



EMPLOYMENT TRIBUNALS

Claimant: Mr A Mackowski

Respondent: National Rail Infrastructure Limited

Heard at: Reading Employment Tribunal (by video)

On: 8-12 January 2024, 14 and 16 February 2024¹

Before: Employment Judge Hook, sitting with
Dr C Whitehouse
Ms J Hartland

Representation:

Claimant: In person

Respondent: Mr J Crozier, Counsel on 8-12 January 2024 and
Mrs Carter, Solicitor, on 16 February 2024

JUDGMENT having been sent to the parties on 5 March 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In this case the claimant brought claims of constructive dismissal, direct discrimination based on race, harassment based on race and victimisation. As stated in the judgment, none of these claims were well founded and were all dismissed.
2. The respondent in this case is Network Rail Infrastructure Limited. In these reasons any reference to the shorter "Network Rail" should be read as a reference to the respondent.

¹ on 14 February 2024 the Tribunal deliberated without attendance of the parties.
10.8 Reasons – rule 62(3)

3. The Tribunal sat for five days 8-12 January 2024. The Tribunal panel sat in private for further deliberations on 14 February 2024 and gave oral judgement and reasons on 16 February 2024.

PROCEDURAL HISTORY

4. There was a preliminary hearing on 18 August 2023. Employment Judge Moore struck out claims of disability discrimination and equal pay. Judge Moore's reasons are fully set out in the record of that hearing.

FINAL HEARING

Witnesses

5. At the final hearing, the claimant gave evidence himself and called evidence from his mother, Mrs Ursula Mackowski.
6. The claimant told us he was suffering from stress and depression during the hearing. The Tribunal took steps to take account of this in the proceedings such as asking the claimant if he was feeling okay and offering to take breaks. There were no other adjustments that the claimant asked for.
7. The respondent called evidence from seven witnesses:
 - a. Peter Frampton
 - b. Danielle Pound
 - c. Robert Breckon
 - d. Daniel Collins
 - e. Dominic Gorton
 - f. Adam Cooper-Watson
 - g. Gregory Martin

Burden and standard of proof

8. The standard of proof applicable to these proceedings is the balance of probabilities. That means that on the disputed issues the Tribunal will weigh up the relevant evidence that has been presented to the Tribunal by the claimant and respondent and decide what is more likely than not to be true. To say that something is proved on the balance of probabilities is to say that the evidence shows it to more likely than not be true.
9. The Tribunal has taken account of the evidence of the witnesses called by the claimant and respondent and the documentary evidence put before us.
10. The general position in civil law is that the claimant, who has brought the case, has the burden of proving his case. However, in claims under Equality Act 2010, under s. 136, if facts are established from which the Tribunal could decide that an unlawful act of discrimination has taken place the burden of proof shifts to the respondent to show that there is a non-discriminatory explanation. This shifting burden of proof may apply to claims of discrimination, harassment and victimisation (claims that the claimant has brought in this case).
11. The first stage is that the claimant must show a prima facie case that potentially less favourable treatment has occurred (see Laing v Manchester City Council and another 2006 1CR 1519, EAT). In determining this the Tribunal must look at all the circumstances (which will be apparent from the evidence) and draw reasonable inferences where appropriate.
12. In this case the claimant seeks to pass the first stage by showing that events indicated in the Scott Schedule agreed by the parties occurred.
13. If the first stage is passed then the burden shifts to the respondent to provide an explanation and show that the act was not discriminatory.

Documentary evidence bundle

14. The parties agreed a bundle of 1406 pages (including index) and referred us to particular documents. The parties were clearly directed that if they wished the Tribunal to have regard to a document in the bundle, they should highlight that document to us.

15. At the outset of the final hearing, preliminary issues were raised about the bundle. Firstly, the claimant considered that certain documents he had asked to go into the bundle had been left out by the respondent's solicitors. Some of the documents were in the bundle but had been re-labelled in the index from the label, or title, the claimant has proposed for these documents. Other documents had not been included. These were, save for three documents referred to below, put into a supplementary bundle of 12 pages (including index) that was provided to the Tribunal.

16. The claimant asked for three more documents to be included in the bundle which the Tribunal refused. These referred to a person who was not a witness in the case but who works in the respondent's human resources department.

17. The three documents were:
 - a. A screenshot of this person's LinkedIn profile;
 - b. A screenshot of pages from the website of the Solicitors Regulation Authority indicating that this person had been disciplined by the SRA some years ago, was suspended from practice for a period and had restrictions placed on their practice; and
 - c. An online news report appearing to refer to the disciplinary hearing in question and setting out the facts of that case, which were that they had in 2018 sought to conceal a tribunal hearing notification received by their firm to cover-up a diary mistake and was dismissed by their firm prior to the SRA action. According to the news report they suffered a panic attack after becoming aware of

their diary mistake and the SRA disciplinary tribunal considered medical evidence. The disciplinary tribunal described their dishonest action as “not sustained or calculated.”

