



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Mr Jaskan Nijjar

First Beeline Buses Ltd

Heard at: Reading Employment Tribunal (by CVP)
On: 8 February 2022

Before: Employment Judge Allen; Ms Farrell and Ms Osborne

Appearances

For the Claimant: Ms Roberts of counsel

For the Respondent: Ms Percival of counsel

JUDGMENT

This claim is not well founded and is dismissed.

1. Claim

1.1. Mr Nijjar asserts he experienced Direct Discrimination contrary to S13 Equality Act 2010 given his protected characteristic namely that he is of Indian origin when he was demoted on 24 December 2019.

1.2. He seeks compensation and reinstatement as relief supervisor.

2. Findings

2.1. Having heard evidence presented before us over the last two days we find the following facts proved:

2.2. The claimant has a protected characteristic namely; he is of Indian ethnic origin [S9(1)c Eq].

2.3. On 17 November 2008 the claimant commenced employment with the respondent as a bus driver. On 20 April 2015 he was promoted to relief supervisor.

2.4. On 20 November 2019 the claimant reported an injury at work; he tripped and fell on an uneven surface injuring his wrist, elbow, knee and hip [Pg 44]. He continued to work his shifts for the following

week without apparent issue. We are satisfied he was injured as reported given the evidence of the supervisor MA who completed the incident report, the GP's fit note and the OH reports, notwithstanding the questions raised by Dr Crabtree.

2.5. Mr Nijjar complained of shoulder pain to MA [confirmed in his letter of 7 May 2020].

- On 21 November 2019 MA advised him to see his GP.
- MA asserts to his knowledge Mr Nijjar suffered pain in his shoulder for the next week; again, MA advised him to consult his GP.
- MA also confirms that on 27 November Mr Nijjar went home sick and did not complete overtime. MA again advised him to see his GP before he returned to work.
- On 27 November 2019 the claimant was involved in a damage only collision [Pg 51]. The claimant was stationary at the time and not at fault.

2.6. On 21 November 2019 in an email timed at 4pm from Performance Supervisor DB confirms he spoke to both MA and the claimant and that the claimant continued his shift that day. Neither mentioned an issue with the claimant's shoulder to DB [Pg 48].

2.7. The claimant continued his shifts for the following week until 27 November when he went home sick.

2.8. On the following day; 28 November 2019 the claimant consulted his GP who issued a fit note that the claimant had shoulder tendonitis and was fit for alternative duties until 11 December [Pg 56].

2.9. At 12:46hrs on 28 November the Interim Managing Director SG sent an email to Interim Head of Operations SM that he had spoken with the claimant on 25 November to enquire after his health following the collision. The claimant told him he was fine. SG noted he appeared fine and questioned why he had since gone sick. [Pg 57]

2.10. Operations Supervisor PG reviewed CCTV of the claimant driving; he chose footage from 9:30-11:18am on 27 November 2019 as this was the last date footage of him driving had been recorded. He noted the claimant drove one handed (the injured arm), without seat belt, reading whilst the vehicle was moving, holding a pen, drinking and handling money. We find this enquiry was prompted by SG's suspicions the claimant's injury may not be genuine. Review of CCTV and Occupational Health referral were reasonable enquiries to make given SG's suspicions and had nothing to do with the claimant's ethnic origins.

2.11. On 29 November 2019 PG emailed SG with his findings having reviewed CCTV:

- 'I have to say that I am shocked at the driving standards displayed in the 2 hours of footage that has been captured. Jaz is virtually constantly driving with one hand on the steering wheel and using both arms alternately ~also he is holding a pen in his hand whilst driving for a long period. Here is the other issues that I have seen on the CV*
- 09:31 & 09:33 Jaz has cash in his left hand and driving with one hand on the steering wheel using his right hand*
- 09:37 Jaz has no hands on the steering wheel for about one to two seconds waving at another driver*
- 10:09 Jaz is seen pulling away whilst drinking from a bottle of water*
- 10:28 Jaz is reading the VDC card whilst the vehicle is in motion.*
- 10:36 Jaz is again drink whilst the vehicle is in motion.*
- 11:12 Jaz reaches above his head with his injured arm for 6 seconds and shows now ill effects.*
- 11:16 Jaz again reaches up above his head for 3 seconds and again shows no ill effect.*
- 11:18 Jaz is getting off the vehicle carrying his bag and coat with his right arm.'*

2.12. It's in this context that the OH referral was made i.e. people without medical expertise viewing CCTV of the claimant coming to the end of his shift and exhibiting no apparent sign he is in so much pain he can't continue the shift.

