CASE NO: 2600473/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mr Colin Smith**
Respondent: **Nottingham City Transport**

AT AN ATTENDED FULL HEARING

Heard at: **Nottingham** **On: 31 August,1, 3, 6 and 7 September 2021**

Before: **Employment Judge P Britton**

Members: **Mr R Jones**
Mr J D Hill

Representation
Claimant: **In person**
Respondent: **Mr Kevin McNerney of Counsel**

JUDGMENT

1. All claims are dismissed save for that relating to Section 15 unfavourable treatment confined only to the remarks of RW on 18 October 2018.

2. Accordingly, we limit our award for injury to feelings to that finding and award compensation inclusive in the sum of £900.00.

3. The Respondent reserves its position as to costs subsequent to receiving the written reasons for this Judgment.

REASONS

Introduction; procedural history; and the Claimant's application to amend

1. The Claim (ET1) was presented to the Tribunal by the Claimant, him having prepared it himself, as long ago as 7 February 2019. He set out how he had been employed by the Respondent at its bus depot in Nottingham as a Maintenance Plant Fitter since 30 October 2013. Stopping there, this was a small team of three: the Line Manager/supervisor, Mr Ricky Wright (RW) and the Claimant worked alongside another long serving employee, Brian Stuart (BS). There was also, although he doesn't seem to have been part of the team as such, a health and safety person, Mr Feeney who was about to retire. RW reported in the management chain[1] to the Engineering Manager, Graham Smith (GS), who in turn reported to Gary Mason (GM) who was the Engineering Director. He in turn reported to the managing director, Mark Fowles. The Respondent had an HR team of five people in respect of which the Head of HR, was Ben Potgieter (BP) and for our purposes in the otherwise four person team reporting to him where two Senior HR people, namely Sheila Swift (SS), who had very long service, and Lynne Aldred (LA) who had only arrived at the beginning of the year.

2. Essentially, what the claim was about is that on or about 12 October 2018 the Respondent advertised internally and externally for a Maintenance Team Leader. On learning of the same the Claimant was of the view, and which may have been shared by BS, that it was wrong that this job was being advertised because it essentially covered some of the work the two of them had done and for which they had not received any extra pay, and indeed had been refused it following a job evaluation exercise and which had been completed about two years previously. They had raised a grievance at the time in respect of that and it had been dismissed.

3. His second concern as per the grievance that he raised on or about 16 October 2018 following seeing the job advert, was that the job description for this role, including as it did a requirement for a specified electrical qualification, was skewed against his chances of success; but the core point of that grievance was that this job ought not to be there in any event.

4. To cut a very long story short at the heart of his claim was that in the context of discussing the vacancy and that he was of a mind not to apply for it for the reasons we have just canvassed, the Claimant had discussions on 18 and 19 October 2018 with RW. From the evidence we have heard encapsulated it would be that on the first occasion it may well be that BS was also involved in the discussion about whether or not to apply for the new role. They discussed that perhaps BS might apply, but on the other hand he was reluctant as he was nearing retirement and intended in the run up thereto to reduce to working 3 days a week. Therefore they discussed whether the Claimant, albeit reluctantly, should apply, but he needed the reassurance that if he did GM in

[1] During the period of material events Liam O'Brien commenced his employment on 23 August as Chief engineer. He was at the Trent bridge Depot rather than the main depot in Parliament Street and did not line manage the Claimant until after the retirement of GS in March 2019

particular would look favourably at his application we surmise because the Claimant suspected that he was against him. The Claimant's case as per the ET1 and the subsequent particularisation to which we will touch upon, is that RW came back later that day and informed him that having spoken to GM, he would not get the job. This was as stated essentially, (a) because GM didn't like him; (b) because of the Claimant's sickness absences and which brings in the disability issue taking at this stage the claim at its highest on the basis that the absences being discussed related to the time the Claimant had needed off for surgery relating to his having Carpel Tunnel Syndrome (CTS) ; and (c) because he was via his solicitors, Thompsons, pursuing a personal injury claim against the Respondent alleging that it was liable for his having become afflicted with HAV, otherwise known as White Finger. It has in the run up to today been conceded by the Respondent that both of these conditions constitute disabilities, and did so at the time of material events, pursuant to Section 6 and Schedule 1 of the Equality Act 2010 (the EqA).

5. Suffice to say, that having had that second conversation the Claimant says that the following morning prior to the first meeting viz his latest grievance to be held later that day with RW and SS, he asked to RW to confirm what he had said. The Claimant covertly recorded that conversation on his mobile. The transcript starts at Bp[2] 336 in the joint bundle before us. RW confirmed this was the view of GM and therefore of the Respondent. At the grievance meeting that afternoon following RW denying any such conversation, the Claimant disclosed that he had covertly recorded what RW said and alleges that RW and SS were highly critical of him for doing so. The Claimant raised thereafter a second grievance about that and what GM had told RW. Cut short the Claimant pleads that as a result of raising those issues and also GM's antipathy to him, he did not get the job having eventually decided to apply for it and when it was obvious that he was the best person qualified. Instead it went to an outsider, namely Troy. Also his grievances were nor properly investigated and also conducted unfairly by in particular GS and GM. And so the Claimant's claim put very simply is that there was a chain of causation so to speak starting with the opinion voiced to him by RW stretching through to the handling of the grievances and his not being selected for the post.

