EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr T Tabi	and	Royal Mail Group Limited

Hearing held at Reading on: 20, 21, 22 October 2020 (1st hearing – in person)
25, 26, 27 October 2021 (2nd hearing- by CVP)
2 November 2021 (in chambers - CVP)

Appearances:

For the Claimant: In person

For the Respondent: Mr I Hartley, solicitor

Employment Judge: Vowles

Members: Ms H Edwards
Mr P Hough

UNANIMOUS RESERVED JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties and determined as follows.

Direct Race Discrimination – section 13 Equality Act 2010

2. The Claimant was not subjected to race discrimination. This complaint fails and is dismissed.

Direct Disability Discrimination – section 13 Equality Act 2010

3. The Claimant was not subjected to disability discrimination. These complaints fail and are dismissed.

Reasons – rule 62 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

4. This judgment was reserved and written reasons are attached.

Public Access to Employment Tribunal Judgments

5. The parties are informed that all judgments and reasons for judgments are published, in full, online at *www.gov.uk/employment-Tribunal-decisions* shortly after a copy has been sent to the Claimant and Respondent.

REASONS

Submissions

1. On 4 January 2019 the Claimant presented a complaint to the Employment Tribunal with claims of race discrimination, disability discrimination and public interest disclosure.

2. On 26 February 2019 the Respondent presented a response and resisted all claims.

3. Preliminary hearings were held on 1 November 2019 and 19 March 2020. At the latter hearing the claim of protected interest disclosure was struck out but the claim was to proceed in the other matters.

4. On 1 June 2020 the Claimant presented an application to amend the claim by adding two further matters.

Split Full Merits Hearing

5. At the start of the 1st hearing the Tribunal granted, in part, the Claimant's application dated 1 June 2020 to amend the claim to include 2 further matters set out at paragraphs 1 and 2 of the application to amend and paragraphs 10 and 11 of the Claimant's witness statement. Those matters required further investigation and disclosure by the Respondent.

6. The Tribunal decided to hold a split hearing. Evidence and submissions regarding the 2 matters already set out in the current list of issues was heard during the 1st hearing. Evidence regarding the 2 further matters was heard at the 2nd hearing. Decisions on all matters were considered at the end of the 2nd hearing.

Evidence

7. 1st Hearing

   7.1 The Tribunal heard evidence on oath from the Claimant , Mr Tony Tabi (OPG), Ms Anita Boafo (OPG) and Mr Godfred Dodoo (OPG).

   7.2 The Tribunal also heard evidence on oath on behalf of the Respondent from Mr Balvinder Doel (OPG), Mr Alan Butcher (Head of Arrivals, Aviation, Security and Despatch) and Mr Kam Mahli (Night Shift Manager).

7.3 The Tribunal also read documents in a bundle with 242 pages and a further bundle of documents (unpaginated) by the Claimant.

7.4 The Tribunal also heard oral submissions from Mr Hartley and from Mr Tabi.

2nd Hearing

7.5 The Tribunal heard evidence on oath from the Claimant, Mr Tony Tabi (OPG).

7.6 The Tribunal also heard evidence on oath on behalf of the Respondent from Mr Kamaljit Juttla (Night Shift Manager) and Mr Alan Butcher (Head of Arrivals, Aviation, Security and Despatch).

7.7 The Tribunal also read documents in a bundle with 302 pages.

7.8 The Tribunal also heard oral submissions from Mr Hartley and from Mr Tabi.

Background

8. At all material times the Claimant was employed as an OPG at the Heathrow Worldwide Distribution Centre from 6 April 1998 to date. He is still so employed.

9. At the 1st hearing the Tribunal considered one claim of direct race discrimination and one claim of direct disability discrimination.

10. At the 2nd hearing the Tribunal considered two claims of direct disability discrimination.

11. The Claimant's race was described as of Black African origin.

12. The Respondent conceded that the Claimant was a disabled person at all material times by reason of the following:

12.1 Back pain due to an accident in 2007;

12.2 Neck and shoulder pain due to an accident on 5 December 2017;

12.3 Anxiety.

13. At the time of the events described below the Claimant's line managers were as follows:

13.1 LM1 – Mr Sital Shah

13.2 LM2 – Mr Alan Butcher

13.3 LM3 – Mr Kam Mahli

Direct disability discrimination – section 13 Equality Act 2010 (1st hearing)

