Case No: 3319407/2019
3304861/2020
3322555/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr H Mohamoud	**v**	**XPO Supply Chain UK Ltd**

Heard at: Bury St Edmunds **On:** 14 – 18 March 2022

Before: Employment Judge Laidler
Ms S Elizabeth
Mr D Hart

Appearances:

For the Claimant: Mr L Jegede
For the Respondent: Mr P Wilson of counsel

JUDGMENT having been sent to the parties on 5 April 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The issues in this case were identified by Employment Judge Hyams at a preliminary hearing on 7 August 2020. At that point, however, only the first and second claim had been issued and it was confirmed at the outset of this hearing that they were the issues that the Tribunal needed to determine. Plus, the issues in the third claim which will be set out further when the Tribunal gets to them in its chronology. It was, however, clarified at the outset of this hearing that in alleging less favourable treatment on the grounds of race the claimant relies on his colour being black as the basis upon which he says he was treated less favourably.

2. It had been understood from the case management hearing documents that there was an ACAS Early Conciliation point that needed to be resolved but it was agreed at this hearing that that was not something being pursued.

3. The first ET1 was issued on the 17 June 2019, a second claim on the 20 May 2020 and a third claim on 26 October 2021. They were consolidated and all determined at this hearing.

4. The issues were clarified at a Case Management Summary before E J Hyams on 7 August 2020. He obviously did not have the third claim before him at that time and the issues in that are added below. They were discussed at this hearing and it was confirmed they remained the issues to be determined and are as follows:

The Issues

Initial failure to pay full sick pay

1. Did the respondent by not at first paying the claimant (who is black and of African origin) full sick pay after an accident at work which occurred on 31 October 2018, treat the claimant less favourably than it would have done if he had been white? The claimant relies in this regard on a comparison with the circumstances of: –

   Mr Hayden White and

   Mr Skoracki Marcin

Performance improvement plan

2. Did the respondent by placing the claimant on a performance improvement plan in February 2019 treat the claimant less favourably because of his race, i.e. than it would have done if he had been white? In this regard the claimant relies on the manner in which Mr Hayden White was treated. Mr White was absent from work as a result of an accident and when he returned to work he had his picking target reduced, which meant that he was able to meet his performance targets and as a result was not placed on a performance improvement plan.

Buddy duties

3. Did the respondent, by not giving the claimant "buddy" duties (which required training new employees of the respondent and which gave rise to an entitlement to an additional £20 per night) in February 2019, treat the claimant less favourably because of his race i.e. than it would have done if he had been white? In this regard the claimant relies on a comparison with the manner in which his white colleague whose first name was Alexandru was treated

Refusal of permission to take unpaid holiday

4. Did the respondent by refusing in April 2019 to permit the claimant to take 12 days of unpaid holiday treat the claimant less favourably because of his race i.e. than it would have done if he had been white? In this regard, the claimant relies on a comparison with the manner in which Mr Dean Johnson was treated.

Disciplinary action (the 2nd claim)

5. Did the respondent by taking disciplinary action against the claimant after an altercation between him and a white colleague by the name of Mr Aurimas Grigaliumas on 22 December 2019, treat the claimant less favourably because of his race i.e. that it would have done if he had been white? In this regard, the claimant relies on a comparison with the circumstances of Mr Grigaliumas since the respondent took no action against Mr Grigaliumas

Accident at work, sick pay and disciplinary action (3rd claim)

6. Did the respondent treat the claimant less favourably than his white colleagues when he was not paid sick pay following an accident in the freezer and was disciplined? He compares his treatment to that of Ms Dragensecu and Mr. Thomas Lamanski in relation to sick pay and Ms Angela Recau and Mr Adrian Pritia who were not disciplined.

5. The tribunal heard from the claimant and from the following on behalf of the respondent:

Mark Bailey – Warehouse Operations Manager
Cliff Chegwidden – Transport Operations Manager
Lucasz Hruszwiec – Shift Operations Manager
Philip Gathercole – First line Manager
Roy Woodward – First line Manager
Assunta Thomas – HR Manager
Terrence Creber – Shift Operations Manager

6. The tribunal had a bundle of documents of 594 pages and some further documents lodged during the hearing. From the evidence heard the tribunal finds the following facts. The judge decided that these reasons were easier to read and understand if the facts were set out for each issue and then the tribunals conclusions on that issue, before proceeding to the next. The relevant law the tribunal has applied is set out at the end.

