EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Mr A Jamil	Network Rail Infrastructure Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: Manchester **ON:** 5, 6, 12, 13, 14 August 2019 (and in Chambers on 4 November 2019)

BEFORE: Employment Judge Warren

Members: Ms C S Jammeh
Mr S Stott

Representation

Claimant: In person
Respondent: Mr. T Adkin, Counsel

RESERVED JUDGMENT

The unanimous judgement of the Tribunal is that the claim is dismissed. The claims of race discrimination or not well founded.

REASONS

Background and Issues

1. By a claim presented on 11 April 2018 the claimant alleged that he had been discriminated against because of his race, following his employer taking disciplinary action against him and issuing him with a formal written warning for

conduct issues. At the time of the Hearing the claimant was still employed by the respondent. The claimant self describes as British Pakistani. The respondent denied discrimination.

2. The Issues were agreed in a case management discussion on 9 November 2018 before Employment Judge T Ryan as follows.

Direct race discrimination in contravention of section 13 Equality Act 2010

(1) Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act 2010 ("EQA")?

(a) On 16 February 2017 – raising a report numbered 106314 against him in respect of an allegation that the claimant left work early?

(b) On 16 February 2017 – raising another report that the claimant refused to carry out instructions and was sarcastic?

(c) 8 November 2017 – being suspended from work?

(d) 16 January 2018 – receiving a written warning?

(e) 8 May – being given a final written warning?

(2) Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on hypothetical comparators generally i.e. an employee who was not Asian.

(3) In addition, in relation to two particular incidents, the first being a grievance against Mr J Brooksbank, he alleges that Mr Brooksbank (a white colleague) was not suspended when he (Mr Jamil) had been in relation in effect to the same incident, and relies on Mr Brooksbank as his comparator. He also makes reference to Mr Andrew Sutcliffe, a white colleague, as a comparator in relation to the allegation that disciplinary action was taken against him for leaving the office ahead of his finish time..

(4) If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

(5) If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Time Issues

(6) The claim was presented on 11 April 2018. Allowing for ACAS early conciliation, any act or omission which occurred before 6 November 2017 is potentially out of time, so that the Tribunal may not have jurisdiction.

(7) If so, can the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period. Is such conduct accordingly in time?

(8) If not, can the claimant show that it would be just and equitable for time to be extended so that the Tribunal may find that it has jurisdiction?

The Evidence

3. We had a bundle of agreed documents that extended to over 1000 pages. There was an agreed chronology, and cast of characters (with 29 named individuals). We took witness statements as read, and the witnesses were cross examined. We decided the case on the evidential test, the balance of probabilities and took into account the shifting burden of proof in a discrimination case.

4. In support of the claimant's case we heard from Mr Akbar Jamil, his younger brother, and we heard evidence from Mr Paul Roberts (his RMT representative). His brother's evidence remained unchallenged by the respondent, and added little other that general support for his brother by describing the impact of the respondent's actions on him..

5. On behalf of the respondent we heard from Mr Matthew Brandwood, who was a manager in the claimant's department. The evidence of Mr Gordon Harper (Director Infrastructure, and appeals officer) and Mr Paul Gilbert (Director, Operations and appeals officer) was taken as read. We further heard from Miss Marianne Watt, National Performance and Support Manager based in Glasgow, and the manager of Mr Matthew Brandwood. We heard from Mr Andrew Sutcliffe, who was the claimant's supervisor and involved in the incident on 16 February 2017, and Mr Ian Dornan, who was a Programme Manager based in Glasgow and the manager of Ms Marianne Watt. Ian Cockle, the grievance investigation manager, gave evidence, as did Ian Allsop, also a Programme Manager involved in the written warning issued on 16 January 2018 and Mr Gilbert, Director Operations, who dealt with the disciplinary appeal on 29 March 2018.

