EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
MR M TALUKDAR		NETWORK RAIL INFRASTRUTURE LTD

Heard at: London Central

On: 1-3 December, 2020

Before: Employment Judge O Segal QC
Members: Ms C Marsters; Mr S Hearn

Representations
For the Claimant: In person
For the Respondent: Mr Singer, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the claims of discrimination on grounds of race are dismissed.

REASONS

1. The Claimant describes himself as British Asian. He is employed by the Respondent as a Customer Service Assistant (**CSA**) based at Victoria Station.

2. He brings claims that he was discriminated against on grounds of his race, relating to various matters which led to a disciplinary process during which he was suspended and at the end of which he was given a first written warning.

3. We express our gratitude for the way in which the Claimant and Mr Singer conducted the proceedings.

Evidence

4. We had an agreed bundle of 281 pages, together with un-numbered collections of Case Notes put onto the Respondent's HR system in relation to the disciplinary process and suspension. We had witness statements and heard live oral evidence from:

4.1. For the Claimant:

4.1.1. Himself, and

4.1.2. Mr Adnan Malik (**AM**).

4.2. For the Respondent:

4.2.1. Mr Robert Medhurst (**RM**), a Shift Station Manager (**SSM**) at Victoria;

4.2.2. Ms Andreea Aurulesi (**AA**), another SSM at Victoria at the time and the Claimant's line manager;

4.2.3. Mr John Ward (**JW**), another SSM at Victoria; and

4.2.4. Mr Thomas Wood (**TW**), at the time a Project Manager.

Facts

5. There were, in truth, very few if any disputed primary facts. We are therefore able to set out the relevant facts fairly shortly.

6. The Claimant has been employed for over three years as a CSA. He remains employed by the Respondent, but has been off sick for some time.

7. His relationship with AA, as his line manager, had not always been smooth. In an early appraisal AA had adjudged the Claimant as not having met all his objectives. The Claimant considered that unfair and complained about it, including suggesting (though not formally) that JW become his line manager instead of AA. The Claimant also considered that it had been unfair of AA to invoke the Respondent's stage 1 sickness procedure some time after 3 isolated days of sickness in 2019. AM's evidence to us was that AA appeared hostile towards the Claimant.

8. AM had himself had a troubled relationship with the Respondent, being at one time dismissed and then reinstated. It was the evidence of the Claimant and AM, that the Claimant was to some extent resented by colleagues and managers because of his association with AM.

9. One of the Claimant's work duties was to sign in on 'reception' contractors working at Victoria. On 16 February 2019 the Claimant was working on reception with AM when a contractor, Ms Aliona B (**AB**), sought entry to the station. The Claimant and AM describe AB's conduct on that occasion as aggressive and rude. Shortly afterwards, the Claimant and AB spoke again and the Claimant says AB was aggressive towards her on that occasion also.

10. The Claimant raised this promptly with RM who was on duty at the time (AM says he also did so, though RM did not recall that). Later – although not at the time – AB complained that the Claimant had been rude and aggressive to her on the two occasions they met on 16/2/19.

11. On the day, RM reassured the Claimant that he did not have to tolerate aggressive behaviour and said (as noted by him in a contemporaneous log) that he would get to the "bottom" of it. RM spoke to one of AB' managers by phone and asked him to

have a word with AB. He did not follow that up in any way and did not report back on his action(s) to the Claimant.

12. The Claimant was on annual leave for much of the next few weeks.

13. On 23 March 2019, the Claimant was surprised to see AB turn up at reception. He had assumed that AB had been 'banned' from the site. He challenged AB. Each considered that the other was acting aggressively. The Claimant called on security personnel to escort AB away.

14. When the Claimant spoke to RM about this latest incident, RM considered that the Claimant had over-reacted and had behaved inappropriately towards AB, in particular by arranging for her to be escorted away. He told the Claimant so in blunt terms.

15. AB knew a CSA working at Victoria, Niculina Iuga (**NI**). They share a common language, Romanian. AB is Moldovan; NI (and AA) are Romanian. AB complained to NI about the Claimant and NI told AB she could put details of her complaint in an email to her. AB did so on 23 March, which NI forwarded to RM.

