EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000353/2023

Held in Glasgow on 27 – 29 November 2023
Deliberations on 30 November and 1 December 2023

Employment Judge D Hoey
Members N Elliot and J Gallacher

Mr N Mohammed	**Claimant** **In Person**
Network Rail Infrastructure Limited	**Respondent** **Represented by:** **Mr Briggs - Counsel** **[Instructed by Messrs Dentons]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is that each of the claims (which are claims in respect of unlawful direct race discrimination pursuant to section 13 of the Equality Act 2010) is ill founded and they are dismissed.

REASONS

1. The claimant raised a claim for unlawful direct race discrimination (arguing that there were a number of separate acts of race discrimination). The respondent disputed the claims.

2. At a case management preliminary hearing, matters had been focussed and it was agreed a full hearing would be convened. The full hearing took place in person.

3. The hearing began by a reminder of the overriding objective and the need for both parties to work together to assist the Tribunal in ensuring that everything that was done was fair and just with due regard to cost and proportionality.

Preliminary issues

4. As a preliminary issue both parties were advised at the outset of two preliminary issues. The first was that one of the non legal members had noted Mr Briggs had been a solicitor in the firm of external lawyers used by the member's previous employer. Secondly the Employment Judge knew of one of the respondent's witness's family members (but not the witness). The witness in question was not a material witness in terms of the key issues in this case. The parties were given time to consider matters after which both parties said they had no issue in relation to the foregoing. It was agreed that the hearing would proceed to determine the issues (which it did), there being no issue arising in respect of the foregoing.

Case management

5. The parties had worked together to focus the issues in this case. The parties were able to agree timing for witnesses and the parties worked together to assist the Tribunal in achieving the overriding objective, in dealing with matters justly and fairly taking account of the issues, cost and proportionality. The case was able to conclude within the allocated time.

Issues to be determined

6. The issues to be determined were discussed in detail. The claimant confirmed that the issues had become finely focussed in respect of the claims he was advancing before the Tribunal (and the other matters referred to by him in his pleadings were background material). The issues to be determined were agreed to be as follows.

    1. Did the following acts take place:

        (a) Refusal to allow the claimant to move simulation groups to further learning;

(b) Undergoing observations against policy set out by the respondent being asked questions during an examined observation.

(c) Being ridiculed and bullied by having disparaging comments made during the training course (about having a photographic memory);

(d) Delayed receipt of minutes from the grievance meeting and termination appeal meeting;

(e) Delayed outcome of the termination appeal;

(f) Not being able to ask questions during an investigation;

(g) Lack of any communication from line manager from 13 March to 19 June 2023;

(h) Being treated with contempt by lateness to the course being repeatedly referred to by the trainer.

2. Did each act amount to less favourable treatment (the claimant comparing himself with others on the course and in respect of the grievance investigation and termination appeal items, to Mr Wilson, which failing hypothetical comparators); and

2. Was a reason for the treatment because of race, (the claimant being Pakistani).

7. The parties had agreed the position in relation to remedy if that had become an issue.

Evidence

8. The parties had produced a joint bundle of 422 pages with a supplementary bundle of 47 pages.

9. The Tribunal heard from the claimant, Ms Mitchell (claimant's line manager), Ms Danskin (the claimant's trainer), Mr Moffat (grievance manager) and Mr

Scobie (termination appeal manager). The witnesses each gave oral evidence and were cross examined and asked further relevant questions.

Facts

10. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are strictly necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case with regard to what was written and said at the time. There was little dispute about the key facts in this case.

Background

11. The respondent is responsible for (amongst other things) the signalling of trains. The claimant had been engaged as a trainee signaller. His contract stated that his employment was expressly subject to his passing the relevant examinations set by the respondent. The claimant's role was safety critical.

12. The respondent grouped signallers geographically, into teams managed by local managers.

13. The examination a trainee signaller required to pass took place during an 11 week course. This was an intensive and difficult signalling course based off site. It was not uncommon for 20 to 30% of candidates to fail the course which was assessed on the basis of written and practical assessments. The course had a cohort of trainees which were separated into groups chosen by the trainer. Theory would be taught, signalling being primarily (at this stage) based upon a large number of rules and regulations (set out in Rule Books) and practice (with the trainees working on a simulator).

