Case Number: 3202012/2015

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EMPLOYMENT TRIBUNALS

Claimant: **R**

Respondents: **1. East London Bus & Coach Co Ltd**
2. Diane Hannan
3. Denzil Clarke

Heard at: **East London Hearing Centre** **On: 19-22, 27 September, 6-7 December, & 9 December 2016 (in Chambers)**

Before: **Employment Judge Jones** **Members: Mr M F Batten, Ms M Long**

Representation

Claimant: In person (assisted by Miss R Cameron, Rape crisis advocate/ adviser)

Respondent: Mr C Ludlow (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:-

(1) The Claimant did not make any protected public interest disclosures.

(2) The complaints of direct sex discrimination and harassment related to sex fail and are dismissed.

(3) The Claimant withdrew her complaint of automatic unfair dismissal and it is dismissed.

(4) The claims against the 2nd and 3rd Respondent fail and are dismissed.

REASONS

1 The Claimant brought complaints of unfair dismissal, discrimination and detriment because of protected public interest disclosures. The Respondent defended the claims.

2 The Tribunal apologises to the parties for the delay in the promulgation of this judgment and these written reasons.

3 This matter had three preliminary hearings on 30 November 2015, 19 February 2016 and 16 June 2016.

4 The issues to be determined by the Tribunal were set out on pages 66X – 66EE of the bundle of documents. The Claimant was ordered to provide details of her allegations that Mr Clarke had "repeatedly asked for details of my rapes from Thursday 5 March 2015 to Monday 29 June 2015" and "made vile and unpleasant comments." She did so and those were set out in detail on pages 66I – 66M of the bundle.

Evidence

5 The Tribunal had an agreed bundle of documents. Two supplementary bundles were also created. One contained training information and evidence relating to the case of each of the Claimant's comparators. The other contained some policies and duplicated some of the information found in the main bundle.

6 In the Hearing the Tribunal heard from the following witnesses:

6.1 The Claimant on her own behalf;

6.2 Steve Ayers, Garage Operations Manager who dismissed the Claimant;

6.3 Denzil Clarke, bus driver and Acting Garage Supervisor and Acting General Operations Clerk at the Bow Garage; the Third Respondent;

6.4 Diane Hannan, Operations Director of Stagecoach London, who heard the Claimant's appeal – who was also the Second Respondent.

7 The Tribunal made the following findings of fact from the evidence presented to us over the Hearing. We only make findings on those matters that directly relate to the issues in the case.

8 Unless otherwise stated, all references to "Respondent" in these findings are to the East London Bus and Coach Company. Mr Clarke and Ms Hannan will be referred to by name.

Findings of fact

9 The Claimant was employed as a bus driver from 23 August 2014 until her summary dismissal on 23 August 2015.

10 The Claimant was based at Bow Garage. The Claimant passed her PCV Practical Driving Test on 8 October 2014. As a bus driver she was responsible for driving a passenger carrying vehicle, providing excellent customer service and a safe comfortable journey to all her passengers.

11 On Wednesday 10 December 2014 the Claimant was involved in a minor collision with a London Black taxicab. The matter was dealt with by Mr Hollingshead, Assistant Garage Operations Manager at Bow Garage. Following an investigation meeting with Mr Hollingshead the Claimant was issued with Guidance and advised that if she had another accident and it were deemed that she was at fault then further disciplinary action will be taken which may include being returned to the training school for Assessment/Re-Training.

12 In December 2014 the Claimant's shift was cut short and she came into the garage upset because she said that the passengers had shouted at her. Denzil Clarke who sometimes acted as Garage Supervisor was on duty behind the counter that day. He considered that the Claimant was in no fit state to drive and arranged for another driver to cover the second part of her duty.

13 The Claimant sat behind the counter with Mr Clarke for some time that day and they took the opportunity to get to know each other. The Claimant told him that she had no family as she was estranged from her birth family. He told her that he was a preacher and that she could trust him and confide in him. The Claimant was tearful during their conversation. It is likely that around this time they exchanged telephone numbers and began communicating outside of work.

14 During 2015 Mr Clarke sometimes drove the Claimant into work and drove her home after her shifts. It is possible that this started in February when the Claimant asked for a lift as she could not drive in to work as there was nowhere for her to park and there was a transport strike. After that, if they finished their shifts around the same time, the Claimant often asked Mr Clarke for lifts home, which he gave her. Other drivers also gave her lifts.

15 Mr Clarke was a bus driver and an acting Garage Supervisor. He became Acting Garage Supervisor and Acting General Operations Clerk in October 2013. Those were relief roles that he did when cover was needed.

16 He had previously acted up at Leyton, West Ham and Barking Garage in various managerial roles. In preparation for this role of acting Garage Supervisor he had 10 days training between February and March 2014 on the role of a garage supervisor which included training on such matters as discipline and motivation, health & safety and personnel issues. He had already received training on Equal Opportunities as a driver. As acting Garage Supervisor, he was responsible for completing all the tasks and responsibilities of the substantive role whenever he acted up in the role. That included being responsible for the leadership, motivation, performance management,

welfare and guidance of the team and responsibility for maintaining and enforcing company policies and procedures including dignity in the workplace, drugs and alcohol, discipline and grievance.

17 The Claimant was sometimes assigned to drive the 227 bus which meant that she had to drive the Scania model of buses. She found it difficult to do so. On 28 January she asked to be taken off that route because she stated that driving the Scania buses worsened her back pain. She told Mr Clarke that she could not drive the Scania buses because it exacerbated her back pain which she got from a fall in January.

18 From then on whenever Mr Clarke was on duty he would try to ensure that she was not allocated the Scania buses. He supported her attempts to get herself taken off routes that required her to drive Scania buses and assisted her in writing a letter about it to Mr Hollingshead in January 2015.

19 During their conversations the Claimant informed Mr Clarke that Mourad Atil who was another driver at Bow Garage had asked her out on a date. Mr Clarke believed that she was asking his opinion about whether Mr Atil was suitable for her. Mr Atil also spoke to Mr Clarke about the Claimant. It is likely that these conversations occurred when they were off duty.

20 The Claimant went to see the movie "50 Shades of Grey" with colleagues from the garage. Afterwards she informed Mr Clarke that she spent that night with Mr Atil at his flat. She told him that they had not had sex that night. This was on or around the 28 February 2015.

21 On Saturday 7 March Mr Clarke gave the Claimant a lift into work. During the journey she informed Mr Clarke that her relationship with Mr Atil had become sexual. In her witness statement the Claimant described what she said to Mr Clarke about the events of 5 and 6 March. She set out in minute detail the sexual activity between herself and Mr Atil. She has placed that information in speech marks as though quoting from her conversation with Mr Clarke. She did so throughout her witness statement. We found this unusual. It is likely that she did this for dramatic effect rather than to deliberately mislead the Tribunal. We did not find this helpful. In her live evidence to the Tribunal she confirmed that she had not made notes of her conversations with Mr Clarke and that the conversations in the witness statement are reproduced from her recollection. It is unlikely that these statements were direct quotes of what she said to him on 7 March.

22 We find that in their conversation Mr Clarke asked the Claimant where she had sex with Mr Atil. His explanation for doing so was that he knew that Mr Atil shared a flat with Daniel Lepinski and he was concerned that Mr Lepinski may tell other staff at the garage about what was going on. In cross-examination he also accepted that he asked her for details when she said "that animal hurt me" as he wanted to know what she meant. In response, she explained the detail of what he described as 'rough sex'.

23 We find that in this and other conversations about her sexual activity with Mr Atil the Claimant gave lots of information to Mr Clarke and it is likely that he asked questions in order to understand the information that she gave him. We find that the

Claimant was not probed for information and if she had said to him that what he was asking for was private information we find it unlikely that he would have pursued it any further. It was not her case that she had ever said to him that what he had asked was an improper question or that he had asked for personal details which she did not want to share. It is likely that the Claimant volunteered the information. Mr Clarke referred to this in his live evidence when he stated that she "just flowed with the information".

24 We find that Mr Clarke was very conscious of the possibility of the Claimant becoming the subject of gossip in the garage. On the morning when she first told him about the sexual activity he stopped the car just before they got to work so that they could finish their conversation before going into work. In her witness statement, the Claimant referred to another occasion on 12 March when she was again giving him details of the previous evening and she reported that he "tried to silence her". Later in her witness statement she stated that when she was trying to share more details with him, he diverted her attention to other things. These statements do not accord with her case that he was probing her for details or that he was getting enjoyment out of the details that she gave him.

25 We also find that it is unlikely that the Claimant used the word 'rape' in her conversations with Mr Clarke. We say this partly because she admitted in the Hearing that she had not used that word, because Mr Clarke's evidence is that she had not used that word and because of his reported reaction when he was first told about sexual activity between the Claimant and Mr Atil. In her evidence, she stated that his reaction was to tell her that she should keep it a secret and tell no one else. We find that it was unlikely that this would be the initial reaction of someone being told about a rape. We find it is more likely that this would be the reaction of someone who was being given intimate details of sexual activity and who was concerned about gossip and believed that what they were discussing were private, intimate matters.

26 In March 2016 Mr Clarke was questioned about the conversations he had with the Claimant in March 2015. This was in his interview by Ms Hannan as part of her investigation into the Claimant's grievance. In that interview he confirmed that he asked her if she had consented and she said that she had not. He reported that he had asked her if she had screamed and she told him that she had not and that he had told her that sex without consent was rape but that they were in bed together and she had not screamed. In Ms Hannan's interview with him it is recorded that Mr Clarke was not clear whether all this had been said in the same conversation. It is likely that they had many conversations on this matter.

27 Mr Clarke did confirm in live evidence to us that in one of their conversations about her sexual activity with Mr Atil he advised the Claimant to buy lubricant as she had shared with him that the sex had been painful.

28 We find that the essence of his evidence to us was consistent with the interview he gave to Ms Hannan and his witness statement as he confirmed that in their conversations the Claimant did not tell him that she was reporting a rape. It is also highly unlikely that she told him that she was expecting him to do something about or to tell someone else about the events she was describing to him. It was not her case that she asked him for any assistance or that she had asked what he was going to do about what she had told him. She did not say to Mr Clarke that Mr Atil should face any

investigation or consequences at work because of their sexual activity. Instead, we find that it is more likely the Claimant shared information about her sexual activity with Mr Clarke in confidence and as a friend.

29 On the same day, 7 March, the Claimant called a colleague Miranda Colbert and told her of her sexual activity with Mr Atil. We did not hear from Ms Colbert in evidence but from the Claimant's report of their conversation we find it unlikely that she told Ms Colbert that she had been raped. If she had done so it is very unlikely that as the Claimant's friend and as another woman Ms Colbert's response would have been to advise her to keep quiet about it. Ms Colbert was no fan of Mr Atil's as sometime before this, she advised the Claimant to stay away from him due to her stereotypical views of Moroccan men. We find it likely that if the Claimant had informed her that she had been raped her most likely reaction would have been firstly, alarm and secondly, to enquire whether the Claimant had reported the matter to the police; and to enquire after her welfare. The Claimant recalled that Ms Colbert told her that she did not want to hear anything else about the matter. That led us to find that she was giving Ms Colbert information about her sexual activity and not about rape.

30 We find that there were other conversations between the Claimant and Mr Clarke about the continuing sexual activity between herself and Mr Atil. They spoke on 10, 11, 12 and 13 March. The Claimant shared details of her going to Mr Atil's flat, cooking and cleaning for him, them speaking on the telephone for hours and details of more sexual activity between them. She told him that Mr Atil had given her a key to his flat. Mr Clarke is a minister in a Christian church called the Church of God International. He regularly preaches, teaches from the Bible and counsels people on their problems. We find that he believed he was being supportive to her by listening to her.

