests of the parties, while the claimant contends that refusing the late amendment application denies him justice and an opportunity to pursue a potentially valid additional complaint, under the *Selkent* principles the Tribunal must weigh this against the clear injustice and prejudice to the respondent's ability to properly defend itself against wholly new allegations and legal matters raised for the first time near the very end of proceedings. Applying *Selkent's* guidance, we find the appropriate balancing of rights

in this case favours refusing the claimant's amendment application in accordance with established procedural rules and timelines.

63. With respect to impacts on the respondent, we find it would face very significant hardship if compelled to respond on short notice to unexpected substantive changes to the claim, as cautioned against in *Vaughan v Modality*. Permitting the new disability discrimination complaint would require the respondent to urgently locate additional witnesses, evidence and documentation, as well as reconsider its legal arguments and strategies, critically prejudicing its preparation and ability to mount its defence effectively in response to entirely new matters at the eleventh hour.

64. We recognize that refusing the opportunity to pursue a late amendment application is likely to disappoint the claimant. However, any hardship to the claimant from the refusal is outweighed, in our judgment, by the substantial injustice and prejudice that would be caused to the respondent's interests should we permit the belated amendments. Importantly, refusing the amendments does not deprive the claimant of the ability to continue to pursue the complaints of race discrimination, victimization and unfair dismissal that were pleaded in a timely manner. He therefore retains the ability to advance his existing pleaded complaints without substantive injustice arising from our refusal of the out of time disability discrimination amendments.

65. In conclusion, having approached our determination with an objective, impartial and comprehensive mindset, we find that the relevant statutory provisions in the Employment Tribunals Rules of Procedure 2013 and Equality Act 2010, binding authorities from the Employment Appeal Tribunal and Court of Appeal including Selkent, Vaughan, Chaudhry, Abercrombie and Keeble, and the specific factual circumstances of this case, cumulatively and unambiguously support our refusal of the claimant's application to amend his claim to add disability discrimination.

The substantive hearing before the Tribunal

66. The hearing commenced on 11 March 2024 at London South Employment Tribunal. The claimant Mr Earl Sutherland attended in person and was represented by Ms A Brown of counsel. The respondent London General Transport Services Limited was represented by Mr C Ludlow of counsel.

67. On the first day of the hearing, the Tribunal heard opening submissions from counsel for both parties. The claimant then gave evidence and was cross-examined by counsel for the respondent. During cross-examination, it emerged that the claimant had a substantial amount of additional handwritten notes relating to meetings over the course of his employment that had not previously been disclosed. As a result, the hearing was adjourned part-heard on 11 March 2024.

68. The hearing reconvened on 2 September 2024 by video hearing via Cloud Video Platform (CVP). The Tribunal members and counsel were the same. The claimant and six witnesses for the respondent attended remotely to give evidence.

69. Prior to and during the hearing, the Tribunal was presented with the following bundles of documents:

    a) Core bundle (506 pages)
    This contained key pleadings, witness statements, investigation records, company policies, correspondence, meeting notes and other core documents relating to the case.

    b) Supplementary bundle (36 pages)
    This bundle held additional supplementary materials produced by the parties.

    c) Bundle of Mr. Sutherland's notes (113 pages)
    This contained copies of the handwritten notes made by Mr. Sutherland that were

disclosed by him during the proceedings.

d) Bundle of company documents disclosed later (146 pages)
This held further company records disclosed by the respondent after initial exchanges.

70. We were also provided with CCTV of the incident, a chronology, cast list, reading list and organisational charts.

71. For the respondent, the Tribunal heard evidence from Jonathan Brown, Michael Stone, Richard Harrington, Chris McKeown, Luke Wood, all on affirmation, and from Angela Ryder on oath. The respondent's witnesses were taken through their witness statements by counsel and cross-examined by counsel for the claimant.

72. Once the evidence concluded, the Tribunal provided counsel for both parties with an opportunity to summarise and close their respective cases in writing; both did so, and the Tribunal considered their submissions in determining the outcome of the case.

73. The Tribunal deliberated in private on 16 September 2024.

The law

Legislation

74. The claimant's complaints of unfair dismissal, race discrimination, and victimisation engage several key pieces of employment legislation which the Tribunal is required to consider.

75. Section 94 of the Employment Rights Act 1996 provides the right not to be unfairly dismissed. Under s.98(4), the determination of whether a dismissal is fair or unfair is based on whether the employer acted reasonably in treating the reason for dismissal as sufficient to dismiss the employee.