14. The claimant was an articulate and intelligent individual.

15. The claimant's line manager was Ms Mitchell. The claimant's trainer was Ms Danskin. The manager who dealt with the claimant's grievance was Mr Moffat

and the manager who managed the claimant's termination appeal was Mr Scobie. The managers were experienced individuals.

16. The respondent had a number of policies and procedures, including a grievance procedure.

Requests to move simulation groups

17. The trainer of the claimant's cohort had decided to have groups based essentially on geography. That had resulted in the composition of the groups into which the cohort was placed.

18. An initial request to have the groups changed made was accepted as there were reasons why the composition of the group had to change. The claimant wished to change groups. The claimant's request was later and his request was not granted.

19. Given the nature of the training and its composition and delivery the trainer was of the view that it would not have been appropriate to have allowed a change in the groups at the point the claimant requested a change. It was logistically difficult to accommodate the request and disruption to groups was to be kept to a minimum.

20. The reason for refusing the claimant's request to change groups was solely to minimise disruption to the training and group structure. The earlier request had been granted due to issues having arisen in terms of the membership of the particular group. The only reason the claimant wanted to change groups was because he felt he would learn better in a different group.

21. Any individual who had asked to change groups whose circumstances were not materially different to the claimant (aside from race) would have been treated in precisely the same way and the request would have been denied due to the reason being solely to avoid creating adverse impact upon the teams by the time the claimant made the request.

Examiner's questions during examined observation

22. Ordinarily observations do not require any interaction with the examiner who simply observes the candidate and assesses their performance based upon how they perform. There are a limited number of scenarios, however, where the examiner requires to understand where the candidate is looking. These involve safety critical scenarios where the candidate must check a certain area of the track circuit. A failure to check that area of the circuit could give rise to serious risks. Given the location of the candidate and examiner in the room in question, the candidate who is facing that particular scenario must satisfy the examiner that they are checking the relevant area in question. That can usually only be carried out by the examiner asking the candidate what they are checking at the relevant moment in time.

23. The question would only be asked where the candidate is facing the particular scenario. That scenario would only arise in very limited number of situations (and so it is not common for examiners to ask questions during observations, since it would only happen where this particular scenario arose).

24. During one of the claimant's examined observations, the scenario arose whereby the examiner required to be satisfied that the claimant was checking a particular area of the circuit. The claimant was therefore asked a question during his examination because it was a necessary part of the examination that the trainer ask the questions. Any candidate who had been given the particular scenario would have been asked that question.

Trainer observes that claimant has a photographic memory

25. The trainer of the claimant's cohort had noted that the claimant had an excellent ability to recall the precise terms of rules. In fact his memory, to her, appeared to be photographic (and thereby impressive). This was referred to by her a few times during the training session, referring to the claimant's ability to recall precise terms of Rules. The comment was made because the claimant appeared, to the trainer, to have a remarkable ability to remember the precise terms of the rules. It appeared to her that the claimant had a photographic memory. The trainer would have made the comment about

anyone who had exhibited the same ability to remember word for word rules that had been presented to them.

26. Unfortunately while the claimant had an excellent ability to remember the rules (and recite them word for word) he was unable to implement them in a practical way that was required to pass the course.

27. The claimant was upset by the trainer's reference to her belief that the claimant had a photographic memory but the comment would have been made to any person who had exhibited such an ability. The comment was not made in a negative or prejudicial way but was made as an observation of the ability the claimant had shown to recite the precise terms of a Rule. That observation would have been made had anyone shown the same ability as the claimant had shown during the course (and the comment would have been made in the same way with the same frequency).

28. There was correspondence and notes taken at the time which supported the trainer's position.

Minutes from the grievance meeting and termination appeal meeting are delayed

29. The claimant attended a grievance meeting in respect of a grievance he had raised. The minutes for this meeting were delayed in being issued to the claimant.

30. Another employee, Mr Wilson, also encountered similar delays in receiving minutes following a grievance meeting.

31. The delays both individuals encountered with regard to receipt of the minutes of the grievance meetings were not materially different.