31 We find that he assisted her by giving her a folder of information that would help her prepare for the interview for the post of Acting Garage Operations Clerk. In March 2015 when she was told that she was to be transferred to West Ham Garage with the 277 bus route, Mr Clarke drafted a letter for her setting out her grievance about the transfer which she then re-wrote in her own hand. These were the actions of someone who cared about the Claimant and was trying to assist her with issues that came up in her work.

32 On 21 March she told Mr Clarke that Mr Atil had given her a key to his flat. On 22 March she informed Mr Clarke that Mr Atil had told her that he was going back to Algeria for a funeral. We find it unlikely that he asked her for the details as suggested in her witness statement. We find that he did ask her why she had unprotected sex and it is likely that he did so because he thought that this was an unwise thing to do given that the Claimant did not appear to be happy about the relationship and that it had not been going on for that long.

33 Mr Clarke understood from the next conversation that they had about Mr Atil that he had taken his key back from the Claimant and that she was not happy about that. She also let him know that she and Mr Atil had not been talking and Mr Clarke understood that she had blocked him from her phone. Mr Clarke understood that Mr Atil had moved a female relative into his flat which had annoyed the Claimant.

34 On the evening of 10 April the Claimant was driving a bus when she was involved in an accident. Her bus rolled forward into the back of the bus parked in front. This happened because she had failed to secure the handbrake. Following the accident, the Claimant was off sick and returned to work on 20 April.

35 On 20 April David Parker, one of the Respondent's garage supervisors interviewed the Claimant about the accident. She stated that she got out of the driver's cab because she was unwell and in pain. She also stated that she got out her phone to call for help. Mr Parker suspended her and advised her to attend a fact finding investigation interview on the following day.

36 The Claimant attended that interview with Mr Hollingshead, Assistant Operations Manager, on 21 April. The Claimant attended with a colleague as a companion. In that interview they viewed the CCTV footage from the bus. The Claimant stated that the accident occurred as she was about to pull away from the stand. She stated that at that point she felt a pain in her stomach and had to get out of the cab. She attempted to switch off the engine before getting out the cab but could not be sure that she had switched it off. She stated that it was when the bus started rolling forward she realised that she had left the handbrake off.

37 Mr Hollingshead found that there was a case to answer and referred the matter for disciplinary action. In the letter sent to her on 22 April notifying her of his decision he referred to the charges as being 'unsatisfactory probation' and 'driving standards'. The Claimant was advised of her right to be accompanied and that dismissal was one of the possible outcomes of the disciplinary meeting. The letter informed her that if there was any further information that she believed the disciplinary chair ought to be aware of before making their decision, she should provide that information as soon as possible. She was offered the opportunity to view the CCTV footage again – either with a representative or on her own.

38 During the investigation meeting the Claimant complained that after the accident the Respondent arranged for the bus to be collected but that she had been left to wait with only a member of the public until 11.30pm that night. The accident occurred at 21.18. An ambulance attended and took her to St Mary's Hospital. The Claimant complained of a lack of duty of care towards her. Mr Hollingshead notified the Respondent of this complaint at the same time as his referral for a disciplinary meeting.

39 Also on 22 April Mr Hollingshead conducted a grievance meeting with the Claimant following her complaint that she did not want to be transferred to West Ham to drive mainly Scania buses. After their discussion Mr Hollingshead decided to cancel her transfer, refer her to occupational health and review the matter in due course. The Claimant made no allegation – either at the grievance meeting or the meeting to investigate the accident on 10 April – about Mr Atil having raped her on numerous occasions in March. The Claimant confirmed in the Hearing that she found Mr Hollingshead to be a fair manager.

40 The Claimant was given and took up the opportunity with her representative Mr Ahmed, to review the CCTV footage prior to the disciplinary hearing. The hearing took place on 28 April 2015 and the Claimant was accompanied by Mr Ahmed. The hearing was chaired by Stephen Ayres who was a Garage Operations Manager. The

Claimant advised him that the discomfort she felt in the cab was due to it being her 'time of the month' which was agreed in our Hearing to be a reference to her monthly menstrual periods. She advised him that she thought that she might have leaked and that her periods had been heavier than usual. She explained that this was why she had got out of the cab. Having disclosed such personal information, we find it unlikely that she would have felt uncomfortable telling him about a rape.

41 Mr Ahmed pointed out that the Claimant had been left alone at the scene and Mr Ayers informed him that the Respondent was investigating this separately.

42 Mr Ayers viewed the CCTV footage on three occasions. He concluded that the footage did not show the Claimant in any pain or discomfort. The Claimant did not show any discomfort in her face but he did observe her looking confused when she was in the cab and before she left the cab without applying the handbrake.

43 In the process of making his decision on this matter Mr Ayers satisfied himself that the Claimant had received adequate training to do the job when she started at the Respondent.

44 Mr Ayers decided that it was appropriate to dismiss the Claimant due to her serious negligence which could have caused loss, damage or injury; and a serious failure to observe rules/procedures affecting the safety of other staff or of the public. Mr Ayers confirmed to us in the Hearing that at no stage during the disciplinary hearing did the Claimant or her representative make any allegation of rape against Mr Atil or any other member of staff. She did not complain of harassment by Mr Clarke either.

45 His dismissal letter dated 7 May confirmed that the reason for her dismissal was serious negligence which could have caused loss, damage or injury; and a serious failure to observe procedures affecting the safety of other staff and/or the public.

46 In our Hearing Mr Ayers was asked why he had given the Claimant a different sanction to another driver, Gordon Goodson who had also had a similar accident around the same time, on 23 March 2013. He confirmed that Mr Goodson was also within his probation period and that he had previously had a minor accident while driving a bus. His evidence was that he found some inconsistencies in the Claimant's account of the accident whereas he found Mr Goodson's account to be credible. He doubted whether the accident had occurred because the Claimant left the cab due to being in pain as she stated. In contrast he considered that Mr Goodson's account of how his accident occurred was more plausible. Mr Ayers' decision on Mr Goodson's disciplinary hearing was to award him a written warning.

47 Mr Ayers was the manager who dismissed Mr Mohammed Shahid for exiting the cab without applying the handbrake. That bus had rolled forward, hitting a stationary vehicle. Mr Shahid's mitigation had been that this was a freak accident. Mr Ayers did not accept this and considered that he had been given adequate training to do the job. He considered that this was an act of gross misconduct and he confirmed Mr Shahid's summary dismissal for negligence.

48 Mr Ayers was also the manager who conducted Mr Robert Judd's disciplinary hearing. Mr Judd's case was very different to the Claimant's. He was an Acting Vehicle Night Allocator. He was charged with breaching the Respondent's mobile phone policy. He used a mobile phone to contact iBus whilst in the cab with the engine running on a public highway. Mr Ayers considered that he was in control of the vehicle at the time which meant that use of the mobile phone was prohibited. Even though he admitted the charge and expressed remorse Mr Ayers considered that it was gross misconduct and Mr Judd was summarily dismissed. Ms Hannan conducted his appeal hearing which we return to later in these findings.

49 The Claimant appealed against her dismissal. She stated that the Respondent had breached its procedure and that she was appealing on the grounds of the severity of the award. She later added disputed evidence as a ground of appeal.

50 The Claimant was advised that Ms Diane Hannan, Operations Director, would hear her appeal against dismissal and the grievance hearing concerning her complaint about the Respondent breaching its duty of care towards her. On 10 June the Claimant was given a copy of the still photographs from the CCTV cameras on the bus.

51 The appeal hearing was scheduled for 18 June 2015.

52 The Claimant attended the hearing accompanied by Dave Sherry as a workplace colleague. According to the Claimant, it was just before they went into the hearing that she told him about Mr Atil allegedly raping her. He encouraged her to tell the Respondent. The Tribunal did not hear from Mr Sherry in our Hearing.

53 On 18 June the Claimant confirmed that she no longer intended to pursue as a grievance the complaint that the Respondent had breached their duty of care towards her in the way she was treated in the aftermath of the accident on 10 April. She agreed that any matters that she wanted to raise in that regard would be brought up as part of her appeal against dismissal. Ms Hannan was taking notes of that part of the hearing and recorded the Claimant's withdrawal of her grievance and took no further notes on that discussion as that is where it ended. There were no notes taken of the appeal part of the hearing. Ms Hannan did take some notes for herself which were then incorporated into her 7 page outcome letter which she sent to the Claimant on 23 June. We did not have the notes she used to compose the letter as she destroyed them soon after.

54 During our Hearing, the Claimant complained that Ms Hannan had failed in her duty to take minutes at the appeal hearing and that she failed to note that the Claimant had told her that Mr Clarke was aware that she had been raped. We find there is a dispute between the Claimant and Ms Hannan as to whether or not she informed Ms Hannan in the appeal meeting about Denzil Clarke's involvement. We find it likely that if she had done so, Ms Hannan would have noted it in her letter and would have acted on it. We find that the Claimant did not complain about anything missing from the information recorded in the letter, when she received it. Ms Hannan invited the Claimant to write to her by 30 June with her comments if there was anything in the letter that she disagreed with. Mr Clarke's name was not mentioned in the letter. When Ms Hannan became aware of the Claimant's allegations against Mr Clarke sometime later, she took action. We find that it, if it had been made, it is unlikely that she would

simply have ignored such a serious allegation against another member of staff or of management.

55 We find that in the disciplinary appeal meeting the Claimant accepted that she had been at fault in relation to the accident. She also agreed that as a professional PCV driver she would be expected to ensure that the vehicle is securely parked before getting out of the driver's seat which she had on this occasion failed to do. She accepted that she had been negligent but asked that her mitigation should be taken into account. Both parties agreed that the Claimant became visibly upset at times during the disciplinary appeal hearing.

56 As her mitigation the Claimant informed Ms Hannan that she had been raped on numerous occasions by a male driver. The Claimant named the other driver in the meeting as Mr Atil. She informed Ms Hannan that she had been having a relationship with the driver having been forced into it, that he had been violent towards her, that she was fearful in his presence and that she had been forced into sex with him. She informed Ms Hannan that as a result, she had developed a urine infection.

57 The Claimant produced two medical letters at the meeting. One letter was dated 8 May from the Claimant's GP surgery and confirmed that she had been diagnosed with a urine infection after a test. The second letter was from Whipps Cross Hospital confirming that she had attended for a full sexual health check on 30 March after being advised by her GP to do so following a sexual assault. The Claimant confirmed that she had not reported the matter to the police because she wanted to put the matter behind her. She also confirmed that she had not told Mr Ayers as she did not feel comfortable in his presence.

58 The Claimant informed Ms Hannan that just prior to the accident she had felt severe stomach pains which were likely to be related to her period and urinary infection. She stated that given the emotional issues she was battling with at the time as well as the pain, she had not been thinking straight and that is why the accident occurred.

59 Ms Hannan decided to adjourn the meeting to the following day. She advised the Claimant to consider reporting the matter to the police. Dave Sherry, the Claimant's representative also advised her to do so. Ms Hannan asked the Claimant to prepare a written statement detailing the events with driver Atil. The Claimant agreed.

60 The Claimant was adamant that she wanted to return to Bow Garage. Ms Hannan stated that if she was prepared to allow the Claimant to return to work it was highly unlikely that it would be at Bow given the serious allegation that the Claimant had made earlier in the meeting about another driver who was still based at Bow.

61 At the reconvened meeting on 19 June, the Claimant had not yet completed the statement as she stated that she was unsure what details were required. She was advised to include all the details of the relationship, including dates, times and locations of the sexual assaults and of anyone who might have been a witness. The Claimant was again encouraged to report this matter to the police as it was a potential criminal matter which they ought to be investigating.

62 Ms Hannan viewed the CCTV as part of her consideration of the Claimant's appeal. She came to the conclusion that the Claimant's version of events was not evident from her actions immediately around the time of the accident. From what she could see on the footage, Ms Hannan concluded that the Claimant did not act as someone who was in severe pain whether from a stomach ache, period pains or a urine infection.