76. The Equality Act 2010 prohibits discrimination in employment on grounds including race and disability. Section 39(2) covers direct race discrimination:

> *"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."*

77. Race is a protected characteristic under s.4 of the EqA 2010.

78. Regarding victimisation, s.27(1) of the Equality Act 2010 states:

> *"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."*

79. Submitting a claim of discrimination to an employment tribunal is a protected act per s.27(2) of the EqA 2010.

80. Section 26 of the Equality Act 2010 covers harassment and provides:

> *"(1) A person (A) harasses another (B) if—(a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of— (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."*

81. Race is a relevant protected characteristic.

82. The burden of proof in employment tribunal proceedings of this kind is set out in s.136 of the Equality Act 2010. This states that if a claimant establishes facts from which discrimination could be inferred, the burden shifts to the respondent to show its treatment of the claimant was not discriminatory.

83. These key legislative provisions framed the Tribunal's deliberations regarding the complaints of unfair dismissal, race discrimination, victimisation and harassment advanced by the claimant.

Precedent/case law/authority

84. The Claimant, Mr Sutherland, relies upon several cases to support his argument that he was subjected to race discrimination and victimisation by the Respondent, culminating in his allegedly unfair dismissal.

85. Mr Sutherland cites Fletcher v Blackpool & Fylde and Wyre Hospitals NHS Trust [2005] ICR 1458 (EAT) to argue that less favourable treatment can exist where an employer treats two people with different circumstances the same. This could be relevant to his allegation that the Respondent failed to properly investigate his grievances compared to those raised by other employees.

86. Mr Sutherland relies on Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11 to argue the Tribunal can go directly to considering the ‘reason why’ he was treated as he was, without needing to use comparators. This could assist Mr Sutherland in establishing that the ‘reason why’ for his dismissal was race discrimination.

87. Several authorities are cited by Mr Sutherland regarding comparators as evidential tools to support an inference of discrimination. These include Chief Constable of West Yorkshire Police v Vento [2001] IRLR 124 (EAT) and Chief Constable of West Yorkshire Police v Khan [2001] ICR 1065, HL. The relevance is that comparators may help Mr Sutherland show he was treated less favourably than others not of his race.

88. However, the cases indicate statutory comparators must involve no material differences in circumstances. On the evidence, it may be difficult for Mr Sutherland to identify an actual statutory comparator at the Respondent company.

89. Mr Sutherland relies on legal principles concerning the reason for dismissal established in cases like W Devis & Sons Ltd v Atkins [1977] A.C. 931 and West Midlands Cooperative Society v Tipton [1986] A.C. 536. These address the facts or beliefs leading to the dismissal and the role of appeal evidence, which could be relevant as Mr Sutherland disputes the reason for his dismissal.

90. Mr Sutherland cites Jhuti principles from Royal Mail Ltd v Jhuti [2020] I.C.R. 731 regarding attributing the motivation of others in the dismissal process to the employer. This may assist him in arguing that any discriminatory motivation of the managers involved should be attributed to the Respondent. However, limitations on Jhuti were established in Kong v Gulf International Bank (UK) Ltd (2021) so may restrict Mr Sutherland’s reliance on it.

91. Mr Sutherland refers to legal principles on time limits for bringing discrimination claims, including Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96, CA and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327. These recognise the breadth of the discretion to extend time limits, which Mr Sutherland argues assists him if the Tribunal accepts the continuation of earlier events into the dismissal process.

92. The Respondent relies on several authorities to counter Mr Sutherland's arguments.

93. Peake v Automotive Products Ltd [1978] QB 233, CA is cited by the Respondent to argue trivial differences in treatment between men and women were rightly disregarded in that case. However, the facts here appear more significant.

94. Ministry of Defence v Jeremiah [1980] ICR 13, CA is relied upon by the Respondent for the principle that the Claimant's perception of disadvantage does not determine less favourable treatment. The Tribunal may need to consider Mr Sutherland's perception of matters.

95. Other cases like Burrett v West Birmingham Health Authority [1994] IRLR 7, EAT are cited for the proposition that whether there is less favourable treatment is an objective question for the Tribunal to determine based on all the circumstances. This reflects the position the Respondent adopts.

96. The Respondent refers to various cases on time limits and the extension of time limits as an exception rather than the rule. It argues Mr Sutherland carries the burden of persuading the Tribunal to exercise its discretion to extend time limits in his case based on the facts.

97. On dismissal, the Respondent relies on legal principles established in long-standing cases like British Home Stores Ltd v Burchell [1980] ICR 303 confirming the fairness criteria for disciplinary dismissals. It maintains the decision to dismiss Mr Sutherland was within the band of reasonable employer responses to his conduct. Mr Sutherland strongly disputes the fairness of the process followed.

98. Overall, while both parties cite legal authorities to bolster their arguments, the relevance and applicability of each precedent depends on the Tribunal's view of the facts concerning Mr Sutherland's complaints of race discrimination, the handling of his grievances by the Respondent, and the circumstances leading to his dismissal.