16. AB's email complains of the Claimant having behaved aggressively and having used inappropriate and discriminatory language to her on two occasions: the first undated, but presumably 16 February; the second 23 March. It appears that RM had discussed the 23 March incident with AA. On 30 March, RM forwarded AB's email to AA, as the Claimant's line manager.

17. AA decided that she should open a disciplinary investigation. It was the first she had conducted. She discussed that decision, as she did the various steps she took as part of the investigation, with HR, as recorded in the Case Notes.

18. AA wrote to various "witnesses", asking them to attend an interview. Those letters were either given to the witnesses by hand or sent by recorded delivery to their home addresses. Both the content of the letters and the names of those to whom they would be sent was, at least on the face of the Case Notes, approved by HR. Those letters set out the allegations against the Claimant in unnecessarily emotive terms. A more neutral description, along the lines, "*alleged unacceptable behaviour by Mr Talukdar towards a contractor, Aliona"* would have been preferable. The letters said that the

witness could be accompanied by a colleague, but did not say they could be accompanied by a union rep.

18.1. One such letter was sent to AM's home address. There is no evidence to say whether or not it was signed for. AM said he did not receive it.

18.2. Another such letter was sent to the Claimant, who did receive it. That letter, unfortunately, used the same template as the other witness letters, and therefore informed the Claimant, wrongly, that it was not his conduct which was being investigated.

19. Various interviews were conducted by AA, including two with AB, one with the Claimant and one with another CSA, Mr Yousaf Khan (**YK**), who had witnessed interactions between the Claimant and AB on 16 February. It was the evidence of the Claimant and AM that YK and some other religious Moslems working at Victoria were hostile to the Claimant because he was a non-religious Moslem.

20. The Claimant was interviewed by AA on 17 April 2019 (and again on 1 May), without a union rep to accompany him. He did not apply for a different manager than AA to deal with the disciplinary investigation. The Claimant returned from a period off sick on 16 April and spoke to YK, partly to see if YK would accompany him to the interview the following day. YK told the Claimant he was to be interviewed by AA. The Claimant asked him what he would say. There followed an exchange in which YK says he felt the Claimant was attempting to intimidate him and to persuade him not to give his account of what he had witnessed. That was and is denied by the Claimant.

21. YK complained about this to JW, who asked him if he wished to make a formal complaint. YK said he did and so JW noted down the details of his complaint (as summarised above). JW considered that, in light of the ongoing investigation and the seriousness of the complaint, it would be appropriate to suspend the Claimant from work (on full pay), to avoid the risk of him seeking to influence witnesses to the investigation. The alleged attempt by the Claimant to influence YK's evidence was added as a fresh charge in the ongoing disciplinary process.

22. JW held a suspension meeting with the Claimant, having taken advice from HR. The Claimant was very upset and tried to explain to JW what, on his account, had really happened; but JW told him that he could not do so at that time, but should do so when he was interviewed by AA, when he had time to reflect and was accompanied. The Claimant felt it to be most unfair that he should be suspended without even having the opportunity to put his side of the story to JW. JW told us that part of his reason for not allowing the Claimant to explain himself at the meeting was a concern that, in his emotional state and without accompaniment by a union rep or colleague, the Claimant might incriminate himself. Apart from the shock and stigma of the suspension, it is agreed that the Claimant would lose out financially during the period of any suspension because he would not be able to work overtime which was generally available (though not a contractual entitlement).

23. That suspension continued until the conclusion of the disciplinary process several months later. The Respondent's Disciplinary Policy states that a suspension should not generally last for more than 4 weeks and if it does it should be reviewed and the reason for its continuation should be explained to the person suspended. JW, and then TW, allowed the suspension to continue, partly by default and (in TW's case) partly because he considered it would not be appropriate to lift the suspension until the disciplinary process was concluded.

24. AA completed her investigation report in early May and concluded that there was a case for the Claimant to answer of gross misconduct or misconduct.