63 After considering everything Ms Hannan informed the Claimant that her decision was to uphold the dismissal. She considered that Mr Ayers' decision had been fair based on the evidence he had before him at the time. The Claimant's actions had been negligent.

64 Although she confirmed the decision to dismiss the Claimant she also decided, after consideration of the Claimant's mitigation, to offer her re-engagement at her former grade of DE21 rather than as a new starter. That meant that her pay would remain the same as before. The Claimant would be given a new contract. She was expected to pass a medical test and go through the standard procedures that would be required of a new recruit. Ms Hannan was clear that it was not appropriate to place the Claimant back at Bow Garage given the allegations that she had made and decided to offer her a job at Leyton until the complaint had been duly investigated and resolved. As Ms Hannan ensured that this was also made clear in the letter, we find that the Claimant would have been aware that what was proposed was not a permanent move to Leyton. In deciding to offer her a job at Leyton garage the Respondent had also taken into account that the Claimant could not be placed in the Newham area because of historical issues with her family.

65 Ms Hannan believed that during the meeting on 19 June the Claimant accepted the offer of re-employment. On that basis an appointment was made for her to attend Occupational Health on 23 June for a pre-employment medical check. In live evidence Ms Hannan confirmed that she had concerns about the Claimant's ability to drive and do her job given that she had been off work since the accident which had occurred in April. She was confident that if there were any issues the pre-employment medical check would pick it up. The Claimant also agreed to return to Head Office after that appointment to give Ms O'Brien a written statement setting out the details of her allegations of sexual assault. This was all set out in Ms Hannan's decision letter dated 23 June in which the Claimant was also informed that she would be on 12 months probation and that the Head Office Recruitment Team would take over the details of her return to work. Ms Hannan ended her letter by advising the Claimant of the availability of counselling from First Assist which was available to all of the Respondent's employees. She gave the Claimant their contact details.

66 On 23 June the Claimant attended to complete her pre-employment checks. She failed the drug test as she had taken Night Nurse medication a few days earlier. She passed a later test. The Claimant contacted Ms Hannan on the same day to query the decision to place her at Leyton Garage. She believed that it was unfair that she should be moved and stated her opinion that Mr Atil should be transferred instead. We find that at this time the Respondent had not yet carried out its investigations into the Claimant's allegations against Mr Atil. It is likely that Ms Hannan was surprised by the change in the Claimant's position as she believed that the Claimant accepted the job in

Leyton at the meeting on 19 June and that is why the induction was set up and a contract sent out to her. In her response to the Claimant's email Ms Hannan stated that if Leyton was no longer acceptable to the Claimant she should liaise with the recruitment team as they would be able to find something suitable for her. The recruitment team would have had all the Claimant's details and documents and would have been aware of the requirement that the Claimant was not placed in Bow and would have been well placed and able to find her another suitable location. In those circumstances, it was appropriate for Ms Hannan to refer the matter to the recruitment team.

67 In making her decision on 19 June Ms Hannan had not overturned Mr Ayers' decision. The Claimant's dismissal for gross misconduct was confirmed. Ms Hannan decided to give the Claimant a new job on the basis of her mitigation and the surrounding circumstances. At this time, Ms Hannan was not in a position to make a judgment on the Claimant's allegations against Mr Atil as it had not yet been investigated and the police were still conducting their investigations.

68 On 24 June the Claimant attended Head office to meet with Ms O'Brien. Ms O'Brien sat with the Claimant as she prepared her statement although there were times during the day when she had to answer the telephone and do other tasks. The Claimant had the use of a desk and was able to stay at the office until 5pm to complete her statement. She was asked to move desks during the day. The Claimant confirmed in her witness statement that she was there until the end of the day and that Ms O'Brien was the last person to leave the office. We find that, by the end of the day the Claimant produced a detailed statement, which she gave to the Respondent.

69 The Claimant reported the alleged sexual assault to the police on 25 June.

70 Sometime around the 26 or 27 June the Claimant informed Mr Clarke by text message that she had reported her allegation of rape and sexual assault to the police and that they were likely to want to question him about what he knew. Mr Clarke was taken aback by this and at page 289B we saw an email from him on 29 June to her about this. He asked her whether she went into details with the police and reminded her that she had "shared some very personal, intimate, private confidential stuff with him" which he did not want to share with anyone and betray her trust. We had copies of some of the text messages between them around this time which demonstrate that the Claimant was angry with him and accused him of knowing that she had been raped. She was also angry that he referred to her as having a 'normal' relationship with Mr Atil when she considered that it had not been so.

71 The main statement of terms and conditions of employment document that the Claimant was given for this new job was dated to start on 13 July 2015. It named her place of work as Leyton Garage and stated that she was contracted to work 40 hours over 5 days with 2 rest days each week. It stated that the first duty would start at approximately 03.00 and the last one would finish at about 03.00. It also stated that she may be required to work on the night bus rota when requested. On those occasions the first duty would start at approximately 19.41 and the last one finish at 09.46 hours.

72 On 13 July the Claimant attended her induction at head office. At this point the Respondent still believed that she intended to take up the job. During the induction process the Claimant expressed concern to Michelle O'Brien that the new contract required her to work on the night bus rota when requested. She stated that this had not been part of her previous contract and that she was unable to work nights given what had happened to her. Ms O'Brien confirmed that the Claimant could swap duty rotas with other drivers and after contacting Leyton garage, she also confirmed that as a new driver the Claimant was unlikely to be asked to work nights. Ms O'Brien also spoke to Ms Hannan on the Claimant's behalf and was told that as a supportive measure the Respondent was willing to ensure that the Claimant did not have to work a night duty whilst the police investigation into her allegations against Mr Atil was ongoing. At this stage however, the Respondent was not going to permanently remove the night work clause from the contract. The Claimant was unhappy about this. She considered that she was being disadvantaged because she had complained. She felt that the Respondent was punishing her for speaking up about her alleged assault.

73 It was during this conversation with Ms Brien that the Claimant informed her that Denzil Clarke knew about and had known about her alleged rape by Mr Atil from the beginning. Ms O'Brien notified Ms Hannan of this new allegation.

74 On or around 16 July the Claimant reported her alleged rape to the Health & Safety Executive. The Respondent wrote to her on the same day to confirm the offer of employment as a bus driver at Leyton Garage.

75 On 17 July the Claimant wrote to Ms O'Brien setting out her objections to the terms of the new contract. She felt that it did not pay sufficient regard to her safety and well-being. She felt that it was not satisfactory for the Respondent to only suspend the requirement to work on the night shift during the police investigation and complained that the Respondent were not doing enough to assure her safe return to work.

76 The Respondent were keen to get on with their investigation into the Claimant's allegations against Mr Clarke and Mr Atil.

77 On 20 July Ms O'Brien wrote to the police officer involved in the investigation to enquire whether it would be appropriate at that point to interview Mr Clarke. DC Tully responded and asked Ms O'Brien to hold off doing so until he had spoken to Mr Clarke that week. The Claimant was informed of this delay in an email of the same date.

78 On 27 July the Claimant was signed off as not fit for work by reason of depression.

79 By 31 July DC Tully informed the Respondent that although the police had still not spoken to Mr Clarke, it could speak to whoever it needed to speak to as it should not make a difference to the investigation. Unfortunately, Ms O'Brien did not pass this information on to Ms Hannan.

80 On 11 August the Claimant wrote to Ms Hannan to bring a grievance alleging that the Respondent had failed its statutory duty towards her in relation to health and safety within the work environment. She outlined again what she alleged occurred between her and Mr Atil and stated that she told Denzil Clarke about it. She alleged

that Mr Clarke had put her at risk and endangered the lives of the public when he neglected her and ignored her. She contended that the Respondent had failed to provide her with a safe place and safe system of work. She alleged that instead of protecting her, Mr Clarke had gossiped about her with another driver. It is likely that this was a reference to Mr Alom who was also a driver at the garage and who had indicated to Mr Clarke that he liked the Claimant. Mr Clarke had encouraged her to get into a relationship with Alom as he was likely to treat her better than Mr Atil as he seemed like a nice person. At the time, the Claimant had been reluctant to do so. We were told that the Claimant has since married Mr Alom and he attended the Tribunal Hearing with her. In the letter the Claimant threatened to issue proceedings in the Employment Tribunal against the Respondent and to allege that the Respondent had breached various statutory duties under the Health & Safety at Work Act 1974, the Employment Rights Act 1996 and the Equality Act towards her. The Claimant brought the letter with her to the meeting on the following day.

81 The Claimant met with Ms Hannan on 12 August. She was accompanied by Ms Cameron who is an advocate from the London Rape Crisis. The Respondent understood that the Claimant had requested the meeting to talk about the night duty clause in the new contract. Ms Cameron took notes of the meeting. At that meeting the Claimant handed the above letter to Ms Hannan. She questioned Ms Hannan about the Respondent's investigation into her allegations. She wanted to know whether Mr Atil and Mr Clarke had been interviewed. Ms Hannan explained to the Claimant that it would not have been the usual procedure to speak to either man while the police were continuing their investigation. The police investigation would normally take precedence and the Respondent would have been careful not to have done anything which might have jeopardised it. It was also the case that Ms Hannan believed that they were still under the request from the police to refrain from interviewing Mr Atil and Mr Clarke until they had completed their investigations.

82 The Claimant also complained that she was not offered the same job as she had before and she complained about not being allowed to return to Bow Garage. Ms Hannan explained the terms on which she was being re-employed.

83 The Claimant brought the meeting to an abrupt end by walking out. In her email of the same day the Claimant confirmed that she had walked out of the meeting. She said that she did so because Ms Hannan had stated in the meeting that she had chosen to be in a relationship with Mr Atil. After reading the letter from Ms Hannan we find that it is likely that the Claimant became upset when she was told that the Respondent could not suspend driver Atil before the police had completed its investigation or without further evidence. It was at this point in the meeting that the Claimant became angry. She was told that the Respondent would also not question Mr Clarke until the police investigations were complete. The Claimant responded by threatening to issue proceedings in the Employment Tribunal. Ms Hannan denied that she was hostile to her. It is likely that the Respondent was firm about what it could and could not do for the Claimant and she was upset because she was not getting what she wanted.

84 In Ms Cameron's note of the meeting, the Claimant is recorded as having stated that she would not be signing the new contract and would be back in contact with ACAS and take the matter to an Employment Tribunal.

85 On 19 August Ms Hannan wrote to the Claimant setting out her record of what had been discussed. She expressed disappointment that the Claimant had declined the offer of re-employment.

86 The Respondent did conduct an investigation into the Claimant's allegations against Mr Atil and Mr Clarke.

87 Ms Hannan interviewed Mr Clarke on 21 August with Mrs O'Brien in attendance to take notes. We have already referred to this interview above in these findings. Mr Clarke was clear and consistent in his denial that the Claimant had ever mentioned the word 'rape' to him. He used the words 'consent' and 'force' in his responses to Ms Hannan. The note of the meeting also show that he said that the Claimant was angry when she told him about the 'rape'. We find that this is a reference to the fact that an allegation of rape has been made since their conversation and this was a reference to the subject matter of their conversation. This was not a confirmation that she used the word 'rape' in their original conversation.

88 Mr Clarke had initially been reluctant to divulge the contents of his conversations with the Claimant to the Respondent. He wanted to keep her confidence. From her enquiries of him, Ms Hannan believed that had Mr Clarke any inkling that the Claimant was in danger or that she was being forced to do something against her will he would have raised the alarm and reported it to the police. Although the Claimant had told him that she was in pain due to sexual activity and that she had an infection he did not equate those things with rape.

89 We find that Ms Hannan's conclusion after this interview was that Mr Clarke had no reason to suspect that something untoward or criminal had taken place or that any sexual contact had been without the Claimant's consent.

