EMPLOYMENT TRIBUNALS

Claimant: **M Mughal**

Respondent: **London Underground Limited**

Held at: **London South Employment Tribunal by video hearing**

On: **23, 24, 25 November and 9 December 2021**

Before: **Employment Judge L Burge**
C Bonner
P Adkins

Representation
Claimant: R Hodgkin, Counsel
Respondent: V Brown, Counsel

RESERVED JUDGMENT

The Judgment of the Tribunal is:

1. The Claimant's claims of race and religion/belief discrimination fail and are dismissed; and

2. The Claimant was not disabled within the meaning of section 6 of the Equality Act 2010 at the relevant time and so the Claimant's claims of disability discrimination are also dismissed.

REASONS

Introduction

1. The Claimant worked for the Respondent from 13 May 2019. Following an altercation at work and subsequent investigation, he became unwell, did not pass his probationary period and was dismissed on 14 January 2020. The Claimant claims direct race and religion/belief discrimination and disability discrimination.

The evidence

2. Mohammad Mughal (the Claimant) and Farooq Ahmed (Train Operator and trade union official) gave evidence on behalf of the Claimant. Joe Blake (Area Manager), Bridget Harvey (Customer Service Manager and Claimant's line manager) and Aisha Tague (Head of Ticketing, Revenue and SRT Customer Service, Appeal officer) gave evidence on behalf of the Respondent.

3. The Tribunal was referred during the hearing to documents relating to liability in a hearing bundle of 646 pages. A further policy document was given to the Tribunal during the hearing of 23 pages. An updated Schedule of Loss was also provided by the Claimant.

4. Both Ms Hodgkin and Ms Brown provided the Tribunal with written and oral closing submissions.

Issues for the Tribunal to decide

5. The parties provided the Tribunal with an agreed list of issues. These were:

A. DIRECT RACE DISCRIMINATION

   a. The Claimant identifies as Asian

   b. Did the Respondent engage in the following less favourable treatment of the Claimant:

      i. Not addressing an incident between the Claimant and "M" on 27 September 2019 as an assault on the Claimant and reporting it via the Respondent's Electronic Incident Reporting Form procedures;

      ii. Interviewing the Claimant about the 27 September 2019 incident without providing him with an opportunity to be accompanied by a trade union representative or work colleague;

      iii. Suspending the Claimant from work on 28 September 2019;

      iv. Not providing the Claimant with the opportunity to receive support and/or advice from a trade union representative or work place colleague before the Respondent decided to suspend him;

      v. Not interviewing an apprentice who was a potential witness of 27 September 2019 incident;

      vi. Not providing the Claimant with the interview minutes of the apprentice who was a potential witness of 27 September 2019 incident;

      vii. Denying the Claimant a disciplinary hearing as part of the Respondent's Discipline and Work procedures;

viii. Failing to provide evidence in the Respondent's possession in relation to the incident on 27 September 2019 despite stating it would be provided to the Claimant;

ix. Repeatedly arranging probation review meetings when the Claimant was unavailable to attend them between 21 November and 14 January 2020;

x. Declining to correspond and/or discuss with the Claimant's trade union representative the Claimant's employment concerns between 8 December 2019 and 14 January 2020;

xi. Subjecting the Claimant to an unfair disciplinary process contrary to R's policies;

xii. Dismissing the Claimant on 14 January 2020 at a probation review meeting contrary to the Respondent's policies notwithstanding "M" had withdrawn his allegations against the Claimant;

xiii. Declining to pay the Claimant's salary (including company sick pay) and statutory sick pay when the Claimant was on sick leave and suspended from work between 16 December 2019 and 14 January 2020;

xiv. Failing to refer the Claimant for an OH assessment upon receipt of GP medical advice as regards the Claimant's illness between 16 December 2019 and 14 January 2020; and

xv. Declining to investigate the Claimant's harassment and bullying complaint submitted to the Respondent on 8 December 2019 and not informing him about this. This allegation was subsequently withdrawn.

c. If so, in doing so did the Respondent treat the Claimant less favourably, in circumstances with no material difference, than the Respondent treated or would treat others?

d. The Claimant relies on "M" (a white male) as his comparator and a hypothetical comparator.

e. Was the Claimant subjected to that less favourable treatment because of his race?

B. Direct Religious Discrimination

a. The Claimant identifies as Muslim

b. Did the Respondent engage in the following less favourable treatment of the Claimant (see Issues A(b)(i)-(xv) above)?

c. If so, in doing so did the Respondent treat the Claimant less favourably, in circumstances with no material difference, than the Respondent treated or would treat others?

d. The Claimant relies on "M" (a non-Muslim male) as his comparator and a hypothetical comparator.

e. Was the Claimant subjected to that less favourable treatment because of his religion?