6. Not labelled as such was were the heads of claim engaged whether it be pursuant to the Employment Rights Act 1996 (the ERA) or the Equality Act 2010 (the EqA).

7. In due course a response (ET3) was presented by the Respondent via its solicitors essentially defending the case and stressing that no part of the reason for not promoting the Claimant into this role was because of his disability if that was a claim or, and it was to some extent doing its best with a muddled claim, that might encompass such as harassment and victimisation.

8. Subsequent to the Tribunal receiving the ET3, there were four case management hearings followed by at least four preliminary hearings whereat

[2] Bp=bundle page.

various Employment Judges did their best to try and get the Claimant to frame his claim in a way that was manageable and in terms of heads of claim clear in order that the matter could proceed. That is why it has taken so long to get here. Of most significance is that by the time of the second preliminary hearing heard by Employment Judge Head on 4 August 2020, the Claimant had the benefit of Mr E Benson of the Nottingham Law Centre. He is known to the Tribunal as a retired solicitor of some eminence in Nottingham with a litigation background who has given his services post retirement pro bono to what he assesses as being meritorious cases through his work at the Nottingham Law Centre. Summarised he is a person who the Tribunal knows to be very able at assisting unrepresented people with an ability to clearly grasp what is needed and in that sense give assistance to not only a Claimant but of course the Tribunal and Respondent by making clear the claims pursued at law and why and providing a concise summarisation of the key issues.Through his efforts by about 9 September 2020 this had by and large occurred in the form of what we shall refer to as the Scott Schedule as to which see Bp 16 - 30.

9. There was then a further preliminary hearing before Employment Judge Read on 9 July 2021 which on the face of it must have been because of applications by the Respondent's solicitors and because he adjudicated on whether to make deposit orders. Employment Judge Read made two Deposit Orders in relation to what we might call the harassment victimisation issue. The Claimant decided to abandon those two claims.They were accordingly dismissed by the Judgement issued by Employment Judge Victoria Butler 14 July 2021. He had also by then abandoned another limb of his harassment/victimisation claims via Mr Benson on 1 July[3] and to which we shall return. He had pro bono representation by Mr J Stuart BA (Oxon) Paralegal, Nottingham Law School Legal Advice Centre FRU at that hearing. We understand this may have been arranged by Mr Benson who was by now seriously ill although he clearly remained clearly capable to assist the Claimant. As to why we shall come to. What is fundamental to therefore stress is that the Claimant had the benefit of an extremely experienced and competent lawyer assisting him and also Mr Stuart at that hearing[4]. Finally, there had been a considerable delay in terms of directions for this Hearing before us because of all that case management and therefore there was late agreement on the final bundle which was last month and the exchange of witness statements occurred only very recently. That does matter because witnesses and in particular those for the Respondent are being asked to now recall matters which in effect only span in terms of the events a period from mid-October 2018 to the end of January 2019.

10. What is then of fundamental importance is that Mr Benson, albeit the Claimant may say he was now unwellso could not give him as much support as previously, was able to write into the Tribunal with considerable fluidity circa 18 August making application for Mr Dayne Astill, the Trade Union rep of the Claimant to appear at this Hearing and produce notes he might have kept of various stages of the internal process. Second, he was also able to agree as of

[3] During the hearing we received some additional documents this is one of them. As is Mr Benson's e-mail of 1 July 2021.

[4] The FRU ceased to act on the 17 June 2021.

17 August 2021 a timetable for this matter on behalf of the Claimant; and most important of all at around that stage agree a list of issues which is before us. And finally, prior thereto on 1 July 2021 he had informed the Tribunal and Stephen Britton (no relation to this presiding Judge) who is the instructing solicitor for the Respondent that "for the avoidance of doubt therefore the Claimant is still proceeding with the following claims".He proceeded to restate them by reference to a table therein which was an extrapolation of the Scott Scheule. He numbered the claims proceeding. That list of course has to be adjusted given the claims thereafter dismissed.

11. Despite all that, before us the Claimant sought to raise a further head of claim based upon s13 EQA direct discrimination relying on a like comparator, Gavin, as having been allegedly refused this job having applied for it, because he was also disabled. There is no such claim before the Tribunal. It is not on the final tabulated schedule prepared by Mr Benson. Other claims relying upon the EqA including unfavourable treatment pursuant to s15 are. This goes to the remarks of RW and the causal link to not getting the role as opposed to Troy. Nothing in the table stating " **for the avoidance of doubt**"[5] as being the Claims proceeding mentions Gavin at all. What it means is that the Tribunal is not prepared at the behest of the Claimant to widen out this proceeding so late in the day when there has been so much effort gone into that which it was agreed was to be litigated before the Tribunal. To do so would be contrary to the overriding objective and the interests of justice requiring as it would further preparation by the Respondent and potentially the expense of an adjournment. Thus we refuse his application

The heads of claim.

12. As per the tabulated schedule, allowing for the withdrawals, the following are the Claims before us.

13. **Allegation two**. *on the 18 and 19 October 2018 Ricky Wright informed the Claimant that he would not get promotion (to Maintenance Team Leader) because he had taken the time off for CTS and the Engineering Director did not like him because he was suing the Respondent for personal injury in connection with HAVS.* This is a claim for discrimination arising from disability which is the shorthand for a claim based upon Section 15 of the EqA.

