Case No: 2201764/20

EMPLOYMENT TRIBUNALS

Claimant: Mr. K. Bishop
Respondents: Trenitalia c2c Ltd

Remote Hearing (CVP) London Central **On: 3 June 2021**

Before: Employment Judge Goodman

Representation:
Claimant: in person
Respondent: Mr. Mubarak Waseem, counsel

JUDGMENT

The unfair dismissal claim does not succeed.

REASONS

1. The claimant had worked for the respondent as a train driver for over 35 years when he resigned on 2 October 2019. He brings a claim if unfair dismissal.

2. When first presented the claim included discrimination for sexual orientation about some earlier trouble at work. This part of the claim was dismissed by E.J. Jeremy Burns at a preliminary hearing in November 2020 because out of time.

3. When the claim was first received, the claimant was asked by letter if he wanted to bring a complaint of disability discrimination, but he did not reply.

4. The issues were listed by E J Welch at a case management hearing in September 2020. The issues that remain after the Burns hearing are:

    (1) did the respondent breached the implied term of trust and confidence in one or more of the following ways:
        (i) he was subjected to aggressive assessments by DB during the

period 2017 until March 2019

(ii) he was placed on a driving plan by DB for not blowing his horn going into the depot. Whilst he is not complaining about the action itself, it was unattainable and intimidating for its one-year duration from 11 June 2018

(iii) the driving plan was not signed off at the end of the one-year period (11 June 2019). The effect of the failure to sign it off did not continue the plan but worried the claimant

(2) did the claimant resign because of one or more of the above?

(3) If there was an unfair dismissal, what financial compensation is appropriate including should there be any reduction because of Polkey v AE Dayton Services Ltd (1987) ICR 142 and, has the claimant mitigated his loss?

Evidence

5. To decide the issues the tribunal heard evidence from **Kevin Bishop**, the claimant, **Kevin Langley**, his workplace trade union representative, **Jeffrey Baker**, Engineering Director, who considered the claimant's grievance after he had given notice of retirement, and **Martin Meadlarklan,** HR Business Partner, who reviewed the grievance outcome decision when the claimant appealed it. As the claimant's witness statement was brief, his detailed grievance letter of 1 November 2019, and the narrative attached to the claim form, were treated as additional evidence of events.

6. There was a hearing bundle of 203 pages. Two pages of contemporary handwritten notes were added during the hearing after Mr Baker was asked why there were no records of his grievance investigation meetings, and Mr Baker was recalled to explain them.

Conduct of the Hearing

7. After some initial hitches the hearing went ahead smoothly. There were several observers. Short breaks were taken from time to time. Two days were set aside for the hearing, but in the event, evidence and submissions concluded in the first day. Judgement was then reserved.

Findings of Fact

8. The respondent is a train operating company providing commuter services in east London and Essex.

9. The claimant is a driver who started work for the respondent or its predecessors in 1984. He enjoyed his work, proud of his competence, and had a good record.

10. Around 2015 the claimant suffered depression as a result of a number of

domestic difficulties and at work, the introduction of new train rosters. He had a period of sick leave, while he received medication, and was then reintroduced to work gradually. During this period there was an unpleasant episode when another driver made homophobic remarks about the claimant. It was not in his presence, but he heard about them. The claimant felt too frail mentally to make a complaint himself, but the respondent's managers investigated, and a few weeks later he was told that the driver in question was to attend an awareness course. The claimant did not however get an apology. Sometime later he heard that the driver not in fact been on the course. He took to avoiding him when he could.

11. Shortly after that he was picked up by a manager for driving 0.2 to 0.5 mph over the speed limit. His trade union (ASLEF) objected that without a digital speedometer a driver could not be aware of this, as a manager with a digital speed reading would be. He thought it was agreed that this would not go on his record, but a more senior driver manager insisted it stayed on. The claimant felt oppressed by this.

12. These episodes formed the claim that was struck out because out of time but are recorded here as relevant background to understand the claimant's state of mind as to the fairness with which he viewed his treatment by the respondent.