The Facts

7. The claimant has been employed since 30 July 2017 as a warehouse operative of the respondent working mainly as a picker, picking items from the warehouse and putting them on pallets and cages.

First issue – non fault accident – failure to pay full sick pay.

8. The first issue was a non-fault accident on 31 October 2018. The claimant was off sick for 6 weeks until the 16 December 2018 following this accident. The Tribunal saw his return to work interview document (page 70) and also at page 42 the respondent's company sick pay scheme. The scheme provided:

<u>**Company Sick Pay Scheme (CSP)**</u>

The company operates a discretionary sick pay scheme in line with the sites current absence management policy in place (Bradford Points System). Company sick pay is a benefit to colleagues; it is not a contractual right.

The scheme operates in a two-stage principle, on a "rolling year".

1. Company sick pay been withheld for up to 3 days; these are called sick waiting days.

2.Company sick pay may be withheld using management discretion for a colleague whose Bradford Points are 50 or more at the point of returning to work.

…

[Examples of sick waiting days which is not relevant to this decision]

2. Company Sick Pay

You may be eligible to receive company sick pay dependent on service completed as per your site agreement taking into account the following:

If your Bradford points are 50 or more then the following factors are considered by your line manager prior to withholding CSP

You have fully complied with the absence reporting procedure

Your Bradford Points will be reviewed taking into account; number of days of absence, patterns of absence and reasons for absence.

It will be assumed that all sickness absence will be paid. The reason for withholding CSP must be fair, reasonable and justified by the manager.

Examples of reasons for refusing to pay include:

Blameworthy accidents, where the colleague is at fault

[other examples were given]

There is then a paragraph explaining the Company Sick Pay benefit entitlement in a rolling 12 months

9. There is no dispute that the claimant received five days pay in company sick pay to which he was entitled. This was, however, based on a day rate and the claimant was a night shift worker. The issue for this Tribunal was whether he should have also received enhanced company sick pay which was payment in full when an employee was found to have been involved in a non-fault accident. There is, however, no policy document covering that, and it is not included in the sick pay policy document that the Tribunal saw.

10. The claimant accepted in cross-examination that there had to be an investigation to determine whether he was at fault. The Tribunal received during the evidence the further document of the investigation report that had not been in the bundle. Jamie Cox was the investigator. His report of the 1 November 2018 recorded that the investigation had found some criticism of the claimant, namely that he did not follow correct accident reporting process as well as MHE handling training and noted, "*This will be further investigation upon HM return to work*".

11. The Tribunal saw an email sent by Jamie Cox on 9 November 2018 (page 149) stating that the claimant was not to be paid as the accident was still 'under investigation' and again confirming this would be completed on his return to work. That was also noted at the return to work meeting.

12. On the 31 December 2018 (page 157) Jamie Cox made an enquiry of a Chris Sweetster about the claimant's positioning on his Low Level Order Picker (LLOP) and whether it was a factor in his injury. Even though his investigation does not seem to have been completed, on the 4 January 2019 Jamie Cox was enquiring whether the claimant was expecting any more CSP (company sick pay) referring to it as a non-blameworthy accident. He stated that he had been told the claimant was entitled, "*but has he been given his entitlement for the year?*" This Tribunal did not hear from Jamie Cox.

13. The Tribunal finds that there was confusion amongst the respondent's personnel about the formal Company Sick Pay scheme that it saw in the bundle at page 42 and to which there was a rolling entitlement, and which is described as, "*CSP*" in the policy ith the enhanced scheme where the employee was paid in full for a non-blameworthy accident which, as already stated, is not covered in the written policy. Mr Cox received a reply from Sharon, who is believed was involved in pay roll, to say she had been told by Paul Ward not to pay CSP.

