



EMPLOYMENT TRIBUNALS

Claimant: Mr A Noufel
Respondent: Royal Mail Group Ltd

Heard at: Ashford **On:** 21-23 May 2019
24 May 2019 (In Chambers)

Before: Employment Judge Corrigan
Ms J Forecast
Mr D Clay

Representation

Claimant: In Person
Respondent: Mr M Foster, Solicitor

RESERVED JUDGMENT

1. The Tribunal has not found a contravention of the Equality Act 2010 (direct race discrimination, or direct or indirect religious discrimination) and the race and religious discrimination complaints are dismissed.

REASONS

1. The Claimant, who describes himself as an Algerian/Arab Muslim, claims direct race discrimination and direct and indirect religious discrimination. The Claimant remains in the Respondent's employment.
2. The issues were set out in the Case Management Order dated 18 May 2018. They were discussed with the parties and agreed to be as follows.

Direct race discrimination

3. Was the Claimant treated less favourably than his white European colleagues and/or a hypothetical comparator would have been treated in the following ways:
 - 3.1 his suspension on 25 September 2017;
 - 3.2 the requirement he attend an investigation meeting on 30 September 2017;
 - 3.3 the requirement he attend a conduct interview on 30 December 2017;
 - 3.4 the imposition of a two year suspended dismissal and/or compulsory transfer to a different office? This was not in the claim as it predated it but it was in the issues, it was addressed in the amended response and the Respondent has accepted it as an issue.
4. Was the less favourable treatment because of race?

Direct religious discrimination

5. Did the Respondent, on 30 September 2017, refuse to grant the Claimant's request for 3 weeks leave in August 2018 to go to Hajj?
6. Was this an act of direct discrimination, because a hypothetical comparator would have had the request approved?

Indirect religious discrimination

7. Did the Respondent's provision that holidays are granted on a first-come, first-served basis, or such other provision operated by the Respondent in respect of the allocation of holidays, adversely affect a greater proportion of Muslims than it does those of other religions because:
 - 7.1 Muslims are under a religious duty to go to Hajj as one of the five pillars of Islam,
 - 7.2 it has been known since at least 2016 that Hajj dates for the next 10 years would fall in the summer months,
 - 7.3 any comparator would not have been subject to a religious duty to travel at the height of the holiday season?
8. Was the Claimant put at a disadvantage by the provision operated by the Respondent in respect of the allocation of holidays?
9. Can the Respondent show it is a proportionate means of achieving a legitimate aim?

10. The Respondent confirmed there was no time limit issue.

Hearing

11. We heard evidence from the Claimant on his own behalf. On behalf of the Respondent we heard evidence from Mr Robert Jewiss (Delivery Manager) and Mr Waqar Hassan (Delivery Office Manager).
12. There was an agreed bundle. The Respondent provided a written submission and both parties made oral submissions.
13. The hearing took place during Ramadan and both sides were invited to request adjustments if needed but both parties confirmed no adjustments were needed.
14. Based on the evidence heard and the documents before us the Tribunal found the following facts.

Facts

15. The Claimant describes himself as an Algerian/Arab Muslim. He commenced work for the Respondent in November 2006 as an OPG (Operational Postal Grade). He was initially based at Orpington Delivery Office but transferred to Gravesend Delivery Office after he raised complaints of bullying and harassment which were not upheld and were deemed to have been brought in bad faith. He had been dismissed but then reinstated upon appeal, with no penalty. He moved Delivery Office to have a clean start (p273 paragraphs 1.2 and 1.3).
16. After this incident the Claimant was left feeling insecure with a self-protective attitude, concerned to avoid further problems, and as time passed he started to believe management wanted to set him up to fail.
17. There are 125 staff at the Gravesend Delivery Office, the majority of whom are white. Mr Jewiss gave evidence that there are approximately 10 or fewer BAME staff. The Claimant is the only North African Arab member of staff.
18. We accept that there was an incident on 13 January 2016 which the Claimant tried to raise at the time, but not formally. He overheard a colleague say to another "I can't stand his face" and the other replied "where is he from", to which the first colleague replied "Algeria". The Claimant believed this was about him and made a contemporaneous note (p104). Although the Claimant tried to raise it with Delivery Managers, it never came to Mr Hassan's attention. This incident contributed to the Claimant feeling insecure. This incident is background and is not one of the Claimant's allegations of race discrimination before us.
19. On 10 March 2016 the Claimant thought he had been misled by Mr Jewiss to sign a form of a disciplinary nature. We are satisfied it was at a coaching level, not disciplinary, and that Mr Jewiss attempted to explain it accurately to the Claimant.