13. Once back in full-time driving in 2016, the claimant had a new driver manager (line manager), DB, who had recently been promoted. DB had good driver skills, and had also been on a course for driver assessment. Assessments of drivers by their managers are an important part of railway employers' safety policy. By all accounts DB was particularly zealous in improving driver safety standards. He reported many drivers for what they saw to be minor infringements, which resulted in investigation, and the imposition of development plans, the lengths of which are set on a tariff, depending on how serious the infringement is. The claimant viewed DB as unapproachable, and less line manager, more investigation manager. Whenever he became aware of his presence he became anxious that he might be reported for something.

14. On 7 June 2018 the claimant was driving a train into East Ham depot when he saw DB carrying out an assessment of a trainee. He was given instructions to proceed into the depot. He says he was so nervous about the presence of DB that he omitted to stop at the stop board and sound his horn, as is mandatory. Realising what he had done, he stopped and sounded his horn late.

15. Failing to stop at a board is a serious mistake. He was interviewed by DB in the depot and asked why he had made the error. The claimant said it was him, and his aggressive management style, which had caused him to lose concentration. We can see from an email he sent at the time to his own manager that DB took this hard. The claimant was not the only driver complaining that his approach was too harsh. He did not like to be seen, he said, as an uncaring monster.

16. The claimant was taken off roster and had to spend eight days in the staffroom while the matter was reviewed. It can be seen from internal emails that there was a debate between DB and the operations standards manger about whether the incident should be classed as failure to stop at a stop board, or failing to apply instructions. It went down as the latter, then was changed to the former. Meanwhile the claimant had been given a development plan for failing to stop, the more serious offence.

17. The development plan is in standard form. It states the purpose is to monitor drivers with regard to their competence and safety performance following operational incidents “by using a mixture of instruction, coaching and monitoring the driver and manager will jointly reduce the likelihood of the driver becoming involved in future incidents”. Performance is monitored by “providing advice and support to improve and develop an individuals competence and fitness”. The written plan had to be agreed by the driver and managers. It had to be “regarded as a contract”. It should include “unannounced monitoring” as this would always capture a more realistic picture of natural performance than direct assessment.

18. The mandatory plan length for failing to stop is 12-18 months. The claimant’s plan was set at 12 months, from 13 June 2018 to 12 June 2019, because of the claimant’s good record, with a note: “as long as the corresponding checks on his anxiety carried out”, as the driver had identified that a manager’s presence put him off from commonplace checks.

19. The plan was designed to check that he was following depot entry procedures to the letter. There was to be a re-briefing on locations and instructions on horn use, with an initial formal driver assessment, other checks in months four and six, and unobtrusive checks in months eight and 10, that is January to April 2019, to be carried out on empty coaching stock going into East Ham. He was asked to talk aloud to himself as he entered the depot, reciting the steps to be taken, a technique called commentary. It can be seen that another manager at the time queried how DB would monitor this on an unobtrusive assessment: “is he going to audibly call out? Just curious how you’re going to measure that? Get on an ECS from Fen(church Street) and listen or is he pointing so you could see from the shed?” .

20. The version of the plan as designed at the outset is available, but not the plan as annotated by DB during the 12 months. It was never signed off by either of them at its conclusion, when there is supposed to be a meeting for discussion when it ends.

21. At the outset when the plan was being signed the claimant made it clear to DB that he saw the plan as punishment. Nevertheless he accepted he had no option. The policy provides that a driver has the right to request a review of the plan, but the claimant was unaware of this.

22. Normally on board assessments are carried out with the assessor sitting in the rear cab, at the back of the train. In this plan, DB as assessor was to sit in the passenger coach immediately behind the driver's cab. The claimant says on one occasion he became aware that DB must be immediately behind him, because he had put up a hand to block the spy hole which the driver uses to look down the inside of the moving train to check for trouble. This must have been in the January to April period. DB told the claimant that in fact train noise was such that even there he could not hear the claimant, so it was not useful.

23. At the end of the plan period the claimant approached DB to get it signed off but was told he was off sick that day. He asked other managers if they could sign it off, but was told it must be DB, as there had to be a meeting to discuss what had been learned. DB did not sign it off, and later explained it was because of pressure of work. On 26 August, and on 4 September the claimant asked DB again, and was told he would see, but nothing further occurred.