18. The respondent confirmed that in the present case this person had had “an advisory HR role.” One of the managers who had dealt with HR processes concerning the claimant had spoken to this person for HR advice. The claimant said he considered these three documents to be relevant to his case as people in Network Rail have, he believes, “closed ranks” against him. He suspects that the person referred to in the document interfered with his case and “brushed [his] complaints under the carpet and advised Mr Collins [a Network Rail manager] not to do anything.” He suggested that the concealment of a tribunal notification in 2018 suggested this person might have tampered with documents in this case. He could not specify any document he was concerned might have been tampered with.

19. The respondent submitted that the three documents were entirely irrelevant to the issues in this case. There are no allegations against this person in the Scott Schedule of the claimant’s allegations. The Tribunal would be hearing evidence from witnesses who had substantively dealt with the grievance that the claimant had raised. It was submitted that the person concerned is “largely irrelevant” to the case and “what happened to them in a previous career is utterly irrelevant.” The “Speak Out” reports, documents in which the claimant had raised concerns about various matters at his work had been disclosed and relevant reports are in the bundle.

20. The Tribunal took the view that the three documents did indeed appear to lack relevance to the issues in the case. There was no specific complaint in this case against the person concerned and the events of 2018 (which on the basis of the news report that the claimant asked us to have regard to, appeared to concern a serious but one-off mistake over five years ago for which there was personal mitigation and had been addressed by the relevant tribunal) was extremely unlikely to have any bearing on our

assessment of the disputed issues in this case. We therefore refused permission for the three documents to be added to the bundle but said that the claimant could renew his application to include them later in the hearing if the evidence heard gave the documents relevance. The claimant did not seek to raise the matter again later in the hearing.

Claimant's application to add to the list of issues

21. A further preliminary issue was that the claimant sought to add another allegation to the 21 allegations in the Scott Schedule. The allegation as drafted was not straightforward to understand but the claimant explained that, in short, he was alleging that his sources of stress (or stressors) had not been dealt with adequately on 13/9/22 by Network Rail managers. He names two managers, Danielle Pound who already was a witness in the case and Alison Prentice who was not.

22. He said in the draft addition to the Scott Schedule (which he had emailed to the Tribunal on 4/1/24) this was part of the direct discrimination and harassment against him. He said that it was disability discrimination and victimisation.

23. The respondent objected to this proposed addition to the Scott Schedule. The allegation appeared to, at most, touch on disability discrimination which was struck out as a claim in August 2023. A list of issues and the Scott Schedule were discussed at a further preliminary hearing in October 2023. Agreed versions of these were put into the bundle which did not include this allegation. The present version of the bundle was sent to the claimant in late November 2023, and he had not raised his wish that this allegation be included until his email of 4 January 2024. The claimant told us he had not noticed its absence until over the Christmas period.

24. The respondent submitted that allowing this extra allegation to be included now would require an extra witness. The allegation was made against Alison Prentice. She was not a witness in the case. If this allegation was to be added a statement would need to be taken from her, further

documents might need to be obtained and she would likely need to attend to give evidence.

25. The Tribunal considered it was unreasonable of the claimant, having received the present iteration of the Scott Schedule in late November, not to raise his request for an additional allegation until 4 January 2024 (just two working days before the start of this hearing) and the point made by the respondent that it would introduce a new person to the case and need for additional evidence was correct. The Tribunal therefore considered it was not in the interests of justice to allow this addition to the Scott Schedule (or the consequent amendment to the list of issues that would have been required).

THE LAW

26. As noted above, the claimant brought claims of constructive dismissal, direct discrimination based on race, harassment based on race and victimisation.

CONSTRUCTIVE DISMISSAL

27. When an employee terminates their contract of employment that can, in certain circumstances, be considered to be a dismissal. This is made law by Employment Rights Act 1996, s. 95(1)(c). A termination that is in fact a dismissal is referred to as a “constructive dismissal” and arises out of conduct by the employer.

28. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 CA the Court of Appeal ruled that a constructive dismissal requires a repudiatory breach of the employment contract. There must be a fundamental breach of the contract by the employer, which must cause the employee to resign, and the employee must not delay too long before resigning. If they delay too long they will be taken as affirming the contract (agreeing to the contract continuing) and losing the right to bring a claim that a constructive dismissal has occurred.