32. The reason for the delay was solely down to logistical reasons and no other reason. Any person who had lodged a grievance (irrespective of race) would have encountered the same delay.

33. The claimant also encountered delays in receipt of his termination appeal meeting minutes. These were delated due to the appeal manager having been on holiday and him having encountered issues with the IT, the note taker and

receiving the minutes. That was the sole reason for the delay. Any person who had lodged a grievance (irrespective of race) would have encountered the same delay.

Outcome of the termination appeal is delayed

34. The outcome of the termination appeal was provided to the claimant. There was a delay in providing the outcome letter to the claimant. The reason for the delay was solely because of logistical issues, including the appeal managers holiday and issues with IT and the notetaker. Any person who had an appeal meeting (irrespective of race) would have encountered the same delay.

Asking questions during a grievance investigation

35. The claimant had raised a grievance and during the grievance process a grievance manager had been appointed. That individual met with the claimant and undertook a fact finding investigation. The fact finding manager undertook to speak to the relevant individuals and develop an understanding as to what had occurred and the reason for it.

36. While the claimant believed he was going to be asked for questions he wished the grievance manager to ask of witnesses, that was not the respondent's policy nor was it the investigation manager's approach. Had the claimant asked that specific questions be asked (or specific persons be spoken to) the manager would have done his best to do so. The manager in question asked those whom he considered relevant (and appropriate) for information about the grievance and carried out the investigation.

37. The same approach as to carrying out the investigation would be undertaken in respect of any person who raised a grievance, irrespective of race.

Lack of communication from line manager from 13 March to 19 June 2023

38. The claimant did not pass the exam. He had therefore been absent from work and was looking for alternative employment, the respondent having sent the claimant a list of vacancies on a weekly basis.

39. Line managers contact direct reports where they consider it necessary and reasonable to do so. In the claimant's case there was no direct communication from 13 March to 19 June 2023. During this time the claimant had been given a period of time to find redeployment, him having failed to pass the test to become a signaller. The claimant's line manager was undertaking a very busy role and during a very busy time (involving rail strikes and increased operational demands upon the area of track for which she was responsible). There was no basis for the claimant's line manager to contact the claimant in the circumstances.

40. At each stage during the internal processes in respect of which the claimant was undertaken, he was assigned a specific manager (such as a grievance manager). The claimant had the ability to contact those managers (or his line manager) if he required support or contact. The claimant had not contacted his line manager and she did not consider there to be any reason for her to contact him.

41. The claimant's line manager would have treated any individual in the claimant's position in the same way, irrespective of their race. As the claimant was not continuing in his role as signaller, the claimant would (if he secured employment) be given another line manager.

Trainer refers to claimant's lateness

42. The trainer was of the view that the training course was intensive and the time spent with the class required to be maximised. She had given her mobile number to allow contact to be made in the event of any delays or issues.

43. The claimant was late one morning for the course. The trainer had not been told of the delay. While the claimant had asked colleagues to advise the trainer, the trainer had not been told and she was therefore unaware of the claimant's attendance on the morning in question. This was supported by notes and communications at the time.

44. The claimant was not treated "with contempt" (as believed by the claimant) but instead was spoken to about the importance of attending the course on

time and raising any issue as to attendance as soon as possible. The importance of good time keeping was referred to on a number of occasions. The reference was not in a negative or prejudicial way but as a reminder of the importance of good timekeeping.

45. The reason why the claimant was confronted about his lateness was solely due to the importance of punctuality on the course (and the impact this had on the claimant's and the other learner's time and knowledge).

46. Any other person who had been late during the claimant's training had followed protocol (which the claimant had not done). Any other person who had been late in the same circumstances as the claimant would have been treated in precisely the same way (irrespective of race).

Observations on the evidence

47. The Tribunal found each of the witnesses generally to be credible. They did their best to recollect the position. Given the claim was solely about direct race discrimination, the key issue in this case was the Tribunal determining the reason why the respondent acted in the way it did with regard to the treatment relied upon by the claimant.

48. The claimant was candid in the giving of his evidence that the basis for each of his assertions of direct race discrimination was upon his belief that his race was a reason for the treatment. He accepted that there was no direct evidence of race being a factor (which is not uncommon in these situations).