25. TW was tasked to deal with the disciplinary hearing. It was the first he had conducted. TW interviewed the Claimant, and, separately, AM, on 28 May 2019 – on both occasions in the presence of a union rep, Adrian Yates (**AY**). AM mentioned an occasion on which a white CSA, Bethany Simpson, had complained about a rude contractor and that contractor had been banned from the station by management – he felt the same should have happened when he and the Claimant had complained about AB.

26. TW also interviewed RM, who had not been interviewed by AA.

27. There was then a reconvened disciplinary hearing with the Claimant and AY, after some delay due to a combination of factors, on 23 August 2019. The notes of that

meeting reflect that AY's understandable focus was on refuting any case of gross misconduct and in doing so he accepted that the Claimant's behaviour to AB might have been inappropriate on an occasion.

28. TW adjourned the hearing. He reflected on the evidence, made some notes of his thoughts at the time, and then resumed the hearing and gave the Claimant verbal notice of his decision to administer a first written warning. His statement and his oral evidence to us (as well as his contemporaneous notes) explained that:-

    28.1. He appreciated that an important issue was the Claimant's understanding that if RM had dealt with the 16 February incident more thoroughly, the 23 March incident would not have occurred;

    28.2. The evidence about the first interaction on 16 February was contradictory: the Claimant and AM giving one account, and AB and YK another;

    28.3. The evidence about the second interaction was less in dispute, with the Claimant having admitted to telling AB robustly that he would have her removed from the station if she did not conduct herself appropriately (though he did not admit using the words "kick her out") and – as TW understood it – AY having accepted that the Claimant had not spoken in an acceptable way on that occasion;

    28.4. The evidence about the Claimant's conversation with YK about what YK might say to AA was "one person's word against the other's".

    28.5. He therefore concluded he should rely principally on the evidence of the second interaction on 16 February. In the circumstances, there had been no proved gross misconduct; but a first written warning for misconduct was appropriate.

29. After an unexplained delay, that outcome was confirmed in a letter dated 20 September to the Claimant, which also confirmed that his suspension was lifted. That letter unfortunately was rather vague as to what charges had been upheld and as to what evidence had been accepted or rejected. It recounted the allegations and indicated (misleadingly) that it was a combination of the Claimant's behaviour in respect of all the incidents complained of by AB and YK which had caused TW to

give the written warning. TW accepted that the 'reasons' part of the letter was *"lazy"*.

30. Since putting in this claim, the Claimant's appeal, by way of a review of the papers as we understand it, was concluded and the warning upheld.

The Law

31. This is a claim of direct discrimination, contrary to s. 13 EqA 2010 (the Act), which provides that

(1) 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.

32. Section 136 of the Act provides, as to the burden of proof, that

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) 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.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

33. We were referred to various authorities by Mr Singer dealing with the burden of proof issue. We summarise only those we consider pertinent to this case:-

33.1. The well-known remarks of Mummery LJ in ***Madarassy v Nomura International Plc*** **[2007] ICR 867**, [56-58], in the context of a claim that the claimant had been treated less favourably than actual comparators, that for stage 1 of the burden of proof provisions to be met, required that *"a reasonable tribunal could properly conclude"*, from all the evidence, that discrimination occurred; a mere difference in status and treatment is not sufficient. Only then does the absence of an adequate explanation of the treatment become relevant.

33.2. ***Chief Constable of Kent v Bowler*** **UKEAT/0214/16**, which confirms at [97] that a tribunal must address the evidential question of the reason for a respondent's conduct in a non-mechanistic way, being careful to establish the

factual explanation for that conduct even if it differs from that given by the Respondent.

34. We were also addressed by Mr Singer on the law relating to time limits, a 'continuing act' and extending time. In the circumstances where we do not uphold the claims of discrimination, we do not set out that law here.

Discussion

40. Given that there were no material disputed facts and that the relevant law was not in dispute, we do not consider it necessary to set out each party's submissions. Suffice to say that:

    40.1. Mr Singer asked us to find that in no instance did the burden of proof shift to the Respondent, and pointed out that the Claimant's race had not featured in evidence including the Claimant's cross-examination;

    40.2. The Claimant believed he had been treated unfairly in several respects and asked us to find that this was because of his race.