20. For a time the Claimant was on an assigned duty, meaning he was on a fixed paired duty with another colleague. That colleague was slower than the Claimant, who it is agreed worked fast. The Claimant was concerned to avoid blame for what he perceived as the other's shortfall. The Claimant describes an incident where his partner was aggressive and swore at the Claimant, when challenged by the Claimant about his methods. The Claimant complained and was allowed to move from that duty to become a reserve. At the relevant time the Claimant was a reserve.
21. Paired duties require a high degree of cooperation and Mr Jewiss said it was not that uncommon for pairings to break down and staff to move around due to disagreement between colleagues.
22. The Claimant requested to use breaks on Fridays for religious observance and, after Mr Hassan arrived as Delivery Office Manager (DOM) in April 2016, he was offered, and he agreed, to take the whole of Friday as a fixed day off as that was easier to accommodate operationally.
23. Each year in about September staff select their desired leave dates on a form for the following financial year. A maximum of 3 weeks can be taken in the summer which is a time when many staff want to take holiday. Staff are warned not to book their holidays until their leave is confirmed. In order to be fair if a particular week is oversubscribed the Respondent looks at whether the person has had the same week the preceding year. Priority is given to whole week requests. The policy is at paragraph 34 on page 34. It is nevertheless possible for exceptions to be made by increasing the number of staff allowed leave in a particular week (the leave ceiling) where reasons are given in writing. The kind of reasons where that would be granted include religious trips and pressing family occasions.
24. The initial request process is handled by an administrator. It is only where exceptions need to be considered that the DOM would become involved. Initially the leave request form is returned showing what has been approved and not approved against the usual criteria. Staff can then make further requests and then a final leave card is produced with the approved leave for the year.
25. In August 2017 the Claimant first informed Mr Jewiss and another Delivery Manager, in Mr Hassan's absence, that he wanted to carry forward a week's leave from 2017 to 2018 in order to request leave for Hajj. The Claimant says that he was told to fill in the leave form. We accept this as it was just before leave forms were due. The Claimant says that Mr Jewiss then said "make sure you don't turn in the wrong way" which the Claimant says was referring to when Muslims circle the Kaaba. We found the Claimant's evidence credible, but we also found Mr Jewiss credible in his response that he did not make this comment and is not sufficiently aware of Hajj to be able to make such a comment. Faced with conflicting credible accounts we have taken into account the fact that there is no documentary evidence to support this. The Claimant did not make a contemporaneous note as he had done for the incident at paragraph 18, at page 104. The Claimant made no complaint about it despite putting other complaints in writing to the Respondent subsequently. Nor did he raise it later

when he specifically complained about the leave request (p220). It also is not mentioned in the claim form itself. In the absence of such documentary evidence we do not find it more likely than not to have happened and prefer Mr Jewiss's account.