6. The statement of Mrs K Iqbal was taken as read as the claimant did not seek to challenge her evidence.

The Facts

7. The claimant was originally employed by Moshel Limited in December 2007. He had a desk based job involved in receiving messages about problems on the rail network which needed repairs. In effect it was a form of customer service role. In July 2013 he was the subject of a TUPE transfer into Network Rail. He was suspended and disciplined in 2016 with a first written warning for threatening behavior towards a manager. The warning expired around 26 September 2017.

8. Before then, on 1 February 2017, the claimant left his desk early, apparently to leave his shift, at 11.23am. He was due to finish at 11.45am. He was seen to spend time chatting to another member of staff, distracting him from work. Mr Brooksbank, his supervisor on that day, asked him about outstanding work uncompleted. The claimant replied that he had finished for the day and continued to talk to his friend. Mr Brooksbank said that if he had finished he was to leave and the claimant replied "no" with a smug look on his face. Mr Brooksbank pointed out that his colleague was working, and the claimant replied that he could still talk to him.

9. Mr Brooksbank felt there was nothing that he could do and he was left feeling undermined. He did confirm in his evidence that the claimant was not in any way threatening but came across as arrogant and condescending. He described the subsequent atmosphere as "tense". He had worked with the claimant for over ten years and over those years had found him to be disruptive, intimidating and provocative in his attitude to work and to lack of respect for his team leaders.

10. Mr Andrew Sutcliffe was a white disabled member of staff, who relied on a government funded taxi through Access to Work to get to and from the office every day. As a result he was sometimes late, and was allowed a certain amount of latitude. His managers however noted in their evidence that if he was late he always made up the time at the end of his working day, and they had no c0ncerns about his work ethic or attitude to his supervisors. His circumstances were very different to those of the claimant.

11. Mr Brooksbank described the claimant as either not doing any work, doing it incorrectly, or influencing other workers not to work.

12. Following this incident, and on a later date, the claimant was suspended. Mr Brooksbank explained that when the claimant returned to work after his suspension Mr Brooksbank found alternative employment as he did not feel comfortable working alongside the claimant.

13. Returning to the incident on 1 February, the claimant lodged a grievance about Mr Brooksbank, saying that he had been aggressive. Mr Brandwood, the Helpdesk Manager, was advised of the incident by two separate employees, Mr Brooksbank and another supervisor, Kazima Iqbal. He believes it to have been an example of insubordination by the claimant. He received the claimant's grievance alleging aggressive behavior by Mr Brooksbank, whom he described as a white colleague, saying that it was racially motivated.

14. Mr Brandwood, who had been out of the office on 1 February, discussed what had happened with Marianne Watt, his line manager and the National Performance and Support Manager based in Glasgow. It was agreed that Mr Brandwood would collate statements and information from those in the office at the time, in case of formal action. Evidence was obtained from Mr Brooksbank, Kazima Iqbal, Mr McMahon (claimant's colleague), Asma Biba (another colleague), Sultana Begum (colleague) and Paul Roberts, the claimant's union representative. Ms Watt hoped that the issues between Mr Brooksbank and the claimant could be resolved amicably. It was a small close working environment and she was concerned at the claimant's hostility towards other members of the team.

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15. On 13 February the claimant indicated that he wanted his grievance dealt with formally, and Ms Watt had no further involvement in it. The grievance then followed a formal route but was not upheld. The claimant's subsequent appeal was dismissed. The managers involved in the grievance were different to those who dealt with the subsequent disciplinary process. Ms Watt continued down a disciplinary route but agreed to suspend the disciplinary process until the claimant's own grievance had been resolved.

16. The disciplinary process was instigated following a complaint by Mr Brooksbank and Ms Iqbal on 21 February. The formal grievance was actually received by the respondent on 23 February.

17. It was Ms Watt who instigated the disciplinary process once she had received the bundle of evidence provided by Mr Brandwood, and she believed the claimant was displaying repeated behavior. The claimant was at that stage still the subject of a live written warning for similar conduct.