41. We begin by saying that we all considered that, with one possible exception, all of the witnesses on both sides were doing their best to give us honest and accurate evidence.

42. The one possible exception is, that we were left in some doubt whether AA's denial of any hostile feeling to the Claimant was accurate. The tone of some of her evidence in cross-examination (including, for instance, about her annual appraisals of the Claimant), the facts of the stage 1 sickness review (although the critical letter was only produced by the Claimant after AA had completed her evidence), and the reference in the Case Notes to one of the reasons for not attempting to deal with AB's complaint informally as being that she had had to speak to the Claimant about his conduct on a couple of previous occasions (though we heard only summary oral evidence from AA about those occasions) – together suggested a degree of frustration or hostility towards the Claimant. It is right to note, however, that much of that might have arisen (or at least increased) in the context of the claim brought by the Claimant in this tribunal.

43. We deal with matters where the Claimant has complained about the Respondent's conduct towards him, in the context of this claim, chronologically.

RM's actions 162/19, 23/3/19

44. This is the one complaint in relation to which the Claimant suggests there is an actual comparator, Bethany Simpson. However, neither he nor AM (understandably) could recall any details of the allegation against the contractor in that case, and it seems that RM was probably not the manager concerned. We were not therefore able to give any weight to the treatment of Ms Simpson as a useful point of comparison to the treatment of the Claimant.

45. It seems agreed, and we find, that RM acted appropriately on 16 February having received the Claimant's complaint. However, as RM fairly accepted, it might be considered a failing on his part not to have followed up his initial action in reporting the matter to AB's manager by checking that the manager had spoken to AB, what AB's explanation/reaction had been, and then reporting back to the Claimant.

46. RM explained that failing as being simply that, being busy at work and not believing the incident complained of to have been severe, he did not think or remember to pursue it further. We accept that explanation as true. We are not convinced that s. 136(1) would have been met on this issue; but in the event we consider that there is a non-discriminatory explanation for the omission complained of.

47. It is right, as TW implied, that had RM followed up the 16 February incident, the 23 March incident would likely not have occurred. However, it did; and RM had to deal with what had occurred. He could, and perhaps should have been more sympathetic to the Claimant in the circumstances, but he was genuine in believing that the Claimant had over-reacted on that latter occasion. In any event, RM's actions in relation to 23 March were relevant to future events only really in that he forwarded AB's email of complaint to NI, on to AA. He cannot be criticised for doing so. Whether or not the contents of that email were accurate, on their face they describe incidents of significantly inappropriate behaviour by the Claimant.

AA's decision to investigate and the investigation

48. For the same reason, AA's decision to investigate the matter formally, whilst not perhaps mandatory (she might have tried to speak to both parties informally first and seek a resolution by 'mediation'), again cannot be criticised and was probably the natural way to proceed.

49. The following aspects of the investigation gave the tribunal more or less cause for concern, but in no instance did we feel *"a reasonable tribunal could properly conclude"*, from all the evidence, that that AA's actions indicated that discrimination had occurred:-

    49.1. The letter sent to the Claimant inviting him to interview was significantly deficient, as set out above. A different sort of letter must be sent to the person being investigated to those sent to witnesses, explaining that his/her conduct is being investigated, that the possible outcome might be, e.g., a disciplinary hearing into potential gross misconduct; and (although not required by statute) preferably the right to be accompanied by a union rep if the charges are serious. However, this was AA's first disciplinary investigation; the letter had been approved by HR; and it was clear that even at tribunal AA was unsure why it had been wrong to send the letter she did.

    49.2. AA might have followed up AM's failure to respond to the request for him to give evidence. However, he was off sick at the time; and she did not realise he was as significant a witness as the Claimant believed him to be.

    49.3. AA might have taken a more thorough forensic approach to apparent inconsistencies in the various evidence of AB, read with that of YK. However, that is more easily done in hindsight under scrutiny in a tribunal that at the time by a manager with other duties. Moreover, AA was only determining whether there was a case to answer.