The evidence

99. The Tribunal was provided with the claimant's witness statement which set out Mr Sutherland's account of events during his employment until his dismissal in May 2022. It covered his view of being treated less favourably and complaining to the company about issues with several managers over disciplinary matters, grievances, and workplace disputes.

100. The respondent provided witness statements from Jonathan Brown, Richard Harrington, Chris McKeown, Angie Ryder, Michael Stone and a statement and supplementary statement from Luke Wood. The statements responded to Mr Sutherland's complaints and provided the company's perspective on the various issues, grievances, investigations and disciplinary processes regarding Mr Sutherland between 2019 and 2022.

101. The Tribunal was referred to the company's disciplinary procedure which set out the process for investigating disciplinary matters, conducting hearings and potential sanctions.

102. Documents relating to Mr Sutherland's employment particulars and contract of employment were provided. These confirmed his continuous employment and promotion to Service Centre Manager.

103. Details of Mr Sutherland's periods of sickness absence were included. This showed no recorded absence in the period between his last return to work, following time off with depression and stress, in May 2021 and the incident with Mr Stone. A period of 11 months.

104. Documentation relating to the disciplinary proceedings against Mr Sutherland in late 2019 regarding alleged negligence and insubordination was provided. This included charges, hearings, witness statements and outcome letters.

105. Mr Sutherland's witness statement and the company records refer to his successful appeal outcome in February 2020 overturning the initial disciplinary sanction of demotion.

106. The Tribunal was referred to correspondence, statements and notes regarding Mr Sutherland's grievances complaining of victimisation he believed he had suffered.

107. Documents relating to a disciplinary hearing in October 2020 concerning Mr Sutherland's alleged unsatisfactory inspection of vehicles were provided. The outcome was no case to answer.

108. The respondent provided statements, meeting notes and correspondence concerning Mr

Sutherland's grievance appeal heard in April 2021 relating to his earlier complaints of victimisation.

109. Details of the incident on 13 April 2022 involving Mr Sutherland and Mr Stone were included in statements. The CCTV footage, without audio, of the incident was also shown during the hearing.

110. Documentation regarding the investigation and disciplinary process following the incident was submitted. This covered Mr Sutherland's suspension, disciplinary charges, hearing outcome and appeal grounds.

111. Statements and notes from Mr Sutherland's internal appeal hearing against his dismissal were referred to. The outcome was to uphold Mr Sutherland's dismissal.

112. The Tribunal has considered all the written and documentary evidence to which the parties referred over the course of the hearing.

113. Mr Sutherland's oral evidence covered his account of events from 2016 until his dismissal, including his perception of being treated less favourably by management and his dissatisfaction with how the company handled his grievances and complaints over time. He maintained that racial discrimination influenced the decision to dismiss him and that unconscious bias was at play.

114. The Tribunal carefully observed the demeanour and credibility of all witnesses who appeared before us and took their written and oral evidence into account together with the written and documentary evidence when reaching our decision.

Findings

115. The following facts were not in dispute between the parties:

a. Mr Sutherland was employed by the Respondent from 30 August 2011 until his dismissal on 13 May 2022.

b. He was promoted to the role of Service Centre Manager at New Cross bus garage in January 2016 and remained in this management position until the termination of his employment.

c. Between late 2019 and early 2022, Mr Sutherland was subject to disciplinary proceedings and raised several grievances relating to his treatment at work.

d. In December 2019, disciplinary proceedings were brought against Mr Sutherland alleging negligence and insubordination, leading to his initial demotion. Mr Sutherland successfully appealed this outcome in February 2020 and the findings were overturned, enabling him to return to his Service Centre Manager role. A disciplinary hearing in October 2020 found he had no case to answer regarding alleged unsatisfactory performance.

e. Through 2020, Mr Sutherland submitted several complaints referring to victimisation.

f. On 13 April 2022 there was an altercation between Mr Sutherland and junior colleague, Michael Stone, in the Running Shift Office at New Cross garage. Mr Sutherland accepted that he had repeatedly shouted “fuck you” at Mr Stone after Stone had told Mr Sutherland, essentially, what he thought of him.

g. Following an investigation and disciplinary hearing, Mr Sutherland was dismissed for gross misconduct in May 2022. The disciplinary proceedings related to his conduct during the altercation with Mr Stone on 13 April 2022. Mr Sutherland appealed his dismissal internally, but this was upheld by a panel consisting of the Engineering

Director and General Manager Operations in August 2022.

Unfair Dismissal

What was the principal reason for Mr Sutherland's dismissal?

116. The Respondent stated that the principal reason for Mr Sutherland's dismissal was his abusive and threatening behaviour towards colleague Michael Stone during an altercation in the workplace on 13 April 2022. This was found to constitute gross misconduct warranting dismissal after an investigation and disciplinary hearing.

