Case No: 2400767/2016

EMPLOYMENT TRIBUNALS

Claimant: Mr GA Maydew

Respondent: Siemens Rail Automotive Holdings Limited

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the ***Judgment with reasons*** sent to the parties on **22 March 2017**, is corrected as set out in block type at paragraph (***15) by inserting " we do not find"***

Employment Judge Ross

Date 18 April 2017

SENT TO THE PARTIES ON
19 April 2017

FOR THE TRIBUNAL OFFICE

Important note to parties:
Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.

Case No: 2400767/2016

EMPLOYMENT TRIBUNALS

Claimant: Mr G A Maydew

Respondent: Siemens Rail Automotive Ltd

HELD AT: Manchester **ON:** 13 February 2017
13 and 14 March 2017

BEFORE: Employment Judge Ross
Mrs P A Corless
Mr P Dodd

REPRESENTATION:

Claimant: Miss S de Ville Forte (February hearing)
In person (March hearings)
Respondent: Mr M Warren-James, Solicitor

JUDGMENT having been sent to the parties on 14 March 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant brings claims for disability related harassment pursuant to section 26 of the Equality Act 2010 and claims that by reason of his dismissal he suffered less favourable treatment pursuant to section 13 of the Equality Act 2010 and unfavourable treatment pursuant to section 29 of the Equality Act 2010.

2. We heard from the claimant and for the respondent from Mr C Stafrace, the dismissing officer; Mr M Kent, the appeals officer; and from Mr D Lee, a Delivery Director.

The Facts

3. It is not disputed that the claimant was employed by the respondent as a Site Services team Leader from 24 March 2014 until he was dismissed for gross misconduct on 2 November 2015. The reasons given in his dismissal letter

(see pages 170-172) were that he had travelled within a work vehicle having consumed alcohol; he attended the workplace outside of normal working hours having consumed alcohol, firstly to collect the work vehicle and then to use the facilities; and that within the second incident he caused damage to company property, breaking the security cabin window and causing injury to himself and a security guard.

4. It is not disputed that the claimant attended a work related function on 25 September 2016 where alcoholic and non alcoholic drinks were provided by the company. The claimant admits now and at the disciplinary hearing that he consumed three alcoholic drinks. The claimant does not dispute that after the consumption of alcohol he later returned to the site with a colleague, Corey Goldstraw, to collect a work's vehicle which Mr Goldstraw drove. The claimant travelled in the van as a passenger whilst his supervisor, Paul Barrett, was collected. The men then returned in the van to the site. The claimant said he intended to use the toilets. The van was parked outside the depot. The claimant walked towards the security cabin, stumbled and fell into the window of the cabin. He suffered serious injuries to his right arm. He accepted at the Tribunal that prompt action by Paul Barrett probably saved his life.

5. When the glass from the security cabin window shattered as the claimant's arms went through the window a security guard inside the cabin suffered a serious eye injury.

6. There is no dispute that the claimant is a disabled person within the meaning of the Equality Act 2010 by reason of the injury to his right arm.

The Law

7. We turned first to the harassment claim. The relevant law is at section 26 of the Equality Act 2010. It is for the claimant to show facts that suggest he was subjected to unwanted conduct because of disability.

8. The first question for the Tribunal is what is the unwanted conduct? The claimant relies on the flash alert at page 95 of the bundle.

9. We find the flash alert was dated 29 September 2015. Mr Lee told us that although he had a discussion with Ian Grainey of another company on the site, Skanska, in relation to this matter, he did not dictate the content of the flash alert which is found at page 95 of the bundle.

10. It is undisputed that the flash alert has the heading "Network Rail" at the top right-hand corner. At the bottom of the alert it states: "For more information please contact Ian Grainey". The alert is entitled "Vandalism Injury Event".

11. Mr Mayhew told us he took exception to the alert because of the headline "vandalism". His claim form to the Tribunal notes the claimant took exception to the reference to vandalism and a "night out" because he felt it degraded his reputation. His witness statement also suggested that the alert had released his medical details without permission, thereby identifying him as the person who had caused the vandalism. He relied on the fact that the reference to his injuries, together with the reference to "the third party was a Northern Hub Alliance employee" was sufficient to identify him.