26. The Claimant tended not to work overtime due to childcare. During the week ending 16 September 2017 there was an incident where another colleague paired with him did not want to stay out and do overtime on his own and so they both "cut off". The Claimant says when they returned to the Delivery office Mr Jewiss said "I'll send you back to Orpington". The Claimant believed this to be a threat and of significance given what followed. Mr Jewiss denies this was said. He says he did not have authority to do that (transfer the Claimant back to Orpington). We accept that whatever was said was not a threat, given Mr Jewiss had no power to transfer the Claimant.
27. On 16 September 2017 the Claimant was paired with another reserve colleague who had joined in November 2016. She only worked Saturdays and was widely known to be slow. He had been paired with her before and that had been his experience (that she was slow) and they had needed help to ensure the mail was delivered.
28. The OPGs have to sort mail and prepare their "walk" before they can go out on deliveries. On 16 September 2017 the Claimant tried to suggest the most efficient way for them both to prepare but she declined to do as he proposed. The Claimant therefore completed sorting and then returned to find his walk had not been prepared by his colleague so he then did that. He was ready to leave well before his colleague. He did not help her further but instead went to report to the Deliver Manager on duty that he did not think they would get their mail delivered that day. He also had a conversation with another Delivery Manager who said he could leave non-urgent mail behind. The Respondent says best practice would have been to further assist his colleague so that they left earlier, though not every OPG would have.
29. The Claimant waited until 9.30. He was frustrated because even once his colleague was ready she was not displaying any urgency, instead talking to another colleague.
30. Once out on the delivery the relationship between the Claimant and his colleague swiftly broke down. The Claimant was completing his loops at a far greater pace. The protocol is at page 101, referred to as "park and loop". The pairings only work if the two colleagues work by completing loops and meeting again at the van before continuing with the next loop. As Mr Hassan explained it is important that they work together and stay more or less in sync, even if one is much slower than the other, so that communication is not lost. The Claimant accepts that he went on to deliver more loops rather than help his colleague. When the Claimant had completed three loops they did meet, and there was an interaction in which she thought the Claimant was rude, and responded calling him rude and nasty. This led to the Claimant ringing the office to ask Mr Jewiss to speak with her. The relationship broke down then and Mr Jewiss became intermediary as the two were

again out of sync. At one point the colleague drove past the Claimant without stopping. The Claimant tried to remind her of a Special Delivery that she had, but she ignored him so he did assist her by doing that for her, as it is very serious if a Special Delivery is late. The Claimant called into the office again and spoke to another Delivery Manager and told him his colleague had driven past without stopping. He discussed how much work was left. A decision was taken back at the office that there was going to be a significant failure to deliver the mail unless help was sent. 9 other staff were sent to assist. The day itself had been a light post day and therefore fortunately sufficient colleagues were free to assist.

31. The Claimant is supposed to work to 1.40pm but has a rest break. There is a dispute about whether he had been told to leave his break to the end of his shift, but on that day it was his intention to leave his break to the end so that he could leave early and meet child care commitments. Although this is informally done on a Saturday and everyone is anxious to leave as soon as work is done, it was not permissible to have an expectation that he could leave early whether or not the work was done. The Claimant had an argument with a Delivery Manager about this as he wanted to finish at 1pm despite the crisis. The Delivery Manager said the Claimant's break had been when the Claimant was waiting for his colleague to be ready that morning. He said he did not want to see the Claimant back until his finish time. In the event the Claimant had a lift back with one of the additional colleagues sent to assist, and arrived back at 1.30pm. Mr Jewiss sought to say it had been earlier but his own statement at the time said 1.30pm, as did others. Mr Jewiss said that that would be the appropriate time to return as staff normally have 10 minutes to wash up etc. at the end of their shift. Meanwhile his paired colleague had returned back separately without knowing if she was leaving the Claimant behind.
32. The mail was ultimately delivered but only because of the assistance of the others. 9 bags had been outstanding. This was an exceptional number.
33. When the Claimant returned to the Delivery Office he had a further discussion with the Delivery Manager mentioned at paragraph 31. He was emotional and agitated. They continued to discuss the Claimant's finish time, with the Delivery Manager giving the Claimant his duty times sheet. The Manager's account was that the Claimant was talking over him in his agitation and accused him of abusing his power. He asked the Claimant to leave. The Claimant in any event had to go as he was late in respect of his childcare. The Claimant accepts that he was asked to do a statement about what had happened on delivery which he refused.
34. The Claimant's perception of the incident on 16 September 2017 was he had been paired with a known under performer and then he was being blamed and/or required to lose his break because of her performance. From the Respondent's perspective this was a very serious incident with risk to the delivery of the mail. It required 9 additional staff to ensure there was not a failure. As a result Mr Hassan was aware of it from the day itself as he was consulted about the situation by the management on duty and wanted to know what had happened.

