JB1

EMPLOYMENT TRIBUNALS

Claimant: Miss C Blyden

Respondent: London Underground Limited

Heard at: London Central **On:** 25 September 2017

Before: Employment Judge Goodman

Members: Mr M Ferry
Mrs G Tipton

Representation

Claimant: In Person
Respondent: Mr P Livingston, Counsel

JUDGMENT having been sent to the parties on 26 September 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

Introduction

1. This is a hearing of a race discrimination and harassment complaint of which the sole issue for a decision today is the one identified at 15 (b) of the Claimant's Grounds of Claim - that the Respondent was guilty of manipulating the final examination result as an act of direct discrimination and harassment, because of or related to her race, which is black.

Procedural History

2. The case has a complicated procedural history which needs to be summarised. A claim was first presented on 5 July 2016 but did not proceed because no fee was paid and she did not get remission. It was represented

on 29 August 2017, but rejected as there was no early conciliation certificate. When she did have a certificate it was accepted, as of the 19 September 2016.

3. Following a Preliminary Hearing for case management, the Claimant provided further particulars by email on 9 December 2016, as the initial claim form's account was so brief as not to be intelligible as to what was complained of.

4. On 20 February 2017, she supplied grounds of claim which had been drafted by solicitors. These have been adopted as the grounds of claim. At that preliminary hearing, the matter was listed for hearing today and the Respondent given time to amend their response. The Respondent then did so. Now knowing the detail of the claim, and the dates that events had taken place, the Respondent applied to strike out on the grounds that much of it was out of time.

5. At a Preliminary Hearing on 24 April 2017, which the Claimant did not attend, Employment Judge Walker struck out all but the final examination issue which we are to hear today.

6. There was a Preliminary Hearing before Judge Lewzey on 11 May, at which she set a reconsideration hearing for 2 June 2017, when Employment Judge Stewart reconsidered the matter in the presence of the Claimant and declined to overturn the decision.

7. On 14 July, the Claimant sent a notice of appeal to the Employment Tribunal, who invited her to redirect it the Employment Appeal Tribunal, which she did in August. The Tribunal understands that it has yet to reach the sift stage in the EAT.

Absence of the Claimant Today

8. On 4 September 2017, the Claimant emailed the Tribunal and the Respondent saying that she was informing the Tribunal that the date that had been set for the main hearing now had to be altered "as the EAT have

just informed me that my hearing will be done around that time". The Respondent in the meantime had sent her the hearing bundle, not without difficulty over her current address, and also their witness statements. The Claimant has not exchanged a witness statement.

9. On 13 September the Claimant indicated in an email that she was going to be on holiday on the hearing date. On 18 September the Respondent said they opposed the postponement, they were ready to go ahead and had booked counsel, and had they had arranged for their witnesses to attend.

10. On 22 September 2017, the Regional Employment Judge refused the postponement application, and told the Claimant: "if you choose not to attend the Tribunal will decide whether to proceed in your absence". The Claimant was also advised of the decision by telephone. That afternoon, the Claimant emailed the Tribunal administration: "thank you for your telephone call informing me that you had sent an email on behalf of the Judge, let me send a message to the Judge again through you that I will not be attending the hearing on Monday until after my EAT hearing. I have already informed the EAT and they have taken it into consideration. I had informed you weeks ago that the dates had to be changed as the EAT had advised me, I hope this is very clear now for the Judge."

11. This correspondence was shared with the lay members in the course of this morning, when the Claimant did not attend the hearing and it was necessary to decide an application by the Respondent under Rule 47, which says: "if a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so it shall consider any information which is available to it after any enquiries that may be practicable about the reasons for the party's absence."

12. In respect of the Claimant's reasons for not attending, it is quite clear that she knows that there is a hearing, and has known it since February 2017 when the date was set. She was also aware that it was coming up because she has the bundle, and a considerable amount of emails from the

Respondent seeking to exchange statements. She has made it quite clear in her own emails that she does not propose to attend because she wants her appeal decided first.

13. The Tribunal considered the rule 47 application and decided that we would proceed to decide the claim that remains on the basis of what is known about the Claimant's case, particularly as all the Respondent's witnesses are here and the Respondent is already committed to the expense of legal representation today. In all the circumstances that is the better course and in the interests of justice, rather than dismissing it without making a decision.

Evidence

14. For the **Claimant,** we read through her grounds of claim document but particularly paragraph 15, which sets out the issue for today. We also read her emails to the Tribunal of 9 December 2016, (there are two of them) and we have particular regard to item 10 of the one that deals with the process of promotion to service operator. These points were put to the Respondent's witnesses; in particular, that threats were made to her by Keith Collier, and that there was a delay which was unusual and unwarranted in the marking of the exam paper and the feedback of the result to her.

15. We also read witness statements and heard live evidence from **Keith Collier**, the Respondent's Operational Trainer, who had written the course material and ran most of the course in June 2016, **Claudine Deprez**, the Trainer who marked the test that the Claimant failed and gave her feedback on it, and from **Carl Williamson**, Training Manager, whose job it was to give feedback to the Claimant on the day.