14. This claim was described in paragraph 3 of the Claimant's witness statement as follows:

> *"Performing deputy manager's role at HWDC.*
>
> *In 2016 at HWDC the Night Shift Manager (Kam Mahli) agreed for me to start performing a deputy manager's role. Those who performed this role are paid an allowance on top of their wages or salary as this involves performing extra or different tasks. My line manager Sital Shah introduced me to the doc door staff and told them that I would be working under him to manage the area. After a meeting with the Night Shift Manager (Kam Mahli) and Section Lead (Alan Butcher) I was assigned the task of working with the shunters ie collecting information on their daily activities in the yard and then recording it. This I was told management would use it to reduce the number of shunters working in the yard in order to cut costs. Having performed this task I gave the information collected to Mohammed Choudhury. The work that I did with the shunters helped Royal Mail management to cut costs by reducing the number of shunters from 5 to 2. I had to stop working with Sital Shah to manage the doc doors after management refused to pay me allowance which is given to others who performed similar deputy manager role or duties. When I approached Kam Mahli to ask why I am not being paid any allowance, he asked me to discuss it with Mr Butcher. I approached Mr Butcher and asked about the allowance, he told me that he has asked resource to start paying my allowance. I still did not receive any allowance*.
>
> *I thought Royal Mail was an equal opportunity employer until two attempts to progress within the company was thwarted, one in 2010 at SLMC, and the other in 2016 at HWDC. Some senior managers have made it impossible for me to progress in Royal Mail…"*

15. The Claimant's account was supported by Mr Dodoo who said that Mr Shah had told him that Mr Tabi would work under him to manage the doc doors and that he performed this task for a period of time. He said that Mr Tabi also attended the Manager's briefing and told him that the deputy manager's role involved less manual work and he thought that this would help with his back pain. He said that Mr Tabi stopped doing the role after a period and told him that that was because he had not been paid the deputy manager's allowance as promised by Mr Mahli and Mr Butcher.

16. The Claimant alleged that the failure to pay him the deputy manager's allowance was an act of direct disability discrimination under section 13 Equality Act 2010.

17. *Section 13 – Direct Discrimination*

> *(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.*

18. *Section 136 – Burden of Proof*

(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.

19. There is guidance from the Court of Appeal in Madarassy v Nomura International plc [2007] IRLR 246. The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination, they are not without more sufficient material from which a Tribunal could conclude that on the balance of probabilities the Respondent had committed an unlawful act of discrimination. The Claimant must show in support of the allegations of discrimination a difference in status, a difference in treatment and the reason for the differential treatment.

20. If the burden of proof does shift to the Respondent, in Igen v Wong [2005] IRLR 258 the Court of Appeal said that it is then for the Respondent to prove that he did not commit or is not to be treated as having committed the act of discrimination. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof and to prove that the treatment was in no sense whatsoever on the prohibited ground.

21. The Tribunal took account of the relevant provisions of the Equality and Human Rights Commission Code of Practice on Employment 2011

22. The Respondent denied that the Claimant was performing the duties of a deputy manager or that he had been promised a deputy manager's allowance.

23. Mr Butcher said:

> *"Managerial allowances can only be paid to deputy managers who have undertaken an assessment process, formal training and passed a specific course and are called upon to cover managerial absences etc.*
>
> *I am not aware that Tony made any such application to become a trainee manager, nor that he completed any assessment process or formal training. Further I am aware that Royal Mail's HR services hold no record whatsoever of any such applications made by Tony in 2016 or in 2017.*
>
> *I can confirm that I have no recollection of stating to Tony that I would authorise any payment to him of allowances for the completion of managerial tasks either, including collection of information from the shunters.*

I can also say with certainty that if I had attempted to process such a payment I know that this would not have been made. This is because gathering information from the shunters is not a task which would attract any form of managerial allowance in any event – simply because it is not a managerial tasks and since it just involves gathering some information and noting it down using a clipboard.

Further and in any case I do not understand why Tony alleges that my agreement (of lack thereof) to pay him any such allowances was because of (or had anything to do with) his disability. ...

In light of this and for completeness, non-disabled employees in Tony's position would not have received these allowances and therefore I do not understand how Tony can alleged that he had been treated less favourably because of his disability in this regard.

In terms of the other (un-named) colleagues that Tony alleges completed the same duties-tasks as he did in 2016, and yet received this managerial allowances, I am not aware of any colleagues of his level receiving or having received such an allowance. This is because as I have stated above this type of work will not attract a payment of this allowance. I therefore strongly deny that I have discriminated against Tony as alleged or at all."