14. **Allegations three and ten**: *"The Claimant not appointed to the Team Leader position because of the time taken off due to CTS, the Engineering Director did not like him and he was suing the Respondent in respect of HAVS; and because he had complained of discrimination and had taken steps (by making the recording) to prove discrimination".* That is also brought as a Section 15 claim but additionally as a victimisation claim pursuant to Section 27 of the EqA.

15. **Allegations 4;6 and 7; and 11**: The Claimant was:

[5] Our em phasis.

- *accused of blackmail and gross misconduct by Sheila Swift and Graham Smith, of holding a loaded gun to the Respondent (Graham Smith on 22 November 2018), and*
- *Sheila Smith was aggressive to the Claimant on 19 October 2018.for complaining about Mr Wright's discriminatory remarks and making a recording to prove it.*

16. Thus there was first a claim pursuant to s15 of the EqA; second for harassment pursuant to s26, and third for victimisation pursuant to s27. Stopping there, the last limb of that head of claim in fact went with the dismissal by EJ Victoria Butler following the non-payment of a deposit in relation to it. Thus, there is no claim remaining relating to the 19 October viz Sheila Swift (SS). And also went was that she harassed him by way of blackmail remarks on 22 November. What is left is whether Graham Smith (GS) at the meeting on 22 November 2018 harassed him by the remark *"loaded gun to head"* and whether SS victimised him by referring to *"sounds like blackmail"*.

17**. Allegations 5,9 and 12**

*On 22 November and in the letter from Graham Smith of 20 November 2018, (*which incidentally is an error because it's the letter of SS of that date), *the Respondent stated that the Claimant's recording of the conversation with Ricky Wright would not be taken into account in any future grievance meeting with the result that the Claimant's second grievance was rejected at all stages (Note: although this applied to the meeting of 22 November 2018, the Claimant's complaint is in respect of the refusal to take the recording into account in subsequent grievance meetings.*

18. Cross referencing to the Scott Schedule this accusation had also related to Ben Potgeiter and which goes the stage 3 grievance appeal hearing heard on 22 Janaury 20219 and the outcome on 25 Janaury 2021 whereby the appeal was dismissed. But that was withdrawn circa 1 July 2021.

19. So those are the claims before us.

20. In passing the Claimant resigned on 8 April 2019. There is no claim relating thereto before us.

Findings of fact and first observations and the application of the law engaged

21. Against that background we will therefore now deal with our findings of fact as we do so we will bring in the definitions of the sections engaged as above as per the EqA.

22. As to sworn evidence first we heard from Dayne Astill. Unlike the other witnesses, his evidence in chief was not by a written witness statement. This is not a criticism of him and it is not surprising as he appeared at the request of

the Claimant by way of witness summons including that he produce notes of any of the meetings which he attended with the Claimant as his trade union representative. He was was at all the meetings save for the job interviews to which we shall come. He is employed by the Respondent as a bus driver. But he is also the senior shop steward on behalf of Unite. He produced some notes (Bp380-386).

23. He really could not assist this Tribunal much at all. He did say, and this goes to the covert recording issue, that the Claimant had passed the recording through to him at Unite for it to be transcribed but that the Claimant then seems to have put that on hold for a while. He couldn't really assist much more on that issue. He attended every grievance meeting with the Claimant from that on the afternoon of 19 October 2018 all the way through to the final grievance appeal outcome which was heard on 22 January 2019 by Managing Director, Mark Fowler and the Head of HR, Mr Potgieter. In his evidence Mr Astill never said that any of those meetings was conducted in an oppressive or improper manner as alleged by the Claimant. When dealing with the feedback the Claimant received shortly after being informed that he had not got the job which was 7 December 2018, (Bp286), and regarding a suggestion by the Claimant that in particular Lynn Alred of HR, and to whom we shall shortly return, had been hostile, Mr Astill said there was nothing untoward in the way that the meeting was conducted. Indeed, had there been then he would have protested and if necessary walked out with the Claimant. His notes likewise give no support on these issues to the Claimant.

24. The we heard from the Claimant. There are elements of his evidence to which we shall return unless covered by the observations and first findings that we make under this heading.

25. . And then first for the Respondent Liam O'Brien (LB). He is the Chief Engineer, so he reported to GS who in turn would be reporting to GM. He only joined the business on 23 August 2018 along with Lynne Aldred (LA) who is in the HR team. He conducted with LA the second round of interviews for the post which had been advertised externally and internally. We accept their evidence supported as it was by the other Respondent witnesses and indeed DA; namely that where there is only a narrow pool available internally it does widen the potential for recruiting to external applicants.. What we can see from the control list of applicants for the role is that there were eight. Of those there were two internal applicants which is the Claimant and Gavin. The rest were external and who appear to have come through an online agency. Of those it appears that four were short listed: the Claimant, Gavin, a Mr Hamilton and Troy. We can see that Hamilton withdrew. The recollection of Sheila Swift (SS) is that Gavin withdrew. There is no evidence to the contrary. Thus at this second round of interviews there were two candidates, the Claimant and Troy. LB did not know the Claimant at all having been there for such a short while.