90 On 4 September Ms Hannan interviewed Mr Atil. Ms O'Brien attended to take notes. Mr Atil confirmed that he had already been interviewed by the police about the Claimant's allegations. He denied raping the Claimant. He confirmed that the relationship between himself and the Claimant had taken place outside of work and was nothing to do with work. He was confused as to why the Respondent's Operations Director was asking him about it. The Respondent concluded that it was the Claimant's word against Mr Atil's and there was no independent evidence of her allegations. The Respondent concluded that it could take no action against Mr Atil. The Respondent considered that as he was also one of its employees, it also owed Mr Atil a duty of care. The Respondent was aware that Mr Atil was never arrested or charged over the alleged rape. If he had been it is likely that the Respondent would have taken action against him while the police action continued, pending an outcome. No further action was taken but after his interview with Ms Hannan, Mr Atil resigned from his employment with the Respondent.

91 We find that there was no-one else that the Respondent should have interviewed as part of this investigation. Ms Hannan interviewed the people that the Claimant referred to i.e. Mr Atil and Mr Clarke. Although the Claimant had also mentioned Miranda Colbert the Respondent decided not to interview her as it was unlikely that she had anything significant to add. The Claimant had told Ms Colbert

about an incident with Mr Atil on March 7. She had also mentioned the same incident to Mr Clarke. The Respondent was concerned that this matter did not become the subject of gossip in the garage and wished to contain any investigation to only those individuals who could assist it. In those circumstances Ms Hannan decided that it was sufficient to only interview Mr Atil and Mr Clarke.

92 The Claimant issued her ET1 in this case on 14 September. The police wrote to the Respondent on 15 September to inform them that unless other evidence came to light they would not be taking any action against Mr Atil.

93 In respect of the Claimant's Comparators we make the following findings of fact:-

93.1 In the case of Mohammed Shahid we have already found above that Mr Ayers dismissed him for failing to apply the handbrake and causing a collision with another bus in front of him– much like the Claimant. Ms Hannan heard his appeal against dismissal. He appealed on the ground of severity having accepted that he had been negligent. Ms Hannan concluded after conducting his appeal that he was truly embarrassed by the accident. Ms Hannan's decision on the appeal was to reinstate him with a final written warning based on his honest approach and remorseful attitude. He did not receive back dated pay.

93.2 Ms Hannan gave evidence on this appeal decision. She took into account Mr Shahid's length of service as he had been employed by the Respondent for eight years with only one previous incident on his records which had earned him a verbal warning. That was an adverse driving report. Ms Hannan's final written warning was to remain live for 12 months and he was warned that if he made the same mistake again it would end in his summary dismissal.

93.3 The Claimant also compared herself to another driver, Mr Ikram Ali. Ms Hannan had not been involved in his case but the Respondent was able to obtain the documents to ascertain what occurred. Mr Ali had been dismissed by Simon Davis who was an Operations Manager at Leyton Garage. He was found to have committed gross misconduct in relation to the misuse or failure to properly use the brakes. On his appeal against dismissal which was heard by the Respondent's Managing director Mark Threapleton, the Respondent took the decision to overturn the decision to dismiss him and reinstated him on sympathetic grounds after representations by Unite the Union. Mr Ali had 11 years of service with the Respondent and his previous driving standards record had been satisfactory.

93.4 The Claimant referred to another driver named Stephen Chimhina as a possible comparator. Mr Chimhina stood up to make an announcement on the iBus machine on the bus while seated in the drivers' cab. The handbrake was off and the bus rolled forward and hit another vehicle in front of it.

93.5 Mr Chimhina had no absences from work which meant that the matter was dealt with promptly. This matter was dealt with by a newly appointed manager David Clarke who at the time was the Acting Assistant Garage Operations Manager. Ms Hannan considered that he had taken a lenient approach as Mr Chimhina was not dismissed. Mr Clarke considered that the accident had been avoidable but as Mr Chimhina had taken full responsibility for it and understood the consequences of doing so again, he made the decision to issue him with a written warning that would remain on his record for 12 months.

93.6 Ms Hannan had heard Robert Judd's appeal against dismissal. He had been dismissed for using his mobile phone while in control of a vehicle. He admitted his mistake and after hearing his appeal Ms Hannan concluded that he had not intended to breach the Respondent's mobile phone policy but had been intending to do all he could to keep the service running. She also considered his mitigating factors. It was her decision to reinstate him with a final written warning. Mr Judd did not get any back pay.

94 The Tribunal also had some documents from Christopher Pinder's case. The manager who dealt with his case was Mr Hollingshead who had since moved to Australia. The Respondent had been unable to get the full facts of what had occurred in his case. The Respondent was further hampered by the absence of a fact finding interview in his staff file. However, the Tribunal can see from the documents produced that the Respondent concluded from an investigation that Mr Pinder wanted to use the iBus public address system (PA) to inform passengers to use the front and rear doors due to a wheelchair user using the middle doors. As the iBus PA system was not working, he turned around in his seat to address passengers and as the handbrake had not been applied the bus rolled forward into the rear of the bus that was stationery in front of him and caused some damage.

95 From his decision letter the Tribunal find that Mr Hollingshead considered all the relevant and mitigating factors, which included that Mr Pinder had received a commendation and had Box 1 driving standards achievements. He also considered that the accident had been avoidable. He took into account Mr Pinder's attendance and performance record. His decision was to impose a Final Written Warning. Mr Pinder initially indicated that he wanted to appeal against that sanction but he did not pursue it.

96 Ms Hannan was able to find the documentation that related to Mr Rahman's disciplinary. By the time of this disciplinary meeting he had completed two years service with the Respondent and in that period had an unblemished record for his driving standards. This disciplinary action was taken because of an accident which involved him committing a number of driving offences. The manager who conducted the hearing considered that he had committed gross misconduct. He took into account Mr Rahman's previous ability and considered that it would not be appropriate to dismiss him. He had previously driven with skill. He was awarded a Final Written Warning to remain on his records for one year. Mr Rahman did not appeal against this sanction.

97 During our Hearing the Claimant produced a hard bound desk diary. This had not been disclosed prior to the start of the Hearing. The Claimant was therefore likely to be in breach of the orders for disclosure made at the previous preliminary hearings. However, the Claimant did not attempt to enter the diary into evidence in the trial. She produced it in the middle of her cross-examination of Denzil Clarke and was about to use it as an aide memoir to assist her in formulating her questions to him. Mr Ludlow spotted the diary and raised its presence in court with the Tribunal. After discussion as to what it was and why it was only just being produced in court, the Claimant was ordered to hand it over to the Tribunal.

98 The Claimant was asked what was in the diary and it is likely that she was unprepared for this question. She answered that it held records of her duty times and information.

99 The Respondent examined the diary and found that also contained other information. The diary had entries in multi-coloured ink (red, green and black). Those entries were about when she was at Mr Atil's address, when they met and what they did. There were also entries that related to pages in the bundle of documents. The Claimant failed to attend court at 9.30am the following morning to give the diary to Mr Ludlow for the Respondent. The court had ordered her to do so before the Hearing resumed at 10am that day. At the end of the Respondent's case the Claimant was re-examined on the content of the diary. Copies of its pages were entered into evidence as the Respondent wished to make submissions on it.

100 We find from the Claimant's cross examination on the issue of the diary and the way in which the matter unfolded that it was unlikely that the Claimant planned to put the diary in evidence as a true record of events at the time. She had not got an opportunity to use it in the way that she wanted before she was stopped.

101 It is clear that the Claimant had used the diary to record her duty times, pay and other information. Also, since she reported the matter of the alleged rape to the police, she had also used it to assist her in formulating her response to the questions asked by the police when they interviewed her as part of their investigation. She had written dates, places and events in the diary that related to the matters she had reported to the police which were essentially her interactions with Mr Atil. She had used her Oyster card records and her debit/credit card transaction records to work out where she was at specific times, which was also recorded in the diary.

102 We find that it is likely that the police asked her to provide that information and she used the diary to assist her with that task. We do not find that she had put that information in the diary to persuade us that those things occurred since she had not submitted the diary to the Tribunal as evidence. Before bringing the diary to the Hearing, it is likely that the Claimant had cross referred documents in the bundle with entries in her diary and intended to use it to cross-examine the Respondent's witnesses. She did not submit the diary to us as a contemporaneous record of things that had occurred and it is unlikely that she would have done so as there were page numbers from the hearing bundle noted in the diary. The Claimant was aware of her duties to disclose all relevant documents in preparation for the case as she represented herself at the preliminary hearings in this matter.

103 The Respondent had a number of policies that were relevant to the issues in this case. The Claimant's main terms and conditions of employment document that had been signed on 14 October 2014 confirmed that the Respondent's grievance and disciplinary procedures were available from the Claimant's line manager and at her place of work. If she required further advice on using the grievance procedure she was advised to contact the local manager, trade union or Human Resources Department for assistance. She was also referred to the Respondent's Handbook/Rule Book and company policies where relevant. The Claimant signed to confirm receipt of a copy of the Respondent's rule book.

104 We looked at the Grievance Procedure in the bundle. That procedure stated that it was a process by which matters of concern to employees could be pursued with management. Employees were encouraged to try to resolve matters initially with their line manager or supervisor and if the matter cannot be resolved on an informal basis, they could raise it formally and in accordance with the procedure.

105 We also had the Respondent's Equal Opportunities Policy in the bundle. That document began with a statement that the Respondent is committed to providing a workplace that is free from discrimination, harassment and victimisation for the benefit of all and to ensuring that all employees, job applicants and customers are treated with dignity and respect. The purpose of the policy is to ensure that no employee, job applicant or customer receives less favourable treatment on the grounds of their gender, marital status, age, race, colour, nationality, ethnic or national origins, disability, religion or belief, class or trade union membership etc.

106 The policy set out that managers had a responsibility to ensure that discrimination, harassment or victimisation is not carried out either by themselves, or by the staff within their line management responsibility. Also, each employee had the responsibility for the practical application of equal opportunities in their day-to-day activities and working relationships with colleagues and customers and to ensure that they do not carry out any acts of discrimination, harassment or victimisation. Employees who believed that they had been subject to unfair or unlawful discrimination, racial or sexual abuse or harassment, were advised in the policy to raise their concerns through the grievance procedure and where such grievances may relate to the normal line of supervision, they were advised to approach another nominated manager. The policy stated that such discrimination or harassment would not be tolerated and would constitute gross misconduct and could, if proven, lead to the perpetrator's dismissal from employment.

107 The Respondent also had a detailed policy on harassment. This dealt with harassment of employees by customers as well as harassment between employees. The Respondent undertook in this policy to take all reasonable steps to stop harassment and prevent recurrence as well as protecting its employees from such behaviour.

108 Employees were encouraged to take informal action to stop harassment but if it persisted or they wanted to take more formal action there was a clear procedure for putting it in writing and raising it with management. The Respondent undertook to address all complaints swiftly and in confidence. Harassment was defined in this policy and examples of such conduct was given. The policy set out that unwanted physical

conduct such as unnecessary touching, gestures, physical threats or assault, unwanted verbal conduct such as unwelcome advances, remarks, suggestions and propositions, innuendo, lewd comments, jokes etc. were all examples of harassment which the Respondent would take very seriously, as set out above.

109 The Respondent had another separate policy on welfare which acknowledged the Respondent's duty as a good employer to promote and safeguard the welfare of its employees. The Respondent undertook to support employees with general counselling, working with Occupational Health in relation to matters such as stress, alcoholism, drugs, sickness and at times of bereavement.

110 Lastly, the Respondent had a stress policy and guidance to managers. That policy applied to all in the company. It detailed separately the duties of different parts of the workforce. Directors/Managers had to ensure that bullying and harassment is not tolerated within their jurisdiction, to attend relevant training, be vigilant and offer additional support to staff facing extreme stress outside work; and to ensure all employees are fully trained to discharge their duties. Employees had the responsibility of raising issues of concern with their line manager or trade union representative, informing the line manager if they are suffering with stress or a stress-related illness; and to accept opportunities for counselling when offered and attend arranged appointments. This policy was complemented by a further detailed policy and guidance on work-related stress specifically for employees which was also in the bundle.