24. Mr Butcher's account was supported by Mr Mahli who said that the tasks which the Claimant said he was performing were not managerial tasks and would not attract managerial allowances. He said that if the Claimant wished to be considered for a trainee manager position he would have to make an application in response to an advert which would be dealt with by the HR Department. He said that he was the only person who could authorise managerial substitution on the night shift (in his position as the night shift manager) although Mr Butcher could do this in his absence. He said however that this can only be permitted if the employee has undergone the applicable application/training process in which he had no involvement.

25. In summary he said the reason the Claimant did not receive any managerial allowances was not because he is a disabled person but simply because he did not meet the criteria for its payment.

26. The Tribunal noted that there was no documentary evidence to support the Claimant's account. He said that it had all been done verbally. The Tribunal had no reason to doubt the accounts of Mr Butcher and Mr Mahli that for an employee to work as a deputy or assistant manager that an advert, an application and assessment and an appointment is required.

27. The Claimant had made a previous complaint in 2010 regarding his application for the role of deputy manager which had been rejected. He was then told in a letter dated 6 October 2010 from Mr Simon Wilsom, Mail Centre Manager:

> *"... Having considered all the facts in this case my decision is to uphold your complaint on the grounds that I can find no reason why you could not apply for the role of deputy manager.*
>
> *Please feel free to apply in the normal way should a position become available..."*

28. Accordingly, the Claimant was aware that for an appointment to a managerial position there was a requirement for a process to be followed if a position was available and that he should "apply in the normal way".

29. The Tribunal found as a fact that the Claimant had not been appointed, either formally in writing or verbally as a manager nor were the duties he alleged he performed managerial duties.

30. There was no evidence to support the Claimant's claim that the failure to pay him managerial allowance was less favourable treatment because of his disability (in this case the back pain). Also, there was no evidence that any other employee was treated differently in accordance with the evidence of Mr Butcher and Mr Mahli which the Tribunal accepted. The Claimant did not provide details of the identity of these alleged comparators.

31. Accordingly, this claim fails on the above grounds.

32. However, the Respondent also alleged that this claim was out of time and the Tribunal had no jurisdiction to consider it under section 123 Equality Act 2010.

33. *Section 123 – Time Limits*

> *(1) Subject to sections 140A and 140B, proceedings on a complaint within section 120 may not be brought after the end of -*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*

34. The matter complained of took place in 2016 and the Claimant ceased to carry out the duties he alleged before the end of 2016. The ET1 claim form was presented on 4 January 2019. The claim was therefore presented out of time by 1 April 2017. It was 1 year 9 months out of time.

35. The Tribunal considered the decision of the Court of Appeal in Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434 CA, that when an Employment Tribunal consider exercising the discretion under what is now s.123(1)(b) Equality Act 2010 there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule. The onus is therefore on the Claimant to convince the Tribunal that it is just and equitable to extend the time limit.

36. It was clear from the Claimant's evidence that during the events described above he had the support of a trade union representative, and was receiving support from his trade union.

37. The Claimant was asked during the hearing by the Tribunal why he did not present his claim until 4 June 2019 when the event complained of concluded by the end of 2016. He said:

> "*I decided not to do it at that time. I probably did not know I could make an ET claim, I didn't think about it that way at the time. I didn't discuss it with my trade union representative."*

38. The Tribunal found that since the Claimant had access to trade union support there was no plausible or reasonable explanation why his claim was not presented to the Tribunal within time and why it was delayed for so long. The Tribunal could find no grounds for extending the time limit under the just and equitable principle.

39. Accordingly, even if the Tribunal had found the Claimant did carry out the authorised managerial duties, and that the managerial allowance was not paid because of the Claimant's disability (back pain) the Tribunal would have found that it did not have jurisdiction to consider the claim.

40. Accordingly, this claim fails for the following reasons set out above.

    40.1 Not factually proved.

    40.2 No causal link with disability even if factually proved.

    40.3 The Tribunal has no jurisdiction to consider the claim because it was out of time and there was no evidence of any continuing act with the later claims and no grounds for any just and equitable extension.