26. Taking her out of sequence and because she obviously links to LB, during the hearing we heard from LA. She had only been there from the beginning of the year and only knew the Claimant in passing. There was a structured "crib sheet"

compiled by them for the interviews with the questions they wished to ask tailored to the core requirement of the job description which was before us. Suffice to say that Troy scored better than the Claimant. The issue becomes in essence, and because it is Claimant's case on the non selection issue, as to whether they acted perversely by under scoring him and unjustifiably finding his approach to the role when interviewed negative when it was not and because they were acting at the behest of GM to make sure he did not get the job.. We will deal with that in due course.

27. Returning to the sequence of evidence giving, following on from LB we heard from GS. Prior to his retirement in March 2019, he had been employed by the Resondent for some 17 years. He has a very long history in the bus industry and he was of course the Engineering Manager at the material time. He comes into the scenario first because with Sheila Swift (SS) they conducted the first round of the interviews for the role on 14 November 2018. The notes for both are before us commencing at Bp233. Late in this Hearing the Claimant, who had been in touch with Troy produced some documentation from the latter. In passing it turns out that he only lasted a matter of weeks in this job and may have been suspended for incompetency after only five days. As to whether that supports the Claimant in terms of raising an inference as to the integrity of the slection process, we shall return.

28. What we can glean is that he seems to have been invited to a first interview on 9 November, whereas the notes of GS and SS date both his interview and that of the Claimant as having take place on 14 November . Just dealing with that soupçon, we know that before Ricky Wright (RW) was removed from the process post the second grievance, he had been undertaking with SS the stage one interviews, because the person appointed would work under him. He was substituted by GS. In passing, we know that the Claimant was initially very reluctant to apply for this role, but was persuaded to apply on 13 November 2018, which was past the deadline, following the repeated urging of SS. Why would she do that if she was part of the alleged conspiracy of GM to thwart the Claimant? Her actions do not support that allegation.. What we do have is that GS and SS are absolutely clear these interviews all took place on the 14th. The notes of the interviews reflect that as do the invitations to the next stage. We found both of them to be honourable witnesses. The Claimant has not produced sufficient by way of an inference that their actions have a sinister connotation.. Thus we conclude as suggested by SS, and because it makes sense, that the interview of Troy was put back so that the candidates were interviewed on the same day.

29. Furthermore , they put the Claimant forward to the stage two interviews. Neither doubted his technical skills. This was to be the same view of LB and LA. But GS in particular was concerned that the Claimant was displaying a negative approach to the role itself when of course they were looking for positive commitment. Nevertheless with some persuasion from SS he agreed that the Claimant should go forward. GS is clearly very experienced and we thought also fair minded. He obviously put aside his reservations because he hoped that the Claimant might display a more positive attitude at the next round. That

finding does not square with them being hostile to him and about doing the bidding of GM.

30. That brings us to their final involvement in the scenario and the allegations of victimisation and harassment against them.. Put simply together they heard the first stage of what in effect became the Claimant's second grievance albeit combined with the first[6] because there had been an unequivocal withdrawal of it on 22 November 2018. The facts are not in dispute, the question becomes did they as a matter of law harass the Claimant pursuant to Section 26 and/or victimise him pursuant to Section 27 at that meeting and in the run up thereto on 20 November when SS informed the Claimant that for reasons which we shall come to, he could not rely on pursuing his grievance against RW because of his failure to provide the promised transcript of the covert recording .

31. We now come to the evidence of Gary Mason (GM). He heard the second stage, in reality a first appeal, of the Claimant's combined grievance and which took place on 2 days namely 10 and 12 December 2018 as to which the minutes are at Bp288 onwards. There is an issue as to whether or not he should have heard that appeal given the clear issue of RW and thus the alleged antipathy of GM to the Claimant and the implication that he thwarted his appointment to the new role. . But there is no such claim before the Tribunal. It is not an issue on the agreed list of issues. Or in the " *For the avoidance of doubt"* e-mail of Mr Benson of 1 July 2021. In any event GM says that he played no part in the interviewing process. In that respect first GS and SS are adamant that he did not. We have already made plain that we find them to be witnesses of integrity and who would not be influenced as alleged.

32. LA and LB are equally adamant that GM had no involvement and did not influence their decision to select Troy.. But is there any evidence that they were so influenced? There is an issue as to the second stage interview with Mr Troy. It is clear from the totality of the evidence, that he had been sent either a letter or an e-mail inviting him to attend for the second interview on the 5 December, which was when the Claimant would also attend for interview. The Claimant did. But Mr Troy did not attend.. Late documentary evidence provided by the Claimant from Mr Troy is that on the 6th a member of the HR team, Karen, emailed him querying if he was still interested and if so why had he not turned up for the interview? And he explained in reply that he had not received the invitation and had been trying to unsuccessfully contact the Respondent. That doubtless explains why he was then interviewed a few days later. The notes of the interviews for that second stage do indeed for the purposes of the Claimant contention that there is something suspicious about the process, still have the same date on the top for both of them namely 5 December. But the evidence we have received from LB and LA is that the interview sheet for each candidate would have been topped so to speak by them at the start of the day in terms of each of the pro forma interviews with a list of questions and cribs they were looking for. And so, it must mean that it was simply not changed for Mr Troy. Is there something sinister in that? Which is what the Claimant suggests doing his