C. Disability Discrimination

a. Disability

i. Did the Claimant have a physical or mental impairment at the material times (s.6(1)(a) EqA 2010)?

ii. The Claimant stated in a PH before EJ Jones QC that he suffers from a mental impairment which he described as 'depression, stress, anxiety'.

iii. If so, did the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities (s.6(1)(b) and s.212(1) EqA 2010)?

iv. If so, was that substantial adverse effect long-term (s.6(1)(b) EqA 2010)?

v. When did that substantial adverse effect start?

vi. At that date, had it lasted for at least 12 months (Sch 1, para 2(1)(a) EqA 2010)?

vii. At that date, was the impairment likely to last for at least 12 months (Sch 1, para 2(1)(b) EqA 2010)?

viii. At the relevant times, were any measures taken to treat or correct the impairment (Sch 1, para 5(1)(a) EqA 2010)?

ix. If so, but for those measures, would the impairment have been likely to have had a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities (Sch 1, para 5(1)(b) EqA 2010)?

x. Disability is contested by the Respondent, as per the Respondent's email to the Tribunal dated 30 October 2020. The Respondent does not admit that the Claimant is a disabled person within the meaning of s.6 EqA 2010.

D. Direct Disability Discrimination (if the Claimant had a disability at the material times):

i. Did the Respondent engage in the following less favourable treatment of the Claimant:

i. Declining to pay the Claimant's salary (including company sick pay) and statutory sick pay when the Claimant was on sick leave and suspended from work between 16 December 2019 and 14 January 2020;

ii. Failing to refer the Claimant for an OH assessment upon receipt of GP medical advice as regards the Claimant's illness between 16 December 2019 and 14 January 2020;

iii. Repeatedly arranging probation review meetings when the Claimant was unavailable to attend them between 21 November and 14 January 2020;

iv. Declining to correspond and/or discuss with the Claimant's trade union representative the Claimant's employment concerns between 8 December 2019 and 14 January 2020;

ii. If so, in doing so did the Respondent treat the Claimant less favourably, in circumstances with no material difference, than the Respondent treated or would treat others (ss.13(1), 39(2) and 23(1)-(2)(a) EqA 2010)?

The Claimant relies on "M" (a non-disabled male) as a comparator and a hypothetical comparator.

b. If so, was C subjected to that less favourable treatment because of his disability (s.13(1) EqA 2010)?

E. Discrimination arising from disability (If the Claimant had a disability at the material times):

a. Did the Respondent engage in the following unfavourable treatment of the Claimant (s.15(1)(a) EqA 2010):

i. Declining to pay the Claimant's salary (including company sick pay) and statutory sick pay when the Claimant was on sick leave and suspended from work between 16 December 2019 and 14 January 2020;

ii. Failing to refer the Claimant for an OH assessment upon receipt of GP medical advice as regards the Claimant's illness between 16 December 2019 and 14 January 2020;

iii. Repeatedly arranging probation review meetings when the Claimant was unavailable to attend them between 21 November and 14 January 2020;

iv. Declining to correspond and/or discuss with the Claimant's trade union representative the Claimant's employment concerns between 8 December 2019 and 14 January 2020;

b. If so, did the Respondent so treat the Claimant unfavourably because of an (identified) something (s.15(1)(a)), namely:

i. The Claimant being unwell and the Respondent being obliged to pay the Claimant's salary while unwell and suspended from work;

ii. The Claimant being unwell and the Respondent being obliged to refer the Claimant to OH for advice;

iii. The Claimant presenting with symptoms of depression and anxiety;

c. If so, did that (identified) something arise in consequence of the Claimant's disability (s.15(1)(a) EqA 2010)?

d. If so, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim (s.15(1)(b) EqA 2010)?

e. Did the Respondent know, or could the Respondent reasonably have been expected to know that the Claimant had the disability in question (s.15(2) EqA 2010)?

    i. If so, what was the date of actual or constructive knowledge?

F. Failure to make reasonable adjustments (if the Claimant had a disability at the material times):

a. Did the Respondent apply the following PCPs to the Claimant (s.20(3) EqA 2010):

    i. Proceeding with meetings notwithstanding that the relevant employee has a medical certificate saying that the employee is not fit for work for the time the meeting is arranged

    ii. Declining to pay employees on probation company sick pay (including statutory sick pay)

    iii. Requiring employees to complete probation in 6 months

b. Did any or all of those PCPs place the Claimant at a substantial disadvantage, in relation to a relevant matter in comparison with persons who are not disabled (s.20(3) EqA 2010), namely:

    i. The Claimant being unable to attend his probation review meetings

    ii. Not being paid company sick pay (including statutory sick pay) while on sick leave.

    iii. An employee with a disability may be unable to attend work prior to the expiry of the 6 month time period

c. Did the Respondent fail to take such steps as it was reasonable to have to take to avoid the disadvantage (s.20(3) EqA 2010), namely:

    i. Re-scheduling the probation review meetings to a mutually convenient time and location

    ii. Paying the Claimant company sick pay (including statutory sick pay)

d. Did the Respondent know, or could the Respondent reasonably be expected to have known:

    i. That the Claimant had the disability in question; and

    ii. that the Claimant was likely to be placed at the substantial disadvantage(s) in question (Sch 8, para 20 EqA 2010)?

e. If so, what were the respective dates of actual or constructive knowledge?