24. The claimant accepts that the plan was over when it expired, and could only be extended before it expired, but he resented the way he was held to tight standards as a driver by a manager who was not doing his own job properly.

25. It was while brooding on the injustice of this that a second incident occurred on 5 September 2019. He lost concentration and overshot the platform at Barking. He carried out the correct procedures for this error and reported himself. In the investigation interview he said he had lost concentration, as his anxieties were taking over his thoughts, involving past treatment by his driver manager. He agreed his sister was seriously ill but denied that was the cause. The next day he went sick. An occupational health report in October expected a recovery in a few weeks following an increase in antidepressant medication. However he never returned to work, because on 2 October he resigned, saying he would take early retirement.

26. The claimant had already contemplated early retirement then. A year before, in October 2018, the claimant told DB he was planning on retiring in September 2019, when he would be 55. While recognizing this was an indication rather than a commitment, DB had reported this to HR. In 2019 the claimant decided he would retire, and booked three weeks of off-roster leave, which would fall in September, October and November 2019, within the notice period. He told the tribunal the retirement was planned so he and his partner could move to another area. Then on 11 June 2019, the day before his development plan expired, he emailed the East Ham driver depot manger asking if he could in fact stay on for at least another six months, instead of leaving in September 2019, but still take the leave, saying: "If you could get this agreed for me it would be fantastic because I do enjoy my job and want to stay with c2c as long as possible". The respondent was happy to oblige, and the manager told him she was "really keen to keep you here as long as possible". In an email to HR on 26 July, copied to the claimant, she said it meant: "we keep a mainline driver for longer, which is obviously very good news".

27. The emails also show that in June 2019, when the pan ended, the claimant switched to another team of experienced drivers, managed by AH, who was new to managing.

28. The claimant told the tribunal the reason for changing his mind in June about his retirement date was that family members had fallen ill and he wanted to remain in the area to care for them.

29. It was against this background that the claimant, now off sick and under investigation for the Barking incident, wrote to the driver depot manager on 2 October: “please accept this letter of my intention to take early retirement giving the 12 weeks notice required from today”. After expressing gratitude for a “mostly excellent and enjoyable career”, he added: “To be honest the last year or so has been a strain on my mental health and I feel this has not helped with poor line management”.

30. While the early retirement was being processed, the claimant wrote to the senior driver manager at the depot again on 1 November 2019 about a grievance “regarding the treatment I have received during the last couple of years”. The grievance and its handling is not part of this claim, but it is useful as to the events leading up to the claimant’s decision to leave. He had felt under “constant pressure” from DB causing him to feel extreme stress, anger and anxiety. Following the East Ham episode he had told DB that the mistake occurred because he was distracted by the pressure on him and other drivers to do everything 100% correct”. He said morale at the depot was then at an all-time low because he was reporting so many drivers who are getting disciplined. DB had replied that previous managers have made life easy for drivers by not using the discipline procedures correctly. Discuss the development plan, and DB standing behind the driver’s door to listen to commentary: “this has caused me even more stress as he knew he was the person who was the cause of my distraction”. DB had admitted that the plan was not achievable because he could not hear him. He went on to complain about the plan not being signed off though three months had elapsed. This made him “upset and angry, I couldn’t understand how driver manager could be so insistent everything had to be done so correctly, by the book and wouldn’t take any responsibility for his own actions”. “I feel I have been under so much stress that this has caused me to have concentration issues and without doubt the cause of me slightly overrunning Barking station in September of this year”. His anxiety had turned into a depression, it was too debilitating for him to return to work and because of this he had decided to take early retirement earlier than he would have liked.

31. Jeffrey Baker investigated, first by holding a meeting with the claimant and his union representative Kevin Langley, then meeting DB. Kevin Langley confirmed that other drivers found DB difficult. DB himself was upset.