35. Other colleagues involved also wrote statements which were referred straight to Mr Hassan. The statements are all in the bundle but they did not all make their way to Mr Hassan on the same date. His initial perception from the day itself and the statements received first, including Ms Smith's (p135), gave him a concern that the Claimant had set out with an intention from the start to expose his colleague rather than support her, and therefore risk the mail. He did not initially focus on the wrong doing of the colleague in question.
36. The Claimant was absent with stress as a result of the incident from 18 September 2017 for a week. The Claimant had a meeting and "discussion of perceived stress issues" with Mr Jewiss on 23 September 2017 (pages 139-141). The request for the Claimant to write a statement about the incident was repeated when the Claimant attended on 23 September 2017 but the Claimant did not do it until 30 September 2017, when he did provide a lengthy statement.
37. Meanwhile, on the Claimant's return from absence on 25 September 2017 Mr Hassan suspended him from outdoor delivery. The circumstances justifying suspension are on page 58 and include refusal to carry out a reasonable instruction and where there is a risk to mail. The reasons in the Claimant's case are given on page 143: "On [16 September 2017] you were unable to complete the workload assigned to yourself...There are reports that you appeared agitated and left without providing any reasonable explanation at the end of the day". It is not clear in the document itself but the leaving without providing reasonable explanation was a reference to leaving without providing an explanation for being unable to complete the work and what had happened ie leaving without providing the statement he was asked to write. By the date of the suspension the Claimant had still not provided a statement. The Claimant was absent again from 27 September.
38. His colleague from the 16 September had worked as normal on 23 September (the week after) but she too was suspended from outdoor delivery work when she next came to work. By this time Mr Hassan had more statements and so was more aware of her culpability on that day, including her cavalier attitude to the Special Delivery.
39. Mr Jewiss held fact finding meetings with both the Claimant and his colleague. The Claimant's was held on 30 September 2017. His colleague's was a week later on 7 October 2017. Both cases were then escalated to Mr Hassan. Normally some matters can be deal with by the first line manager, and normally matters are only escalated if the potential penalty is outside the first line manager's power eg dismissal. Mr Jewiss said his reason for escalating here related to the number of staff who had had to help and the risk to mail. We find that the seriousness of the events meant that it would be escalated. Escalation does not mean that a higher level of penalty is likely and it is still possible that no action will be taken. This decision was communicated to the Claimant on 6 October 2017.
40. That the Claimant wished to take leave for Hajj was known by Mr Hassan, Mr Jewiss and the administrator by 30 September 2017 as evidenced by the email on

page 161. Mr Hassan is himself a Muslim and understands the importance of Hajj. One of the weeks requested by the Claimant was oversubscribed and the Claimant had had the same week the week before.

41. On 30 September 2017 Mr Hassan raised the issue of the Claimant's leave request with Mr Jewiss in the email on page 161 making it clear that he would allow the leave and raise the "leave ceiling" by one if the Claimant put the request for Hajj in writing. Mr Jewiss met the Claimant for his fact finding in relation to 16 September on 30 September 2017 at 9.30 (after the email from Mr Hassan at 8.09). Both agree the matter was discussed at that meeting. The Claimant says he received the form back and two of the weeks requested had crosses next to them (p288A). He says Mr Jewiss told him which other weeks he could pick in the summer. There is a hand written note on page 288A saying MAX 3 weeks in summer.
42. On the other hand Mr Jewiss says he would not have gone through alternative dates and would have told the Claimant to put the request in writing as Mr Hassan had requested. Mr Jewiss did feedback to Mr Hassan on the day that the Claimant had said he would put it in writing though there is no file note to this effect as Mr Hasan requested (page 161). We accept that the email conversation does reflect what Mr Jewiss said to the Claimant though he did not make a file note. He did therefore ask the Claimant to put the request in writing.
43. It is clear from page 161 that Mr Hassan was prepared to grant the leave.
44. The Claimant had also discussed the issue with Mr Hassan directly before as evidenced by page 184. We accept Mr Hassan's evidence that he explained that it would be granted and the Claimant needed to put it in writing.
45. The Claimant remained absent from work and on 12 October 2017 Mr Jewiss invited him to meet on 14 October 2017 to explore how he could be supported to return to work.
46. On 14 October 2017 prior to his own leave Mr Hassan left some instructions about the Claimant's Hajj holiday request via email to Mr Jewiss and another Delivery Manager (page 184). He clearly intended to approve the leave and instructed the other Delivery Manager to amend the Claimant's leave card to reflect this. He asked Mr Jewiss to remind the Claimant in the absence review meeting that he needed to put the request in writing. He asked Mr Jewiss to capture it in the minutes. He noted that it was strange that the Claimant had not put the request in writing as he had sent other correspondence. He asked the other Delivery Manager to hold back the leave card until the Claimant had put the request in writing.
47. The Claimant declined to meet but put in writing his perspective of what had been happening since 16 September 2017 and that he considered it race discrimination (pp178-179). He queried why his colleague had not been suspended (though she had been by then). "You used [my colleague's] performance to get me into trouble, [the Delivery Manager on duty] bullied and harassed me regarding my