Findings of Fact

6. The Claimant was employed by the Respondent from 13 May 2019 as a Customer Services Assistant level 2 ("CSA2"). He was stationed at the Euston and Green Park station area Victoria line but could be required to work at any location. Under his contract of employment he was required to complete a probationary period of six months. If during the probation the Respondent was not satisfied with his performance they could terminate his contract with one week's notice. His probation could be extended by up to a maximum of nine months in total. The Respondent's Probation Policy also said that all new starters must complete a six month probationary period in which their suitability for their role would be assessed.

7. All employees (including probationers) were subject to the Respondent's Code of Conduct which set out behaviours expected of staff. There was also a Discipline at Work Procedure and an accompanying Discipline at Work Support Pack. Ms Harvey and Mr Blake gave evidence that managers had to apply the Guidelines for Managing Probation when dealing with a probationer. Under this guide, there were five main reasons why a probationer may fail their probation: failed training; poor attendance; poor timekeeping; poor performance; or a number of misconduct offences which are not serious in isolation but in total warrant dismissal. The Respondent's witnesses gave evidence, and the Tribunal finds as a fact, that employees who had passed their probation would be referred to a Company Disciplinary Interview ("CDI") under the Discipline at Work policy whereas probationers would be referred to a probation panel instead. That was always the practice even though it was not explicit in the policy that probationers would not be referred to CDI. Ms Harvey gave evidence that they did not set the rules, they followed them. The Tribunal found the Respondent's witnesses to be honest, straightforward witnesses and believed them.

8. The Respondent held a three month probation review meeting with the Claimant on 23 August 2019 and sent him a letter dated the same day confirming he had successfully completed his first three months. He was progressing well and had received two customer commendations.

9. On 27 September 2019 the Claimant was working at Euston Station. At 12.50 the Claimant and "M" (another CSA2 who had recently passed his probation) had an altercation over a set of keys.

10. Ms Harvey, the Claimant's line manager, was on duty at the time. The Claimant went to see her after the incident to inform her that he had activated the emergency button of his radio and had been instructed by the supervisor on duty to report the incident to her.

11. Ms Harvey undertook a fact finding exercise to understand what had happened. The Claimant and M wrote memos setting out their own version of events. The Claimant mentioned an "apprentice" being present with him

on the platform at the start of his account. Ms Harvey interviewed the Claimant at 15.45 and she interviewed "M" at 17.15. Ms Harvey gave evidence that it was clear to her that there were discrepancies in the two employees' versions of events and she did not think that either of them were telling the complete truth although both had said there had been a physical altercation, shouting and swearing. Ms Harvey concluded that these behaviours were against those set out in the Code of Conduct and so there should be a further investigation. She suspended both the Claimant and M on full pay. The Claimant telephoned in weekly to keep in touch with the Respondent as required.

12. Ms Harvey investigated with the help of her colleague, Andrew Weaver, Customer Service Manager. She requested CCTV, but found it did not contain images from inside the passenger operated machine area ("POM") where the altercation had taken place and so was not helpful. She obtained written accounts and undertook fact finding interviews. On 28 September 2019 she interviewed CSS Williamson, he had helped her take memos from the Claimant and M immediately after the incident. CSS Lavey had heard raised voices and seen the Claimant looking angry and heard him say he had pushed the red button. He had also seen that one side of the hi-vi had been ripped off. CSS Barzey was interviewed on 29 September 2019. She had overheard the conversations, the Claimant had sworn at M about a question over Oyster cards earlier in the day and she had later seen the Claimant come out of the POM looking angry with one side of his hi-vi hanging down. On 29 September 2019 CSA Lampkin was interviewed, he had heard the emergency radio broadcast and had seen the Claimant walking in looking distressed with one side of his hi-vi hanging down.

13. An hour before his shift was due to finish the Claimant was feeling unwell and so was sent home from work by Customer Service Manager (CSM) Jason Russon. The Claimant attended his GP clinic, the notes record "stress at work". In evidence to the Tribunal the Claimant said that he was fit to work by no later than 30 September 2019. The Tribunal finds that the Claimant was unwell for a brief period and then fit for work and well from 30 September 2019.

14. At the end of September/early October 2019 the Claimant met with M together with their trade union ("TU") representatives, discussed the incident that had occurred and agreed a "mediation statement". When the Claimant was interviewed on 4 October 2019 and 31 October 2019, and when M was interviewed on 11 October 2019, they repeatedly answered questions with a set paragraph:

"*Further to my memo and fact find which took place on the 4th October 2019, and mediation email submitted, I have nothing further to say in regards to the events that took place on the 27th September 2019 other than myself and CSA , we have met with both our representatives and jointly agreed to put any differences we may have had between us aside and will continue to work in a professional manner and to the standards London Underground expects from staff. I will like to add therefore I have nothing to add further and under advise and in agreement with my trade union to answer no further questions on the matter."*

15. Ms Harvey gave evidence that the mediation summary requested permission to move forward with their roles and duties as soon as procedurally permissible and possible. Her view was that she could not consider this letter as an investigation was already underway and it appeared that the letter was trying to interfere or influence the outcome. She also noted that the mediation summary accepted that both employees had acted inappropriately.