Law and submissions

111 The Claimant confirmed at the start of the Hearing that she was not pursuing complaints of unfair and wrongful dismissal.

Discrimination

112 Section 13 of the Equality Act 2010 (EqA) states that:

> "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."

113 The Claimant's complaint is that the Respondent treated her less favourably because of the protected characteristic of gender. The Claimant relied on actual comparators for her complaint. She referred to Mohammed Shahid, Ikram Ali, Robert Judd, Christopher Pinder, Stephen Chimhina, Mr M Rahman and Gordon Goodson. Section 23 EqA states that when comparing cases for the purposes of section 13 there must be no material difference between the circumstances relating to each case.

114 The law on harassment is contained in section 27 EqA:

> "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 purposes or effect of

(i) violating B's dignity, or

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

A also harasses B if –

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

115 Section 27(4) states that in deciding whether conduct has the effect referred to in subsection (1)(b) set out above, each of the following must be taken into account:

(a) The perception of B

(b) The other circumstances of the case

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

116 The Respondent referred the Tribunal to the case of *Land Registry v Grant* [2011] EWCA Civ. 769 in which Elias LJ focused on the words "intimidating, hostile, degrading, humiliating or offensive" and observed that:

> *"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caused by the concept of harassment".*

117 In the case of *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 the EAT stated that the conduct that is treated as violating a complainant's dignity is not so merely because he thinks it does. It must be conduct which could reasonably be considered as having that effect. The Tribunal is obliged to take the complainant's perspective into account in making that assessment but must also consider the relevance of the intention of the alleged harasser in determining whether the conduct could reasonably be considered to violate a complainant's dignity.

118 It is also important where the language used by the alleged harasser is relied upon, to assess the words used in the context in which the use occurred.

119 Section 136 of the EqA addresses the issue of the burden of proof in discrimination complaints. The burden is on the Claimant to prove that she has been treated less favourably and harassed by the Respondent because of her gender.

120 The section states that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. That does not happen

– the court cannot hold that the contravention occurred – if A shows that it did not contravene the provision.

121 This means that if the Claimant proves facts from which the Tribunal can infer that her treatment by the Respondent amounted to harassment and was less favourable in the ways she has pleaded and that there is something more that links that treatment with her gender – then the burden shifts to the Respondent to show that the treatment was in no way related to her gender. In that case the claims would fail.

122 The Tribunal was aware of many cases in which this principle was discussed. Including *Igen v Wong* [2005] IRLR 258 and *Madarassy v Nomura International Plc* [2007] IRLR 246. In the case of *Laing v Manchester City Council* [2006] IRLR 748 tribunals were cautioned against taking a mechanistic approach to the burden of proof provisions. The court stated that the focus of the tribunal's analysis must at all times be the question whether it can properly and fairly infer discrimination. It stated also that sometimes it will be possible on the facts found for the tribunal to reach a conclusion that the protected characteristic was not the explanation – without formally going through a two stage process. In every case the Tribunal has to be concerned with the reason 'why' someone was treated as they were (*Nagarajan*).

Protected disclosures

123 The Claimant's case was that she suffered detriment because she had made protected disclosures.

124 In order for disclosures to be considered as protected in accordance with the Employment Rights Act 1996 (ERA) three requirements need to be satisfied. In order to be a 'qualifying disclosure' there needs to be a disclosure of information, which is made in the public interest and is made by the worker in a manner which accords with the scheme set out in the ERA sections 43C-43H.

125 Whether or not the disclosure qualifies depends on the nature of the information being revealed. The worker making the disclosure must have a reasonable belief that it tends to show one of the following statutory categories of failure. It is not necessary for the information to be true. However, determining whether they are true can assist the Tribunal in their assessment of whether the worker held a reasonable belief that the disclosure in question tended to show a relevant failure. (*Darnton v University of Surrey* [2003] IRLR 133). It is in this respect that the Respondent submitted that we needed to determine the nature of the relationship between the Claimant and Mr Atil because if, it was submitted, we concluded that she knew that she was in a relationship then she could not have had a reasonable belief that she was disclosing a criminal offence when she spoke to any of the Respondents.

126 The ERA sets out six categories of failure to which the information must relate if the disclosure is to be one qualifying for protection. Out of those six there are three that could apply to the facts of this case. Those are: (a) that a criminal offence has been committed, is being committed or is likely to be committed, or (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; (d) that the health or safety of any individual has been, is being or is likely to

be endangered; or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been or is likely to be deliberately concealed.

127 The Tribunal considered the case of *Cavendish Munro Professional Risks Management Ltd v Geduld* [2011] IRLR 38 where the EAT stressed the requirement that in order for the disclosure to fall within the statutory definition there must be disclosure of information. The court made a clear distinction between the provision of 'information' which would satisfy the test; and making an 'allegation' which would not be covered. A mere allegation against the employer or a simple expression of dissatisfaction would not be sufficient to warrant the protection of the ERA.

128 A qualifying disclosure is made in accordance with section 43C of the ERA if the worker makes the disclosure to her employer. In situations where the worker reasonably believes that the relevant failure relates solely or mainly to the conduct of a person other than her employer or relates to a matter for which a person other than her employer has legal responsibility then the worker can make the disclosure to that other person. A disclosure to a prescribed person is only made in accordance with section 43F if the worker makes the disclosure to a person prescribed by an order of the Secretary of State and reasonably believes that the relevant failure falls within any description of matters in respect of which that person is so prescribed and the information disclosed and any allegation contained within it are substantially true.

129 Although there is no longer a requirement that a disclosure be made in good faith in order to qualify for protection the Tribunal still needs to consider that aspect in relation to the issue of remedies. In a successful case if it appears to the Tribunal that the protected disclosure was not made in good faith the Tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the worker by no more than 25%. The Tribunal would need to consider the law in cases such as *Street v Derbyshire Unemployed Workers' Centre* [2004] IRLR 687 in determining the meaning of the term 'good faith' in each case.

130 The Tribunal were also mindful of the decision of the EAT in *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4 in which it was noted that where there are a plethora of disclosures, the requirement is that there was a reasonable belief in relation to each. McMullen J stated that it was not enough that the claimant can be shown to have believed in the general gist of his complaints. The Respondent submitted that this case was also authority for their submission that although the test is a subjective one as it is of reasonable belief there must be some substantiated basis for the belief; and that a worker's personality and individual circumstances are relevant in assessing whether or not their belief was reasonable.

131 In *Korashi* the EAT gave guidance on 'reasonable belief'. Although the test is objective this has to be considered taking into account the personal circumstances of the discloser. The question is whether it was reasonable for her to have that belief. Further, where an employee relies upon multiple alleged protected disclosures (as is very common), reasonable belief must be made out in relation to each of the disclosures and a general belief in the broad gist of the content of the disclosures is not enough.

132 The Claimant referred the Tribunal to the case of *Babula v Waltham Forest College* [2007] IRLR 346 per Wall LJ in which he stated as follows:

> "It is also …. significant that s.43B(1) uses the phrase 'tends to show' not 'shows'. There is, in short, nothing in s.43B(1) which requires the whistleblower to be right. At its highest in relation to s.43B(1)(a) he must have a reasonable belief that the information in his possession 'tends to show' that a criminal offence has been committed: at its lowest he must have a reasonable belief that the information in his possession tends to show that a criminal offence is likely to be committed. The fact that he may be wrong is not relevant, provided his belief is reasonable, and the disclosure to his employer is made in good faith (s.43C(1)(a*))[the good faith requirement was removed in with effect from 25 June 2013].*
>
> The purpose of the statute…… is to encourage responsible whistleblowing. To expect employees on the factory floor or in shops and offices to have a detailed knowledge of the criminal law sufficient to enable them to determine whether or not particular facts which they reasonably believe to be true are capable, as a matter of law, of constituting a particular criminal offence seems to me to be both unrealistic and to work against the policy of the statute. Provided the worker's belief is reasonable a disclosure may qualify as a protected disclosure even if it subsequently transpires that the information was untrue."

133 The Claimant submitted that she suffered detriment as a direct consequence of making the protected disclosure. Section 47B ERA prohibits an employer from subjecting a worker to any detriment by any act or any deliberate failure to act that is done on the ground that the worker has made a protected disclosure.

134 The Respondent submitted that the Tribunal should pay attention to the guidance set out in the case of *Blackbay Ventures Ltd v Gahir* [2014] IRLR 416 where the court set out that the tribunal in such a case should (i) separately identify each alleged disclosure by reference to date and content, (ii) identify each alleged failure to comply with a legal obligation or health and safety matter (as the case may be), (iii) identify the basis on which it is alleged that each disclosure is qualifying and protected and (iv) identify the source of the legal obligation relied upon by reference to statute or regulations (save in obvious cases). The court stated that if a tribunal does not go through this exercise it will not know the particular disclosure said to have resulted in a particular detriment nor the relevant date of the alleged detriment, if indeed the worker had suffered a detriment. The Tribunal should then go on to consider whether the worker had the reasonable belief required under section 43B(1). The enquiry should then move on to whether the disclosure was made in the public interest. The Tribunal must identify the alleged detriment and the date thereof as part of its findings.

135 The Tribunal also considered the case of *Fecitt v NHS Manchester* [2012] ICR 372 in which the Court of Appeal stated that it is not necessary for the protected disclosure to be the sole or principal reason for the treatment. Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower.

136 Consideration of the meaning of 'subjecting to a detriment' has been given by the EAT in the case of *Abertawe Bro Morgannwg University Health Board v Ferguson* [2014] IRLR 14 where the EAT held that the employer does not have to be able to control the circumstances giving rise to the detriment. The court also gave guidance on the concept of a deliberate failure to act by the employer.

Credibility

137 The Respondent submitted that the Claimant was not a credible witness. The Respondent invited the Tribunal to find that the Claimant had not been raped and that instead, she had a relationship with Mr Atil that had not worked out as she wished. Mr Ludlow submitted that the Claimant was not a witness of truth on this issue. The Respondent submitted that the Tribunal should conclude from the way in which the Claimant handled the disclosure of her diary and her comments about the diary as further evidence of her dishonesty and that not only should her claim be dismissed but the Tribunal should find that she was not to be believed.

138 Mr Ludlow submitted that as she knew that she had not been raped it was impossible for her to have told Mr Clarke or Ms Hannan that she had been raped. The Respondent's case was that the Claimant knew that she had not been raped which meant that she could not have had a reasonable belief in relation to the whistleblowing legislation. The Respondent submitted that the premises of her case had not been made out and that instead the Claimant fabricated evidence that she put before the Tribunal.

139 In her submissions the Claimant acknowledged that she had been friends with Mr Clarke during her employment. She accepted that she had not used the word 'rape' and that she had not asked Mr Clarke to do anything but submitted that he ought to have taken it upon himself to act on her behalf after what she had told him. She submitted that when she was telling him about her sexual activity with Mr Atil he never told her to stop but pressed her for details. This was different to her written case which was that he probed her for details and harassed her in the way he spoke to her. She referred to the written statement that Mr Clarke gave Ms Hannan during the Respondent's investigation where he used the word 'consent' and submitted that this meant that he knew that she had been raped and ought to have taken action and in failing to do so, had failed in his duty of care towards her.

Judgment

140 In applying the relevant law to the facts found we would firstly acknowledge that it is not inconceivable that the criminal offence of rape can take place within a relationship, or within marriage as well as between strangers. The Tribunal did not hear from Mr Atil and this is not a criminal court. The fact that the Claimant presented at the Hearing as an intelligent, confident person does not preclude her being the victim of rape. We cannot make a judgment as to whether or not she was raped by Mr Atil. In this Employment Tribunal, we are concerned to only deliberate on the list of issues as agreed at the start of the Hearing. This Tribunal has to determine the nature of the Claimant's relationship with Mr Atil - as Mr Clarke and Ms Hannan would have understood it - from what she told them at the time and from her conduct. We will

address the issue of the credibility of the Claimant and the other witnesses in the Hearing as it arises in our application of the law to our findings as set out above.