49. The Tribunal was careful to assess the evidence that was led, particularly with regard to the decision makers in respect of each of the issues raised by the claimant. The Tribunal heard evidence from each of the decision makers and was able to analyse carefully their reasoning.

50. There were some aspects of the claimant's case that the Tribunal did not accept. That was by and large because it related to what the claimant had been told by others and was not within the claimant's direct knowledge and the Tribunal was able to make positive findings from the evidence it heard in respect of a person who had been present at the time. Thus the claimant

believed that a colleague had waited less than him with regard to the issue of minutes. However, the Tribunal preferred the evidence of the person responsible for both minutes that the time the claimant waited was the same (if not less) than the time his colleague had waited.

51. Similarly the claimant believed that the trainer had been told of his lateness. The trainer said she had not been told about the claimant being late. The Tribunal preferred the trainer's evidence on this point. Similarly the Tribunal accepted the trainer's evidence that no other person had failed to follow the protocol when being late. While the trainer could not remember all matters, the Tribunal found the correspondence and notes taken at the time useful, which supported the trainer's position.

52. These were matters that were not within the claimant's knowledge and were matters upon which direct evidence was led by the relevant witness.

53. Where there was a conflict in evidence between the claimant and the trainer, the Tribunal found the trainer's evidence to be more likely than not the case and the Tribunal preferred the trainer's evidence. The trainer had taken contemporaneous notes and had spoken with colleagues and her position was clear. The trainer was candid in her evidence. The claimant did not find the trainer's style of teaching suitable for him and he was highly critical of the approach taken, which led to his forming a particular view as to what he was told and how such things were communicated (which also informed the claimant's belief as to why he was being told such things).

Law

Burden of proof

54. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> *"(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."

55. The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

56. It is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

57. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears ***in Igen Limited v Wong 2005 ICR 931*** and was supplemented in ***Madarassy v Nomura International plc 2007 ICR 867***. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question.

58. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

59. It was confirmed by Lord Justice Mummery in the Court of Appeal that it is not always necessary to address the two-stage test sequentially (see ***Brown v London Borough of Croydon 2007 ICR 909***). Although it would normally be good practice to apply the two-stage test, it is not an error of law for a tribunal to proceed straight to the second stage in cases where this does not prejudice the claimant. In that case, far from prejudicing the claimant, the approach had relieved him of the obligation to establish a prima facie case.

60. Thus in direct discrimination cases the tribunal can examine whether or not the treatment is inextricably linked with the reason why such treatment has been meted out to the claimant. If such a link is apparent, the tribunal might

first consider whether or not it can make a positive finding as to the reason, in which case it will not need to apply the shifting burden of proof rule.

61. The Tribunal was also able to take into account the Employment Appeal Tribunal decision in this regard in ***Field v Steve Pye & Co EAT2021-000357***.

62. In this case the Tribunal has been able to make positive findings of fact without resort to the burden of proof provisions.

Direct discrimination

63. Discrimination is defined in section 13(1) as follows: "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."

64. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies: "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."

65. The effect of section 23 as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person.

66. Further, as the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including ***Amnesty International v Ahmed 2009 IRLR 884***, in most cases where the conduct in question is not overtly related to [the protected characteristic], the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator.

67. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In ***Amnesty International v Ahmed*** 2009 IRLR 884 the Employment Appeal Tribunal recognised two different approaches from two (then) House of Lords authorities - (i) in ***James v Eastleigh Borough Council 1990 IRLR 288*** and (ii) in ***Nagaragan v London Regional Transport 1999 IRLR 572***. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan***, the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another 2009 UKSC 15***. The burden of establishing less favourable treatment is on the claimant.

68. The Tribunal should draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance, where necessary, of the burden of proof provisions) – as explained in the Court of Appeal case of ***Anya v University of Oxford*** 2001 IRLR 377.

69. In ***Glasgow City Council v Zafar 1998 IRLR 36***, also a (then) House of Lords case, it was held that it is not enough for the claimant to point to unreasonable behaviour. He must show less favourable treatment, one of whose effective causes was the protected characteristic relied on.