12. We turned to the first issue: did the respondent subject the claimant to unwanted conduct? The respondent denied that it was responsible for the flash alert. It relied on the fact that it had been composed by Ian Grainey, an employee of Skanska, and the alert had gone out nationally under the letterhead of National Rail.

13. Mr Lee told us that although he had shared information with Mr Grainey he did not dictate the content of that flash alert and we accept his evidence. We also note that Mr Grainey may not have obtained his information from Mr Lee alone. It is clear from emails in the bundle (see pages 93, 94 and 95) that the security guard was employed by yet another firm and that information about his version of events had been relayed to Skanska, the company for whom Mr Grainey worked. Accordingly we are not satisfied that it was the respondent that was responsible for the flash alert.

14. However, in case we are wrong about this we have turned to the second issue: was the unwanted conduct related to disability? We are not satisfied the claimant has adduced facts to suggest that it was. We rely on the claimant's evidence that what he found was unacceptable about the flash alert was that it identified him as a vandal. He was upset because he is identified from the alert because his injuries are clearly described and therefore anyone reading the alert would know that he was the employee referred to as the third party responsible for the vandalism injury event, because the third party is also described as a Northern Hub Alliance employee. The medical information is that: “A third party sustained severe laceration to his arm as a consequence of his actions”, and “a third party has had an operation to transfer an artery to his leg to replace a damaged artery in his arm and additional surgery is required to repair nerve damage to the injured arm”.

15. We find that the reason the claimant found the conduct unwanted was because he had been identified as being described as being responsible for a “vandalism injury event”. He took exception to his disability, namely the injuries to his right arm, being mentioned because it was these that made him identifiable. Accordingly we find the reference to the claimant's disability is incidental. The claimant objects to the reference to his disability simply because it makes him identifiable as the person responsible for the vandalism event. Accordingly, for this reason **we do not find** that the unwanted conduct of the flash alert was related to the claimant's disability.

16. Therefore this claim fails.

17. We turn to consider the next claim, which was that the claimant was discriminated against pursuant to section 13 of the Equality Act 2010. The issue for the Tribunal is: did the respondent discriminate against the claimant by treating the claimant less favourably than another by dismissing him, because of disability?

18. In answering this question we reminded ourselves of the reverse burden of proof. We reminded ourselves that the claimant should adduce some facts which could suggest that the respondent discriminated against him by dismissing him, and that the reason for his dismissal was his disability. We also reminded ourselves that section 23 of the Equality Act 2010 requires a

very specific comparator. The claimant relied on a real comparator, Paul Barrett. Section 23(1) states:

"On a comparison of cases for the purposes of sections 13, 14 or 19 there must be no material difference between the circumstances relating to each case."

19. Section 23(2) states:

"The circumstances relating to a case include the person's abilities if –

(a) On a comparison for the purposes of section 13 the protected characteristic is disability."

20. We remind ourselves of the guidance in **High Quality Lifestyle Limited v Watts [2006] IRLR 850**. There was no suggestion in this case that Mr Barrett had the same limitations on his abilities as the claimant does by reason of his injuries to his right arm. In fact the contrary was true. Insofar as there was any information at all it was suggested that Mr Barrett was able bodied. Accordingly the claimant cannot rely upon him as a comparator.

21. Even if we are wrong about that and the claimant is entitled to rely on Mr Barrett as a comparator in relation to the factual circumstances we find that once again there is a material difference. Although Mr Barrett also consumed alcohol on the relevant night and also travelled in the company vehicle, that is where the similarity ends. Mr Barrett did not go to the site on the first occasion to collect the vehicle and on the second occasion only left the vehicle to come to the claimant's assistance. Whereas the claimant became involved in an incident where he suffered a serious injury to himself and which led to a serious injury to a security guard, by contrast Mr Barrett, by the claimant's own evidence, probably saved his life on that occasion. We find there was a difference in relation to the disciplinary process because three counts of gross misconduct were upheld against the claimant whereas only one was upheld against Mr Barrett. Accordingly the claim must fail at this stage.