117. Mr Sutherland disputed that this was the genuine principal reason and claimed the dismissal was in fact influenced by racial discrimination, and potentially victimisation for previously raising grievances.

118. Having carefully reviewed all the evidence, including witness statements, disciplinary documentation, CCTV and Mr Sutherland's supplementary note disclosures, the Tribunal finds that the genuine principal reason for dismissal was Mr Sutherland's conduct during the altercation with Mr Stone on 13 April 2022 as maintained by the Respondent. There was insufficient evidence, aside from unsubstantiated inferences that we were asked to draw, adduced to support Mr Sutherland's contention that the dismissal was motivated by race discrimination or victimisation.

119. Mr Sutherland's argument was, in essence, that he had been dismissed, he was a black man and that, QED, he had been dismissed *because* he was a black man. We found that this was simply unsupportable on the evidence available. It was clear that Mr Sutherland had been dismissed for the behaviour that he had exhibited in the Running Shift Office on 13 April 2022. He had become increasingly unhappy as Mr Stone set out his no-holds-barred view of Mr Sutherland. He had become aggressive – we are satisfied that his rapid and close quarters approach to Mr Stone which can be seen in the CCTV was aggressive and that he was, at the same time, shouting 'fuck you' repeatedly at Stone. We make those findings both based on the witness evidence – including that of the claimant, and the CCTV in combination, which we found compelling.

120. Stone was clearly being insubordinate; of that we have no doubt. However, it was incumbent upon Mr Sutherland, being in a more senior and management role, to behave in a way which his status required. Addressing himself a subordinate member of staff using foul language, and invading his personal space whilst clearly shouting and irate were an objectively unacceptable way to respond.

121. As a management team member Mr Sutherland had at his disposal the self-same management, behaviour and disciplinary policies that have been deployed against him. He told us that he did not consider it necessary to file a disciplinary case against Mr Stone for his insubordination. However, that would clearly have been the proper and correct course for him to follow. What he did instead was, on any view, unacceptable workplace behaviour. Abusive behaviour of the kind he exhibited – and arguably that of Mr Stone too – are explicitly listed as acts of gross misconduct in the respondent's disciplinary policy.

122. Mr Sutherland has averred that his mental health meant that he was unable to handle Mr Stone's insubordination. However, we were not satisfied that this was reliably evidenced and, even were we to accept that his mental health was in such a parlous state as he now seeks to convince us, the remaining evidence did not satisfy us that he was so out of control.

123. It was common ground that when he entered the office, seconds prior to the altercation with Mr Stone, Mr Sutherland was complaining about instructions he had just been given by his own manager – to take a vehicle to another garage to conduct brake testing. He accepted in evidence that he was making complaint to, he says, Mr Robinson (Mr Stone's manager who was in the office with Stone).

124. In his belatedly disclosed notes, following the aborted March 2024 hearing, Mr Sutherland

made a hand-written note about 13 April 2022. He told the Tribunal that he made his note later on the same evening. In it he complains about the instructions given by his manager:

> *"Told by Naz [Abidi] to take a bus for rolling road test to another garage. I refused (where in my job description does it say I am to drive buses between garages as part of my duties)"* [page 101 of the lately disclosed notes bundle]

125. He makes no mention of the altercation in the office immediately following his disagreement with Naz Abidi. We were surprised that he did not do so. He told us, on being asked, that he had not mentioned it because as far as he was concerned it was just something that happened and that he was not the sort of person to worry about things like that or to act officially against Mr Stone for his insubordinate behaviour.

126. We found that he took the view that the use of formal processes was for other people and that he did not see the need to use them; he was, we found, content that he had dealt with Mr Stone in a way which he was satisfied meant the matter was closed.

<u>Was the Respondent's principal reason for dismissal potentially fair?</u>

127. The Respondent submitted that abusive and threatening behaviour of the kind displayed by Mr Sutherland amounted to gross misconduct, and dismissal was within the range of reasonable responses by an employer. It was potentially fair in the circumstances.

128. Mr Sutherland accepted that he had used unacceptable language, and apologised for it, but argued his language was provoked by Mr Stone and was not threatening or abusive. He claimed swearing was commonplace in the bus garage environment. Mr Sutherland denied any threatening conduct.

129. Having considered the language used, his demeanour and behaviour, position as a manager, the company's policies and procedures, and context of the altercation, the Tribunal finds that the respondent reasonably concluded that Mr Sutherland's conduct during the incident with Mr Stone on 13 April 2022 fell below the standards reasonably expected, below the standard that a properly informed and reasonable bystander would consider reasonable and constituted potential gross misconduct. Dismissal was potentially a fair sanction.

<u>If so, did the Respondent act reasonably in treating this as sufficient reason to dismiss Mr Sutherland?</u>

130. The Respondent maintained it acted reasonably in all the circumstances in treating Mr Sutherland's conduct during the altercation with Mr Stone as sufficient reason for dismissal. The abusive language used by a manager breached expectations.