70. In ***Shamoon v Chief Constable of the RUC 2003 IRLR 285***, a (then) House of Lords authority, Lord Nichols said that a Tribunal may sometimes be able to avoid arid and confusing debate about the identification of the appropriate comparator by concentrating primarily on why the complainant was treated as she was, and leave the less favourable treatment issue until after they have decided what treatment was afforded. Was it on the prescribed ground or was it for some other reason? If the former, there would usually be no difficulty in deciding whether the treatment afforded the claimant on the prescribed ground was less favourable than afforded to another.

71. The Equality and Human Rights Commission Code notes at paragraph 3.4 that it is more likely an employer's treatment will be less favourable where the treatment puts the worker's at a "clear disadvantage", which could involve being deprived of a choice or excluded from an opportunity. At paragraph 3.5 the Code notes that the worker does not need to experience actual disadvantage (economic or otherwise) as it is enough the worker can reasonably say they would prefer not to be treated differently from the way they were treated. The example given is of a worker who loses their appraisal duties which could be less favourable treatment.

72. It is also important to note that the treatment would be "because of the protected characteristic" if it was "a substantial or effective though not necessarily the sole or intended reason for the treatment" (***R v Commission for Racial Equality 1984 IRLR 230***).

73. Chapter 3 of the Code contains useful guidance in applying the law in this area and we have had regard to that guidance.

Submissions

74. The respondent had usefully provided written submissions which the claimant had considered. The claimant's position was that each act had occurred, that it was less favourable treatment and that he believed a reason for the treatment was his race.

Decision and discussion

75. The Tribunal spent a considerable period of time considering the evidence that had been led in light of the applicable law. Having considered the evidence led, and the position adopted by each party. the Tribunal was able to reach a unanimous decision in respect of each of the issues which are dealt with in turn.

(a) Refusal to allow the claimant to move simulation groups to further his learning

76. The claimant's request to move simulation groups had not been agreed by the trainer. While an earlier request had been granted, that was due to an issue with regard to the composition of the group. The claimant's later request to move was declined. The act relied upon in relation to this issue had therefore been established – his request had been denied.

77. The next issue is whether the treatment amounted to less favourable treatment. The comparator relied upon by the claimant was the other individuals who had asked to move teams (who were on the course). However, their request had been made at an earlier point in the course. Their circumstances were materially different to the claimant's position. The Tribunal accepted the trainer's evidence that no one had asked to move teams at (or after) the point the claimant had, and if they had done so such a request would also have been refused.

78. Had anyone made a request when the claimant had made it, whose circumstances did not material differ from the claimant's circumstances, the request would not have been granted. The trainer's position was that it was not logistically appropriate to change the composition of the groups at the point the claimant made the request as it would affect the learning of each affected person in the groups. An earlier change in the teams had been made but that was earlier in time and due to circumstances that required action (and not simply the wish of an individual). Any request by a member of the groups to change, because they felt they would learn better in a different group, made when the claimant made the request would be refused.

79. Therefore there was no less favourable treatment because any person who made the request the claimant made, whose circumstances were not materially different, would have been treated in precisely the same way as the claimant was. There was no less favourable treatment.

80. Even if the treatment was less favourable, the sole reason for the treatment was because of the desire to avoid negatively impacting upon the learning of those affected. The trainer was of the view it was logistically difficult to accommodate the request, given the desire to keep the groups together and

to avoid disruption. The request would have been treated in precisely the same manner had it been made by someone of a different race from the claimant.

81. The reason for the treatment was in no sense whatsoever because of race. Race was entirely irrelevant as to the reason for the treatment in this regard. The treatment was because of the trainer's decision to maintain consistency and avoid negatively impacting learning.

(b) Being asked questions during an examined observation

82. The claimant was asked a question during his observation assessment. No other candidate was asked the question. The treatment relied upon in this issue had therefore been established.

83. The next issue is whether asking the claimant questions during the observed assessment was less favourable treatment. The questions asked of the claimant were appropriate and necessary and solely due to the particular scenario that he had been given. The same questions would have been asked of any candidate sitting the exam, regardless of race, if they had been presented with that scenario and specific situation.