141 The Tribunal will now address individually the issues set out over pages 66X-66EE and 66I-66M.

Paragraph 5 (page 66Y) asks whether the Claimant informed Denzil Clarke that she had been the victim of rape or attempted rape either on 5 March or at any stage thereafter.

142 In our judgment she did not do so. In our judgment, the Claimant told Denzil Clarke, in confidence as a friend, details of her sexual activity with Mr Atil. She spoke to him in his car while he was giving her a lift into work. She informed him about her sexual activity with Atil outside of work. Most of the Claimant's conversations with Mr Clarke took place outside of work or when they were off duty. In our judgment and as she conceded by the end of the Hearing, she had not used the word 'rape' in her conversations with Mr Clarke. It is also highly unlikely that in their conversations or in her conduct she had given an indicated that she had been forced to have sex without consent.

143 They continued to have conversations about her relationship with Mr Atil - outside of work, on the telephone and in Mr Clarke's car. The Claimant provided graphic and explicit details of what had occurred between her and Mr Atil. It is this Tribunal's judgment that Mr Clarke did not understand the Claimant to be reporting sexual assault or to be asking him to take action against Mr Atil or to conduct any investigation into the matter. It would have been reasonable for him to assume that she was talking to him as a friend and that she expected him to keep her confidences. He frequently advised her to be careful not to be overheard giving these details at work, to focus on her work and her prospects within the business and it is our judgment that he genuinely cared for her as a friend. He looked out for her and we referred to many examples above – such as changing the rotas for her so that she would not have to drive the Scania buses – where he went out of his way to help her. In our judgment, if Mr Clarke believed that the Claimant was being forced to have sex against her will then he would have taken some action to assist or support her.

144 It is also our judgment that the Claimant never made a complaint to Mr Clarke in his capacity as a manager or Acting Garage Supervisor or Acting General Operations Clerk. She did not raise a formal grievance with Mr Clarke and it is our judgment that she knew how to do so. She admitted that she never asked him for help.

145 Whether or not the Claimant believed at the time that she was in a relationship with Mr Atil, the information she gave Mr Clarke gave him no reason to think that this was anything other than a consensual relationship between two adults.

146 When the Claimant informed Mr Clarke that she had now reported the matter to the police, he again stated that he had no intention of breaking her confidence. In our judgment he was prepared to stand by that as one of the main tenets of their friendship. This confirmed that he clearly thought that the content of their conversations had been shared in the context of their friendship. We had no evidence to support the Claimant's case that these were manager/subordinate conversations

and that Mr Clarke should have taken it upon himself to somehow take formal action against Mr Atil on her behalf. He had not been asked to do so, and he had not witnessed or heard anything that would have led him to conclude that this would have been appropriate.

147 In our judgment the Claimant had not told Mr Clarke that she had been the victim of rape or attempted rape either on 5 March 2015 or at any stage thereafter.

148 In our judgment, the Claimant had not made any disclosures to Mr Clarke.

Paragraph 6 (on 66Y) asks whether, if the Claimant had informed Denzil Clarke of Mr Atil's alleged behaviour; had she done so in the reasonable belief that it tended to show that a criminal offence had been committed or that her health and safety was or had been endangered.

149 In our judgment she had not. What the Claimant had told Mr Clarke was a detailed, graphic account of her sexual activity with Mr Atil. In our judgment, at the time they had these conversations the Claimant did not give any indication that she believed that what had occurred between her and Mr Atil amounted to criminal activity or that her health and safety had been endangered.

150 In our judgment, at the time she had the conversations with Mr Clarke, the Claimant did not conduct herself as someone who believed that she was the victim of crime. The Claimant agreed that she did not ask for help and it is our judgment that she did not. She never asked for any assistance. She never gave the impression that she was afraid of Mr Atil or that she needed help to break away from him or that she was being forced into having sex without her consent. Mr Clarke surmised that she had misgivings about her encounters with Mr Atil which is why he encouraged her to go out with Mr Alom but that is a far cry from knowledge that she was being subjected to the criminal offence of rape.

151 It is our judgment that the Claimant did not inform Mr Clarke that her health and safety was endangered or was likely to be endangered and that he should take some action in his capacity as Acting Supervisor about it. She informed him that she had a urine infection and that the sex had been painful. The Claimant is an adult woman. Unless she told Mr Clarke that this had occurred against her will he could not have assumed that she reasonably believed that a criminal offence was being committed or that her health and safety was in danger. Although from the notes of his interview with Ms Hannan it is apparent that issue of consent entered his mind at the time of the interview when he reflected on their conversations; it is our judgment that this was not something that the Claimant raised with him at the time she told him the details of her sexual activity with Mr Atil.

152 In our judgment the Claimant had not made any disclosures to Mr Clarke.

Paragraph 8 (page 66Y) asks whether the Claimant told Ms Hannan either orally on 18 June and/or by email on 17 July and/or in the written grievance dated 11 August of the alleged treatment she had been subjected to by Mr Atil and Mr Clarke.

153 It is our judgment that the Claimant did not talk about Denzil Clarke at the appeal hearing. She did tell Ms Hannan about Mr Atil at the appeal hearing on 18/19 June. She had not given any of this information to Mr Hollingshead, Mr Ayers, or any of the other managers who dealt with her between March and June.

154 It is our judgment that the email of 17 July was sent to Ms O'Brien and not to Ms Hannan. The Claimant told Ms O'Brien of her allegations about Denzil Clarke at the induction on 13 July and this information was passed to Ms Hannan. In the letter of 11 August she referred to the alleged sexual assaults by Mr Atil and Mr Clarke's knowledge as she allegedly told him about them. She also referred to her belief that he had failed to help her but had instead gossiped with another male driver about her.

155 In our judgment the Claimant had made a disclosure. She disclosed to Ms Hannan in the letter of 11 August and to Ms O'Brien in the email of 17 July and in their conversation on 13 July that she had been the victim of sexual assault by Mr Atil. Also, in her conversation with Ms O'Brien on 13 July and in the letter of 11 August she had disclosed that Mr Clarke had failed to help her. She repeated these allegations in the meeting on 12 August.

156 The Claimant did make disclosures on 13 July, 11 and 12 August.

Paragraph 10.1 (page 66Y) asks whether the disclosures to Ms Hannan were made in the reasonable belief that they tended to show that a criminal offence had been committed.

157 It is our judgment that at the time she made the disclosures, the Claimant did not have a reasonable belief in her mind that a criminal offence had been committed on her by Mr Atil between 5 March and 7 April. She never made a complaint to the Respondent at the time of the alleged assault. If she considered that Mr Clarke was not taking appropriate action she confirmed in her evidence that she was aware of the Respondent's policies and how to raise a grievance and she failed to do so or to go to his superiors with her complaints. This was a matter that she only raised as part of her mitigation in her appeal against dismissal. She did not inform the police and initially resisted the Respondent's attempts to get her to do so. It is our judgment that bringing this matter up at her appeal was most likely to bolster her attempts to get her job back and to get Mr Atil punished as she was either upset about the way in which the relationship had ended or the fact that it had ended.

158 In our judgment the Claimant wrote the letter of 11 August, the grievance letter, in anticipation of the meeting on the following day in which the night work clause in the new contract was going to be discussed. The Claimant wanted Mr Atil to be suspended and punished somehow, even without an investigation. She also wanted the night work clause in her contract lifted and it is likely that she disclosed what she put as Mr Clarke's involvement in the hope that it would get the Respondent to remove that clause in her contract.

159 The Claimant knew that she had been in a relationship with Mr Atil even if it had not gone how she wanted. She had not said anything to Mr Clarke at the time that would have led him to believe that anything criminal had been happening between her and Mr Atil.

160 It is our judgment that the Claimant did not have a reasonable belief that her disclosures to Ms Hannan tended to show that a criminal offence had been committed.

Paragraph 10.2 (66Y) asks whether the disclosures she made to Ms Hannan tended to show that her health and safety had been endangered on 5 March and thereafter when Denzil Clarke failed to support her and other drivers and placed the public at risk. She also alleged that this continued after she raised the issues with Ms Hannan who failed to implement any measures to protect her and other women.

161 In our judgment the Claimant could not have reasonably believed that her health and safety was endangered on 5 March and thereafter. If she had it is likely that she would have conducted herself differently i.e. it is unlikely that she would have continued to go to Mr Atil's flat or continued to see him. If she had wanted the Respondent to address what had happened between her and Mr Atil as a health and safety issue, then in our judgment she would have made a complaint or raised a grievance about him and his treatment of her, to the Respondent's managers. She could also have taken other measures that did not involve the Respondent - such as reporting the matter to the police.

162 In our judgment there was no issue of her continuing health and safety as she had not been at work since the date of the accident on 10 April. By 19 June she had not been at work for two months. There was no continuing issue of safeguarding her at work. In addition, by the time this matter was raised by the Claimant at her appeal meeting with Ms Hannan, there was no continuing relationship between the Claimant and Mr Atil so there was nothing for Ms Hannan to protect her from. She had not reported to the Respondent that Mr Atil was following, harassing, stalking or doing anything else in relation to her that was putting her health and safety at risk and about which action needed to be taken. In our judgment at no time – either in March or in July/August when she reported the sexual activity with Mr Atil to the Respondent – was there any issue of her health and safety being endangered or of other drivers being put at risk.

163 It is also this Tribunal's judgment that the Respondent did not have any information that Mr Atil was a health and safety threat to anyone else.

164 Ms Hannan took measures to safeguard the Claimant by refusing to put her back in the garage where Mr Atil worked. The Claimant was insistent that she should be posted to the garage where the alleged rapist continued to work but Ms Hannan refused. She did so in an effort to protect the Claimant even though she did not know whether the allegations were true. She was prepared to give the Claimant the benefit of the doubt.

165 In our judgment the disclosures to Ms Hannan were not made in the reasonable belief that they tended to show that the Claimant's health and safety had been endangered on 5 March and thereafter.

Paragraph 10.3 asks whether any of the disclosures the Claimant made were in the reasonable belief that Denzil Clarke had failed to comply with a legal obligation, namely a duty of care to protect her and to report the matter she complained about to a senior manager and this continued to 28 April 2015.

166 In our judgment Denzil Clarke's supervisory role was minimal. He was able to change rotas for her. He occasionally acted as a supervisor as well as a driver. In our judgment when they spoke about the Claimant's relationship with Mr Atil they were not speaking in a manager/subordinate role. She did not talk to him in an official capacity. These were conversations that they had in his car, on the telephone and while on breaks. He reportedly said to her that they should remain in the car to complete the conversation so that they were not overheard by colleagues. Mr Clarke was Acting Garage Supervisor but he was also the Claimant's friend. It is our judgment that she never spoke to him about these matters in an official capacity. She never asked for his assistance in dealing with the matter or for Mr Atil to be disciplined or sanctioned in any way because of the way she had been treated. Although they were work colleagues, their conversations did not take place within a work context.

167 In our judgment, Mr Clarke as an Acting Garage Supervisor did have a duty of care to the Claimant as a driver. If the Claimant had told Mr Clarke anything that could have led him to believe that a crime had been committed or that she believed herself to be in danger or that she was in danger, it would have been appropriate for him to report it to management, to the police or other appropriate authorities. In our judgment, Mr Clarke did not hear anything from the Claimant that led him to have those concerns. He questioned the Claimant's choices, which is why he advised her to start seeing Mr Alom instead of Mr Atil as he considered that he would treat her better. That was his personal judgment.

168 The Claimant had not asked Mr Clarke to do anything in response to the information she gave him. She told him about the sex in confidence and because they were friends.

169 It is our judgment that the Claimant did not tell Mr Clarke anything that triggered his formal duty of care or that would have required him to take action in his role as Acting Garage Supervisor.