18. Whilst the disciplinary procedure was on hold and the grievance procedure was ongoing, there was a second incident on 16 February. Another supervisor, Andrew Sutcliffe, indicated that the claimant was not working productively, and the sarcastic response he received was considered potential insubordination. Mr Brandwood raised it with Ms Watt in an email. Ms Iqbal corroborated the account. Ms Watt raised this as a disciplinary incident with the Human Resources Department and this also was placed on hold pending the outcome of the claimant's grievance.

19. Once the grievance procedure had been completed, two investigating managers were appointed and the two incidents investigated and followed to disciplinary stage. Ms Watt had no further involvement.

20. Mr Ian Allsop was appointed as disciplinary manager in November 2017. He had no previous involvement in any of the incidents and he did not know the claimant.

21. The claimant attended an investigatory meeting in July and notes had been kept. There had been investigatory meetings with all potential eye witnesses in the room on 1 February, including the claimant's union representative, Mr Roberts. In addition there were copies of the claimant's log-ins and work records for the relevant dates.

22. A separate investigation had been undertaken in relation to the incident on 16 February. A decision was taken that there would only be one disciplinary hearing in relation to both incidents to prevent the two issues "stacking" i.e. that were both incidents found against the claimant the punishment for the second would have to take account of the punishment for the first. By dealing with the two together this could be prevented.

23. The hearing was held on 19 December 2017. The claimant asserted that there was a conspiracy by way of retribution because he had logged a grievance against Mr Brooksbank. He thought matters should have been dealt with locally. He complained that his union representative, Mr Roberts, could not represent him because Mr Roberts had been present at the first incident and made a witness statement about it. He did agree that there had been an alternative union representative made available to him.

24. Mr Allsop agreed to look into the evidence of 16 February further, and then he emailed Mr Brandwood to clarify matters raised by Mr Jamil (page 600).

25. Mr Brandwood was able to confirm that a half day of work involved finishing at 11.45am not 11.30am (i.e. 3.75 hours). In relation to the incident of 16 February Mr Allsop established that Asma Bibi, Sultana Begum and Kazmina Iqbal were all working but Asma Bibi and Kazmina Iqbal could not remember the day in question, although Kazmina Iqbal indicated that Mr Jamil was often quite rude to the supervisors. It transpired that Sultana Begum was in fact on leave. The recording system had broken, and Mr Brandwood had been unable to provide sample working reports for Mr Allsop. He did indicate to Mr Allsop that Mr Jamil would take his lunch at around 11.30am and nobody else would leave for lunch before 12.00pm.

26. The hearing was reconvened on 16 January 2018. The claimant was represented by a union representative. Mr Jamil had received a copy of both the original and the new evidence, and the new evidence was discussed. Mr Allsop

reached a decision and explained it as follows. He upheld the decision that the claimant had finished early as this had been admitted by the claimant, who believed he was entitled to leave at 11.30am. Mr Allsop did not impose a sanction because the time loss was minimal in relation to 1 February 2017. The claimant confirmed that he would in future log off at 11.45am. He upheld the second allegation of failing to comply with the requirement of a supervisor that he leave (also on 1 February 2017) as all of the evidence supported the contention that he had remained on site talking to his colleague after being asked to leave. He found that Mr Jamil had failed to comply with a reasonable management request on 16 February. This was a further example of insubordination.

27. Mr Allsop considered that these issues were behavioural and Mr Jamil had confirmed to him that his previous warning was for a behavioural issue.

28. Mr Allsop chose to ignore the existing written warning which overlapped with the first of the disciplinary issues and decided to issue a second written warning, commenting that he believed Mr Jamil had behavioural issues. He gave Mr Jamil a right of appeal.

29. It was noted that Mr Jamil did not raise the issue of race during any of the disciplinary procedures.

30. The delay in processing the disciplinary issues was entirely down to the decision to handle Mr Jamil's grievances first.