32. On 13 December Jeffrey Baker wrote to the claimant with his findings. The development plan was standard for failing to stop, and unobtrusive checks were important to assess safety, are not designed to catch people out. DB

had admitted that the assessment from the adjacent saloon was not practical. The delay sign was “not satisfactory”, he could understand the anxiety, and he was recommending improving the signing of process. He went on to say that DB, who was “very focused about doing his job properly” had been put into the manager role without any training on managing people, which would help him recognise symptoms of stress and adapt his management style to suit, while still continuing to adhere to the safety and driver performance aspects of his job. His formal recommendations were that DB, and all the other managers, had people management training, and driver development plan should be closed out on time.

33. Interviewing the claimant, Jeffrey Baker explored what he wanted to achieve: would he resend his resignation, for example? The tribunal accepted his evidence that the claimant indicated that he was not coming back, and wanted DB to be reprimanded so that he could not do the same to others. In this respect, the finding on signing off the plan, and implicit criticism of DB’s style, and the recommendation of training, gave the claimant what he wanted

34. The claimant was dissatisfied and appealed. The respondent had not recognised that DB’s aggressive management have contributed to the two incidents where he had lost concentration. Other drivers had not been treated so severely for similar incidents. He would not have agreed to the plan if he had known that DB would be standing behind the driver door. He restated his grievance about the plan not being signed off. He had been battling anxiety and depression for some years. Management had not dealt in a satisfactory way with earlier homophobia and incorrect assessments. He had worked hard for many years but the pressure of “a non-caring line management, assessment and investigation team” had taken its toll, and this was “the main reason I decided I had to take early retirement and not carry on until allotted to take retirement”.

35. The appeal was reviewed by Martin Meadlarklan, an HR business partner who has no background in the railway. He discussed the appeal letter with Jeffrey Baker and then wrote to say that the appeal would not progress to stage II of the procedure because there was nothing new that had not already been covered in his findings.

36. The claimants notice expired on 25 December 2019. He has not looked for work since then. His sister has been seriously ill, and he involved himself in looking after her, as he was not working. This intensified in lockdown when they had to isolate, and when after a few weeks he was told he had to isolate with them. At the same time he was accepted as a volunteer NHS responder, and he has found voluntary work so satisfying that he hopes to be taken on running a local animal charity for children. He did not however rule out that he may look for other work in time.

Relevant Law

37. There are circumstances in which an employee’s resignation can be treated

as a dismissal. By section 95 (1)(c) of the Employment Rights Act 1996 it is a dismissal where:

> "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

38. It was made clear in **Western Excavating ECC Ltd v Sharp (1978) IRLR 27** that the employer's conduct must be a breach of the fundamental term of the contract, entitling the employee to treat the contract as at an end. It was not enough that the employer's conduct was unreasonable. However, an employment contract carries an implied term of mutual trust and confidence between employer and employee, and if this is breached by the employer, an employee can treat that breach as repudiatory, and the contract as at an end. The term, set out in **Woods**, as confirmed in **Malik v BCCI (1997) ICR 606** is that

> "the employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.''

39. The conduct can be a series of actions which cumulatively amount to serious damage, and the "last straw" which precipitates the decision to treat it as at an end need not of itself be so serious as to repudiate the contract if it is of that character – **Omilaju v Waltham Forest LBC (2005) IRLR 35.**

40. If the employer's conduct is the exercise of discretion, that does not repudiate a unless the decision was wholly "irrational", not just unreasonable – **Braganza v BP Shipping Ltd (2015) 1WLR 166**.

41. The tribunal should consider whether the employee has by delay or inaction in response to a breach affirmed the contract. The steps to be considered by the tribunal was set out in **Kaur v Leeds (2019) ICR1.** The tribunal has to consider what was the most recent act, whether the claimant has affirmed it since, if he has not, was that breach repudiatory, if there was a course of conduct, an affirmation within it may be disregarded. Finally the tribunal has to consider whether the claimant resigned in response to the breach, whether an individual act or the last in a course of conduct.

Discussion and Conclusion

42. Examining the conduct alleged by the claimant to be repudiatory, the claimant starts with "aggressive assessments" from 2017 to March 2019. There is little evidence of the claimant himself being treated *aggressively* over this period. In effect, the claimant says that he was nervous of DB because he was trying to catch drivers out.