170 It is therefore our judgment that Mr Clarke did not fail to comply with a legal obligation, namely his duty of care to protect the Claimant and to report the matter to a senior manager. The Claimant never lodged a complaint with him nor did she report a crime. The duty did not arise.

171 It is also our judgment that the Claimant could not have had a reasonable belief that Mr Clarke had failed to comply with a legal obligation to protect her and report the matter.

172 This complaint fails and is dismissed.

Allegation 11 (page 66Z) is that the Claimant believed that she made public interest disclosures.

173 In our judgment the Claimant first raised this allegation of rape at her appeal hearing against her dismissal for gross misconduct. Her case was that she was allegedly raped in March. She did not raise it with management or anyone else within the Respondent in March, April, or May. In our judgment the Claimant told Ms Colbert about sexual activity and not about rape. The Claimant did not make any allegation of rape when she had the accident with the bus or when she was disciplined. She only raised it after her dismissal and she has continued to pursue the allegation since then.

174 It is our judgment that she did not raise it on several occasions with Denzil Clarke. Instead, she had several conversations with him in which she described her sexual activity with Mr Atil. She did not disclose to him that she believed that she was victim of crime or that she was being forced into sexual activity against her will.

175 In June the Claimant made allegations of rape against Mr Atil when she spoke with Ms Hannan. Due to Ms Hannan's insistence, she did subsequently report the matter to the police.

176 It is our judgment that it is unlikely that at the time she made that disclosure to Ms Hannan she believed that she had been the victim of rape and was making disclosures in the public interest. By the time she reported it to the police she may well have convinced herself that what had occurred between herself and Mr Atil on one or other occasion was rape. However, it is our judgment that at the time she made the reports in June to the Respondent she did so to get her job back and later, to get the Respondent to remove the requirement to work nights from the new contract.

177 In our judgment the Claimant's refusal of the job offered to her by Ms Hannan does not, as alleged in point 11.4, show that she reasonably believed that the disclosures were made in the public interest. It was not clear to us why she refused the job. It was a job that she believed she could do and had done and was fighting to keep; it was at a garage that was away from the person she alleged had assaulted her and was away from her family who she also had issues with.

178 The Respondent determined that the dismissal was fair and appropriate in the circumstances where the Claimant had admitted a negligent act and where it did not accept her mitigation i.e. that she had been suffering with pain at the time of the accident. Ms Hannan took her mitigation into account and decided to offer her a job. That was a benefit and not a detriment.

179 When the Claimant raised the issue of night work Ms Hannan agreed to lift the requirement for her to do so until the end of the police investigation. In the circumstances, the Respondent made reasonable offers to the Claimant but she chose to refuse it. We were not clear of her reasons for doing so but in our judgment it was not because she believed her disclosures were in the public interest. We did not accept that if she had accepted the job it would have put her in an untenable position.

180 In this Tribunal's judgment the Claimant made disclosures in July to Ms Hannan. However, those disclosures were not protected for the reasons set out above.

Allegation 12 (66Z) states that in relation to the disclosures to Denzil Clarke and Diane Hanna, the Claimant relies on the following detriments: those are set out in paragraphs 12.1 – 12.3. 12.4 asks whether they were in fact detriments.

181 In this Tribunal's judgment the Claimant did not make protected public interest disclosures. The Claimant does not get the statutory protection from detriments and the Tribunal is not required to address the alleged detriments in paragraph 12.1 – 12.3.

182 In addition, as stated above, in this Tribunal's judgment the offer of a job was not a detriment to the Claimant as stated in 12.3. The offer of re-engagement was made in good faith. Ms Hannan upheld Mr Ayers' decision to dismiss the Claimant. She was not convinced of the Claimant's version of events in her mitigation. However, she was prepared to offer the Claimant re-engagement as a bus driver on a new contract. Since the Claimant wanted to be a bus driver the Tribunal cannot see how that could be considered a detriment. Ms Hannan refused to put the Claimant back in the garage where her alleged rapist worked. That was reasonable and also could not be considered a detriment. Although the contract stated that she would be required to work nights the Respondent was prepared to release her from that obligation while the police investigation continued. Once that investigation concluded the Claimant would have been able to make other representations to the Respondent. In our judgment this was not a detriment to her.

183 It is also our judgment that Mr Clarke did not tell the Claimant that she should not report a rape. He told her that she should be careful not to become the subject of gossip in the garage. If she had told him that she had been the victim of rape or if she had told him anything that could have indicated to him that she had been the victim of rape, it is our judgment that given his concern for her, the help he gave her during her employment and their friendship; Mr Clarke would have assisted the Claimant in reporting the matter to the police.

184 As we have found above, they did discuss the details of her sexual activity and in so doing, it is possible that Mr Clarke asked her for details and may well have asked her some of the questions listed at 12.2.1 – 12.2.13. In our judgment, the Claimant easily shared and volunteered information. They had conversations about intimate matters and both consented to have that type of conversation. Those conversations did not take place in Mr Clarke's capacity of manager or as part of a complaint that she made about Mr Atil. The Claimant never protested about the nature of the conversations since she initiated most of them and was content to share information with Mr Clarke. There was no evidence that she was forced to share information about her sexual activity or that she was pressured in any way into telling Mr Clarke about her personal life.

185 Once the Claimant informed Mr Clarke that she had reported alleged rape to the police and told them that he knew all about it, he did ask her for details of what she had told the police. In our judgment that was not because he was worried that he would be in trouble. In our judgment that was he knew that it was possible that he would be interviewed and he wanted to know whether she had told the police about all the sexual activity with Mr Atil or just about particular events. He did not want to divulge

more of her private information than was necessary. At all times, it is our judgment that Mr Clarke was concerned about keeping the Claimant's confidence.

186 In our judgment allegation 12.2.16 is unrelated to any disclosures the Claimant made. The Claimant was dismissed for gross misconduct. She was not dismissed as a detriment for making disclosures. At the time of her dismissal, Mr Ayers was unaware of any allegation against Mr Atil. She was dismissed because of her negligent driving. The Respondent did not accept her mitigation. On appeal, Ms Hannan considered the evidence and the Claimant's mitigation and concurred with Mr Ayers' decision.

187 Allegation 12.2.17 was not explored at the Hearing. This was the subject of an internal complaint but the Claimant withdrew that complaint during Ms Hannan's hearing. She did not pursue that matter before us.

188 It is therefore our judgment that the matters stated in paragraphs 12.1 – 12.3 were not detriments. Also, in relation to paragraph 14 they were not detriments done by another worker as they were not detriments.

Allegation 15 asks whether the Claimant made protected disclosures to the HSE orally and in writing (on their "Concern Form") on 16 July 2015.

189 The Claimant did report the alleged rapes to the Health and Safety Executive (HSE). She did not do so until 16 July. The HSE is a responsible person under the Employment Rights Act. However, when disclosing to them it is our judgment that the Claimant did not have reasonable belief that she was disclosing information that tended to show that a criminal offence was being committed or that her health and safety was in danger. The answer to allegation 16 is that the HSE is a responsible person under sections 43C to 43F of the ERA 1996.

190 Even if by that time she had convinced herself that what had happened in March was rape, it is our judgment that the detriments she referred to did not flow from that action. Ms Hannan had already decided on 19 June to offer her re-engagement as a bus driver which in our judgment was not a detriment. Ms Hannan had also confirmed her dismissal. This was also not a detriment. Ms Hannan found that Mr Ayers had made the right decision given the evidence and the fact that she did not find the Claimant's explanation of the accident to be convincing.

191 The conversations that the Claimant had with Mr Clarke in which she alleges that he subjected her to detriments, had already occurred by the time she disclosed matters to the HSE.

192 It is our judgment that the disclosure to the HSE was not a protected disclosure. Even if it was, the alleged detriments did not occur after this disclosure and so could not have happened because of it. (Allegation 17). The Claim fails and is dismissed.

193 The Claimant was unable to pursue a complaint of unfair dismissal as she had not been employed for two years at the time of her dismissal. She withdrew the complaint of wrongful dismissal at the start of the Hearing.

194 In addition, it is our judgment that the Respondent dismissed her for negligence in that she left the handbrake off and the bus rolled forward and collided with another stationary vehicle.

195 The claimant admitted this in the internal hearings and at the Tribunal.

196 The Respondent has shown that other drivers who commit the same offence are usually dismissed. Mr Shahid and Mr Ikram Ali were dismissed for the same offence. Their sanctions were changed on appeal because of their particular circumstances. They both had longer periods of service with the Respondent, better driving records and had been held to have given true accounts of the accidents. The Respondent followed its policies and procedures in dealing with the Claimant's disciplinary matter. The issue of whether they had failed in their duty of care to her on the night of the accident was a matter about which she initially complained but later chose to not to pursue.

197 There was no evidence that Mr Ayers' dismissal was for any reason other than her negligence.

In allegation 23 (66BB) the Respondent avers that it took all reasonable steps to investigate the allegations made by the Claimant at the appeal hearing on 18 June 2015.

198 In this Tribunal's judgment, the Respondent took reasonable steps to investigate the allegations the Claimant made at her appeal hearing.

199 The Respondent encouraged her to report the matter to the police. As rape is a criminal offence the police were the appropriate authorities for conducting investigations in her allegations. This was especially so since the alleged rapes were not alleged to have occurred at work.

200 However, as the alleged rapist was one of the Respondent's employees and the Claimant also made allegations against Denzil Clarke in his capacity as a manager, it was appropriate for the Respondent to conduct investigations into what had occurred. The Claimant also raised a grievance on 11 August alleging that the Respondent had failed in its duty to ensure her health and safety.

201 The Respondent was advised by the police to refrain from starting its internal investigation. We find no fault with the Respondent for complying with that request. Ms Hannan conducted the interviews as soon as she was aware that the police had authorised the Respondent to do so.

202 The Respondent interviewed the individuals that the Claimant named. It was appropriate not to interview Ms Colbert as she had limited information to give. The Respondent was not conducting a police investigation where the expectation is that every possible avenue is followed up. The Respondent, as the Claimant's employers, were conducting an internal investigation into their employees' conduct to see if there was anything that had occurred that warranted disciplinary or other action. It is our judgment that the Respondent conducted a thorough investigation. Ms Hannan interviewed Mr Clarke and Mr Atil. Ms Hannan also interviewed the Claimant and she

was asked to prepare a written statement with her version of events. There was no-one else, apart from Ms Colbert that the Claimant considered she ought to have interviewed.

203 It is our judgment that the Respondent took all steps to conduct a reasonable investigation into the Claimant's allegations after the appeal meeting and that it did so in a reasonable period of time.

Allegation 24 (66CC) asks what were the appropriate steps that the Respondent and Ms Hannan took to ensure that on re-employment, any risk to the Claimant were removed by offering her the chance to be based at a different garage and to not be required to work on the night bus rota?

204 It is this Tribunal's judgment that the Respondent took all appropriate steps to ensure that on re-employment the risks of the Claimant running in to Mr Atil was removed by offering her work at Leyton Garage. The Claimant failed to explain satisfactorily her position that working at Leyton would place her at risk because Mr Atil was doing 'the knowledge' in the area and may drive past her on occasion. That did not make sense while at the same time she was also advocating to continue to be based in Bow where Mr Atil worked and where they met. Her position was illogical. The Respondent took appropriate steps to ensure that if the Claimant accepted their offer of re-engagement, she was highly unlikely to meet her alleged rapist.

205 Although her original contract had not required her to work a night bus rota, the Claimant had occasionally driven a bus at night before the incident in April and therefore before her dismissal. There was no requirement that she should avoid the night bus rota. It is our judgment that when Ms Hannan offered her a new job and she asked to be released from the requirement to occasionally work on the night bus rota, which was now a standard clause in the bus drivers' contract, the Respondent responded sympathetically and agreed to her request while the police investigation was ongoing.

206 The Respondent's solution was appropriate and reasonable in the circumstances where there was an unproven allegation of rape and its internal investigations had not yet concluded.