14. On the 6 January 2019 (page 158) Jamie Cox was enquiring of Adam Buchan and Paul Ward what the reason was for non-payment. He was also requesting the whereabouts of CCTV for the incident that he wanted to review. By letter of the 13 January 2019 (page 153) Adam Buchan stated that the claimant had received "*all entitled CSP and has nothing further outstanding. It is my belief he has put through a claim so any money he feels owed will be considered in his claim".*

15. On the 26 January 2018 (page 148), Jamie Cox wrote to various people believed to be in payroll and copied to various managers at the respondents sending the investigation and stipulating, "*outcome no case to answer*". That is consistent with the claimant's evidence that he was told that by Jamie Cox on a shift around about that time.

16. On 23 January 2019 the claimant submitted a grievance about the delay in paying him the enhanced sick pay. He was not making any allegations of less favourable treatment on any grounds, just raising the delay in paying him. This was to be heard on 31 January in conjunction with another grievance raised by the claimant. The minutes were seen at page 81.

17. The claimant challenged that he had not been paid what he was entitled to stating, "*the accident wasn't my fault so I should get paid*". He alleged that 20 minutes after putting in his grievance Jamie had told him there was no case to answer and that he had been shown the email from Adam Buchan stating not to pay the claimant as he had put a claim in which must be reference to the email of the 13 January referred to above.

18. This grievance outcome of Catherine Mallon was dated 26 February 2019 (page 162). She found that the claimant had been paid "*your full company sick pay entitlement in accordance with the Bradford Points Policy*". The outcome was that he not be paid anything further.

19. The claimant appealed on the 3 March, although the tribunal did not have the written appeal document. This was heard before Andy Dear on 7 March 2019 (page 166). The claimant again explained he did not get paid for the 6 weeks he was off, and he now stated, "*others have been paid if accident not their fault*". He raised the case of Hayden White. There was nothing noted in the notes about race. The claimant said in cross-examination he did mention race, but it had not been written down. The notes were however signed by both the claimant and his companion. That was all that was said and Mr Dear agreed to look into it.

20. In an outcome letter of the 18 March 2019 (page 172), Mr Dear stated the claimant was paid his full sick pay entitlement in accordance with Bradford Points Policy and the remainder at SSP but concluded, "*on this occasion I have decided to pay you company sick pay for the whole period of your absence following the accident*". There is no dispute that it was then paid.

21. The claimant's comparator was Mr Hayden White and his return to work following an accident was seen at page 65 of the bundle. It is noted on his return to work interview that he had been paid some payments but nil 'at present' and that the pay had stopped and he was receiving SSP. Nothing is known about his accident or its investigation. The other person the claimant referred to was Mr Skoracki Marcin and nothing is known about his circumstances at all.

22. The claimant raised a further grievance on the 28 March 2019 (page 174)

stating that he had been racially discriminated because of how long it took him to be paid alleging he had only been paid when he mentioned that others had been paid for an accident at work.

23. When the grievance was heard by Mr Chegwidden on the 25 April 2019 the claimant did refer to people who were English, Polish and himself being treated differently. The Tribunal finds that Mr Chegwidden did not really explore in detail the issue of race discrimination and had he done so the claimant may have at least felt his concerns had been acknowledged about the delay. However, this is not something from which the Tribunal can drawn an adverse inference that the delay in payment, which is the issue before this Tribunal, was itself discriminatory. Mr Chegwidden was not involved in that decision.

24. The Tribunal's conclusions on this first issue are that the claimant has not proved facts from which the Tribunal could conclude that he was treated less favourably on the grounds of his race and consequently the burden of proof does not pass to the respondent. Had it done so it is clear that firstly the investigation into the accident needed to be completed. Once it had been it is the case that there was delay and that the reason for that was never fully explained to the claimant. From the documents the Tribunal has seen it seems to have been caused by confusion over the company sick pay entitlement in such circumstances and further by Adam Buchan's belief that the claimant had made a claim against the respondent for his injury and that any loss of wages would be recovered through that process. It would have helped if the enhanced sick pay policy, which is has been called in this hearing, were in writing.

Second issue - performance improvement plan.

25. When the claimant returned to work he did have a fitness to work certificate referring to a return to work with restricted duties, but that was for the period before he returned to work. When he did return and met with Mr Woodward on the 16 December he declared that he was fully recovered and fit for work. Mr Woodward's evidence, which the Tribunal accepts, was that the claimant may be referred to occupational health and he would seek guidance from HR. That is consistent with the form that was completed where Mr Woodward left the section blank with regard to a referral. The form also made it clear the claimant confirmed he was fit to work with no adjustments.