2.13. The OH referral was completed by the disciplinary manager GH on 2 December 2019 [Pg 60]. It sets out in detail the respondent's suspicions. DB gave evidence that in the context of a 14 day sick note an OH referral is normal practice.

2.14. In an OH report dated 9 December 2019 the doctor stated:
"it is a little difficult to understand how he could remain fit to work for a full seven or eight days and then become too incapacitated from his injuries to continue working" [Pg 62].

This fed management suspicions rather than allayed them.

2.15. On 17 December 2019 the claimant was invited to an investigatory meeting for driving below the required standard. We

find there was nothing untoward by the fact it was addressed to 'Driver' Jaskan. We accept DB's evidence this was an error on his part since the claimant was a driver and relief supervisor. DB took no other part in the process and we therefore reject the claimant's assertion this was evidence the case against him had already been decided [Pg85].

We find this letter fell below the standards of a fair and reasonable investigation as set out in the ACAS code because it makes no mention of the fact that the claimant's driving standards were being investigated. The claimant reasonably assumed the CCTV referred to in the letter was footage of his fall on 20 November.

- 2.16. The notes of the Investigatory meeting held on 19 December 2019 are headed 'incident at Heathrow'. The claimant attended with his union rep who acted on that occasion as a witness. The claimant was invited to comment on the OH report; He disagreed with the doctor's statement that:

'it was difficult to understand how Mr Nijjar could remain fit to work 7-8 days and then become incapacitated.'

CCTV of driving on 27 November 2019 between 9:30 and 11:18 was shown during the meeting. The claimant asserted his poor driving was due to his shoulder injury.

Meeting notes record he states his driving is acceptable [Pg 66] and when challenged about the specific elements admitted his driving:

'isn't very good, but it is what it is'.

Notes are signed and dated by the claimant.

- 2.17. The way the claimant has presented in front of us yesterday and today is entirely consistent with his behaviour as described in the investigatory meeting. We don't agree with DB's assessment that he was being flippant.
- 2.18. DB concluded the standards of driving he saw on the footage were so poor they could not be ignored. In the circumstance there is nothing from which we can infer the decision to refer for disciplinary proceedings was racially motivated.
- 2.19. The disciplinary meeting took place on 23 December 2019 and was chaired by Operations Manager GH (who no longer works for the respondent and did not give evidence or make a statement) [Pg 69]. The claimant attended with the same union rep TL.
- 2.20. The meeting took place with less than 48 hours' notice at the claimant's request. Unlike at the investigatory meeting the claimant knew the nature of the conduct to be discussed in advance.

The elements of poor driving were listed and the claimant responded he had done nothing wrong. Union Rep confirmed the claimant admits drinking from a bottle while driving and holding a pen.

We find that GH seems irritated with the claimant who says he carried on working trying to help the company out and GH responded

'You only do that when it suits you'

we think there is also an element of prejudgment when he says, discussing the same point, he expects better from a supervisor.

Nevertheless, we find there was no obligation on GH to take the shoulder injury into account when dealing with elements of the claimant's driving relating to drinking and reading whilst the vehicle was in motion. These were not minor and we reject Ms Roberts assertion that they were.

The meeting notes make no mention of consideration of the claimant's good service. Whether that should factor into the decision on the disciplinary outcome was another matter.

The respondent has produced some documentation regarding disciplinary meetings with other staff from which we see it is common to consider work history. One of those disciplinary matters was conducted by the same disciplinary officer, GH and at page 108 of the bundle we see it was his practise to consider work history. No such note is made in the meeting notes about the claimant.

GH concluded the claimant's driving standards fell below those expected of a driver particularly a supervisor; he decided he should be demoted and required to undergo 1-day remedial training. This was confirmed in writing on 24 December 2019.

2.21. The claimant exercised his right of appeal and was again referred for an OH assessment. A report was produced dated 16 January 2020 [Pg 73a]. The appeal manager SM was not sure if he had it by the time of the appeal meeting on 20 January 2020, however we find it more likely than not it would have been available to him by the time the appeal outcome was written on 29 January 2020.

2.22. At the appeal meeting SM reviewed the footage of the claimant's driving and summarises what he sees which is consistent with PG's summary above. SM did refuse to review further CCTV of the claimant's driving on 27 November.

SM did not uphold the appeal. We find this was reasonable given the prolonged period of poor driving for which the claimant had been disciplined.

We find it is more likely than not SM started the meeting by saying something like '*people who make false claims cost the company a lot of money*'. We don't think that comment was motivated by race. TL was present, took an active role in both this and the disciplinary meeting and we think it more likely than not he would have challenged an overtly racist remark. We also think the fact the claimant did not mention it in the grievance letter is significant and a further indication it was not a racist remark.