Direct race discrimination – section 13 Equality Act 2010 (1st hearing)

41. On the night shift on 5 December 2017 the Claimant was struck by a YORK (a metal cage containing mail on wheels) and this resulted in the shoulder/neck injury which was conceded by the Respondent as a disability. He was attended to by a First Aider and advised to go to hospital. The claim is based upon the conduct of Mr Doel who accompanied the Claimant to the A & E Department. The Claimant summarised his claim in this matter in paragraph 7 of his witness statement as follows:

> "*7. Grievance case against B Doel*
>
> *B Doel picked me up from the A & E on the day of the accident and brought me back to HWDC. He said Kam Mahli asked him to do so. When he arrived at the A & E I have already been examined X-ray had been done and I was waiting for my X-ray results. When I was called to listen to the results of my X-ray, B Doel stood in the doorway eavesdropping on the conversation the doctor and I had in regard to my medical information. The door was not shut*

and our backs facing the door meaning we did not notice him until I left the room. The doctor said I was lucky that no bone is broken however there was in fact evidence of tissue damage (hence why I was referred for treatment after). B Doel came back to HWDC and reported fabrication to Kam Mahli. B Doel went on to say "… she told T Tabi that there is no fracture and she can't see any bruises due to his dark skin.. not only was this a false statement he had reported to management, but a covertly racist one too. Furthermore it is rather distressing that management went on to believe such a remark as evidence enough to decide I was fit to work again so soon after the accident. B Doel fabricated a statement used to report back on my health. Whether it was to bolster his position with those above him or to make his job easier when dealing with the paperwork and detailing after the accident, his actions went on to add to the distress of the accident. I went on to raise a grievance case against B Doel because of this. "

42. The Tribunal found that the comments of the nurse which were repeated by Mr Doel did not amount to less favourable treatment because of race. There was a reference to skin colour but it was an innocent repetition of the fact of the Claimant's dark skin possibly obscuring a bruise. There was nothing to suggest that Mr Doel would not have repeated the nurse's comments regarding a colleague's injuries to his managers in similar circumstances on his return to work, regardless of the patient's race and/or skin colour.

43. The Tribunal did not accept the Claimant's account that Mr Doel's account of comments were false. Mr Doel repeated the comments immediately on return to work to Mr Mahli. Mr Doel said:

"I was later instructed by Kam Mahli shift manager to attend Wrexham Park Hospital in order to check on Tony and to ensure that he could return to HWDC safely which I did.

I went into one of the consultation rooms with Tony to see a nurse who gave him his X-ray result and advised that there was no fracture and that she "couldn't see any bruises due to his dark skin". She also advised that there had been some swelling on the shoulder and prescribed him some co-codamol.

At no time during my time at hospital with Tony did he advise that he wished for privacy, or that he did not wish for me to listen to what the medical professionals were advising him and so I stayed with him when the nurse called him in to discuss his injury and examine him which was when the nurse said the comment above.

I then drove myself and Tony back to HWDC where we arrived at approximately 08.00am. Tony stated that he was well enough to drive himself home (which he did) and advised that he would be returning for work later that night as usual. However Tony didn't return to work that evening and reported sick.

When I entered HWDC Kam asked me for an update as to Tony's condition and so I repeated to him exactly what the nurse had said "as outlined above at paragraph 10)."

44. That account is entirely consistent with the information given by Mr Doel during an investigation in April 2018 into the incident as follows:

"Q – Did you overhear the feedback from the doctor to T Tabi about his condition?

BD - Yes I heard what the nurse said to T Tabi about his condition because I was with him at the time when nurse was doing check-up.

Q - If yes what did you hear?

BD - When nurse took T Tabi to the check-up room first she did physical examination and checked T Tabi shoulder for any fracture or bruises and after check-up she told T Tabi that there is no fracture and she can't see any bruises due to his dark skin. The nurse took T Tabi into the X-ray room to look at his x-ray report, she told T Tabi that she can see a little bit swelling on the shoulder and asked him if he is taking any medicine. T Tabi told her that he is already on co-codamol painkiller because of his back problem. She gave T Tabi some more painkiller (co-codamol) and said that he might have to take a week rest for swelling to go down. I was with T Tabi all the time and he did not object at any time for me being with him in the room while nurse was doing check-up. Actually he was pleased I was supporting him."

45. Far from playing down the Claimant's injuries as suggested by the Claimant, Mr Doel raised, in terms of the nurse's comments, the possibility of bruising but that being obscured.