[6] The first for our purposes being that which was raised post the advertising of the post and which had a first stage grievance hearing on the afternoon of the 19 October 2018 before RW and SS.

valiant best. Well the evidence there is really in what they said and the records of the interviews. Yes, Mr O'Brien (LB) didn't record comments at each stage of going through the questions with Mr Troy as he did with the Claimant. He just ticked the boxes as compliant with appropriate scores. But he did do a summary at the end of the form of his observations and conclusions as to how Mr Troy had interviewed.. Miss Aldred (LA) was fuller. In her entries in terms of the answers to each question. But the bottom line is that both of them said that the Claimant simply didn't show the enthusiasm and positivity for the role unlike Mr Troy.. It follows that their evidence is consistent with that of GS and SS.

33. The point is that when one looks at what they were asking for as per the job description technical skills was not an issue. Just as with GS and SS they considered that the Claimant had the technical skills required for the role. And looking at the questions which LB and LA had prepared (interviews are at Bp270-285) none of them are related to technical ability. They are all focused upon team leadership skills; understanding how to move the business forward; commitment to the need for the role. And in terms of the answers given by the Claimant, just as he had been before GS and SS (Bp233-234), he was somewhat negative and which of course fits with his belief that the role should never have been considered necessary in the first place as per part of his grievance dated 16 October. And so at the start of the second interview when asked what he would do to take the business forward he replied that he would go back to where they had been before the changes two years before because he didn't think the current regime worked . Furthermore he didn't see the need to tightly man manage the small team because what would he have to contribute to managing such as BS. And the evidence of LB and for that matter LA on this point was so clear, They weren't undermined by any cross examination. LB was the new broom from Arriva. Coming as he was from a larger business than the Respondent he had his plan for how he wanted the maintenance department to run and integrate more into the overall business operation, and thus was looking for commitment and an ability to take on new practices such as operated by Arriva to the new role. And he was not getting it from the Claimant. And we repeat that his conclusion is consistent with the other witnesses on this issue.

34. It follows that we conclude that if there was any inference to be drawn from the Troy issue, it is rebutted by the Respondent because of the weight of the evidence. Thus it follows that there is no causative link between the alleged opposition of GM to the Claimant being appointed and his non selection. He failed to get the job primarily because he did not show the commitment that was needed.

Conclusion on the non selection issue

35. Thus as to the claims based on the non selection issue they all therefore fail.

Final witnesses

36. As to the remaining witnesses for the Respondent, as is by now obvious we heard from SS. Finally we heard from Mr Potgieter who heard with Mr Fowler the stage 3 grievance appeal hearing on 22 January 2019.

The Ricky Wright Issue and the allegations of harassment and victimisation against GS and SS: interface to the grievances

37. We have already touched upon much of this. Go to the back of the bundle and which deals with the disciplinary investigation relating to Mr Wright (RW) commencing circa 29 January 2019, (Bp341), and thence the handing out of a final written warning to him over what he said to the Claimant viz GM, piece it together with the Claimant's evidence, and then factor in the all-important transcript of the covert mobile phone recording undertaken by the Claimant on 19 October 2018,(Bp336), and what we get is as follows.

38. So, the Claimant had this first discussion with RW at the end of work of 18th. He initiated that conversation. To be told that he would not get the job even if he applied and because of GM may well have caused him to become depressed and possibly tearful. And it may be that the Claimant already suffered from anxiety and depression. There is a reference to this as a diagnosis in the sick notes from January 2019 when he went absent never to return prior to his resignation from the employment. The Claimant has inferred as such in his evidence and cross examination of the Respondent witnesses. However, we wish to stress that there is no claim for disability discrimination relying upon anxiety and depression before us. Furthermore there is no claim of constructive dismissal.

39. In any event the following morning the Claimant having dwelt upon it all wanted to speak further to Ricky (RW). That takes us to the transcript at Bp336. The Claimant was seeking to get RW to confirm what he had said the evening before about GM and why he would not get the job. He did not believe that RW would tell him the truth if he thought it would then get back to GM and so he decided to record said conversation covertly having been on the ACAS website. Stopping there, the Judge to assist his colleagues, has looked at legal authorities on this subject. The admissibility of such a recording is not as clear cut as the Claimant thinks because albeit a tape recording can be deployed before a Tribunal and particularly where it relates to matters alleging discrimination, it may not be admissible depending on how it might have been obtained : see ***Williamson v Chief Constable of Greater Manchester Police EAT034609***.

40. That is not however the core point, but that there was an element of trickery by the Claimant may explain how SS felt on the afternoon of the 19th and thus was critical of the Claimant.

41. As to why there was an element of trickery requires reference to the transcript of the covert recording. Thus:

"*CS: Gosh I thought they would never go.*

RW: Right fire away Colin.
CS: Right this grievance is stage one is it.[7]

Going back to the conversation:

RW: Yes, it is

CS: Ok now because I'm an open type of person you said yesterday that mmm, I don't know whether it's to do with you or Gary, it's to do with my sickness record. Was it you, was it Gary which one was it?