16. On 2 November 2019 Ms Harvey decided to refer M to CDI in accordance with the policy and she warned him that a possible outcome was dismissal.

17. On 11 November 2019 Alero Abbey wrote to the Claimant requiring him to attend his 6 month probation review meeting on 21 November 2019 and to "follow up with the mitigations you put forward in your fact-find meetings of the 4th October and 21st October 2019 following your altercation with CSA ["M"].. and to discuss the outcomes from these." She advised the Claimant that a possible outcome was dismissal. Ms Harvey gave evidence, that was accepted by the Tribunal, that her understanding was that as the Claimant was a probationer this issue would be dealt with at the probationary review but that as "M" had passed probation the appropriate route was the CDI. She also gave evidence that her grade could not make probation decisions, that was for the grade above her role and Ms Abbey was the grade above.

18. The probation Review meeting was rescheduled twice, first to 4 December 2019 and then to 10 December 2019 due to the Claimant's TU representative's availability. The Claimant was copied into the emails and the new invites were sent out. However, the Claimant then stated that the rescheduled 10 December date fell into his annual leave and so he was unable to attend. Ms Abbey was "taken aback by the content of this email, as [he was] copied into the emails from [his] workplace colleague, Mr Ahmed requesting for the meeting to be rescheduled and confirming" 10 December 2019 was acceptable.

19. On 8 December 2019 the Claimant entered 4 ½ page grievance outlining what he said was a bullying and harassment grievance against Ms Abbey. In summary he complained of the arranging of his meeting while he was on leave, Ms Alero's arranging of the meetings and comment that she was "taken aback" and whether these constituted discrimination based on his race and religion. He also complained that "M" could put his case to a CDI where "M" could see the full case against him whereas he had to attend a probation review meeting. He did not understand why the mediation was not taken into account. There was no mention of the Claimant being unwell or having a disability.

20. On 9 December 2019 Ms Abbey rearranged the probation Review meeting to 18 December 2019. Given that the Claimant had raised a complaint against Ms Abbey, the Respondent decided that Area Manager Joseph Blake would conduct the probation review instead.

21. On 15 December 2019 the Claimant wrote to Mr Blake requesting more time to prepare for the meeting and sort out his and TU representative availability.

22. On 16 December 2019 the Claimant saw his GP, the notes reflect that he was suffering from "low mood". That day the Claimant provided a letter from his GP, Dr Eslami dated 16 December 2019 saying that Dr Eslami was very worried about the Claimant's mental wellbeing, he had started on antidepressants and had been referred to psychotherapy. It was clear from Dr Eslami's letter and the Claimant's Impact Statement that at that time he was off sick, the Claimant could not cope with everyday interactions and needed anti-depressant medication and counselling to assist him. Dr Eslami requested that the Respondent give the Claimant support and respite from any contact or meeting whilst he was "managing him over the next few weeks". He asked for respite for "this very particular moment of his mental ailment".

23. On 17 December 2019 Mr Blake wrote to the Claimant saying he had noted the GP's comments and the meeting would now take place on 2 January 2020. The Claimant was reminded that the purpose of the meeting remained the same – to conduct his 6 month probation review and to follow up with the mitigations the Claimant had put forward in his fact finding meetings.

24. On 18 December 2019 the Claimant emailed to say he was medically unfit to engage in correspondence.

25. On 19 December 2019 Mr Blake emailed to say it was not appropriate for him to liase with the Claimant's TU representative, it was a formal meeting that the Claimant was required to attend.

26. On 23 December 2019 the Claimant saw his GP again and this time the notes record him as having "anxiety with depression". The medication had been helping but he still felt anxious. The fit note records him as being unable to work due to "depression and anxiety due to stress related work" from 16 December 2019 – 20 January 2020.

27. On 2 January 2020, Mr Blake and Mr Phlora (HR) attended the probation review meeting. The Claimant did not attend but his TU representative did and they discussed the reasons why the Claimant had not attended any of the suggested meetings so far. Mr Blake considered whether to refer the Claimant to OH but decided that it would serve little benefit as it seemed clear to him that the Claimant had not passed his probation. In cross examination Mr Blake said that he was not reinvestigating the incident but that if the Claimant had attended the review and provided him with new information he could have taken it into account. Mr Blake said he had no reason to believe that the Claimant would give further information as he had not given any in the fact find. Mr Blake's view was that even if he had referred the Claimant to OH and they had told him to wait a month it would not have made any difference, he was off with work related stress and the matter needed to be concluded, not just from the Respondent's perspective but also because of the Claimant's mental health. Mr Blake told the

Claimant's TU representative that he would only correspond with the Claimant, it had to be the Claimant who attended the probation review meeting and that the Claimant should let him know if the TU representative was going to be representing him at the meeting. At the end of the meeting, Mr Phlora and Mr Blake decided to give the Claimant another opportunity to attend the meeting. The meeting was adjourned to 14 January 2020. A letter was sent to the Claimant informing him of this, with a reminder of the purpose of the meeting and the support available to him through Occupational Health.