46. The Claimant in cross examination said the reason for the manager's letter to him regarding his absence on leave was an attempt to reduce the Respondent's record of accidents in the workplace and that was repeated by Mr Dodoo in his account at paragraph 9 of his witness statement:

"Most HWDC managers want to maintain zero accident record so when Tony had the accident an ended up at A & E in the hospital, some of these managers started to bully and harass him. Most accidents occurring at HWDC on the night shift are recorded as near miss accidents. This they do to keep the accident records clean."

47. The Claimant made a formal complaint about the 5 December 2017 accident but made no mention of race or race discrimination in that account. Eventually his grievance was closed by the Respondent because he had failed to attend meetings when requested. Later, on 2 May 2018, the Claimant requested that the grievance be re-opened. That was treated as an appeal against the closure of the grievance. Even then the Claimant refused to attend any meetings with the appeal manager, Mr Bob Lawrence, but he did submit some written

submissions. That clearly included an allegation of race discrimination but Mr Lawrence concluded in his written outcome to the claimant as follows:

> *"You then say:*
>
> [Mr Tabi] *Also following the departure from the A & E Mr B Doel recorded the following information "and after check up she told T Tabi that there is no fracture and she can't see any bruises due to his dark skin". I find this phrase constituted direct discrimination on the grounds of my race.*
>
> [Mr Lawrence] *I believe Mr Doel was simply repeating the words which he heard the nurse use. The phrase "dark skin" is not inherently racist to my mind and could be used to describe the skin colour of many different people from any different races. I also do not believe Mr Doel was saying this in a malicious or inappropriate way."*

48. The Tribunal agreed with the conclusion of Mr Lawrence. Comments were made by Mr Doel but they did not amount to less favourable treatment on the grounds of race.

49. Accordingly, this claim fails.

50. Additionally, the Respondent claimed that this claim had been presented out of time and that the Tribunal had no jurisdiction to consider it under s.123 of the Equality Act 2010.

51. The Claimant confirmed that he first heard of Mr Doel's comments on 7 December 2017. The ET1 claim form was presented on 4 January 2019. The claim was therefore out of time by the end of March 2018.

52. The Claimant confirmed that he had the support of his trade union representative when he made his grievance on 19 February 2018 and there was nothing to prevent him making a claim to the Tribunal at that time.

53. The Claimant was asked during the Tribunal hearing whether he had discussed this claim with the trade union representative, It was pointed out to him that there was no mention of race in the 19 February 2018 grievance. He said that was correct and it was only when he made his grievance that the trade union got to know about it. He was asked when he concluded that the comment was made because of race. He said, *"After thinking about it – I can't pinpoint exactly when I thought about that."*

54. The Claimant did not say anything about awaiting the outcome of the grievance or the outcome of the grievance appeal which was produced on 22 January 2019. In any event, the length of time the grievance took was due to the Claimant not engaging and refusing to attend meetings regarding the grievance investigation and the grievance appeal.

55. The Tribunal found there were no plausible or reasonable explanation for the failure to present the claim to the Tribunal within the three month time limit.

There were no grounds from which the Tribunal could extend time based upon the just and equitable principle.

56. Accordingly, even of the Tribunal had found that the comments of Mr Doel were racially discriminatory, it would have found that it had no jurisdiction to consider the Claimant because it was so far out of time.

57. This claim fails.

Direct disability discrimination – s.13 Equality Act 2010 (2nd hearing)

58. This claim was set out in paragraph 1 of the Claimant's application to amend the claim dated 1 June 2020 and in paragraph 10 of the Claimant's original witness statement.

59. The first part of the claim relates to the triggering of a stage 3 attendance review. The second part of the claim relates to the Respondent's alleged failure to deal with the Claimant's grievance.

60. Paragraph 10 of the Claimant's witness statement reads as follows:

> "*10 Wrongly triggering stage 3 attendance review (COD-Consideration of dismissal)*
>
> *Two senior manager Alan Butcher and Kamaljit Juttla both on the night shift and both mentioned in my B and H and grievance cases against GC and BD, have deliberately triggered a stage 3 attendance review (COD-Consideration of dismissal) in order to have me dismissed form Royal Mail. I was aggrieved by their actions. I requested that the case be investigated though the grievance process but this yielded no results. Even though the case was registered and assigned reference numbers (case number 8002893327 on 10/03/2020, case number 8002893328 on 10/03/2020 and case number 8002896592 on 13/3/2020) on the Royal Mail PSP system, yet the case was never investigated. These cases were passed to Gurpal Sidhu to investigate. Royal Mail did not inform me about this officially. I was just told by word of mouth by my union rep. Gurpal Sidhu wrote to me on 20/6/20 that he would not be investigating into my case as it would not be appropriate to accept these matters to go through the grievance procedure.*
>
> *I believe Gurpal Sidhu's reason for not investigating is not sound or just and that he did not investigate it, as he would have found genuine allegations of bullying and harassment. This left me rather confused as I put the case forward I felt grieved about the actions and behaviour of the two senior managers…"*