finish time on that Saturday, you did not provide any support that I requested on that day when I called the manager's office twice to report non professional [behaviour of my colleague]..." He referred back to giving up his assigned duty to avoid "this exact situation". He said "I feel simply the way I am being treated is simply due to racial discrimination, because amongst about 150 employees at [Gravesend], I am not the worse employee, yet the way I am being treated is portraying me as if I was the worse [sic]" He felt this situation was set up to get him sacked from his job. Mr Jewiss received this letter and placed it on file. It was not brought to the attention of Mr Hassan or anyone else. Mr Jewiss said his reasoning was that the Claimant sends so many letters to management raising lots of things. This was not following the formal grievance process. The only previous matters brought to our attention was the Orpington matter.

48. We accept that had Mr Hassan known about the letter and the allegation of race discrimination at the time he would have addressed it.
49. As a result of the absence review meeting not happening the conversation Mr Jewiss had been instructed to have about putting the request for leave in writing did not take place.
50. Mr Hassan had a formal conduct meeting with the colleague from 16 September on 10 November 2017 and with the Claimant on 30 December 2017. Mr Hassan says at that meeting he asked the Claimant again to put the leave request in writing and handed him a pen and paper. This was not in his statement but we found Mr Hassan a credible witness and accept from the documentary evidence such as page 184 that he was keen to address the leave, he had already decided to approve it and already increased the leave ceiling and needed the paperwork to support that decision. We therefore accept this did happen.
51. The colleague was summarily dismissed for her attitude to the Special Delivery and failure to inform managers of any issues and her unacceptable behaviour whilst on delivery which could have resulted in delay to mail. She was informed of the decision on 30 December 2017.
52. The Claimant lodged this claim on 21 January 2018. The Respondent became aware of the Claimant's claim in March 2018. The Response was submitted 29 March 2018 and Mr Hassan was contacted about that, so he was aware of the claim. Mr Hassan did not reach a decision in relation to the Claimant's conduct on 16 September 2017 until 20 March 2018, having sent the Claimant the notes of the formal conduct meeting in February.
53. The Claimant was given a suspended dismissal with a compulsory transfer. The decision letter and report are at pages 215 to 218. The three charges are listed on p215 as unexcused delay of mail by failure to perform contracted hours on 16 September 2017, unacceptable behaviour towards a colleague on 16 September 2017 and unacceptable behaviour towards managers whilst out on delivery and on return from delivery on 16 September 2017. Mr Hassan concluded the Claimant knew his contractual hours and had not worked them. He had not exhibited the required cooperation and flexibility in his interactions with his

colleague and managers. The Claimant stood and waited an hour for her to be ready, and Mr Hassan was astonished the Claimant found that acceptable. He was not willing to accept or take responsibility. He found the Claimant had intent not to help his colleague. At times his behaviour to his colleague fell short of what was acceptable which led to possible failures in relation to the mail. Mr Hassan considered the claims he was harassed by managers but found this a smoke screen to avert responsibility. He considered summary dismissal but took into account the Claimant had notified his managers as per protocol. He decided a compulsory transfer was appropriate as he felt there was a breakdown in the Claimant's relationship with managers and some of his peers and it would give him a fresh start.

54. The decision was communicated to the Claimant at a meeting on 24 March 2018. It is agreed that at that meeting Mr Hassan raised that the Claimant should put his leave request for Hajj in writing and he would still be granted the leave. The Claimant replied on 26 March 2018 (p 220) by which time he was aware he had a claim in respect of the alleged failure to grant leave. He said:

"As per your request on [24 March 2018], I am writing this final request for the annual leave that you have initially declined, even after I explained that it was for the purpose of HAJJ, the Muslim pilgrimage.