131. Mr Sutherland argued his conduct did not warrant dismissal, especially given his long service. He claimed the decision was influenced by managers with grievances against him.

132. Having evaluated Mr Sutherland's language and demeanour during the altercation, his position as a manager expected to set an example, the potential impact on colleagues, and the context of a tense dispute, the Tribunal concludes that the Respondent acted within the reasonable band of employer responses in treating this incident as sufficient reason to dismiss Mr Sutherland.

<u>Were there reasonable grounds for the Respondent's belief in the reason for dismissal?</u>

133. The Respondent relied on the CCTV footage of the incident, Mr Stone's complaint, confirmation from Mr Robinson who witnessed it, and Mr Sutherland's responses during investigation to form an honest belief that Mr Sutherland had committed gross misconduct on 13 April 2022 warranting dismissal.

134. Mr Sutherland argued the CCTV did not show the full context. He denied conducting himself inappropriately aside from using the unacceptable language for which he had apologised.

135. Based on the available evidence, including CCTV, statements and Mr Sutherland's responses when interviewed, the Tribunal finds there were reasonable grounds for the Respondent to believe Mr Sutherland had committed gross misconduct on 13 April 2022. The reason for dismissal was established.

At the time the belief was formed, had the Respondent carried out a reasonable investigation?

136. The Respondent submitted that a full, reasonable investigation was conducted by obtaining eyewitness statements, reviewing CCTV footage and interviewing Mr Sutherland before deciding to dismiss him.

137. Mr Sutherland claimed the investigation was flawed as Mr Stone's complaint was not put to him at the time and he was prevented from having a representative. He argued Mr Stone provoked the incident.

138. The Tribunal finds that a broadly reasonable investigation was carried out by the Respondent in the circumstances. Eyewitness accounts and CCTV footage were obtained near the time and Mr Sutherland was interviewed and given opportunity to respond. There was no requirement to disclose Mr Stone's complaint earlier. It was clearly within the remit of the investigator to offer their opinion as to whether or not there was a case to answer.

Was the dismissal process procedurally fair?

139. Put simply. No.

140. The Respondent maintained that its procedures ensured Mr Sutherland was fully informed, had representation, was given chance to respond at disciplinary hearing, and could appeal the outcome.

141. Mr Sutherland claimed he was not informed of the full allegations before the disciplinary hearing and that the dismissal was predetermined by managers who were biased against him based on prior disputes. He also disputed the fairness of the appeal process.

142. Having carefully evaluated all the evidence, including the company policies, investigation documents, disciplinary records and testimony of the key individuals involved, the Tribunal concludes there were significant failings in the fairness of the disciplinary process applied to Mr Sutherland's dismissal.

143. Specifically, the Tribunal finds there was a concerning failure at the investigation stage regarding Mr Stone's conduct. The investigator, Mr Wood, unaccountably found that Mr Stone - a subordinate member of staff - had no case to answer for his own *admitted* insubordinate behaviour towards Mr Sutherland, who held a more senior managerial position. This disregarding of Mr Stone's own misconduct represented a significant flaw in an otherwise reasonable investigation process conducted by Mr Wood. The investigation stage should have properly considered all culpability regarding the altercation – we could not see how Mr Wood reached his conclusion that Mr Stone had no case to answer.

144. The Tribunal finds that Jonathan Brown, as the manager who conducted the disciplinary hearing, failed in several key respects to properly, fairly and reasonably discharge his duties. Mr Brown did not adequately consider Mr Sutherland's statement, responses, evidence and mitigating circumstances raised verbally, and in writing, at the hearing. He failed to adequately explore or make enquiries regarding Mr Sutherland's statements about his health issues and their impact. Mr Brown also appeared to simply accept, without real scrutiny, the case put forward by the investigator Mr Wood.

145. We were also disturbed by Mr Brown's assertion that Mr Sutherland provided no evidence at all at the disciplinary hearing. He backtracked on this to an extent when asked by the Tribunal how he treated the verbal and written statement given at the disciplinary hearing by Mr Sutherland. He did not, on being asked, initially seem to appreciate that Mr Sutherland's statement *was* evidence; it was only when pressed further by the Judge that he accepted this

to be the case. We were not satisfied that he had, in fact, appreciated this at the material time.

146. Furthermore, Mr Brown did not provide clear notification of the appeal timeframe and process following the hearing. Overall, Mr Brown's conduct of the disciplinary hearing displayed procedural deficiencies and unfairness towards Mr Sutherland as the subject of the disciplinary proceedings.