28. On 6 January 2020 the Claimant's doctor reviewed him. Dr Eslami telephoned Ms Harvey while he was with the Claimant. Dr Eslami asked about counselling but as the Claimant was already receiving counselling through a GP referral, Ms Harvey did not think that the Respondent would provide additional counselling unless it was the only counselling. In the Claimant's medical records the condition was said to be "anxiety with depression" and the GP noted that the Claimant was still recovering with medication but still felt anxious.

29. The doctor reviewed the Claimant again on 13 January 2020 for his anxiety and depression review, noting that he was still feeling no better.

30. On 14 January 2020 the probation review meeting took place. The Claimant and his TU representative did not attend. Mr Blake conducted the meeting with Mr Phlora as the note taker. It was noted that the GP had telephoned Ms Harvey. Mr Blake noted the initial good 3 month review and then looked at the incident. He concluded that both the Claimant and M were at fault, the Claimant then did not take the opportunity presented to him during the investigation process to recognise his wrongdoing and to assist with the fact finding investigation, answering stock answers and saying that he had nothing further to say. Mr Blake considered that he was required to consider if, on the balance of probability, the Claimant had demonstrated the behaviours required by employees at Respondent, as set out in the Probation Guidance. In his view, even if he delayed the process further to wait for the Claimant to attend a meeting or to seek advice from occupational health, he did not consider that his view would change. He also thought that even if he attended a meeting, the Claimant may just repeat the stock responses he had provided at the fact finding stage and reiterate the mediation letter that he had "nothing further to state in relation to this matter". Mr Blake decided that the Claimant had not demonstrated the required behaviours to pass probation.

31. Mr Blake gave evidence, that is accepted by the Tribunal, that he had never met or spoken to either the Claimant nor M and did not know what race or religion either party was.

32. The Claimant was informed by letter dated 15 January 2020 that he was dismissed with effect from 14 January 2020 and the reasons why the Respondent had made the decision.

33. It is not clear whether the Claimant was paid statutory sick pay or nil pay for the period 16 December 2019 to 14 January 2020. The list of issues stated

that he was not paid statutory sick pay nor a higher rate of pay. In cross examination the Claimant accepted that he had received statutory sick pay. Clause 15 of the Claimant's contract of employment states:

"*Provided you comply with [the Respondent's] Sickness absence reporting requirements you are eligible for [the Respondent's] sick pay In accordance with [the Respondent's] sick pay rules details of which are available on the LUL Intranet LUL may make changes to the sick pay rules from time to time without giving notice in advance".*

34. In Ms Tague's appeal outcome letter she says

"Having reviewed the guidance on LU Sick Pay (version A1), I can confirm that 'During a period of sick leave in place of normal salary, sick pay is paid to employees with more than one year's service and, at the discretion of Employing Managers, employees with less than one year's service."

35. The Tribunal was not referred to a Sick Pay policy. The Tribunal finds as a fact that M was paid full pay while suspended whereas the Claimant was paid full pay during the first part of his suspension when he was reporting in to the Respondent weekly, but then received less pay (either SSP or nil pay) during the period 16 December 2019 and 14 January 2020.

36. On 20 January 2020 the doctor reviewed the Claimant again, his mood was low, it reported he had been dismissed and had poor sleep since the dismissal.

37. On 21 January 2020 the Claimant appealed the decision. He said that the Respondent did not follow their own policies and procedures, he was not allowed TU representation, he had suffered "possible" disability discrimination, no referral to OH, he had suffered personal injury, the sanction of dismissal was too severe, he had suffered race and religious discrimination and that the Respondent had followed the wrong policies.

38. On 27 January 2020 the Claimant attended his GP weekly appointment.

39. On 29 January 2020 M attended his CDI hearing with his TU representative. The CDI outcome for M was that he committed gross misconduct, having listened to his mitigations they decided to issue him a 6 month final written warning from the date of the incident.

40. On 3 February 2020 the Claimant's medical notes stated that the Claimant had reported that he had "difficulty breathing". The notes record him as saying he "feels breathless when playing football". In cross examination the Claimant said they he had been playing football in the garden due to national lockdown. The Tribunal is aware that the national lockdown did not occur until March 2020. The GP notes did not indicate that the Claimant's anxiety and depression was discussed.

41. On 17 February the Claimant visited the GP again about his difficulty breathing. He said that the inhalers help a little but he still felt breathless

when playing sports. There was no indication that the Claimant's anxiety and depression were discussed.

42. In cross examination the Claimant accepted, and the Tribunal finds as a fact that at some point around this time the Claimant stopped taking medication and stopped counselling.