RW: Well off the record.

CS: Yes.[8]

RW: It's Gary.

CS: So, Gary said even though he knows that it's caused by this place. Does he know I have got a claim in against the Company?

RW: Yes, he does.

CS: So again, I think he's using this prejudicing me because of them two issues.

RW: Right ok then where are you coming to?

CS: So, when I bring this up in the meeting are you going to deny it or are you going to agree with it.

RW: Well I will have to deny it I've got not fucking choice.

CS: Even though you know it's true you will still deny it.

RW: Yes, but I told you off the record cause if he fucking knows that ive told you the fucking shit I'm going to get it will be more than my fucking job.

CS: Yes, but can you understand.

RW: Yes, you can suggested can't you understand how I feel knowing that's the reason.

RW: I don't think it's a reason it's just a reason that will go against you he would prefer someone from outside. ……

RW: …..then yes we look at the sickness record when we look at promotion it's as simple as that yes.

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[7] That is referring to the fact that the Claimant had of course put in the first grievance by now relating to the job issue which was due for hearing that afternoon at the first stage by RW and indeed Sheila Swift as per procedure. The Claimant had got lined up his Trade Union rep.

[8] The Tribunal's emphasis

CS: That's discrimination because obviously.

RW: Potentially the problem that you have got is proving it…"

42. On the afternoon of 19 October the first stage meeting for the grievance duly took place. The Claimant was accompanied by Dayne Astill (DA) as his TU rep. The Claimant put it to RW that he had said that he wouldn't get the job because of GM. This got a response from RW as to which see the minutes at Bp223:

"*Having discussed qualifications*

CS: You should have you have copied them. I will be discriminated against because of my sick record I've had Carpal Tunnel operation and also have a claim in against the Company for Hand and Arm Vibration. I asked RW for an off the record chat and he told me I wouldn't get the job because of my sick record, my claim and Gary Mason didn't like me. Do you deny this?

RW: Yes

CS: Well I recorded that conversation so can prove you said this.

RW: You asked for an off the record chat which you then taped?

CS: I wanted to know the reason I wouldn't get the job I've checked the legalities of covert recordings I have done nothing wrong.

SS: I beg to differ. If Dayne had come to this meeting and said can I take the meeting rather than take notes I would have said yes provided I can have a copy of the tape to also take my notes from. It is totally unacceptable for you to do what you have done I am sure DA will have something to say about this.

RW: Can we have an adjournment I'm afraid I can't go on at this presently. I can't believe you would do this when all I've ever tried to do is to help you".

43. So, they had an adjournment. And the Claimant raised the point again after that in saying the following:

"*Today, I told RW I felt as though I was being discriminated against. RW said I wouldn't get the job because of my sickness record and the fact that Gary Mason doesn't like me.*

SS: CS this is important, did you use the words "off the record chat," if you used the words "off the record" then proceed to covertly record this conversation, we deem this as breach of trust.

CS: I can't recall. I feel discriminated against and my sick record etc is being used against me and I felt forced to prove as I was being discriminated against……..."

44. There is no claim now against SS as to her observations as set out above. But what is incontrovertible is that the Claimant tricked RW into believing the conversation was off the record. Thus the comments of SS were

understandable and reasonable.

45. In any event, it was left that the Claimant would provide a transcript of the covert recording on the basis that he would therefore be deploying it as part of the current grievance. Piecing together the evidence, the Claimant gave the recording to DA the aim being that UNITE would transcribe it for him. Then the Claimant went on holiday.

46. Then what happened on his return is that he wrote to the Respondent on 5 November (Bp226). He said that he was withdrawing the current grievance which relates to the job advertisement/evaluation type issue and that he was doing this *"after talks with my Unite Union Officer*". Down the page, however, he said the following:

> "*I will, however, be submitting a new grievance very shortly with regards to being victimised and treated in an unfair manner through disability discrimination with regard to the position of Maintenance Team Leader a position I was well suited for but not able to apply for because the two people who I had believed had discriminated against me are the two people who would be my direct superiors and of course that's RW and GM".*
>
> He also said this:
>
> *"As well as my grievance I will also be submitting a transcribed recording that I believe is proof of discrimination".*

47. He issued this second grievance on 7 November 2018 (Bp228). He raised categorically the issue of RW and what he had said and *"that he had suffered due to discrimination to my disability".* On 7 November SS responded (Bp229). She acknowledged the second grievance, but she was not prepared to permit him to withdraw the first because they were intrinsically linked. She is of course correct. Therefore, both would now proceed to a further grievance meeting. She then stated:

> *"This recording appears in your mind to play a significant part of your claim of discrimination. We therefore cannot properly investigate your claim if you have not produced this audio file as evidence as Ricky does not recall details of this conversation.*
>
> *As your second grievance does involve Ricky Wright it would not be appropriate for him to take any further part in the grievance meeting and so we will arrange for this to be dealt with by Graham Smith, Engineering Manager* ***as soon as we have received your audio recording".***[9]

48. The Claimant, it seems in concert with a senior UNITE official and not DA, decided circa 13 November when he put in his job application (Bp230) that he would not provide the transcript. The Claimant suggests that this was because there was no need for him to do so at that stage as he was going down the job application route. He would only need to continue with the grievance if he didn't

[9] Tribunal's emphasis .

get the job. This in fact is clear from the minutes of the grievance meeting on 22 November to which we shall shortly come. But he did not tell the Respondent of this before the meeting.So in the immediate run up to this grievance hearing on 20 November SS wrote to the Claimant pointing out that they hadn't had the transcript (Bp261).