31. The subsequent appeal against the disciplinary outcome was handled by Mr P Gilbert, director. He had had no involvement in the previous grievance or disciplinary processes and was unaware of the claimant beforehand.

32. The claimant in his appeal reasserted his view that the matter should have been dealt with locally. He considered it inconsistent with the treatment of other colleagues and he believed that the disciplinary process began after he had lodged his formal grievance on each occasion.

33. The appeal hearing took place on 29 March 2018. Both sides by then had all of the accumulated evidence. Notes were taken and Mr Jamil was once against represented by a union representative. The claimant at the appeal asserted that he had always finished at 11.30am on a half day, his work rate had never been raised as an issue before, and there would always be gaps in activity on the computer log. In relation to 1 February, he had finished work and was talking to Mr Roberts about pay issues, and Mr Brooksbank had been aggressive with him first. He claimed to have gone back to his desk to log off, collected his belongings and left at 11.30am. He reminded the appeals officer that Network Rail encouraged social interaction. In relation to 16 February, the claimant alleged he only became aware of this in July 2017 and said that he had been spoken to sarcastically and retorted in a similar manner. He considered that

despite being a witness Mr Roberts should have been allowed to accompany him to investigatory meetings.

34. Mr Gilbert adjourned to consider what had been said. Mr Brandwood was able to confirm that informal action had been inappropriate because of the earlier live formal written warning which was for a similar incident of insubordination and current at the time of 1 February.

35. Mr Gilbert decided to uphold the decision in both cases as he believed that it was reasonable for line management to take action against Mr Jamil. The decision to deal with the matters formally was based on the fact that he was the subject of a previous written warning and also this appeared to be repeat behaviour. The written warning had expired before Mr Allsop issued his written warning, and this was not therefore contradictory. Mr Gilbert in his evidence also noted that there was no reference to racial discrimination in the appeal he heard.

The Law

36. Section 13 of the Equality Act 2010 states:

> "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."

37. Section 4 of the Equality Act 2010 provides that race is a protected characteristic.

38. Section 9 of the Equality Act 2010 states that race includes colour, nationality, ethnic or national origins.

39. Section 136(2) of the Equality Act 2010 provides that if there are facts from which the Tribunal could decide in the absence of any other explanation, that a person (A) contravened a provision of the Equality Act 2010, the Tribunal must hold that the contravention occurred. If the claimant establishes a prima facie case of unlawful discrimination his claim will succeed unless the employer can prove that there was a non discriminatory reason for the treatment in question.

40. In **Igen Limited v Wong [2005] EWCA Civ 142** the Court of Appeal considered and amended the guidance contained in **Barton v Henderson Crosthwaite Securities Limited [2003] IRLR 332**.

> (1) It is for the claimant who complains of discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of adequate explanation, that the respondent had committed an act of discrimination against the claimant which is unlawful. These are referred to as "such facts".

(2) If the claimant does not prove such facts the claim fails.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves.

(4) In deciding whether the claimant has proved such facts it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inference it is proper to draw from the primary facts found by the Tribunal.

(5) It is important to notice the word "could". At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage the Tribunal is looking at the primary facts proved by the claimant to see what inferences of secondary fact could be drawn from them, and must assume that there is no adequate explanation for those facts. It is also necessary for the Tribunal at this stage to consider not simply each particular allegation but also to stand back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.

(6) Where the claimant has proved facts from which inferences could be drawn that the respondent has treated the claimant less favourably on the proscribed ground then the burden of proof shifts to the respondent, and it is for the respondent then to prove that it did not commit, or as the case may be, is not to be treated as having committed that act.

(7) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the proscribed ground. This requires a Tribunal to assess not merely whether the respondent has proved an explanation for such facts, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the proscribed ground was not a ground for the treatment in question.

(8) Since the facts necessary to prove an explanation will normally be in the possession of the respondent, a Tribunal will normally expect cogent evidence to discharge that burden of proof.