147. Mr Sutherland reasonably objected on grounds of perceived bias to the involvement in his appeal of Mr McKeown and Mrs Ryder, both of whom had been engaged in contentious matters involving Mr Sutherland in the past. The appeal process demonstrably failed to cure defects in the disciplinary process by not ensuring impartial and unconnected appeal panel members.

148. The Tribunal finds there were insurmountable flaws in the procedural fairness of both the disciplinary and appeal process leading to Mr Sutherland's dismissal. The company's procedures around separation of functions and impartiality of decision-makers were inadequate. The process and procedure followed was contrary to established guidance and legal principles on conducting fair disciplinary proceedings and appeals.

149. Considering the clear procedural deficiencies and complete absence of an impartial appeal, Mr Sutherland's dismissal was fundamentally procedurally unfair. The respondent failed to adhere to reasonable standards of procedural fairness. We were also concerned that the respondent, not a small company with limited resources, appears to operate disciplinary processes in an ad-hoc manner with minimal Human Resources involvement. There was insufficient separation between the subject and decision-makers, and deficient record-keeping practices. For instance, neither the initial nor appeal stages examined data on how policies were implemented or whether, as Mr Sutherland claimed, people of colour were disproportionately subject to disciplinary processes. The respondent's makeshift disciplinary model raised substantial fairness concerns.

<u>Was dismissal within the range of reasonable responses?</u>

150. The Respondent submitted that given the nature of the misconduct, Mr Sutherland's position as a manager, potential impact on colleagues and work environment, and exhaustion of alternative sanctions, dismissal was within the band of reasonable employer responses.

151. Mr Sutherland argued dismissal was disproportionate given his unblemished record over 11 years apart from issues he was blamed for but denied. He claimed a warning would have sufficed.

152. Putting the procedural defects to one side for the time being, the Tribunal accepts the Respondent's position that in view of the seriousness of the gross misconduct, Mr Sutherland's seniority, breach of standards expected of a manager, and prior disciplinary record, dismissal was within the range of reasonable employer responses to his conduct.

153. However, that dismissal was in the range of reasonable responses cannot rescue the decision to dismiss from the egregious procedural failings of the respondent.

Race Discrimination

<u>Has Mr Sutherland proven facts from which the Tribunal could conclude that he was treated less favourably because of race in relation to:</u>

154. The language, conduct and behaviour of Michael Stone during the 13 April 2022 incident;

    a. Mr Sutherland provided no reliable evidence of discriminatory language, conduct or behaviour by Mr Stone during the incident beyond unsubstantiated allegations. The Tribunal finds there are insufficient facts from which less favourable treatment by Mr Stone because of race could be inferred in relation to this incident. Mr Stone was rude, provocative and insubordinate but not racist.

155. The conduct and behaviour of Anthony Robinson during the 13 April 2022 incident;

   a. No reliable evidence was produced by Mr Sutherland of discriminatory conduct by Mr Robinson during this incident. The Tribunal does not find facts from which less favourable treatment by Mr Robinson because of race could be inferred in relation to the 13 April 2022 incident.

156. The contents of Michael Stone's email complaint on 13 April 2022;

   a. Mr Sutherland argued that the language used by Mr Stone in his email complaint following the incident was discriminatory but did not provide reliable evidence demonstrating this. The Tribunal finds insufficient facts have been established from which less favourable treatment because of race could be inferred from the content of Mr Stone's 13 April 2022 email.

157. The investigation into the 13 April 2022 incident;

   a. Mr Sutherland claimed the investigation process was discriminatory but did not produce reliable supporting evidence. The Tribunal finds there are no proven facts from which less favourable treatment because of race could be inferred in respect of the investigation into the 13 April 2022 incident.

158. The conduct of the disciplinary hearing by Jonathan Brown on 12 May 2022;

   a. While Mr Sutherland argued Mr Brown was biased due to previous disputes with managers, no direct evidence was produced of discriminatory conduct by Mr Brown during the disciplinary hearing. The Tribunal does not find facts from which less favourable treatment because of race by Mr Brown can be inferred.

159. The conduct of the appeal hearing by Chris McKeown and Angie Ryder on 26 July 2022;

   a. Mr Sutherland objected to Mr McKeown and Ms Ryder's involvement but provided no evidence their conduct of his appeal hearing was discriminatory. The Tribunal finds insufficient facts from which less favourable treatment because of race in the appeal process could be inferred.

160. Mr Sutherland's dismissal.

   a. Mr Sutherland maintained his dismissal was influenced by racial discrimination but did not establish facts to demonstrate this. The Tribunal concludes there is no factual basis from which an inference of less favourable treatment because of race in respect of Mr Sutherland's dismissal could be made.

<u>If so, has the Respondent proven a non-discriminatory reason for this treatment?</u>

161. As the Tribunal has not found proven facts from which less favourable treatment because of race could be inferred in respect of the matters alleged above, the burden of proof does not shift to the Respondent to show a non-discriminatory reason for such treatment under s.136 Equality Act 2010.