43. Moving onto the driving plan initiated in June 2018, it was 'unattainable' in that DB was unable to carry out unobtrusive assessment of whether the claimant was commenting as he drove as planned, because of train noise. By 'intimidating', the claimant means being aware of DB's presence in the

saloon. It is inevitable that being assessed can be nerve wracking, but by being on a plan of any kind claimant knew he was undergoing assessment and unobtrusive assessment was an important part of this, to see that drivers drove safely even when they did not know they were being watched**.** It is a common feature of the incidents at East Ham and Barking that the claimant blames DB for his errors. But having made the error, there is no doubt that under the policy the incident had to be investigated, and there had to be a development plan. This was "reasonable and proper cause" for putting him on a plan and assessing him unobtrusively. Although, as it turned out, and as his colleague had predicted, DB's choice of doing this from the saloon immediately behind the driver's cab was not practical, this was not unreasonable, although in the circumstances the claimant found it irritating.

44. Up to now the circumstances were tolerated by the claimant, to the point where as the plan ended he reversed his decision to seek early retirement in September 2019.

45. What seems to have operated on him after that was the delay signing off his plan, leading to brooding resentment at DB, and the unfortunate episode at Barking. Was the delay unreasonable? There is no doubt that Mr Baker, while careful in his language, holds the view that the plan should have been closed off when it ended, not left open. While this had no practical effect on the claimant's career, it was damaging psychologically, and is hard to excuse – speculatively, perhaps DB was avoiding a meeting with the claimant for fear of confrontation. Mr Baker also implicitly criticises DB's management style. The tribunal concludes from the evidence available that the carrying out of this particular plan by DB involved little or no *coaching*, *advice* or *support*, as envisaged in the respondent's policy, only monitoring, and the claimant, and, according to the trade union representative, his colleagues, experienced this "coach" as hostile. This punitive approach was not the respondent's policy, and was unlikely to achieve the desired aim of improving the standard of drivers who made errors.

46. Was this style of management "calculated or likely" to destroy or seriously damage the trust and confidence of the employment relationship? As a matter of fact it damaged the confidence of a long serving and valued employee. It is not clear that the damage was serious, or likely to be destructive, except to the claimant, who on his own account was vulnerable by reason of his pre-existing depression. Most employees would have kept going. It is not claimed here that the management style should have been adjusted for disability under the Equality Act, so the respondent's conduct has to be judged by the measure of employees who are not vulnerable by reason of past depression. In other respects the claimant was treated considerately. His June decision not to retire was warmly welcomed by the respondent, as would have been clear to him from the message copied to him in July 2019 (he said in tribunal that he had not read it, but he had disclosed it; he complained he had had to chase up the manager to action the change, but has not said this was more repudiatory conduct). The depot manager sent a friendly message offering to chat when he went sick. She was aware of his difficulties with DB. He was

also getting a new driver manager, someone he got on with.

47. If it was serious damage, is this why the claimant resigned and took early retirement? He did not resign because of the way the plan was carried out, because as it ended he asked to stay on, and although annoyed by the subsequent failure to sign off the plan, this was not for fear that it would not be signed off, but irritation at DB's double standards, though this could well be viewed as part of a course of conduct on DB's part – first a punitive and fault finding approach, then avoiding closing it off. The precipitating cause however was not the failure to sign off the plan, but the Barking incident. But for that he would have carried on. Although the claimant attributes his lack of concentration on that occasion to DB, there was nothing more DB had done on this occasion (though the inaction on signing off continued). Of course the claimant was knocked back by having to face another investigation and plan for this mistake, but there was no further conduct of a repudiatory character on the respondent's part to cause it. The occupational health report expected a return to work in a few weeks. I conclude that the resignation was not in response to repudiatory conduct, and it is not, in law, a dismissal on which to found an unfair dismissal claim.

48. I add that had I found this was a dismissal it is unlikely the claimant would have styed long. He had indicated he would stay another six months, that is, to March 2019. By that date the country was in lockdown and his sister and brother in law would have been isolated. It is highly probable he would have retired at that point, rather than expect some other family member to stop work and isolate with them.

Employment Judge Goodman

Date: 4th June 2021

JUDGMENT and REASONS SENT to the PARTIES ON

. .04/06/2021..

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FOR THE TRIBUNAL OFFICE