41. The Tribunal has applied the guidance offered by the Employment Appeal Tribunal in **Laing v Manchester City Council [1006] IRLR 748** and **Network Rail Infrastructure v Griffiths-Henry [2006] IRLR 865**. The reasoning in the former decision has now been approved by the Court of Appeal in **Madarassy v**

Nomura [2007] IRLR 246 CA.

Conclusions

42. We found that on the evidence we heard this was a particularly well established and racially diverse workforce. The claimant had been part of that workforce for in excess of ten years. He had never expressed earlier concerns about racial issues at all. It was a relatively small office. His behaviour was historically poor. The supervisors had struggled to manage him. One found another job when he believed the claimant was returning to work after a period of suspension.

43. We noted that it was incumbent upon the Employment Judge to remind the claimant of the bases of his case as he failed on more than one occasion to deal with the issue of race when cross examining witnesses. All in any event denied any racial motivation.

44. We have no doubt that the claimant felt singled out at work. He may well have been, because of his underlying response to supervision, which was consistently and inherently challenging. Mr Sutcliffe, in particular we noticed, used as a comparator by the claimant, was white, disabled and reliant on a Government funded taxi to bring him to work. As a result he received a degree of latitude in his start time. His other supervisors and managers, however, noted that if he was late he worked later each day to make up the time and there was no criticism of his productivity of timekeeping. We did not find him to be a useful comparator. The second named comparator suggested was Mr Brooksbank. He was white and a supervisor. As such he was within his right to ask the claimant to knuckle down and get some work done. The claimant did not reply using an appropriate tone of voice but challenged the request in a sarcastic way, undermining his manager in front of the team. This was later found to be insubordination. There was no evidence at all other than from the claimant to suggest that Mr Brooksbank had been sarcastic towards the claimant first. This was open-plan office with people working in close proximity to each other.

45. We found ourselves concluding that the evidence of the respondent witnesses was more cogent than that of the claimant. The witnesses supported each other (and this was very much a team made up of different ethnic backgrounds). The claimant was generally seen to be difficult to manage.

46. In the circumstances we concluded that whilst on the face of the written evidence it could be said that the claimant suffered a detriment by being suspended and issued with a written warning, the reality of the situation was that by the time of his suspension there had already been a written warning, and two further alleged incidents of behavioural issues with him with the managers. The respondent did not try to deal with the two later issues independently of each other, which may have led to the claimant's dismissal. Instead, they suspended

hearing his disciplinary case until after his grievances had been concluded, and then joined the two together as a matter of fairness to him. As a matter of evidence we find that the first report of a disciplinary matter was made prior to the reporter being aware that the claimant had lodged grievances. There was therefore no evidence to support his contention that this was “a tit-for-tat situation”.

47. We are satisfied that the disciplinary charges had real substance and that the written warning given was entirely justified based on the claimant’s conduct.

48. We do find that the respondent subjected the claimant to treatment which fell within section 39 of the Equality Act 2010 in that a report was raised about an allegation that he had attempted to leave work early, and that on 16 February he had refused to carry out a reasonable management instruction and was suspended. We are not satisfied that his subsequent suspension and receipt of written warnings were detriments following two allegations of discrimination. The respondent did not treat the claimant less favourably than it treated or would have treated comparators, and we are satisfied that his protected characteristic of race played no part in the raising of the two reports. The respondent’s explanation based on the claimant’s behaviour proves a non discriminatory reason for the two reports.

49. We noted that the respondent conceded that the Tribunal had jurisdiction to hear these claims.

50. In the circumstances we are entirely satisfied that on the balance of probabilities the claimant’s treatment by the respondent was due entirely to his inappropriate behaviour towards his supervisors and others within the office environment and in no way related to his race. We dismiss the case.

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Employment Judge Warren

Date: 19 November 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

2 December 2020

FOR THE TRIBUNAL OFFICE

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