Victimisation

<u>Was Mr Sutherland subjected to a detriment because he made protected acts complaining of race discrimination and victimisation? If so, what were the detriments?</u>

162. Mr Sutherland claimed he was subjected to detriments including disciplinary proceedings and dismissal due to making grievances complaining of race discrimination and victimisation.

163. The Respondent submitted there was no evidence linking any detriment to a protected act by Mr Sutherland. Disciplinary and dismissal decisions were based on misconduct allegations unrelated to any grievance.

164. The Tribunal finds that Mr Sutherland did make protected acts by submitting grievances alleging race discrimination and victimisation. However, there was insufficient evidence produced to causatively link these to any subsequent detriments. The disciplinary and dismissal decisions appeared motivated by misconduct allegations rather than his grievances.

Was Mr Sutherland's dismissal because of a protected act?

165. Mr Sutherland argued his dismissal was in retaliation for complaining of race discrimination and victimisation in grievances.

166. The Respondent stated the dismissal resulted from Mr Sutherland's conduct in the altercation with Mr Stone. There was no link with any previous grievance.

167. While Mr Sutherland had made protected acts in submitting grievances, the Tribunal finds no factual basis to infer his subsequent dismissal in 2022 resulted from those earlier complaints. The principal reason for dismissal was gross misconduct during the incident with Mr Stone rather than any protected act.

Were the relevant managers aware of the protected acts at the relevant times?

168. The evidence indicates that certain managers involved in Mr Sutherland's case, including Mr Brown, Mr McKeown and Ms Ryder, were likely aware at relevant times of his prior grievances complaining of race discrimination and victimisation. However, the Tribunal found no facts to suggest their decisions were influenced or motivated by this awareness.

Remedy

If Mr Sutherland was unfairly dismissed, what remedies should be awarded - reinstatement, re-engagement, compensation?

169. Having found Mr. Sutherland was unfairly dismissed by the respondent, the Tribunal must consider appropriate remedies to compensate him for this loss.

170. We carefully evaluated whether to order reinstatement or re-engagement. However, given the breakdown in relations between the parties, we concluded such an order was not practicable.

171. We have determined that compensation is the proper remedy for Mr. Sutherland's unfair dismissal. He claims losses including basic and compensatory awards, along with pension loss which is yet to be calculated.

172. Based on his £804.71 gross weekly wage and other details, we find Mr. Sutherland's total potential compensation entitlement is to be determined.

173. In assessing the appropriate compensation, we apply a Polkey deduction of 85% to the compensatory award. This reflects our conclusion, having reviewed the evidence, that there was only a 15% prospect Mr. Sutherland may not have been dismissed if a fair disciplinary process was followed. While dismissal was potentially reasonable, procedural deficiencies created some doubt that an unbiased process could have resulted in a different outcome. But we find this chance was limited to 15% based on the circumstances.

174. We also apply a 70% deduction for Mr. Sutherland's contributory fault. His abusive reaction and language as a manager were unacceptable despite the clear provocation and insubordination of the subordinate Mr. Stone. However, Mr. Stone's conduct and Mr. Sutherland's depression mitigated his behaviour sufficiently to limit the deduction to 70%.

175. The precise compensation amounts payable will be determined once detailed calculations are provided. The parties will receive separate directions on remedial steps required. But subject to those steps, we find the above Polkey and contributory fault deductions appropriately reflect the circumstances of this case based on our findings.

b) If Mr Sutherland suffered any detriment because of a protected act, what compensation is just and equitable?

176. The Tribunal concluded that Mr Sutherland did make protected acts by submitting grievances alleging race discrimination and victimisation. However, there was insufficient evidence produced to causatively link these protected acts to any subsequent detriments suffered by Mr Sutherland.

177. As no detriments caused by his protected acts have been established, the Tribunal finds that no compensation is payable under this head. The issue of compensation therefore does not arise.

Costs application by the Respondent – in relation to the aborted hearing in March 2024

178. The respondent has applied for costs against the claimant arising from the adjournment of the hearing on 11 March 2024. The application is made under Rule 76(1)(a) of the Employment Tribunal Rules of Procedure 2013 based on alleged unreasonable conduct by the claimant leading to the adjournment.

179. During cross-examination near the end of day one of the hearing, it emerged that the claimant had in his possession handwritten notes from various internal meetings with the respondent that had not been disclosed. The existence of these notes had not previously been revealed.

180. The respondent argues the late disclosure of this material, partway through the hearing, justified adjournment of the proceedings but caused it significant wasted costs. It seeks recovery of counsel's brief fee incurred for the planned 5-day hearing, which had to be aborted.