61. The Respondent's attendance policy states that an employee may be issued with warnings in the following circumstances:

    61.1 An attendance review 1 warning should they be absent for 4 absences or 14 days in any 12 month period.

61.2 If, having been issued with the attendance review 1, an employee incurs a further 2 absences or a single absence of 10 days or more, within the 6 month period following the date of the review being issued., an attendance review 2 may be issued.

61.3 If after being issued with attendance review 2 the employee incurs a further 2 absences or a single absence of 10 days or more, within the 6 month period following the date of the review being issued, that employee's dismissal will be considered under review 3 (COD).

62. Mr Juttla and Mr Butcher explained that attendance reviews are prompted automatically by the Respondent's PSP system once an employee is recorded as having incurred absences which exceed the above standards. When this occurs, the system prompts the employee's line manager via email so that the appropriate action can be taken.

63. The Tribunal bundle of documents included a copy of the Respondent's attendance policy, the Claimant's sickness record from April 2005 to November 2020, and a list of the attendance reviews from September 2013 to May 2020.

64. As stated above, the Claimant's first line manager was Mr Shah, the second line manager was Mr Butcher and the third line manager was Mr Sidhu. Neither Mr Butcher nor Mr Juttla were responsible for entering the Claimant's sickness absences on the Respondent's system. Mr Juttla was not a line manager of the Claimant and only became involved at the request of Mr Butcher because Mr Shah was not available and the PSP system had prompted a review 3 consideration of dismissal regarding the Claimant.

65. There was a history of attendance reviews 1 and 2 having been prompted by the system but not issued or actioned over a lengthy period of time from September 2013 to June 2018. Mr Juttla was asked to consider dismissal under the attendance policy due to consideration of dismissal (COD) prompts on 15 September 2018, 19 October 2018 and 2 April 2019 due to further absences. These prompts had not been actioned by the Respondent's managers.

66. Mr Juttla noted that a significant amount of time had passed without dealing with the considerations of dismissal (review 3) referred to above. Given the significant amount of time which had passed since the Claimant's final prompting of the consideration of dismissal in April 2019 Mr Juttla considered it inappropriate to take matters further under the attendance policy. Accordingly, he asked the Claimant to meet with him so that he could explain the position to the Claimant and formally draw a line under the review process. He made it clear that that was his intention and that he would not be dismissed but the Claimant refused to attend a meeting in any event. Mr Juttla therefore simply went ahead and indicated on the system that the Claimant would not be dismissed. That is noted as having been done on 28 June 2019. On the record of the Claimant's attendance reviews it is noted that on that date considerations of dismissal were "closed".

67. It follows that far from seeking to have the Claimant dismissed under the attendance review procedure, Mr Juttla decided to draw a line under the process so far as the Claimant was concerned and in fact his absence review record was reduced to zero. He decided not to proceed with dismissal.

68. In fact, the Claimant attended a further meeting with a more senior manager, Mr Andrew McQueen, on 8 January 2020 and Mr McQueen informed the Claimant that a later prompted attendance review had been in error and his attendance review record was again reduced to zero.

69. It is worthy of note that the Claimant had an extensive sickness absence record. From 2014 up to the accident on 5 December 2017 the Claimant had taken 172 days sickness absence. After 5 December 2017 to 7 October 2020 the Claimant took 50 days sick leave due to neck/shoulder pain and 244 days sickness absence due to stress. It was unsurprising therefore that absence review prompts were triggered automatically by the Respondent's PSP system. As stated above, neither Mr Butcher nor Mr Juttla were involved in either entering the absences or in prompting the reviews.