26. The Tribunal saw an email from Mr Woodward of the 17 December (page 150) when he sent the return to work form to HR stating, "*I think it will be worth arranging an OH appointment for Hassan*". It was subsequently agreed on that day that the claimant would for the first week work a 5-hour day. The claimant did not raise the issue of occupational health again until he was told he was put on an improvement plan. It was open to him to have raised it if he thought it would help him. He was then though referred to occupational health at that later stage. The claimant was struggling to

meet his picking target and, on 28 February 2019, Mr Woodward informed him he would be placed on a performance improvement plan. The Tribunal saw the document at page 140 which the claimant accepted reflected the discussion that they had that he was currently picking at a rate of 142 cases per hour and that they sought an improvement to 147 within a week, to be followed by another review. He was advised that failure to improve could result in action being taken which they were obliged to tell him.

27. The claimant compares himself to Hayden White who had been off sick following an accident. His return to work has already been referred to. In particular, he stated that he was not fully recovered from his accident and there was a phased return to work. In cross-examination the claimant accepted there was a difference to his case. The claimant then stated that Mr Woodward should have waited for the claimant to be seen by occupational health before putting him on the PIP. The delay in referring him to occupational health was the subject of the claimant's grievance dated the 4 March 2019 which was initially heard by Lucasz Hruszwiec and then by Cliff Chegwidden. The Tribunal has already given its views on Mr Chegwidden's hearing of the grievance.

28. Mr Woodward demonstrated in a document at page 79 that he had reason to put others on a performance plan including Mr Dean Johnson, who was white British, Mr M Arceo, who he believed is Filipino and Mr M Udin who he thought was British Asian.

29. The claimant was reviewed on the 10 and 20 March and could be seen to be improving. He accepted, and it is the case, that no disciplinary action was taken against him. He accepted that Mr Woodward had to advise him that if he did not improve there might have to be disciplinary action but acknowledged that he was not "*threatened*" with it.

30. The Tribunal's conclusion on this issue is that the claimant has not established facts from which the Tribunal could conclude he was treated less favourably on the grounds of race by being placed on the performance improvement plan. The comparator Hayden White is not a true comparator within the meaning of the Equality Act in that his circumstances were not the same as the claimants.

The third issue - buddy duties

31. The claimant's allegation is that the buddy duties he performed were removed from him. He accepts however that he was never told that. His case is that before his accident he was given the buddy duties which were training new starters for which he was paid £20 a night and he and his colleague Alexandru Draghia would alternate between the starters. The Tribunal saw at page 76 a table prepared for these proceedings. The claimant disputed the details for Alexandru when it showed he had only covered two shifts in week 48, a week when the claimant was not at work, but accepted the details for himself which showed two shifts in week 3. On

numerous weeks there were no new starters, and some were covered by Rob, who the Tribunal understands was on the on-site training team.

32. The claimant has not established less favourable treatment. In fact, the claimant did more shifts than Alexandru in the time frame that the Tribunal saw in the table.

Refusal of permission to take unpaid holiday.

33. On the 15 April 2019 the claimant requested 24 days annual leave. Twelve days to be paid and twelve unpaid for the period 3 May to 5 June 2019 (page 176). The allegation is that the respondent treated him less favourably when he was told it would all be paid as he had not as yet exhausted his annual leave entitlement. The leave was approved by Adam Buchan but on the basis it would be paid. He wrote on the form, "*no unpaid is authorised until all paid is used*".

34. The claimant compares his treatment to Dean Johnson who he says was given two weeks paid holiday and 2 weeks unpaid in April 2019. Dean Johnson was a new started in his first year of employment. He was permitted to take unpaid leave on the basis that the respondent does not allow employees to take unaccrued leave in year one and he had not accrued sufficient entitlement. The claimant raised for the first time in his witness statement that he was not allowed to do that when he first started but the Tribunal had no information about that nor about the operational situation when the claimant started or when Dean Johnson did.

35. The fact is, the claimant was paid for his leave which was not a detriment and on the facts the claimant has not established any facts from which the Tribunal could conclude he was treated less favourably on the grounds of his race.

The second claim

36. The second claim was issued on 20 May 2020. It concerns differences that occurred between the claimant and Aurimas Grigaliumas.