16. We also had a bundle of documents which contained the pre-course reading material, the three answer books for the candidates who took the test, as marked by the trainers, and an email from Keith Collier about an attempted telephone call to him by the Claimant on 3 July.

17. We noted that in her email of 9 December, the Claimant referred to having made recordings on her telephone of remarks made by Mr Collier to which

she objected, but these recordings have not been disclosed and we do not have either the audio recording or a transcript of it.

Findings of Fact

18. The Claimant was first employed by the Respondent as a Customer Service Assistant (CSA) on 30 September 2013.

19. In October 2014, she applied for what she called *promotion* to Service Operator levels 1-3. From the Respondent's evidence we understand that a Service Operator is someone who, as part of a team, controls signals and the routing of trains, including both controlling the signals and giving instructions to train operators, who may not move without an instruction. It is evidently a safety critical role with responsibility for the operation of the entire Underground network.

20. The Respondents have invested in an extensive computerised system with a central control room. The purpose of the advertisement for 12 months secondments of new service operators was to replace existing service operators in their cabins so that they could then be released for training on the new computerised system.

21. In our finding, although the Claimant understood that she had achieved promotion on a permanent basis, it was in fact for a 12 month secondment.

22. Having applied, the Claimant passed the initial assessment which she sat in December 2014, and then on 19 May 2015 the final assessment, and she passed a medical test too. There was then delay and difficulty in getting on to a training session. This lasted from August 2015 to June 2016, and in the process she lodged a grievance and an appeal against the outcome of the grievance, which were the subject of claims which have been struck out as out of time and so do not concern us.

23. That which *does* concern us is the course which she started in June 2016. She and the two others in her group were to spend four weeks in the classroom. In the course of that four week period there were to be eight

written assessments. They were allowed to re-sit up to two of them if they fell short of the pass mark by only 10%, but could not resit if the margin was bigger. If they failed by more 10%, they would automatically drop out of the training and go back to their substantive roles.

24. They were trained in small groups because from the second week they worked on a simulator, in effect a model railway, which had three positions for staff at it.

25. The Claimant, like others, was sent some general pre-course reading, it was said that CSA's should already be familiar with much of it. She rang Mr Collier before starting the course about how to complete the training needs questionnaire, from which it is shown she was not clear that she needed to know about train operating procedures as well her own previous job.

26. During the first week, starting 20 June, the candidates went over basic knowledge, and Mr Collier reports that although there was initial trouble, the Claimant worked hard at extra reading, and passed at the end of the week.

27. The Claimant has alleged in her email of 9 December that at some point in the course Mr Collier said that she was dangerous, and that she would be off the 6 week course in 3 weeks. Mr Collier denied this, pointing out first of all that it was not a 6 week but a 4 week course, that some people do it in 3 weeks if they are making very good progress, but not this group. The Tribunal finds that if he did say anything about the dangerousness of candidates on the course, it was not directed at the Claimant in particular but an obvious conclusion to draw, given the responsibilities of service operators once they had finished training and went live.

28. Those who got through this initial 4 week classroom training were then seconded for 6-7 weeks to work in the signal cabins, doing a practical assessment. We are told that although some people dropped out of the classroom training because they did not make the grade in the written assessments, a far greater proportion drop out of the practical training.

29. The second week of the course was spent working with the current timetable on the Metropolitan Line, which changes every 6 months. It was very much directed at a practical operation of the railway: how long trains would take to get from one place to another, what the journey time was, when they would arrive, and what instructions should be given to crews.

30. At the end of that week, on 1 July 2016, the candidates were to take a test. It was done open book, that is, with the timetable available to them. The Tribunal has seen the three booklets. They contain printed questions and the candidates then write in their answers on the booklet. The questions were drafted by Mr Collier, initially in October 2013. The questions remain the same, but the answers alter according to the current timetable. Ms Deprez, who marked the test on Friday 20 June because Mr Collier was absent on leave that day, had previously delivered this training, and had herself trained as a service operator (although she found the actual task so stressful that she had reverted to training). Ms Deprez had come in the previous week to make herself known to the course participants.

31. On the morning of 1 July, the three candidates took the test. Candidate A, a white woman, obtained 88%, Candidate B, a black man, obtained 61.9%, and Candidate C, the Claimant, a black woman, got 78.5%. All three failed to make the pass mark, but Candidate A was within 10% and so permitted to re-sit.

32. Ms Deprez's evidence was that she was so surprised that all three had failed that she asked a colleague, Glen Harvey, to check the marking for her to see if she had made a mistake. He did so and confirmed that her marks were accurate.

33. She then called Carl Williamson, the Train Manager, to come over to conduct exit interviews, because candidates B and C, who could not re-sit, would have to return to their substantive roles and not continue on the course. Mr Williamson came over and with Ms Deprez by his side in the nature of Technical Assessor went through the questions and the answers with each candidate. He does not have any notes of the meeting but does not recall any query or protest by either disappointed candidates.