22. In case we are wrong about the comparator we continued to the next issue. We are not satisfied there is any evidence to shift the burden of proof. We remind ourselves there must be more than a mere assertion that the actions of discrimination .In this case there is no more than this. See page 201, where the claimant states at the appeal stage when asked why he thinks his dismissal is discriminatory: "it's just an opinion".

23. However, if we are wrong about that and the burden of proof has shifted, we are satisfied the respondent has shown a non discriminatory reason for the claimant's dismissal.

24. The reason for dismissal is conduct. That conduct is based on the fact that the claimant, a team leader, had consumed alcohol and behaved inappropriately, namely he travelled in a company vehicle and returned to site and was involved in an incident which caused injury to himself and another individual, a security guard. Therefore given we find the respondent has shown a non discriminatory explanation for the treatment the claim must fail.

25. We turn to consider the claimant's claim under section 15 of the Equality Act 2010. The issues for the Tribunal were:

(a) Did the respondent treat the claimant unfavourably because of something arising in consequence of the claimant's disability?

(b) If so, can the respondent show the treatment is a proportionate means of achieving a legitimate aim?

26. The unfavourable treatment relied upon by the claimant is dismissal. We must turn to consider the next question: what is the "something which arises in consequence of the claimant's disability"? There as a lack of clarity as to what this was. The Tribunal believes that the claimant was relying on the fact he was "unable to work for a considerable time" as the something arising in consequence of his disability (see page 181 for the claimant's appeal letter).

27. The Tribunal turn to consider any evidence of a causal connection. The Tribunal reminds itself of the reverse burden of proof in discrimination cases. However, we also remind ourselves of the guidance that a mere assertion of discriminatory treatment is not sufficient. There must be "something more" which causes the burden of proof to shift. We have relied on the guidance in **Igen Limited v Wong [2005] ICR 931 CA** and **Madarassy v Nomura International PLC [2007] ICR 867 CA**. The Tribunal is not satisfied that there are facts which have been adduced which suggest that the claimant was dismissed because he was likely to be unable to work for a considerable time. There was no medical evidence before the dismissing officer or the appeal officer and the only evidence of any discussion in relation to the claimant's disability was after the dismissal hearing had concluded when we find that Mr Stafrace simply asked the claimant how he was and narrated the fact that he was sympathetic because he himself had suffered a riding injury in the past.

28. However, if we are wrong about this and the burden of proof has shifted we are satisfied that the respondent dismissed the claimant for reasons which were non discriminatory and entirely unrelated to the claimant's injury. We are satisfied the respondent dismissed the claimant because on his own admission he had consumed alcohol and then travelled in a company vehicle, attended on site and been involved in an incident which led to serious injury to himself and to a security guard, and thus behaved inappropriately, particularly with regard to the respondent's drug and alcohol policy. Accordingly as they have shown that they relied on conduct as a reason for dismissal the claimant's claim must fail.

29. The claimant had insufficient service to bring a claim for unfair dismissal pursuant to the Employment Rights Act 1996 and accordingly this was not a relevant issue before the Employment Tribunal.

30. During cross examination the claimant at length sought to establish with the respondent's witnesses that because he had not been subject to a blood alcohol test at the time of the incident the respondent could not state that he was "under the influence" of alcohol within a meaning of an appendix of the respondent's drug and alcohol policy.

31. Insofar as this is relevant (and it was not to the issues we had to decide) we find that the reason why a blood alcohol test was not carried out was that the claimant's life was at risk at the time the incident occurred, which was out of working hours and emergency medical treatment was being undertaken at that time and he was then taken to hospital where he was admitted. We also

remind ourselves that the claimant conceded at the disciplinary hearing and at the Tribunal that he had consumed alcohol and the respondent was entitled to rely on that fact given the fact that it had a policy which stated they had a zero tolerance to alcohol in the workplace.

32. There was a deposit order made in this case by Employment Judge Slater. At the conclusion of the hearing the respondent was asked if it had any other application to make. No application was made and accordingly the Tribunal made no order as to costs.

Employment Judge Ross

Date 14 March 2017

REASONS SENT TO THE PARTIES ON

22 March 2017

FOR THE TRIBUNAL OFFICE