29. The breach of contract that is alleged to have taken place must be a fundamental breach and what is fundamental will depend on the facts of a given case. In many cases, including this case, the claimant is entitled to rely on an implied term in the contract of mutual trust and confidence.

30. Mutual trust and confidence are essential to employment contracts and neither party should behave in a way that is calculated or likely to destroy or seriously damage the relationship of trust and confidence. Employers can breach this duty in a number of ways. The claimant in this case says that the respondent did various things identified in the Scott Schedule and these amount to destruction or serious damage to his trust and confidence in the respondent.

DIRECT DISCRIMINATION BASED ON RACE

31. The claimant has brought claims connected to this race. Equality Act 2010 s. 9 defines race and includes “ethnic or national origins.” In this case the claimant relies on his Polish heritage, clearly an ethnic or national origin, as his race. The claimant says he was discriminated against due to his race.

32. One of the forms of discrimination prohibited by the Equality Act 2010 is direct discrimination. Section 13(1) says that a person discriminates against another if, because of a protected characteristic (in this case, race) they treat someone less favourably than they would treat another person. The various ways in which the claimant in this case says he was treated less favourably than others are set out by the parties in the Scott Schedule. Whether something amounts to less favourable treatment is an objective question. What that means is that a claimant’s own perception that they have been treated less favourably is not enough to establish a case, although the Tribunal may have regard to the claimant’s perception of what the effect on him has been of the treatment in question.

33. The claimant must be able to point to a comparator. This is another person who does not share his characteristic (in this case, his race) but who otherwise resembles the claimant. The comparator may be actual or hypothetical. The claimant must show that he was treated unfavourably compared to this person because of his race.

HARASSMENT BASED ON RACE

34. Section 26(1) of the Equality Act 2010 prohibits conduct that violates a person's dignity or creates and intimidating, hostile, degrading or offensive environment. This covers unwanted conduct related to the relevant protected characteristic (race in this case) which has the purpose or has the effect of violating dignity of creating an environment as described in the previous sentence.

35. There are therefore three elements that must be present for a harassment claims to be well founded:

- a. unwanted conduct
- b. which has the proscribed effect or purpose, and
- c. it must relate to the relevant proscribed characteristic.

36. Unwanted conduct can include a wide range of behaviours. The matters complained of in this case are set out in the parties' Scott Schedule. There is some disagreement between the parties as to what occurred. The Tribunal must make findings, on the balance of probabilities, as to what occurred and consider whether all three elements listed above are shown to be present. In some parts of the case the parties agree that a particular event happened (e.g. the claimant was invited to a meeting or was given a written warning) but the respondent contends that it acted reasonably (i.e. it did not have the effect of purpose required to make it harassment) and was not connected to race.

VICTIMISATION

37. People who wish to protect their rights under Equality Act 2010 may sometimes fear reprisal if they take steps to do so. The law seeks to give people protection from such reprisals.

38. Section 27 of the Equality Act 2010 provides that a person victimises another if they subject them to a detriment because they do a “protected act” or they believe the person has done or may do a protected act. Protected acts are bringing proceedings under the Equality Act, giving evidence or information in connection with such proceedings, doing any other thing in connection with the Equality Act and alleging that the Act has been contravened.

39. A detriment is something which a person might reasonably consider changed their position for the worse. It can include being denied a promotion or opportunity to do certain work or training. Unlike, in the direct discrimination claim, a comparator is not required to show that there has been a detriment. The detriments alleged to have been suffered by the claimant are set out in the Scott Schedule.

40. The evidence in the case must show that these detriments were indeed suffered by the claimant. It must also be shown, on the evidence, that they occurred because of protected act (or acts) he had taken. One must cause the other to take place.

THE LIST OF ISSUES

41. The parties agreed a list of issues before the final hearing. This appears in the bundle at pages 45-48. The list of issues reflects the relevant law. There is no need to reproduce the list of issues as the parties both have copies. However, we will refer to the issues in the list later in these reasons when setting out the findings we have made in relation to the claims brought by the claimant.

SCOTT SCHEDULE

42. As referred to above the parties provided an agreed Scott Schedule setting out 21 allegations made by the claimant. Each allegation was relevant to one or more of his claims.

43. The allegations are numbered 1 to 20 including a 5A and 5B, making a total of 21 allegations.

44. In Appendix 1 to this document, we set out each allegation from the Scott Schedule and summarise the evidence we received in connection that allegation and our findings of fact in relation to that allegation. The description of the act or omission in each allegation is reproduced verbatim from the schedule.

FINDINGS IN RELATION TO THE CLAIMS

45. In light of our findings of fact on the 21 allegations, we make the following findings in relation to the four claims advanced and we refer to the list of issues. The issue of time appears in the list of issues but is academic in light of our determination on other issues as set out below.