34. On the 3 July we know that the Claimant telephoned Mr Collier, because he then emailed his employer to say that as she had telephoned at 7am on a Sunday morning and he was on leave, he did not propose to answer, and she had not left a message. We know that on the 5 July the Claimant lodged her first Claim Form, though it did not come to the Respondent's attention until 9 September 2016 after early conciliation.

35. Neither Ms Deprez nor Mr Williamson knew any of the history about the Claimant's delays in getting on to the course until after an appeal against a grievance she had lodged about the delay. Mr Collier knew about it, but only because of something the Claimant said to him at the outset of the course, when she had asked when she would be getting her uniform, and had protested it was a permanent job, not a secondment, and that her solicitor had told her not to sign for anything other than a permanent job.

36. We asked about the ethnic composition of the eligible workforce, given that this is a race discrimination claim, but no one was able to tell us the ethnic breakdown other than to say anecdotally that it appears to be ethnically diverse. We observe that of the witnesses, Mr Williamson is black, and the other two are white. He said by him that within a large group of people for training they would be very ethnically diverse, but the composition of any particular smaller groups would be more random. There is no evidence about how many black or minority ethnic staff get on to training courses, there is no suggestion in the evidence that they are rare on training courses. Mr Williamson pointed out that the trainers have no control over who is in the training group, as that depends on who passes the preliminary assessments.

Relevant Law

37. Section 13 of the Equality Act 2010 provides that there is direct discrimination when someone is less favourably treated than another is treated or would be treated because of race.

38. Harassment is defined in section 26 as where a person A engages in unwanted conduct towards B related to a relevant protected characteristic

and the conduct has the purpose or effect of violating that person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B, and whether the conduct has that effect must be considered having regard to the perception of B, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect.

39. Discrimination claims are hard to prove because Respondents rarely admit to discriminating, and may not even be aware that they are doing so. The Equality Act provides a special burden of proof at section 136, by which, section 136 (2)(a), 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, but the subsection does not apply if A shows that A did not contravene the provision.

Discussion

40. With this in mind, we had to consider what facts had been proved and what we could conclude from them. We had the benefit of a short written submission from the Respondent. There is of course no submission from the Claimant, but we considered the matters raised in her 9th December 2016 email and addressed ourselves to those in particular.

41. The Claimant has of course shown that she failed the test, but of course so did the other two on the course, although one of the three was permitted to re-sit because her mark was within the 10% band. It is also noted that the two black candidates failed and the white candidate was allowed to re-sit. Given the evidence that there is an ethnically diverse workforce and ethnic diverse training content, we are not sure that this is by itself significant.

42. The test appears to have been sat under exam conditions, with all candidates being administered the same questions, apparently the same questions as everyone else who had ever been on that course, and the answers of all three candidates are available. We can see the answers and marks of each and as far as we can tell they have been marked and counted correctly.

43. We note that the Claimant does not complain about the course itself, and that it was an open book examination. Her complaint is only that the mark has been fixed.

44. Of the complaint that Mr Collier threatened her, she appears to have made no complaint about this at the time, and although she has suggested that they were recorded, she has not disclosed the recordings and we have no evidence.

45. Having heard the evidence in the round, it seems to us that the other circumstances of the case involve getting candidates to recognise that they must pass at a high level on this course, because it would be dangerous if they undertook service operating work without understanding or being able to read timetables accurately. If he did make any suggestion that was threatening to the Claimant, we think that he has been misunderstood or misrepresented.

46. We note that the Claimant suggested that it was sinister that rather than marks being given back to the candidates straight away there was a delay of one to two hours, but we accept the evidence that Ms Deprez wanted to get the marks checked because it was so unusual for all three to fail.

47. We note too that if all three failed or did not do well, it suggests not that the test was rigged, but that the teaching that was defective, or less effective than usual. There is no suggestion by the Claimant that the teaching was deliberately poor to make her fail.

48. We concluded that there was no evidence that the Claimant had been less favourably treated in the administration of the test or in the marking of the test paper. She was treated exactly as the pre-course material indicated, namely that she would be given an assessment, and that if she failed to make a grade within 10% of the pass mark, she would drop out straightaway, as she did, along with another Candidate who scored even worse than her.

49. In the circumstances, we have no need to consider whether race was the reason for any treatment. It is a high bar, and difficult for her to show that given that it was a test administered under standard exam conditions and examinations are by their nature designed to apply the same standards to all. There is no evidence that the result was fixed, and we have seen the test papers.

50. As for any harassment allegation, Mr Collier's evidence was accepted that he made no particular threat to the Claimant, and if he suggested that candidates might be dangerous, not aimed at the claimant in particular, and related to the responsibilities of the course.

51. Accordingly, on the evidence the claim is dismissed.

Employment Judge Goodman
6 November 2017