43. Ms Tague carried out a comprehensive appeal which was delayed due to a number of factors including issues related to the pandemic. On 22 February 2021 she wrote to the Claimant with the outcome which was that the appeal was partially upheld and he was offered re-employment in a different location as a new entrant and subject to the normal period of probation. The Claimant did not take up this offer.

44. In evidence to the Tribunal, that is accepted, Ms Tague said that she partly upheld his appeal because she thought it would have been sensible for the Claimant to have been assessed by OH before proceeding with the probationary review in his absence and deciding to terminate his employment. The other reason for upholding the appeal was because the outcomes for the Claimant and M were different. Ms Tague thought the reasons for referring the employees to separate processes were logical and fair as the Claimant was a probationer and M was not. She found "absolutely no reason to believe there was any race or religion discrimination".

Legal principles relevant to the claims

Race or Religion/Belief discrimination

45. Under s.13(1) of the Equality Act 2010 read with s.9 and s.10, direct discrimination takes place where a person treats the claimant less favourably because of race or religion/belief than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case. 'Race' includes nationality or national origins.

46. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the Claimant was treated as he was. (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11; [2003] IRLR 285).

47. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out. (*Nagarajan v London Regional Transport* [1999] IRLR 572, HL. Case law recognises that very little discrimination today is overt or even deliberate. Witnesses can be unconsciously prejudiced.

48. S.136 of the Equality Act 2010 sets out the burden of proof. The burden of proof provisions require careful attention where there is room for doubt as

to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. (*Hewage v Grampian Health Board* [2012] IRLR 870, SC.)

49. Under s.136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.

50. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142; [2005] IRLR 258. Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

51. The Court of Appeal in *Madarassy*, a case brought under the then Sex Discrimination Act 1975, states:

> *"The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) 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."*

52. This was confirmed in the recent Supreme Court case of *Royal Mail Group Ltd v Efobi* [2021] UKSC 33.

Disability

53. Section 6 Equality Act 2010 ("EQA 2010") states that:

> ***6 Disability***
>
> *(1) A person (P) has a disability if—*
>
> *(a) P has a physical or mental impairment, and*
>
> *(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.*
>
> *(2) A reference to a disabled person is a reference to a person who has a disability.*
>
> *(3) In relation to the protected characteristic of disability—*
>
> *(a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;*
>
> *(b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.*

54. Paragraph 2 of Schedule 1 EQA 2010 defines long term as:

> *"2 (1) The effect of an impairment is long-term if—*
> *(a) it has lasted for at least 12 months,*
> *(b) it is likely to last for at least 12 months, or*
> *(c) it is likely to last for the rest of the life of the person affected.*
>
> *(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."*

55. The time to assess whether there is a substantial adverse long-term effect on normal day to day activities is the date of the alleged discriminatory act: *Cruickshank v VAW Motorcast Ltd* [2002] ICR 729.

56. The meaning of *"likely" in* Appendix 1 of the Code of Practice issued by the Equality and Human Rights Commission (the "EHRC Code") follows the ratio of the pre EQA 2010 authority *SCA Packaging Ltd v Boyle* [2009] ICR 1056 i.e. *"could well happen"* in preference to *"probable"* or *"more likely than not"*.

57. The Tribunal must focus on what a Claimant cannot do, and not weigh what a Claimant can do against what they cannot in order to determine disability by weighing those matters in the balance: (*Ahmed v Metroline Travel Ltd* UKEAT/0400/10/JOJ)

Conclusions

Direct Race or Religious/Belief Discrimination

58. The Claimant brought claims for direct Race or Religious/Belief Discrimination. The Claimant identifies as Asian and as Muslim.

    i. *Not addressing an incident between the Claimant and "M" on 27 September 2019 as an assault on C and reporting it via the Respondent's Electronic Incident Reporting Form procedures*;

59. The Respondent was faced with an incident involving two staff members, it was an appropriate response to conduct an investigation to find out what happened. There transpired to be no CCTV in the room and there were no witnesses to the altercation itself. Additionally, before the investigation was complete the Claimant and M attended a "mediation" and agreed that both of them were at fault and could have acted differently.

    ii. Interviewing the Claimant about the 27 September 2019 incident without providing him with an opportunity to be accompanied by a trade union representative or work colleague;

60. There was no right for the Claimant nor M to have a TU representative present at the initial fact finding interview. They were treated the same.

    iii. Suspending the Claimant from work on 28 September 2019;

61. Both the Claimant and M were suspended from work while an investigation took place. They were treated the same.

iv. Not providing the Claimant with the opportunity to receive support and/or advice from a trade union representative or work place colleague before the Respondent decided to suspend him;

62. There was no right for the Claimant or for M to receive support and/or advice from a TU representative or work place colleague before the Respondent decided to suspend him. They were treated the same.

v. Not interviewing an apprentice who was a potential witness of 27 September 2019 incident;

63. The Claimant did mention an apprentice being present on the platform in his first interview. Neither he nor Ms Harvey followed up on it. It would have been good practice for Ms Harvey to follow up to find out who the apprentice was.