84. There was therefore no less favourable treatment since any candidate, whose circumstances are not materially different to the claimant of a different race, would be treated in precisely the same way as the claimant had been treated.

85. Even if the treatment had been less favourable treatment, the reason for the treatment was in no sense whatsoever because of race. Race was entirely irrelevant as to the reason for the treatment in this regard. The sole reason for the treatment was to ensure the examiner knew the claimant was checking a certain area of the circuit which was safety critical and race would have played no part in the decision to ask the questions.

(c) Trainer making comments about claimant having a photographic memory

86. The trainer had referred to the claimant having a photographic memory. This comment was made as an observation by the trainer as to the claimant's ability to recall the precise words of the Rules. It was not said in ridiculing bullying or disparaging manner but rather as an observation as to the unusual ability the claimant had. While the claimant was uncomfortable with the comment having been made, it was an observation that was made as a result of the claimant's ability to recall the precise Rule's words. It was not said in a negative or unfair way but purely as an observation as to how the claimant had demonstrated his learning. Unfortunately knowing the Rule word for word, was not sufficient since it had to be demonstrated and applied in a practical context, a matter with which the claimant had difficulty but the claimant had shown an unusual ability to recall precise words of the Rules.

87. Thus the treatment in the sense of the trainer having made comments about the claimant's photographic memory had been made out from the evidence before the Tribunal.

88. The Tribunal preferred the evidence of the trainer as to the way in which the comments were made and how the comments were made. That was because the trainer regarded the matter with a degree of seriousness and wished to ensure each of the candidates was given the best possible chance of passing a very challenging course which required full attendance during the sessions. While the claimant found the comments unpleasant and perceived them as negative and disparaging, that was the claimant's perception and on balance the Tribunal accepted the trainer's evidence that the comments were purely observational (and the claimant's perception as to the nature of the comments were his perception). The claimant was unhappy with the comments as he did not wish the trainer's observations to have been made and his perception was taken into account by the Tribunal.

89. In determining whether the treatment (making comments about the claimant having a photographic memory) was less favourable treatment the Tribunal considered how a hypothetical person, of a different race to the claimant, would have been treated whose circumstances were not materially different to the claimant's. The Tribunal was satisfied the trainer would have made the

same comment to any candidate who had demonstrated an ability to do what the claimant did. The treatment was not less favourable as it would have been the same. There was therefore no less favourable treatment.

90. The Tribunal was in any event satisfied the reason for the treatment was entirely unconnected to race which played no part whatsoever in the reason why the trainer made the comment about the claimant. The trainer made the comment solely because it was how she observed how the claimant had performed and what he had done with regard to remembering rules, which was unusual. She did not intend the comment to be negative or prejudicial but as an observation of the unusual ability demonstrated. It had also contrasted with how the claimant had performed since although he was able to skilfully recite the Rules word for word, regrettably he was unable to apply them in a practical setting.

91. The reason for the treatment (as had been established) was in no sense whatsoever because of race. Race was entirely irrelevant as to the reason for the treatment in this regard. The sole reason was because the claimant evidenced a photographic memory (which was entirely unconnected to race and solely because of the skill he had demonstrated).

(d) Delayed minutes from the grievance meeting and termination appeal meeting

92. There was a delay in the claimant's receipt of the minutes and the acts relied upon in relation to this issue had been established on the evidence.

93. In assessing whether the treatment was less favourable the Tribunal considered how someone else would have been treated whose circumstances were not materially different to those of the claimant.

94. The claimant had compared his situation with regard to the grievance with Mr Wilson. The Tribunal was satisfied from the evidence it heard that Mr Wilson was subject to a similar delay experienced by the claimant. There were similar delays because the reasons for the delay were similar. Mr Wilson had also experienced a delay in receiving the minutes following his grievance meeting,

in a similar way to the delay the claimant had experienced. The Tribunal found the evidence of the respondent clear, cogent and accepted it.

95. There was therefore no less favourable treatment in receiving the grievance minutes late. Even if there were no actual comparator the claimant would have been satisfied from the evidence that any person who had raised a grievance would have encountered the same delay in receiving the minutes. A hypothetical comparator would have been treated in the same way as the claimant had been treated. There was therefore no less favourable treatment.