50. As to which last point, notwithstanding certain inconsistencies in the evidence (which might be explicable in terms of muddled recall, as opposed to fabrication), it is difficult to criticise AA for deciding that the Claimant did have a case to answer at a disciplinary hearing; and we do not do so.

51. Finally, in respect of the allegation that AA's attitude towards the Claimant was biased against him and that this coloured her decision to have a formal investigation and her approach to that investigation, we note that the Claimant has put forward a specific non-discriminatory explanations for any such attitude: namely, (a) that the Claimant had complained about her appraisal of him and had wanted to change his line manager; and (b) that the Claimant associated with AM.

The suspension

52. As various cases have made clear, suspension is not to be imposed lightly; nor is it to be allowed to continue for any length of time without good reason. The effects on an employee are often severe and long-lasting.

53. JW was, we find, right to suspend the Claimant on the basis of YK's formal, recorded complaint to him. Whether JW was right to refuse to hear the Claimant's story on 16 April is a moot point. In human terms, it would have better to have allowed the Claimant to respond. However, we accept the truth of JW's explanation for why he did not do so, as recorded above. Even if he had heard the Claimant's account of the interaction, it is most unlikely that JW could have decided not to suspend the Claimant; at that stage, it is the risk of influencing/intimidating witnesses that matters; JW could not have been in a position of determining at that point that there was no such risk, based on the Claimant's denial of what YK had alleged.

54. We were all concerned at what turned out to be the very long period of the Claimant's suspension; and, at least on the evidence before us, at the non-compliance (or at best only cursory compliance) by JW and TW with the requirement to review the Claimant's suspension every four weeks, only to extend it with very good reason, and to explain that to the Claimant. It would have been far preferable, in our view, for the Claimant's suspension to have been lifted once AA had completed her investigation (after 2-3 weeks), with a warning to the Claimant that if he were to speak about his disciplinary case to any of the witnesses prior to the conclusion of the disciplinary hearing it would be treated very seriously. As JW very fairly accepted, *"The suspension went on an awfully long time for what it was. It's probably the case that Mo was let down in this respect"*.

55. However, again we accepted as truthful the explanations of JW that he simply assumed the suspension should continue until after the disciplinary hearing (*"not a great deal of thought went to the suspension continuing"*), and of TW that he positively believed that to be correct. We do so all the more readily since the Case Notes suggest that unfortunately HR did not provide any contrary advice to those managers; and because we are all aware that regrettably instances of prolonged suspensions in similar circumstances are not uncommon. There is nothing to suggest that the situation would have been any different had the Claimant been white.

The disciplinary hearing and outcome

56. There seems (rightly) to be no real criticism of the process adopted by TW in dealing with this case; although the Claimant asked unsuccessfully through his union rep for TW to re-interview YK, and suggested (though not at the time) that TW might also have made inquiries of a manager of AB, 'Joel'.

57. Although the outcome letter was delayed and poorly reasoned, as set out above, it is clear from TW's contemporaneous notes that his reasons given to the tribunal for giving the Claimant a written warning were truthful. Those reasons cannot be criticised. A first written warning was, in the circumstances, not inappropriate.

Conclusion

58. We have some sympathy for the Claimant. Errors were made, or at least best practice was not always followed by the Respondent in certain respects, as we have identified – and those had the compounded effect of causing the Claimant to feel badly treated. In particular, RM could have acted less confrontationally towards the Claimant on 23 March given that RM had not followed up the Claimant's complaint of 16 February; and the suspension was allowed to continue for far too long.

59. However, we have accepted the Respondent's witnesses' explanations for their conduct, which is most respects was careful and fair, as having nothing to do with the Claimant's race.

60. In the circumstances, we do not uphold the allegations of discrimination on grounds of race.

Employment Judge Segal

Date: 07/12/20

JUDGMENT & REASONS SENT TO THE PARTIES ON

7/12/20..

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FOR THE TRIBUNAL OFFICE