vi. Not providing the Claimant with the interview minutes of the apprentice who was a potential witness of 27 September 2019 incident;

64. There was no interview of the apprentice and so no interview notes.

vii. Denying the Claimant a disciplinary hearing as part of the Respondent's Discipline and Work procedures;

65. Ms Harvey and Mr Blake followed the Probation Guidelines and it was their understanding of the process that probationers were never referred to CDI and that was why they proceeded in that way. Had the Claimant attended the Probation Review Meeting he would have been able to provide mitigating evidence. The Discipline and Work Policy did not apply to the Claimant as he was a probationer.

viii. Failing to provide evidence in the Respondent's possession in relation to the incident on 27 September 2019 despite stating it would be provided to the Claimant;

66. The Claimant initially did not receive a statement of CSA Barzey.

ix. Repeatedly arranging probation review meetings when the Claimant was unavailable to attend them between 21 November and 14 January 2020;

67. The Respondent re-arranged the relevant meetings numerous times, including during the period when the Claimant was not off sick. His TU representative's availability was the issue on more than one occasion, and then the Claimant was on annual leave. Once the Claimant was off sick, the meeting was rearranged but ultimately did take place on 14 January 2020 while the Claimant was off sick.

x. Declining to correspond and/or discuss with the Claimant's trade union representative the Claimant's employment concerns between 8 December 2019 and 14 January 2020;

68. The Respondent re-arranged the meeting in December 2019 but the TU representative could not attend the proposed dates due to his availability.

In the meeting on 2 January 2020, the TU representative did speak to Mr Blake even though Mr Blake had not received a notification from the Claimant that the TU rep could speak on his behalf. Mr Blake was clear at that meeting that he would only correspond with the Claimant, it had to be the Claimant who attended the probation review meeting and that the Claimant should let him know if the TU representative was going to be representing him at the meeting.

xi. Subjecting the Claimant to an unfair disciplinary process contrary to R's policies;

69. Ms Harvey and Mr Blake followed the Probation Guidelines and it was their understanding of the process that probationers were never referred to CDI and that was why they proceeded in that way. An investigation took place, the Claimant was invited to a probationary meeting which was rearranged numerous times. Had the Claimant attended the Probation Review Meeting he would have been able to provide mitigating evidence. He was offered and did appeal. The appeal was partially upheld.

xii. *Dismissing the Claimant on 14 January 2020 at a probation review meeting contrary to the Respondent's policies notwithstanding "M" had withdrawn his allegations against the Claimant*;

70. The Respondent was entitled to dismiss the Claimant in accordance with its own policies. It was not for the Claimant and M to agree to dispose of the Respondent's investigation into the conduct of two employees by mediating and declining to take further part in the investigation.

xiii. Declining to pay the Claimant's salary (including company sick pay) and statutory sick pay when the Claimant was on sick leave and suspended from work between 16 December 2019 and 14 January 2020;

71. The Tribunal has found that M was paid full pay while suspended whereas the Claimant was only paid full pay during the first part of his suspension when he was reporting in to the Respondent weekly. The Claimant then received less pay (either SSP or nil pay) while he was off sick during the period 16 December 2019 and 14 January 2020. The Claimant was paid in accordance with the Respondent's policies on sick pay.

xiv. Failing to refer the Claimant for an OH assessment upon receipt of GP medical advice as regards the Claimant's illness between 16 December 2019 and 14 January 2020;

72. The Respondent did not refer the Claimant to OH, Mr Blake said that in his view it would not have made any difference. However, given the contents of the Claimant's GPs letters, an OH assessment could have been helpful.

If so, in doing so did the Respondent treat the Claimant less favourably, in circumstances with no material difference, than the Respondent treated or would treat others?

The Claimant relies on "M" (a white non-Asian male) as his comparator and a hypothetical comparator.

Was the Claimant subjected to that less favourable treatment because of his race?

73. Case law tells us that the Claimant has to show there is something "more" than a difference in treatment and a claimant's difference in race or religion/ belief before the burden shifts to the Respondent. The Tribunal concludes that in this case the Claimant has not shown that there is something "more". The Tribunal tests this, by considering the "reason why" the Claimant was treated as he was.

74. There was no evidence that any of the Claimant's treatment was because of his race or religion/belief. In particular, Mr Blake had never met the Claimant and so was unaware of his race or religion/belief. It was clear from the evidence of Ms Harvey and Mr Blake that they applied the policies and procedures as they understood them to apply. Could Mr Blake have waited longer, taken further advice from HR and made a referral to OH? The tribunal concludes that he could have done. Did he not do so because of the Claimant's race or religion/belief? No. Mr Blake's task was to make a decision on the Claimant's probation review. This was an employee who had been involved in an altercation during his probationary period and who had not provided input in the later stages of the investigation and who had not attended the probationary review meetings.