37. The first incident was on 22 December 2019. Aurimas complained to Phil Gathercole that evening in a written statement and added two further paragraphs subsequently. The claimant accepted that Phil Gathercole went to speak to him on the 22nd and the claimant admitted singing a song about a weasel but denied he called his colleague that. He said he was singing a theme tune from a cartoon show, "*I am a weasel*" that he had been watching whilst babysitting. He was asked to stop singing the song.

38. There was a further incident on the 23 December in the carpark and Aurimas made a further statement seen at page 341. The claimant accepted that he was suggesting the claimant had threatened him. The claimant further accepted in cross-examination that there had been nothing

stopping him complaining about Aurimas to management if he had wished to do so. But he stated to this Tribunal that he did not do so because his behaviour "*was not a big deal*" and he was not offended by it.

39. Aurimas raised another issue following which the claimant was suspended on full pay. The claimant then did make a statement admitting some of the allegations. He was invited to a disciplinary hearing at which the respondent suggested mediation. Both parties agreed and there was a successful mediation outcome. There was no less favourable treatment. The circumstances of the claimant and Aurimas were not the same. The claimant was not making the complaint. If he had been then he would have initiated the complaint by giving a statement.

The third claim

40. This was issued on the 26 October 2021. The allegation is that in finding the claimant blameworthy and taking disciplinary action against him for an accident at work this was less favourable treatment on the grounds of his race. In final submissions the claimant's representative stated that the claimant was no longer arguing that the finding of him blameworthy was on the grounds of his race.

41. The accident happened on the 13 July 2021 when the claimant skidded on ice on the floor of the freezer whilst driving the picker. He injured his back. His account was seen at page 550 and the claimant was on sickness absence from the 14 July but did not receive sick pay. The claimant was dealing with Assunta Thomas in HR regarding his sick pay. In an email of the 26 July (page 572) she stated he was not being paid CSP and the investigation would continue on the claimant's return to work. The claimant subsequently requested CCTV footage and then asked to meet with Ms Thomas. There were difficulties about arranging the time for that meeting in view of the availability of the claimant's chosen representative and no criticism can be levied at Ms Thomas for cancelling the meeting and rearranging it.

42. The respondent investigated this incident and decided that the claimant was at fault. In an email of the 9 August 2021 (page 505) Ms Thomas set out what she had been told by the investigating officer, Mr Mustafa, as to why it had been found that the claimant was blameworthy. The claimant had sought to compare himself to Ms Dragenesku and Mr Lameneski, but as stated the claimant has not sought to pursue the allegation about blameworthy conduct.

43. He was, however, still dissatisfied with the fact that he was invited to a disciplinary hearing on the 1 October 2021 (page 522). The meeting notes were seen at page 527. The meeting was held by Mr Creber The claimant wanted to record the meeting and Mr Creber was not happy with that or proceeding at that point as he felt the claimant had become confrontational. There were attempts to rearrange this meeting, but this did not prove

possible, and it has never resumed.

44. The claimant then sought to argue that as the respondent had explained in its grounds of resistance that the two colleagues the claimant had named had had recorded conversations about incidents in which they were involved that should have been offered to him. Although that is an informal process the record is left on the employee's file indefinitely and can influence a taking of disciplinary proceedings in the future. The Tribunal heard from Thomas Creber that that was an outcome which could have come out of his meeting had it ever taken place.

Relevant Law

45. In reaching its conclusions the tribunal has taken the following into account.

46. **Equality Act 2010**

` 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.

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

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.

47. In Madarassy v Nomura International 2007 IRLR 246 CA Mummery LJ stated that:

> The bare facts of a difference in status and a difference in treatment 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

48. As was accepted in the House of Lords in **Shamoon v Chief Constable of Royal Ulster Constabulary [2003] IRLR 285**

> '…employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others.
>
> The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the claimant. Adopting this course would have simplified the issues, and assisted in their resolution, in the present case'

49. For all the reasons given the Tribunal has concluded in relation to each and every allegation that the claimant has not overcome the first hurdle of the burden of proof provisions and applying the approach in both of the above authorities the claims fail and are dismissed.

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Employment Judge Laidler

Date:26 August 2022

Judgment sent to the parties on

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For the Tribunal office