"…*You should be aware that we will not able to investigate your claims of discrimination with Ricky due to the lack of the audio evidence therefore you will not be able to refer to any of the content of your recording at this meeting nor will you be able to introduce this recording as evidence at any further stages of the grievance procedure should you continue to be dissatisfied with the outcome of the meeting".*

49. That we agree with Mr Potgieter is a discreet reference to the then grievance, it doesn't rule out that the Claimant could if he brought a third grievance i.e. if he didn't get the job, deploy the transcript if he disclosed it.

50. In any event we now come to the grievance meeting on on 22 November as to which the minutes commencing at Bp263. GS was now of course hearing the grievance with SS instead of RW. DA was present as the Claimant's TU rep. The issue of the non disclosure of the transcript or indeed the recording, which had never been produced or thus played by the Claimant came up:

"SS: you can't use this evidence now because you've had a couple of weeks to submit the recording you have and to give us an opportunity to investigate your claim. You chose not to supply this recording and therefore we can't investigate your claims we therefore have to deal with the evidence we have in front of us.

GS: This is only proven if RS agrees he said this, and recording could prove this so it's one of those things. That's of course because RW denied it.

Claimant: My advice was to apply for the job as I had a better discrimination case if I applied for the job and didn't get it because if I had got the job I can't have been discriminated against.

GS: ***Your sat there with a loaded gun at our heads get the job then that's okay you're not discriminated against, but if you don't then you are going to fire the gun by using a recording as evidence in a new grievance.***[10]

SS: If you do get the job how are you going to work with RW who will still be the person you have to report to.

CS: I will change my grievance and be aggrieved that he tried to stop me applying for the job and then supply the recording if needed…."

51. Now there is no reference in there as the reader will see to SS using the phrase *"looks like blackmail"* but she agreed she did in her witness statement. This brings in harassment Section 26 and victimisation Section 27 and, in that respect, not only did Employment Judge Heap remind the Claimant of the definitions but we have done. Thus first as to harassment:

[10] Tribunal's emphasis.

S26 Harassment

"(1) A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect."

52. When the Tribunal considers this, and in particular limbs (b) and (c), context is highly relevant as to which *see* ***Richmond Pharmacology Ltd v Dhaliwal 2009] IRLR336EAT***. The Claimant had at least 33 days prior to the 22 November 2018 to produce this transcript having volunteered that he would do so on 19 October. But whether it be of his own volition or acting on the advice of UNITE he had not done so, and he did not produce it at the meeting. But it could not be clearer that his intention would be to use it if he did not get the job. Objectively the Tribunal has no hesitation in thus finding that when GS referred to *"loaded gun to head"* that this was in that context. He wasn't saying it because it related to the Claimant's disability. He was saying it because of the way in which the Claimant was playing cat and mouse with the transcript. As to SS the Tribunal concludes that although a better choice of words might have been appropriate, *"sounds like blackmail"* does not constitute harassment given the context. Blunt it may have been but in the context given his implied threat it was objectively justified and thus it would be unreasonable to conclude that it had the effect of being harassment.

53. That leads us to victimisation. the definition is at Section 27.

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a)B does a protected act, or

(b)A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

……

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

…"

54. The Claimant did make protected acts by alleging a discriminatory regime against him being successful if he did apply for the reasons we have rehearsed This was first on 19 October at the grievance meeting and second on 7 November in grievance number two. But was he victimised in terms of what happened i.e. whether it be SS in her response on 20 November or her comments and those of GS on the 22nd? The first detriment relates to not being allowed to continue the grievance against RW without proving the transcript. But the detriment isn't because he has made a protected act, it is because he will not produce the evidence to back it up despite stating on 19 October that he would produce the transcript and then repeatedly failing to do so.

55. Furthermore without the transcript how could the grievance relating to RW meaningfully proceed given he denied the conversation viz GM? It would be down to one man's word against another. As to the next two stages of the grievance before GM and then Mr Fowles and Mr Potgeiter, the position never changed. The transcript was only received after the stage three appeal hearing. Once the Respondent had it, the matter was investigated. RW, confronted with the transcript fell on his sword and was given a stage 3 warning. It follows that these allegations against GS and SS, do not constitute harassment or victimisation.

56. And as to the remarks on the 22nd of SS and GS they flow from exactly the same reasons we have found apply to the alleged harassment. Just as they do not constitute harassment, they do not constitute victimisation. Furthermore, there is objectively no detriment and because they are statements of fact as to the Claimant's intentions. It follows that we are with Mr McNerney and his submissions. The claims are misconceived and must fail. But in fairness to the Claimant, and should there be a costs application from the Respondent, on the basis that the claims were misconceived, or indeed any of them, this was not raised as far as we can see from the bundle as an application for a strike out before any Judge in the run up to today. Turn it around another way and it doesn't feature in the adjudication of Employment Judge Read who it seems was only asked to consider making deposit orders and as to which the Claimant in effect thereafter did not pursue those specific claims. .