I am aware that you shouldn't have declined it in the first instance, as it was against [the Respondent's] policy that clearly allows four weeks annual leave to be booked for the purpose of HAJJ.

Therefore, could you please authorise the dates from 5 August 2018 to 1 September 2018 as annual leave for the reason stated above. Please include my Holiday card in your response".

55. The Respondent says that the Claimant's leave card, which had already been authorised in accordance with the email at page 184 would then have been sent to the Claimant. The leave card is at page 287.
56. The Claimant disputes receiving it until disclosure as part of this case. The Respondent has no record of it being sent but did clearly include it in disclosure as a relevant document. It is usually sent by standard post. We find that the Respondent was clearly seeking to put everything in order with a view to responding in these proceedings and that it was sent. We note that the Claimant did not chase it any further until his return from sickness absence after the appeal outcome in June 2018.
57. The Claimant appealed the disciplinary outcome. The appeal manager reheard the matter and she conducted her own interviews with staff. She found the initial charge unproven as although the Claimant had arrived late and left 5 minutes early she did not consider this to constitute misconduct. She would simply have required management to speak to him when he was late and have him make up the time.

58. She found the Claimant had helped his colleague to a degree on 16 September 2019 but could have helped more. His manner was short and sharp due to his frustration with her. She found neither to be gross misconduct.
59. She found he was rude to his managers and spoke over them and this was misconduct.
60. She concluded that the Claimant could have avoided some of the issues on 16 September 2017 if he had been a little more understanding towards his colleague but she recognised it was not all his fault. His colleague had been dismissed for her part in what happened that day. The Claimant's intransigence coupled with his colleague's laissez-faire attitude led to problems and she recognised that it was the Claimant that made the contact to the Delivery Office to alert them to the issues. She believed the Claimant had "correctly attracted conduct" but not at this level. She found the appropriate penalty was instead a Warning. Page 69 lists the conduct penalties available. A Warning is the lowest formal penalty.
61. The appeal decision was communicated to the Claimant on 18 May 2018 (pages 272-284).
62. The Claimant returned to work after the appeal outcome in June 2018. It was then that he went to see the administrator about his leave and he says he was given his leave card (around 26 June 2018).
63. The Claimant said this was the first year he was in a position to go to Hajj and that because he was not informed early enough he ended up not being able to find an affordable package. He did not end up going that year.
64. Apart from the letter dated 26 March 2018 the Claimant did not raise the issue of his leave not being granted with the Respondent aside from his claim.
65. The Claimant raised an issue about his manager producing wrong time sheets on 16 September. We do not find this relevant as everyone agreed he was supposed to finish at 1.40pm that day.

Relevant law

Direct Race/Religious Discrimination

66. Section 13 Equality Act 2010 states that a person (A) discriminates against another (B) if, because of a protected characteristic (including race and religion), A treats B less favourably than A treats or would treat others. Section 9 provides that "race" includes "colour;...ethnic or national origins".
67. Section 23 Equality Act 2010 provides that on a comparison for the purpose of section 13 there must be no material difference between the circumstances of the Claimant's case and any comparator's case.

68. The burden of proof is set out at section 136 Equality Act. This states that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that s 13 has been contravened by A then it must hold the contravention occurred unless A shows that it did not contravene the provision.

Indirect Religious Discrimination

69. Section 19 Equality Act 2010 states that a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice (PCP) which is discriminatory in relation to a relevant protected characteristic (including religion) of B's. Section 19(2) states that a PCP is discriminatory in relation to a relevant protected characteristic of B's if:
- 69.1 A applies, or would apply, it to persons with whom B does not share the characteristic;
 - 69.2 it puts or would put persons who share B's protected characteristic at a particular disadvantage;
 - 69.3 it puts B at that disadvantage; and
 - 69.4 A cannot show it to be a proportionate means of achieving a legitimate aim.
70. The burden of proof at section 136 Equality Act 2010 also applies to this claim.

Conclusions

71. Turning to the issues we had to consider we have reached the following conclusions.

Was the Claimant treated less favourably than his white European colleagues and/or a hypothetical comparator would have been treated in the following ways:

72. The Claimant in the hearing raised the issue that being paired with the colleague he was paired with on 16 September 2017 at all was discriminatory or less favourable treatment. This was not listed in the list of issues but we address it briefly here. We do not find this less favourable treatment. The Claimant's colleague had worked a year for the Respondent and only worked once with the Claimant before, when there had been no criticism of the Claimant. Other staff had been paired with her more frequently.

his suspension on 25 September 2017?