96. With regard to the appeal minutes, there was no actual comparator (as the actual comparator relied upon by the claimant had raised a grievance not an appeal but in any event had encountered similar delays the claimant had encountered). The Tribunal was satisfied that any person who had raised an appeal in a similar manner to the claimant would have encountered the same delays in receiving the minutes. There was no less favourable treatment in this regard.

97. With regard to both situations, the Tribunal was satisfied the sole reason for the delay was the administrative issues the author of each of the minutes encountered which led to the minutes being issued later in time.

98. The reason for the delay in both minutes being sent to the claimant was in no sense whatsoever because of race. Race was entirely irrelevant as to the reason for the treatment in both regards. The only reason for the delay was the logistical and administrative issues encountered leading to the minutes being issued late which was entirely unconnected to race.

(e) Omission/delay of an outcome of the termination appeal

99. The claimant did receive the outcome to his meeting (in writing) but it was later than expected and so this issue had been established in evidence.

100. The reason for the lateness was due to the logistical issues encountered. The author of the minute had been on 2 holidays and there were delays in having the minutes typed. Anyone who had raised an appeal whose circumstances

were not materially different to the claimant would have been treated in precisely the same way. There was no less favourable treatment.

101. The Tribunal was satisfied the sole reason for the delay was the issues with regard to IT, holidays and the typing and checking of the minute. Race was entirely unconnected to the reason for the treatment.

102. The reason for the treatment was in no sense whatsoever because of race. Race was entirely irrelevant as to the reason for the treatment in this regard.

(f) Not being able to ask questions during an investigation

103. The claimant had not been invited to ask, or to submit questions to be asked, of the individuals being interviewed in the evidence-gathering phase of the grievance. This issue had therefore been established in evidence.

104. The next question is whether the treatment is less favourable treatment. In assessing whether this was less favourable treatment the Tribunal considered the evidence of the grievance manager who was undertaking the investigation. The Tribunal was satisfied no other individuals had been offered the chance to ask questions. The clamant may have understood that others had been asked (or even been told by others that they had done so) but there was no evidence before the Tribunal to support that assertion; The grievance manager was clear in his evidence, which the Tribunal accepted. The claimant was treated in precisely the same way as any individual who had raised a grievance would be treated. The treatment was not less favourable.

105. Even if there had been no actual comparator, the Tribunal was satisfied that a hypothetical comparator whose circumstances were identical to the claimant (aside from race) would have been treated in the same way as the claimant had been treated in relation to the grievance investigation process. The approach taken was the approach the manager took in every investigation.

106. Even if the treatment had been less favourable, the reason why the claimant was treated in the way he was not in any way related to race. The grievance

manager approached the grievance in the way he sought fit in an attempt to secure as full an understanding as to the position as he could.

107. The reason for the treatment was in no sense whatsoever because of race. Race was entirely irrelevant as to the reason for the treatment in this regard. The respondent's policy (as properly understood) was applied by the investigation manager to the claimant (and race was not relevant to the approach taken).

(g) Lack of communication from the claimant's line manager from 13 March to 19 June 2023

108. There was no contact from the claimant's line manager from 13 March to 19 June 2023. This had been established in the evidence.

109. The next issue is whether the treatment was less favourable treatment. In assessing whether this amounted to less favourable treatment, the Tribunal looked at the treatment and how others would have been treated in the same situation (in the absence of an actual comparator). The claimant's line manager was clear that had another employee been in the claimant's position during this period (of a different race), there would have been no contact.

110. There was no reason to make any such contact. The claimant was not working, was being paid a salary until the resolution of his grievance and was looking for another role. There were other managers in place during the relevant processes. Furthermore his then line manager would change if he secured another role (which he was considering) which failing his employment would end. There was no reason for the manager to contact the claimant (and he had not sought any such contact).

111. Any individual in those circumstances (whose race was different but whose circumstances were not materially different) would be treated in the same way as the claimant was treated. There was no less favourable treatment.