75. M was a non-Muslim white male. He was the other party in the altercation. Having recently passed his probationary period he had the same investigation but the policy and process applied to him was different thereafter. His conduct was classified as gross misconduct, he had a CDI meeting and he was given the sanction of a final written warning. There was no indication that the difference in treatment between the Clamant and M was on account of their race or religion/belief. The difference in treatment of the Claimant and M was their employment status – one was on probation and so had a probation review, the other was a permanent member of staff who was taken down a disciplinary procedure. The decisions on their sanction were taken by different members of staff for different reasons.

76. The Claimant also compared himself to a hypothetical comparator. The tribunal has concluded there is no evidence that someone in the same circumstances as the Claimant but with a different race or religion/belief would have been treated in any different way. Even where there was, on the face of it, less favourable treatment, it was not on account of the Claimant's race or religion/belief. For example, the Claimant initially did not receive a statement of CSA Barzey and also was not referred to OH. Would a non-Asian or non-Muslim have been treated any differently? The Tribunal concludes that they would not have been. The Claimant was treated in accordance with the Respondent's policies and a person without the Claimant's race or religion/belief would have been treated in the same way.

77. The Tribunal has not found any of the Claimant's claims in relation to race or religious discrimination proved. The fairness or lack of it, of any treatment of the Claimant cannot, by itself without more, amount to discrimination. There was no evidence of any animosity towards the Claimant's race or religion/belief by the Respondent's managers. There was no evidence upon which the Tribunal could find or infer any race, religion or belief motive for any of the treatment alleged. There were plausible non-discriminatory

reasons shown for the conduct of the Respondent towards the Claimant. It was no doubt upsetting for the Claimant that he had been dismissed and colleague M had not, this was a result of the application of the probation policy versus the disciplinary policy, not because of the Claimant's race or religion/belief.

78. In these circumstances the Claimant's claim of direct discrimination fails, and is hereby dismissed.

Disability

79. The alleged acts of discrimination were that the Respondent declined to pay the Claimant's salary (including company sick pay) and statutory sick pay when he was on sick leave and suspended from work, failed to refer him for an OH assessment upon receipt of GP medical advice as regards his illness, repeatedly arranged probation review meetings when he was unavailable to attend them and declined to correspond and/or discuss with his TU representative the Claimant's employment concerns. All of these alleged events occurred between 8 December 2019 and 14 January 2020 and so the question for the Tribunal is whether the Claimant was disabled during that period – did he have an impairment which had a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities during that period?

80. The initial short period of absence from work after the altercation was characterised as "stress at work" and was a reaction to what had happened at work. The Claimant recovered and was fit for work. However, by 16 December 2019 he did suffer from a mental impairment, namely anxiety and depression.

81. The Claimant's evidence to the Tribunal was not wholly consistent. In answer to whether he had been playing football in February 2020 as was stated in the GP notes, the Claimant said he had only been playing with his nephews in the garden as it was in the national lockdown. The Tribunal is aware that the first National lockdown occurred in late March. While there were typos in the doctors notes, it was possible to discern what the doctor had meant to type. When the Claimant was asked whether "says the inhaelrs helpa ,ittbut still feel beratehless when palying spots" could mean that the inhalers help but he still felt breathless when playing sports, he would not accept that. The Claimant said "spots is a word" and said that he could not remember what he had reported to the GP. It is not credible that he could not remember the gist of what he had reported to his GP, particularly when his memory was so clear in other areas. The GP notes and the Claimant's answers in cross examination cast doubt on what the Claimant said in his Impact Statement. He had only included evidence favourable to his case. He did not record he had stopped taking medication and/or that his therapist had determined that there had been sufficient treatment to stop. He did not talk about the football/sports that he had been playing.

82. It was clear from the contemporaneous GP letters that the Claimant's depression and anxiety had developed as a result of the continuing issues

at work. Dr Eslami was clearly concerned for the Claimant's well-being. He wrote letters to the Respondent and telephoned the Claimant's line manager while he was with the Claimant. The Claimant was not able to attend work, had started on antidepressants and had been referred to psychotherapy.

83. The Tribunal concludes that the mental impairment of depression and anxiety had a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities as he could not cope with attending the workplace and needed anti-depressant medication and counselling to assist him. The effects were more than minor or trivial, they were substantial. Dr Eslami requested that the Respondent give the Claimant support and respite from any contact or meeting whilst he was "managing him over the next few weeks". He asked for respite for "this very particular moment of his mental ailment". Taking into account the definition contained in paragraph 2 of Schedule 1 EQA 2010 the Tribunal concludes that during the period 8 December 2019 to 14 January 2020, the Claimant's impairment had not lasted for 12 months, was not likely to last for at least 12 months and was not likely to last for the rest of his life. In particular, the Claimant's impairment was not likely (meaning could well happen) to last 12 months, it was likely to be a short term condition based on the particular issues that had arisen at work.

84. As the Claimant was not "disabled" at the time the Claimant's claims of direct disability discrimination, discrimination arising from disability and a failure to make reasonable adjustments fail and are dismissed.

Employment Judge **L Burge**

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Date: 10 December 2021