70. Accordingly, the Tribunal found the first part of this claim not factually proved.

71. So far as the complaint about the Claimant's grievance was concerned, neither the Claimant nor the Respondent had retained a copy of it. It appears to have been summarised by Mr McQueen in an email of 17 January 2020 (page 274) in which he stated:

> *"Tony wants to know:*
>
> *RMG – Internal*
>
> - *Firstly who is responsible for the negligence (not adhering to attendance review procedure)*
> - *If the individual is found negligent he wants the person dealt with under the code of conduct.*
> - *Why were his concerns he raised with his manager not addressed".*

72. The Claimant complained about the letter dated 20 June 2020 from Mr Gurpal Sidhu which included the following:

> *"I acknowledge receipt of your complaints regarding the attendance process*.
>
> *It would not be appropriate to accept these matters to go through the grievance procedure for the following reasons*:
>
> *This is not a valid grievance and seems to be relating to the attendance process and the way your sick absence and subsequent ill health retirement has been managed. The points that you have raised in your grievance can be raised as part of an attendance review 3 appeal hearing meeting as your attendance has*

not reached this stage, it is not a matter that is appropriate for the attendance procedure.

Therefore I will not be investigating your complaint and no further action will be taken under Royal Mail's grievance procedure."

73. The Claimant was aware that he could have gone through the attendance process but he decided to lodge a separate grievance. In the event, as noted above, the attendance review procedure, so far as the Claimant was concerned, was closed by Mr Juttla and a further attendance review raised in error was closed by Mr McQueen.

74. There was nothing in the Claimant's application to amend or in his witness statement which suggested that any of these matters had been done because of the Claimant's disabilities and the Tribunal found no causal link between the disabilities and the raising of the review 3 and/or the closing of the grievance investigation.

75. Accordingly this claim fails.

Direct disability discrimination – s.13 Equality Act 2010 (2nd hearing)

76. This part of the claim was set out in paragraph 2 of the Claimant's application to amend, dated 1 June 2020 and paragraph 11 of the Claimant's witness statement as follows:

> "11. *Improper recording of accident on duty on RM PSP system and keeping of records in the resources office.*
>
> *"Alan Butcher who was the investigating manager for my accident on duty on 05/12/2017 for which I was not culpable, have refused to follow proper procedures in recording the accident. Mr Butcher did not properly record the ERICA report or anything relating to the Accident on Duty on the Royal Mail PSP system. Together with my line manager (Sital Shah) and CWU Rep (Pal Allen), we went through the Royal Mail PSP system and also all the documents kept in my folder at the Resources Office, there was no record of my AOD, which happened on 05/12/2017. Due to Mr Butcher's action of not recording events properly, I am not being paid my Royal Mail sick pay whenever I am off sick and it relates to my AOD. Several absences relating to the AOD which should have been discounted have rather been used against me in the attendance procedure resulting in wage loss."*

77. Mr Butcher was involved in the initial investigations by recording what Mr Shah had told him on 5 December 2017 about the Claimant's accident. He recorded that Mr Shah reported that the Claimant had been hit by a YORK container, that he was in pain and had been seen by a first aider. Mr Butcher spoke to the Claimant who said he was in pain and after being seen by the first aider he was taken to hospital as a precaution.

78. Mr Butcher also interviewed the casual agency worker who had allegedly pushed the YORK into the Claimant and he also arranged a reconstruction of the incident.

79. The formal report of the incident, however, was completed by the Claimant's first line manager, Mr Shah. The ERICA injuries form records that:

> *"From the information given this incident WILL NOT be classified as a RIDDOR specified injury."*

80. That meant that the Claimant's injury would not be reported to the Health and Safety Executive. A summary of the incident was as follows:

> *"Run over. Strike by YORK being pushed by a casual worker. Postman's shoulder hit by a YORK container (loaded) pushed by someone else."*

81. That report was signed by Mr Shah and also signed by the Claimant. The final ERICA report again confirmed that the incident would not be classified as a RIDDOR specified injury and also included the following:

> *"Mr Tabi, the OPG that was struck by a YORK container has been non-committed to the investigation process. His immediate action was to notify a first aider to have it reported in the first aid book as an accident on duty, prior to discussing his condition. Several attempts to interview Mr Tabi to complete the investigation fully have been rejected by him even with the offer to visit him at home. The investigation shows that Mt Tabi was struck by a YORK container however it is not believed to be of a severity that would lead to any absence from work. At this time we challenge that this should not be recorded as a lost time accident*.

82. Mr Shah also completed a "SAFETY ROUTE CAUSE ANALYSIS" in which the incident was described in detail.

83. All the above documents were contained on the Respondent's records of the incident, and the documents were included in the Tribunal's bundle of documents used at both hearings.