Allegation 25 (66CC) asks whether the Respondent's Harassment policy had been implemented.

207 It is our judgment that it had. The Claimant did not complain to Mr Clarke about harassment by Mr Atil. She talked with him about her sexual activity with him. She also spoke to Ms Colbert about that. The Claimant did not raise a complaint about harassment by a colleague until her appeal meeting with Ms Hannan.

208 Ms Hannan took immediate steps once the Claimant made the complaint. She firstly encouraged the Claimant to make a formal report to the police. She instructed Ms O'Brien to liaise with the police so that they could begin the internal investigation as soon as the police investigation allowed the Respondent to do so. She asked the Claimant to provide her with a full statement so that she could investigate the allegations which she then did.

209 The Respondent also offered her a new job and took appropriate steps to ensure that she was not put in any danger by offering her work in Leyton Garage and by agreeing that her night shift work would not start while the police investigation went on. They were likely to review the situation thereafter and decide what to do. If Mr Atil had been arrested or charged with a criminal offence, the Claimant could have asked for some other solution. In our judgment, the Respondent's interim response was appropriate and reasonable, in accordance with all its policies – including the harassment policy - and did not amount to a breach of statutory duty, unreasonable treatment or a detriment to the Claimant.

Allegation 26 (66CC) asks whether the Respondent was vicariously liable for the alleged harassment that the Claimant was subjected to by Mr Atil?

210 In our judgment the Respondent was not vicariously liable for anything that happened between the Claimant and Mr Atil or the Claimant and Mr Clarke. The time she spent with Mr Atil was in her own time, outside of work and the Respondent were unaware that she was subject to harassment. Mr Clarke was not aware that the Claimant was being harassed. She did not complain to him of harassment in his capacity of Duty Manager or at all. What happened between her and Mr Atil was not under the instruction of managers and was not part of their work.

Direct Sex Discrimination

Allegation 29 asks whether the Claimant was subjected to less favourable treatment by Diane Hannan by failing to reinstate her after she was dismissed for gross misconduct and by offering her re-employment at a different location with a night clause.

211 We did not find any facts from which we could infer that the Claimant was rated less favourably by the Respondent on the grounds of her gender.

212 This allegation is against Ms Hannan specifically. Ms Hannan's only involvement in this matter was to hear the Claimant's appeal against her dismissal.

213 In conducting the appeal hearing, Ms Hannan considered whether or not Mr Ayers' decision to dismiss the Claimant was wrong. She did so by hearing the Claimant's explanation of the incident, viewing the CCTV evidence hearing the Claimant's mitigation. Ms Hannan was not convinced of the Claimant's version of events and determine that Mr Ayers' decision to dismiss her was appropriate and fair. In those circumstances, she could not reinstate the Claimant.

214 The Claimant referred to Ms Hannan's decisions in relation to male drivers as evidence of her claim that she was treated differently on the grounds of her gender. We looked in particular at the case of Mohammed Shahid who had been reinstated by Ms Hannan following his dismissal by Mr Ayers for similar offence as the Claimant had committed. We considered that Mr Shahid had considerable longer service with the Respondent than the Claimant having worked there for eight years with only one previous incident on his records for which he had received a verbal warning.

215 There was also the case of Robert Judd who Ms Hannan had reinstated following his dismissal for using his mobile phone while in control of a vehicle. The other comparators that the Claimant referred to had not been dealt with by Ms Hannan.

216 In our judgment, the Respondent would usually dismiss someone for committing the offence that the Claimant did commit; that is failing to secure the handbrake and causing damage to another vehicle by way of an accident. That is what occurred with Mr Shahid, Mr Ikram Ali and Mr Judd. Mr Rahman and Mr Pinder were not dismissed but were also given final written warnings for similar offences. The Tribunal concludes therefore that the offence is considered to be a serious matter by the Respondent. All of the drivers were disciplined for this offence. Some were dismissed and some were given final written warnings. It is therefore not a matter that the Respondent takes lightly. The difference in sanction applied to the driver depended on their individual circumstances. Those with greater length of service, clean records or plausible explanations for why the offences occurred, were either given final written warnings or reinstated on appeal.

217 In this Tribunal's judgment, managers must be allowed some discretion to vary sanctions applied to employees depending on the particular circumstances of each case, as long as that is not done for an impermissible reason. In this case, the Claimant has failed to prove that Ms Hannan's refusal to reinstate her was because of her gender. Ms Hannan did not believe the Claimant's explanation as although she stated she was in pain at the time that the accident occurred, her conduct on the CCTV footage did not demonstrate a person in pain or in any discomfort. They did not believe the Claimant's explanation; she had not been employed by the Respondent for a long time and therefore did not have a proven track record of excellent driving so that the accident could be seen as an aberration. She had been involved in an accident with a black taxicab about 4 months earlier, in December 2014. In those circumstances – which are very different to those of the other drivers who Ms Hannan reinstated - it was appropriate for Ms Hannan to confirm the Claimant's dismissal.

218 However, Ms Hannan also decided - given the information that the Claimant gave at the appeal hearing - that she would offer the Claimant a new job as a driver. It was appropriate for her to do so. It is not an act of sex discrimination to offer the Claimant redeployment at a different location. The night clause was inserted into all the new bus driver contracts. That was unchallenged evidence in our Hearing. When the Claimant raised the issue of night work with the Respondent, Ms Hannan agreed that she should not be required to do night work at least until the end of the police investigation. By which time, the Respondent would have reviewed that requirement.

219 It is this Tribunal's judgment that the Claimant did not prove any facts from which we can infer that the decision to offer her re-employment at a different location with a night clause was an act of sex discrimination. It was done because of the circumstances of the case and the Respondent was prepared to lift the requirement for night work for the duration of the police investigation. If at that time, the Claimant had made representations to the Respondent to either transfer her back to Bow or to lift the requirement for her to do night work on a permanent basis, the Respondent may well have considered it. However, that situation never arose as the Claimant refused the job.

220 The Tribunal does not know whether Ms Hannan said to Mr Shahid "don't do it again" and reinstated him on 22 July 2015.

221 It is our judgment that the circumstances of the Claimant and the alleged comparator cases listed between 30.1 and 30.7 in the list of issues were different so that the Respondent was entitled to impose different sanctions for each individual driver as was appropriate.

222 The complaints of sex discrimination set out in allegations 29 – 34 fails.

Harassment because of sex

223 The allegations set out at paragraphs 35.1 – 35.4 were against Mr Denzil Clarke.

224 In this Tribunal's judgment, the Claimant and Mr Clarke were friends and she gave him details of her sexual activity with Mr Atil as part of their conversations in the context of their friendship. She did not complain to him as a manager and she did not ask him to do anything about the relationship with Mr Atil or the way he treated her.

225 In relation to complaint 35.1, it is this Tribunal's judgment that Mr Clarke was concerned that the Claimant did not become the talk of gossip in the garage and so he advised her not to talk about her sexual activity to other people. However, at no time did he advise her not to tell anyone about a rape or multiple rapes by Mr Atil. It is our judgment that Mr Clarke did not tell the Claimant that she should not tell Mr Ayers about rape at her disciplinary hearing. We had no evidence of this at the Hearing.

226 In relation to 35.2, it is this Tribunal's judgment that Mr Clarke may well have asked the Claimant for clarification of the information she was giving him when they were talking about her sexual activity. That was part of their conversations. Sometimes he asked for clarifications sometimes he asked for details and in response, she gave those details and gave that clarification. At no time did the Claimant ever complain about the questions that she was being asked. She never told him to stop and she never said that those questions were inappropriate. This was an aspect of their friendship. It is not the Respondent's responsibility to advice people how to be friends or what types of conversations to have with each other as all its employees are adults. The Claimant was not a vulnerable adult. The only instance where conversations between employees can be the concern of the Respondent as an employer, is when there is a complaint of harassment or inappropriate conduct by one employee to another. At no time did the Claimant complain about inappropriate behaviour or questions from Mr Clarke to any other member of management. The Claimant confirmed in the Hearing that she was well aware of all the policies and procedures available to her within the Respondent and that she could access them on the intranet. The Claimant did not do so.

227 In those circumstances, the Tribunal's judgment is that the Claimant was not harassed because of her sex by the way in which her conversations with Mr Clarke occurred.

228 Allegation 35.3 refers to "vile and unpleasant comments". That is a reference to the list of comments set out in the Claimant's further and better particulars document served on 14 December 2015 and contained in pages 66J to 66M of the bundle of documents. Mr Clarke agreed that he did make some of those comments in that he asked her for details about the sexual activity between her and Mr Atil and advised her to buy sexual lubricant as she had said to him that the sex was painful. It is this Tribunal's judgment that at the time, the Claimant did not consider those comments to be vile and unpleasant. She has on reflection some months later decided that they were not pleasant but at the time, no complaint was made to Mr Clarke.

229 It was not put to him in evidence during the Hearing that she had expressed to him at the time that his comments were upsetting or "vile and unpleasant". She had not said to him at the time that his questions were inappropriate or that she considered any comments he made to have been improper. At no time, had she told him to stop asking those questions or making those comments. It is not our judgment that he made all of those comments, but given the length of this judgment, we are not going to go through each one individually. There are some comments set out in the list that he denied making and it is our judgment, that it is unlikely that he made those comments. But even the ones that he did make were made in the context of their conversations as adults talking about sexual activity and although they may have been explicit, that was in keeping with the context of the conversation that both the Claimant and Mr Clarke had consented to have at the time.

230 It is our judgment, in relation to allegation 35.4 that Mr Clarke and Mr Alom did speak about the Claimant. Mr Alom told Mr Clarke that he liked the Claimant and Mr Clarke had advised the Claimant that she should go out with Mr Alom instead of Mr Atil as he really liked her and was likely to treat her better. We did not have any evidence of any other "gossiping" that occurred between them. It is likely that the Claimant did take up Mr Clarke's advice as she is now married to Mr Alom and he attended the Hearing daily to support her.

231 It is our judgment, that none of the items in allegation 35 amount to Mr Clarke creating a hostile, intimidating, degrading, humiliating or offensive environment for the Claimant. In this Tribunal's judgment it cannot be that the Claimant perceived the conduct at the time as being intimidating, hostile, degrading, humiliating or offensive or creating such an environment for her. It was not the Claimant's evidence that she ever told Mr Clarke that she perceived that he was harassing her. At the time, she willingly engaged in conversations with him about her sex life. She willingly entered into a conversation with Mr Clarke about the fact that Mr Alom was attracted to her and about her expectations, hopes and concerns in relation to her encounters with Mr Atil. Those were conversations that she usually initiated and freely engaged in with him.

232 It would not be reasonable therefore for the conduct, i.e. any questions he may have asked or any comments he may have made - to have the effect of creating a hostile, intimidating, degrading or humiliating environment. Any comments he did make and it is not our judgment that he made all the comments that are set out in pages 66J to 66M; were made in the context of their friendship and their discussion about her sex life and the details that she gave to him. He was seeking to understand what he was being told and asked questions in that regard. Also, given his background as a minister and counsellor, he was also giving her advice on her personal life from

his perspective. The Claimant took that advice and came back to him on other days with more information. In our judgment, if the Claimant had considered that a hostile, intimidating, degrading, humiliating or offensive environment was being created by Mr Clarke's comments and questions she would not have continued to discuss these matters with him and would have distanced herself from him. The Claimant never did this but continued to talk to him about her sex life.

233 The only time the Claimant distanced herself from Mr Clarke was when she told him that she reported the matter to the police after she had been told at the appeal hearing by Ms Hannan that she was not going to be reinstated following her disclosure of her sexual activity with Mr Atil.

234 In those circumstances, the complaint of harassment fails and is hereby dismissed.

235 It is our judgment that the Claimant's complaints of harassment, sexual discrimination, detriment following public interest disclosures fail and are dismissed.

Employment Judge Jones

22 March 2017