73. Firstly, the Claimant was not less favourably treated than his white colleague with whom he was paired on 16 September 2017. Both attended work after the events of 16 September on 23 September 2017. His colleague attended for a normal duty and the Claimant for his stress discussion. When each next attended, the Claimant on 25 September 2017 and his colleague on 30 September 2017, both were suspended from outdoor delivery duties for their part in the events of 16 September 2017. We are satisfied that the incident raised issues that fall within the permitted reasons for suspension in the Respondent's policy. The reasons each was suspended are at paragraph 37 and 38 above and the permitted reasons for suspension in the policy are at page 58 of the bundle. The incident involved a serious risk to mail which was only averted by the assistance of 9 colleagues, which made it an exceptional incident. In the Claimant's case there was also the issue of the way he had acted with his managers during and just after the incident, when he returned to the Delivery Office.
74. We do not find that the Claimant was treated less favourably than his white European colleagues generally. Both he and other colleagues have failed to deliver all the mail before and needed assistance, without being suspended, but not to the exceptional degree required on this occasion.
75. We find a hypothetical white European comparator involved in this incident in the same way the Claimant was would also have been suspended from outdoor delivery duties due to the gravity of the incident and risk to mail.

the requirement he attend an investigation meeting on 30 September 2017?

76. The requirement for the Claimant to attend an investigation or fact finding meeting was not less favourable treatment. We find any member of staff who had been involved in an exceptional incident involving serious risk to the mail on their delivery like that of 16 September 2017 would have been interviewed in a similar way. The Claimant's colleague on the paired round was also interviewed a week later (and she only worked on Saturdays). Every member of staff who had been involved on that day were required to provide a statement. The Claimant was initially reluctant to do so giving an added reason why a fact finding was necessary in his case.

the requirement he attend a conduct interview on 30 December 2017?

77. The complaint about the requirement to attend a conduct interview is really a complaint about the decision to escalate the matter to Mr Hassan and a formal process rather than dealing with it at the level of Mr Jewiss (First Line Manager level). The Claimant was not less favourably treated than his white colleague that he was paired with on 16 September 2017, whose case was also escalated. Nor was the Claimant treated less favourably than anyone else would have been who

had been involved in a pairing that risked failure to deliver the mail to the same degree as had arisen on 16 September 2017. Mr Hassan had been involved from the day, as managers were calling him to alert him of the risk even though he was not on duty, and we find it inevitable that the matter would therefore be progressed to him. He had already decided upon the suspensions. Mr Jewiss's evidence was that the reason for the escalation was the fact that 9 people needed to be mobilised to prevent a failure of the mail and the 9 bags of post at risk, all of which was exceptional. Risk to the mail is potential gross misconduct depending on the circumstances. Although it was being escalated this did not prejudice the outcome and as Mr Jewiss said, it was still possible for the range of conduct outcomes to be applied including no case to answer.

the imposition of a two year suspended dismissal and/or compulsory transfer to a different office?

78. We agree with the Respondent that this was not less favourable treatment compared to the Claimant's white colleague with whom he was paired on the day, as she was dismissed for her part in the incident.
79. We do not find it less favourable treatment than a hypothetical comparator, with all other circumstances the same ie a comparator who had taken the same actions as the Claimant in the incident.
80. We do agree with the Appeal Manager that the Claimant's part in the incident was not gross misconduct. He was rude to his managers and could have done more to assist his colleague and so there was misconduct. That said, his conduct with management was in the context that he was having a frustrating and emotional day. His concerns expressed to management on that day about being paired with a known under performer were not unreasonable. It is reasonable to expect to be placed with a partner who will perform to a competent standard. We accept that there is some diversity in the speed with which staff perform the role, but the role is high stakes under time pressure and so it is surprising his colleague's performance, described by Mr Jewiss as "terrible" had been tolerated as long as it had. At least one other member of staff had said "never again" about working with her. In these circumstances we agree with the Appeal Manager that the appropriate penalty was a Warning, and that is ultimately the penalty the Claimant has received.
81. We therefore consider that the suspended dismissal and compulsory transfer at first instance was overly harsh but we consider that a hypothetical comparator would have been treated the same. We found Mr Hassan to be a logical and fair-minded manager. Although we consider he came to a harsh penalty we accept he was looking at the evidence before him and his perceptions of it and not at anything else. He did apply a lesser penalty to the Claimant than to his colleague. Her part in the incident merited dismissal, the Claimant's part did not. However, in Mr Hassan's mind the incident was very serious, given the scale of support required and the number of bags of mail at risk. He saw the Claimant's