The claimant raised a grievance which was not upheld however, no claims arise out of that and only the absence of the complaint that SM made a racist remark is relevant to our findings.

The Law

Section 13 Equality Act

(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.

(2) - (5) N/A

Section 9 Race

(1) Race includes—

- (a) colour;
- (b) nationality;
- (c) ethnic or national origins.

Section 136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

King v Great Britain China Centre [1992] I.C.R. 516, [1991] 10 WLUK 157

Held: The tribunal has to make its findings on the primary facts and draw inferences therefrom. Where the employer cannot supply good reasons for its decision, the tribunal is entitled to find discrimination proved.

3. Conclusions

4. Issues

4.1. Direct Discrimination (s.13 EqA). Did the Respondent treat the claimant less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances?

4.2. The claimant relies on the alleged acts of less favourable treatment as follows:

- On 19 December 2019, DB’s decision to forward the claimant to GH for poor driving standards and conduct;

We are satisfied that decision was reasonable based on what DB knew at that stage.

- On 24 December 2019, Mr GH’s decision to demote C;

We are satisfied that the driving in question was below expected standards and for a prolonged period (up to 2 hours) and included a number of the elements which could not be said to be injury related.

We are satisfied the respondent has shown a good reason for deciding to take disciplinary action and has shown good reason as to why the claimant was treated differently from the comparators he put forward.

Whilst it was appropriate to consider the claimant’s work history given the standard of driving in question the failure to do so did not render the disciplinary process unfair and would not have been sufficient to mitigate the bad driving.

- On 20 January 2020, SM's alleged comment, "*people like me make false claims*";

We have found it was more likely than not SM did begin the meeting by setting out that false claims of sickness cost the company a great deal of money but that comment was not motivated by race.

- On 20 January 2020, SM's alleged refusal to review additional CCTV footage;

We are satisfied that viewing CCTV of the claimants driving in other circumstances would not have been sufficient to mitigate a prolonged period of poor driving between 9:30 and 11:18 on 27 November.

- On 20 January 2020, SM's decision not to allow C's appeal.

We are satisfied that SM's decision is consistent with the information before him namely the claimant's unsatisfactory driving standards.

- The claimant relies upon "MB" "Comparator A" and "PG" "Comparator B" as comparators; both Supervisors involved in misconduct who were not demoted.

We find failure to maintain driving standards to the extent they could be regarded as criminal is far more serious than the transgressions of either comparator. Whilst it is clear MB was disciplined none of the 3 matters addressed bore any resemblance to the prolonged period of poor driving exhibited by the claimant.

We note the claimant raises an issue with comparator B re an incident on 4 February. We have seen documents from a disciplinary hearing held on 23 February conducted by PG but no disciplinary documents relating to 4 February where PG was the subject of disciplinary proceedings. In the circumstances, we have insufficient information to make a finding as regards that comparator.

4.3. The disciplinary and appeal managers (GH and SM) had to deal with multiple examples of poor driving over a 2-hour period for which Mr Nijjar blames his shoulder injury. His shoulder injury does not in our view have any bearing on Mr Nijjar's decision to:

- To take both hands off the wheel whilst driving;
- read a duty card whilst driving;
- to drink, twice, whilst driving;
- to hold a pen whilst driving; and
- to hold change in his hands whilst driving.

4.4. We note also that he was observed to drive one handed sometimes with his injured arm and sometimes not; to raise his arms above his head and to carry his belongings with his injured arm. All of these we are satisfied undermined Mr Nijjar's ability to be in full control of the vehicle; at least 3 of them if not 4 interfered with his ability to maintain a proper look out whilst in control of a moving vehicle and those same 3 or 4 may have amounted to offences under S3 RTA'88.

4.5. We are satisfied that the respondent has established good reasons for its decision to demote Mr Nijjar and having considered the facts as we have found them to be cannot infer direct discrimination on the basis of race.

4.6. We are satisfied that there was no less favourable treatment of Mr Nijjar at all. In the circumstances we conclude GH's decision as upheld by SM was within the range of reasonable responses of an employer.

4.7. Applying the approach set out in King v Great Britain China Centre [1992] I.C.R. 516, [1991] 10 WLUK 157 we have looked at

the primary facts; we are satisfied the respondent has shown good reason for its decision and there is no evidence on which we could draw an inference to the contrary.

4.8. The claim is dismissed

Employment Judge Allen

Date: 1/3/2022

Sent to the parties on: 3/3/2022

N Gotecha

For the Tribunal Office

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.