Final conclusions

57. We now cement in that as per Allegations 3 and 10 alleged is that the Claimant's non appointment by LB and LA and thus the appointment of Troy by the Respondent, is also victimisation as per s27 as well as unfavourable treatment pursuant to s15. As to the latter from our findings it is self evident that his not being appointed to the job was not because of something arising in consequence of his disabilities of CTS and HAV. It was never an issue and not discussed. LB did not know of these conditions. And such things as absence record was not in any of the question sheets. The Claimant did not get the job because he failed at interview. As to victimisation there is no evidence before us that they knew of the grievances when they undertook the interviews circa 5 December and possibly viz Mr Troy on 14 December. Both were clear that they did not. As to being quizzical as to whether LA would have known because she was part of the HR team, the Respondent has over 500 bus drivers in its employ let alone the mechanics , administrators etc. In that sense the HR team have

their individual responsibilities and thus LA would have had no reason to be aware of or thus concerned with these grievances. We have no evidence to contradict her, and she was a credible witness. As to LB, he was at the other depot and unaware of the grievances, and there is no evidence to contradict him. He was also a credible witness.

58. The fact that Troy lasted such a short while is irrelevant in that on the evidence he sold himself well at interview and his CV at first blush was impressive. That he turned out to be a poor choice is thus irrelevant.

59. Thus we have now dealt with all the remaining allegations as per Mr Benson's " For the avoidance of doubt" schedule in his e-mail of 1 July 2021 save for Allegation 2, namely that the informing of the Claimant by RW on the evening of the 18th and morning of the 19 October 2018 that he would not get the job and for the reason we have now rehearsed, constituted unfavourable treatment pursuant to s15 of the EqA.

60. Section 15 of the EqA states:

> *(1) A person (A) discriminates against a disabled person (B) if –*
>
> *(a) A treats B unfavourably because of something arising in consequence of B's disability, and*
>
> *(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim*

61. The Tribunal has concluded as follows and in doing so it has referenced in the disciplinary investigation undertaken in relation to RW and the fact that he received a finding of misconduct and a stage 3 written warning (Bp 369) following a disciplinary investigation culminating in a hearing before David Astill, the commercial and operations director, on 21 March 2019. By now the Respondent had the transcript and faced with it RW did not deny what he had said. It was found that what he said was inappropriate and should not have been said in his capacity as the team leader.

62. As to our findings, the Claimant did not entrap RW into what he said on the evening of the 18th. Thus, it means that in that sense the damage so to speak might be said to have been done because then it was in the mind of the Claimant that his fears were confirmed that GM did not want him in the new role and inter alia because of his sickness absences, which relates at least in part to time off for the CTS operations and the PI claim in relation to HAVS. Yes RW was lulled into a false sense of security the following morning. The Claimant duped him by confirming the discussion was off the record and of course covertly recorded the conversation.

63. What the Tribunal concludes is that this was unfavourable treatment because it was to the Claimant's detriment to tell him what RW believed to be the situation rather than pass the Claimant's concern to say HR for them to discuss with the Claimant. This is particularly so as RW confirmed in the investigation that he had been concerned as to the Claimant's mental state and that the latter

became tearful in the conversation. So this was unfavourable treatment and in part it related to something arsing in consequence of the Claimant's disability ie the CTS absences and the HAVS

64. So, the Tribunal has concluded after a lot of thought that the claim of Section 15 unfavourable treatment is made out but in a very limited way confined in effect to the conversation on the 18th October given how the second confirmation was elucidated by the Claimant by the covert tape recording whilst misleading RW that it was off the record. No justification argument is advanced by the Respondent and it accepts vicarious liability. So on this one allegation only the Claimant succeeds to a very limited extent.

The Award

65. We are with Mr McNerney that the Claimant's conduct of matters from the morning of the 19 October 2018 onwards is relevant in assessing injury to feelings. There is no loss of earnings. Post the evening of the 18th the evidence of how the Claimant conducted matters simply does not show any significant injury, illustrative being his entrapment of RW and his ambushing him at the afternoon meeting. During the internal proceedings thereafter, which we have rehearsed there is no evidence that he ever showed any distress . His absence with stress and anxiety later on in events on the evidence before us is linked to his not getting the job and alleged shortcomings viz the grievance process.

66. However, we must of course follow the Vento Guidelines[11]. Given our findings it follows that this case sits very much in the lowest band of the three bands of Vento. The latest Presidential Guidance which of course we must take account of is to the effect that from 6 April 2018 the bottom of the lowest band would be £900.00. But for that guidance we would have awarded £750.00,

67. Pursuant to the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996, we may consider whether to award interest at 8/% from the date of the discrimination, namely 18 October 2018. But it is in our discretion. Hence the reference to "may". As we feel constrained to having to award £900, we decline to award interest and because given our findings it is not in the interest of fairness and thus justice do so. Accordingly, we confine our award for injury to feelings to £900.

_____

Employment Judge P Britton

Date: 28 September 2021

[11] ***Vento v Chief Constable of West Yorkshire Police (No. 2) (2003) IRLR 102 CA.***

CASE NO: 2600473/2019

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