DIRECT DISCRIMINATION BASED ON RACE

46. The Claimant alleges that allegations 1 to 4, 6 to 7 and 17 in the Scott Schedule took place and amounted to less favourable treatment, and that such treatment was on the grounds of his race. For the reasons given in Appendix 1 we have found that these allegations are not proved. It is not proved, on the balance of probabilities that the respondent carried out the

acts or omissions alleged or, where certain treatment is agreed that it amounted to less favourable treatment.

47. The respondent did corporately know that the claimant had Polish heritage. He has told the respondent in 2017 (he had told his manager Peter Frampton and Danielle Pound that his family were Polish) and his name may suggest a Polish or eastern European heritage.

48. We do not find it proved that the claimant was treated less favourably because of this race. There is little or no evidence to suggest that any of the actions of the respondent's employees were motivated by or affected by the claimant's race. We are mindful that discrimination is not always overt but we can see no proved circumstances in this case on which we could properly infer that discrimination took place covertly.

49. In light of our findings above it is not necessary for the Tribunal to reach a finding on whether the comparators put forward by the claimant are appropriate comparators.

HARASSMENT

50. The Claimant alleged that allegations 1 to 3, 6 to 8 and 17 to 20 of his Scott Schedule took place. For the reasons given in appendix 1 we have found that they did not take place or where certain matters did take place they were reasonable actions or omissions in all the circumstances.

51. As can be seen in Appendix 1, we found that allegation 1 did not take place. In relation to allegation 3, the grievance did take six months to answer, but this was reasonable in the circumstances. In relation to allegation 6 we found that Mr Collins's actions were reasonable based on all the evidence available to him. In relation to allegation 7, the claimant was issued with a written warning, but we have not found that was unfair on the evidence available. Allegation 8 is not proved to have taken place.

52. Allegation 17 is not a specific allegation. Allegations 18 to 20 concern continuation of disciplinary process after the claimant's resignation. It is agreed between the parties that this took place. As stated in Appendix 1. we find it was reasonable in all the circumstances and did not amount to harassment.

53. For the claimant to succeed in this harassment claim the conduct complained of must be related to race. In our assessment, there is no real evidence in this case that the conduct cited was connected to the claimant's race.

54. Although the claimant expressed his strong sense of grievance at these matters we do not consider that the conduct established to have taken place could be said on the evidence before us have the purpose or effect of violating the claimant's dignity nor did it create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

VICTIMISATION

55. The Claimant raised a formal grievance on 21 July 2021. the Claimant issued an Employment Tribunal claim on 23 June 2022. It was accepted by the respondent that this constitutes a protected act.

56. The Claimant refers to allegations 3 and 18 to 20 of the Claimant's Scott Schedule as being detriments to which the respondent subjected the claimant because he did the protected act.

57. The Tribunal has found that the grievance did take six months to complete and the respondent pursued disciplinary matters after the claimant's resignation.

58. The Tribunal finds that the six month delay was reasonable in all the circumstances as was the completion of disciplinary proceedings. There were credible reasons for both of these which we refer to in Appendix 1.

The Tribunal does not find that these acts were because the claimant had taken protected acts. We accept the evidence of Gregory Martin (the manager dealing with the disciplinary process) that he was unaware of the claim the claimant had brought until the claimant told him about it in December 2022 and he was not, as the respondent's representative, motivated to pursue disciplinary proceedings because of the claim that had been brought.

CONSTRUCTIVE UNFAIR DISMISSAL

59. The breaches of contract alleged and relied on by the Claimant are allegations 1 to 16 of his Scott Schedule. We have set out in appendix 1 our findings of fact in relation to each of these allegations.

60. We find that the claimant has not proved a repudiatory breach of his contract. He has not proved that the respondent acted unreasonably in the events identified in allegations 1 to 16. None of the actions of the respondent amounted to a repudiatory breach of contract or, therefore, amount to a dismissal of the claimant from his employment. The claimant, we find, chose to resign and moved immediately to a new job that he had been offered, he said in evidence, months before subject to vetting; he was not constructively terminated.

CONCLUSION

61. For the reasons given, the claimant's claims do not succeed.

62. The Tribunal accepts that the claimant was very unhappy in his work for the respondent for some time. There were mutual allegations of poor behaviour between the claimant and his line manager. The evidence in the case does not in our view well found the claims that the claimant has brought.

63. The claimant said that his new employment, for an important organisation, is more satisfying and enjoyable for him, and we wish him well in that.

Employment Judge Hook

11 April 2024

REASONS SENT TO THE PARTIES ON

.1 May 2024.....

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FOR THE TRIBUNAL OFFICE