181. The respondent contends the claimant was on notice to disclose all relevant documents and had sufficient time to do so. It alleges the late emergence of the notes at the hearing was unreasonable and avoidable if the claimant had complied with his disclosure duties.

182. It is said the wide-ranging nature of the claimant's allegations required the respondent to prepare extensive evidence at significant cost, including arranging for six witnesses to attend the hearing. The adjournment to address the newly disclosed notes caused further wasted costs.

183. The respondent argues it has incurred substantial costs preparing for the full merits hearing and would suffer injustice if unable to recover those rendered wasted by the effective abandonment of the planned hearing on day one.

184. It submits this application was communicated to the claimant and his representative in line with the Tribunal Rules. The respondent proposes the costs claim be determined on the papers or at the reconvened hearing.

185. Any order for costs and the amounts to be paid will be decided based on the applicable legal principles, procedural rules and specific circumstances arising in this matter.

186. The claimant opposes the costs application made by the respondent. He argues his conduct cannot be characterized as unreasonable, vexatious or disruptive to justify a costs order under Rule 76(1)(a).

187. The claimant contends he disclosed all materials he believed in good faith were required. He states he understood the undisclosed notes to be private aide memoires rather than disclosable documents. The claimant maintains there was no deliberate intention to withhold relevant information.

188. The notes and disclosed materials were of limited relevance, as evidenced by their marginal use during the proceedings.

189. The claimant argues the late disclosure caused no substantive prejudice. He submits the preparatory work done was not wasted as the hearing was relisted promptly and the respondent already had full notes from the initial day. The additional work required was minor.

190. The claimant considers the amount of costs claimed excessive and unjustified in the circumstances. He disputes there is sufficient basis to find he acted unreasonably to warrant a costs sanction.

191. The claimant requests the costs application be determined only after judgment on liability and potentially remedy, not as a preliminary issue. He asks that the application be dismissed as he acted in good faith and the disclosure issue did not amount to conduct warranting an adverse costs order.

192. The Tribunal has carefully considered the respondent's application for costs arising from the adjournment of the hearing in March 2024.

193. While regrettable, we do not find the claimant's failure to previously disclose his handwritten notes to have been a deliberate or wilful act warranting a costs sanction.

194. We accept the claimant's explanation that he understood the notes to be private aide memoires not subject to disclosure. While he ought to have taken legal advice on this, his stated belief was not unreasonable in the circumstances.

195. The late disclosure ultimately proved of limited relevance to the issues in the case. The adjournment and restarting of proceedings clearly caused some inconvenience, but significant prejudice has not been demonstrated.

196. On balance, we do not consider the claimant behaved unreasonably or vexatiously in his conduct of the litigation. He appears to have acted in good faith based on a genuine misunderstanding regarding disclosure obligations.

197. As such, we do not find this to be an appropriate case for making an order of costs against the claimant. While regrettable, the circumstances do not warrant penalizing the claimant to the extent argued by the respondent.

198. After careful consideration, the Tribunal in its discretion declines to make any award of costs arising from the abandoned hearing. Each party shall bear their own costs in relation to the abandoned hearing.

Conclusion

199. Having carefully considered all the evidence and submissions in this matter, the Tribunal has reached its final determinations on Mr Sutherland's complaints of unfair dismissal, race discrimination, victimisation against his former employer, London General Transport Services Limited.

200. On the claim of unfair dismissal, the Tribunal concludes that Mr Sutherland was unfairly dismissed. While there were reasonable grounds for belief in gross misconduct based on his actions during the altercation with Mr Stone, we find there were significant procedural flaws rendering both the disciplinary process and appeal unfair. Mr Sutherland was denied impartial appeal panel members and not afforded fair procedure in all the circumstances.

201. However, the Tribunal considers dismissal was within the range of reasonable responses open to the employer given the potential gross misconduct. Mr Sutherland's conduct and language fell below reasonable expectations for a manager. Despite procedural unfairness in effecting dismissal, Mr Sutherland's actions constituted culpable contributory conduct.

202. Turning to race discrimination, the Tribunal finds there are insufficient facts from the evidence to infer Mr Sutherland suffered less favourable treatment because of his race regarding the

disciplinary process, investigation, hearing, appeal or dismissal. While he perceived racial bias, direct evidence linking specific treatment to his race was lacking. The respondent provided race-neutral explanations for the treatment impugned.

203. On victimisation, Mr Sutherland did not establish his dismissal or alleged detriments resulted from his earlier grievances complaining of race discrimination. The principal reason for dismissal was gross misconduct. There was no adequate causal link evident between his protected acts and later treatment.

204. For the reasons set out in detail in this judgment, the Tribunal unanimously finds the claim of unfair dismissal succeeds, with compensation as specified. The claims of race discrimination, victimisation fail and are dismissed.

Judge M Aspinall
Saturday, 21st September 2024

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