intransigence and failure to help his colleague further to have contributed to that risk to the mail. In his mind that was serious. The extent of the performance issues with the Claimant's colleague became more apparent in the appeal process than in the process conducted by Mr Hassan.

Was the less favourable treatment because of race?

82. Even if we are wrong, and the suspended dismissal and compulsory transfer did amount to less favourable treatment in comparison to a hypothetical comparator, we are satisfied that this had nothing to do with the Claimant's race. Mr Hassan acted as he did because of his perception of the seriousness of the incident and the exceptional level of risk to the mail on 16 September 2017, and on the basis of the information before him. Mr Hassan was not aware of the Claimant's complaint of race discrimination and we accept his evidence that he would expect such a complaint to be dealt with by being investigated fully and a resolution found.

Direct religious discrimination

Did the Respondent, on 30 September 2017, refuse to grant the Claimant's request for 3 weeks leave in August 2018 to go to Hajj? Was this an act of direct discrimination, because a hypothetical comparator would have had the request approved?

83. The Claimant was not treated less favourably than anyone else would have been treated under the Respondent's leave policy. His leave form was initially returned to him without the leave granted because it was a period which was oversubscribed and he had had it the year before. This is in accordance with the Respondent's policy. However, we accept that he was treated more favourably than others in that his request for leave to go to Hajj was nevertheless approved as an exception subject to his putting it in writing.
84. We do not find the granting of the leave subject to it being put in writing to be less favourable treatment. This was simply to have the document trail to support an exception being made for the Claimant.
85. In any event, the requirement to put the request in writing was nothing to do with the Claimant's religion, but was to do with applying the policy fairly to all, and documenting exceptions.

Indirect religious discrimination

Did the Respondent's provision that holidays are granted on a first-come, first-served basis, or such other provision operated by the Respondent in respect of the allocation of holidays, adversely affect a greater proportion of Muslims than it does those of other religions for the reasons listed at paragraph 7 above?

86. Leave is not allocated on a first come first serve basis. The policy in respect of leave allocation is set out at paragraph 34 on page 34 of the bundle (paragraph 23 above).
87. Each year in about September staff select their desired leave dates on a form for the following financial year. A maximum of 3 weeks can be taken in the summer which is a time when many staff want to take holiday. Staff are warned not to book their holidays until their leave is confirmed. In order to be fair if a particular week is oversubscribed the Respondent looks at whether the person has had the same week the preceding year. Priority is given to whole week requests. It is nevertheless possible for exceptions to be made by increasing the number of staff allowed leave in a particular week (the leave ceiling) where reasons are given in writing. The kind of reasons where that would be granted include religious trips and pressing family occasions. As trips in respect of Hajj would therefore fall within the exceptions the policy does not adversely affect Muslims, as alleged.

Was the Claimant put at a disadvantage by the provision operated by the Respondent in respect of the allocation of holidays?

88. As the Claimant's own request was approved subject to his putting the request in writing the Claimant was not put at a disadvantage by the policy. He did not put the request in writing until March 2018. Had he put the request in writing earlier the leave would have been approved earlier. He knew at an early stage it would be approved if he put the request in writing.

Can the Respondent show it is a proportionate means of achieving a legitimate aim?

89. We find the Respondent's system is a proportionate means of achieving the legitimate aim of securing the required service level at peak holiday season, whilst treating staff requests fairly, though giving priority for exceptional cases including religious pilgrimages upon written requests.
90. We find it is surprising if the Claimant was determined to go to Hajj this particular year that he did not take a more proactive role in obtaining his leave. If he had written a short note requesting it, it would have been granted in October 2017.

Employment Judge Corrigan
15 August 2019