84. The Tribunal found therefore that the first part of this complaint was not factually proved. It is difficult to see what more could have been done to properly record the incident.

85. The Claimant was absent on sick leave due to a shoulder injury caused by the incident for 23 days from 5 December 2017 to 27 December 2017.

86. Once again in the Claimant's witness statement, and in his application to amend, the Claimant does not mention disability discrimination. Indeed, during the course of his evidence both he and one of his witnesses, Mr Godfred Dodoo, said that the reason the incident had not been properly recorded and reported was because the Respondent's managers want to maintain a zero accident record and try to keep the accident records clean.

87. So far as the complaint about sick pay was concerned, the Tribunal found that the Claimant was paid properly under the Respondent's sick pay policy. He was paid full sick pay after the 5 December 2017 incident up to December 2018. Thereafter he was paid half sick pay to March 2019. Thereafter he was paid nil sick pay from March 2019 to October 2020. Then, under the policy his full sick pay was reinstated from October 2020 onwards.

88. The Tribunal noted that so far as sickness absence was concerned after the accident on duty on 5 December 2017 up to October 2020 when full sick pay was reinstated, the Claimant had 244 days absence due to stress and only 50 days absence due to neck/shoulder pain. The Claimant said that the stress was caused by the way he had been treated by his managers after the incident. There were four Occupational Health reports included in the Tribunal bundle, dated 29 May 2018, 8 October 2018, 27 June 2019 and 2 May 2019. In these reports both the shoulder/neck pain and the Claimant's stress were mentioned. It is clear that the Claimant reported that the stress was caused by bullying and harassment by his managers and not a direct result of the incident on 5 December 2017. It appears from the Claimant's sickness record (page 110) that during the period December 2018 to October 2020 when the Claimant was on half or nil sick pay, he is only recorded as having taken 5 days absence due to shoulder pain.

89. The Respondent's policy regarding "sick absence due to industrial injury or disease" was as follows:

> *"An employee who incurs sick absence directly due to an industrial injury sustained, or to a prescribed industrial diseased contracted at work on or after 1 January 1979 will be allowed sick pay at the same rates as above. However during the first 6 months (26 weeks) of any such absence the overall limits on sick pay across 4 years will not apply. The first 6 months (26 weeks) of any such absence will also be ignored when applying these maximum limits on sick pay across any period of 4 years. Any continued absence beyond 6 months will be paid according to personal entitlement and reckoned normally.*
>
> *The business reserves the right to satisfy itself on the advice of its medical advisors that absences are properly and directly attributable to injury sustained or disease contracted at work. The allowance of full rate sick pay is subject to all the following conditions.*
>
> - *The injury or disease must not be due to the employee's own serious and culpable neglect or misconduct.*
> - *The injury or disease must be accepted by the DWP (Department of Work and Pensions, formerly the DSS) as being due to an industrial accident or classified as an industrial disease.*
> - *Employees must comply with the general conditions for sick pay set out above"*

90. The Tribunal was satisfied, having considered the Claimant's sickness absence record which sets out the reasons for absences and the Respondent's absence policies, that the Claimant had been paid all that he was entitled to receive in company sick pay. This part of the claim was no factually proved.

91. Any periods during which less than full sick pay was paid, it was because of the Claimant's sickness absence record and reasons for his absences. There was no causal link with his disabilities.

92. Both the ERICA report and the route cause analysis report made clear that the injury sustained by the Claimant amounted to a bruised shoulder and was not sufficiently serious to be classified as a RIDDOR specified injury.

93. All the Occupational Health reports state that the Claimant was fit for work with appropriate support.

94. The first Occupational Health report referred to above states:

> *"Mr Tabi workplace issues will not have a medical solution and need to be addressed by management with him. I would suggest that this be carried out by someone who is not cited in his grievance for example a senior management in conjunction with HR… As Mr Tabi relates his symptoms to concerns at work, it is unlikely that they will fully resolved until he perceives his concerns are being addressed."*

95. Accordingly, this claim fails.

I confirm that this is the Unanimous Reserved Judgment in the case of Mr T Tabi v Royal Mail Group Limited case no. 3300046/2019 and that I have dated the Judgment and signed by electronic signature.

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Employment Judge Vowles

Date: *18 November 2021*

Sent to the parties on:

01 December 2021

For the Tribunals Office