112. Even if the treatment had been less favourable, there was no basis to find any connection at all with the claimant's race. This had been a busy time for the claimant's line manager. The claimant had not sought contact and there was

no reason to make such contact. The claimant's race was entirely unconnected to the reason why no contact was made.

113. The reason for the treatment was in no sense whatsoever because of race. Race was entirely irrelevant as to the reason for the treatment in this regard. There was no reason to contact the claimant and anyone in his circumstances would have received precisely the same treatment.

(h) Referring to claimant's lateness during training

114. The claimant's lateness had been referred to by the claimant's trainer on a number of occasions in discussions with the claimant and to the group. To that extent the treatment relied upon had been established in evidence.

115. In assessing whether this was less favourable treatment the Tribunal considered the evidence before it. Firstly the Tribunal did not accept the claimant's assertion that there were "repeated and contemptuous" references made to his lateness. There were a number of occasions when this was referred to by the trainer but that was because the trainer wished to remind the claimant (and others) of the importance of good time management. The reference was not done in a negative sense, even if the claimant had not liked reference being made to it.

116. The course was intensive. The purpose is to qualify individuals to work in a highly safety-critical industry. The claimant's lateness had the potential to have knock-on consequences for other delegates. The trainer was concerned about lateness and wished to make that point to the claimant and others. The Tribunal was satisfied the comments were not made in an adverse or negative way but referred to the importance of good time keeping.

117. The trainer had no experience of anyone else in the claimant's cohort of being late and not advising the trainer of lateness. Whole the claimant had understood his lateness had been communicated to the trainer, that had not in fact been done. A comparison with someone who had advised the trainer of impending lateness, and followed the protocol, was not a relevant

comparison since their circumstances are materially different to the claimant's.

118. The treatment the claimant received would have been the same treatment anyone else would have received had they been late and not advised the trainer (irrespective of their race). There was therefore no less favourable treatment.

119. Even If the treatment was less favourable, the reason the claimant was confronted over his lateness was due to the importance of punctuality on the course. The trainer would have treated anyone in the same situation as the claimant in precisely the same way and the claimant's race was entirely irrelevant.

120. The reason for the treatment was in no sense whatsoever because of race. Race was entirely irrelevant as to the reason for the treatment in this regard.

Taking a step back

121. The Tribunal took a step back to consider the evidence and the treatment the claimant had received. The Tribunal recognised that the claimant was firmly of the belief that the training he had received was poor, in relation to the way he learned effectively. The claimant had accepted on a number of occasions that in fact others were treated in precisely the same way as him, for example, in failing the course. The claimant had asserted the treason for the treatment was because the way in which the training was delivered was, in his view poor and failed to create an environment that allowed him to develop his learning. That was not, however, less favourable treatment because of race.

122. While the claimant believed that race was a factor in the treatment he received, the Tribunal had no hesitation from the evidence it heard in finding that there was no link whatsoever between race the claimant's treatment. This applied to each of the decisions in respect of which evidence was led. Race was entirely unconnected and irrelevant to the decisions taken, which were taken by each of the decision makers entirely on the basis of the evidence

before them and in light of the challenging course the claimant was undertaking and the safety critical role for which he was training.

123. The respondent had taken the concerns the claimant raised seriously and had undertaken a detailed investigation into each issue. The course itself was challenging and candidates would regularly fail it. The claimant was afforded more time and the end of his employment was delayed to allow the concerns he had raised to be fully investigated. The respondent invested heavily in the claimant and in considering the serious concerns that had been identified. The respondent found no evidence to support the claimant's assertions following their detailed and thorough consideration.

124. The Tribunal was mindful that persons rarely accept a protected characteristic operates in their mind when making decisions. In this case, however, there was no evidence whatsoever to support the claimant's belief that race was in some way a factor that operated to place him in an adverse position. For each of the decisions made which the claimant considered adverse, the claimant's race was entirely irrelevant. In respect of each of the issues raised by the claimant in this case, the claimant's race was in no sense a substantial or effective reason for the treatment.

Race being in no sense whatsoever a reason for the treatment, claims are dismissed

125. The claimant's claims are accordingly ill founded and they are dismissed.

D Hoey

_____

Employment Judge

4 December 2023

_____

Date

Date sent to parties 10 January 2024

_____