



EMPLOYMENT TRIBUNALS

Claimant: Mr M Munyiri

Respondent: London North Eastern Railway Limited

Heard via CVP (London Central) **On:** 13, 14, 15, 16 March 2023

Before: Employment Judge Davidson
Ms S Plummer
Ms S Campbell

Representation

Claimant: In person (day 1)
Mr E Nestfield, RMT Representative (days 2, 3, 4)
Respondent: Mr H Sheehan, Counsel

RESERVED JUDGMENT

The unanimous decision of the tribunal is that the claimant's complaints of direct race discrimination and harassment on grounds of race fail and are hereby dismissed.

REASONS

Issues

1. The issues were determined at a case management hearing before me on 24 November 2022 as follows:

2. *Time limits*

2.1. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

2.1.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

2.1.2. If not, was there conduct extending over a period?

2.1.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

- 2.1.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
 - 2.1.4.1. Why were the complaints not made to the Tribunal in time?
 - 2.1.4.2. In any event, is it just and equitable in all the circumstances to extend time?

3. *Direct race discrimination (Equality Act 2010 section 13)*

3.1. The claimant describes himself as black African and he compares himself with white people.

3.2. Did the respondent do the following things:

- 3.2.1. call him 'terrorist' in late 2020 (*Allegation 1*);
- 3.2.2. fail to share information during the investigation, in particular CCTV footage (*Allegation 2*);
- 3.2.3. delay in dealing with his grievance (*Allegation 3*);
- 3.2.4. fail to uphold his grievance (*Allegation 4*)?

3.3. Was that less favourable treatment?

3.4. If so, was it because of race?

3.5. Did the respondent's treatment amount to a detriment?

4. *Harassment related to race (Equality Act 2010 section 26)*

4.1. Did the respondent call the claimant 'terrorist' in late 2020?

4.2. If so, was that unwanted conduct?

4.3. Did it relate to race?

5. *Remedy for discrimination or victimisation*

5.1. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

5.2. What financial losses has the discrimination caused the claimant?

5.3. If not, for what period of loss should the claimant be compensated?

5.4. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

5.5. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

5.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

- 5.7. If so is it just and equitable to increase or decrease any award payable to the claimant?
- 5.8. By what proportion, up to 25%?
- 5.9. Should interest be awarded? How much?
6. Following the case management hearing, the respondent requested clarification of which grievance was being referred to in Allegation 4. The claimant did not respond to this correspondence. I concluded, from my notes of the hearing, that the claimant was referring to the second grievance (which was a grievance about the lateness of the outcome of the first grievance). At the start of the hearing, the claimant confirmed that he was referring to the first grievance in respect of both Allegations 3 and 4. The hearing proceeded on that basis and the respondent's witness whose evidence related solely to the second grievance was not called.

Evidence

7. The tribunal heard from the claimant on his own behalf and from Kieran Weir (Station Delivery Manager), Mellissa Fitsimmons (Station Delivery Manager) and Gary Smithson (Station Manager) on behalf of the respondent. There was a witness statement from Jennifer Mearns (Station Manager, Scotland) but, once the claimant clarified his claims, her evidence was not relevant to the issues before us and she was not called.
8. The tribunal had a bundle of documents running to 338 pages and, during the course of the hearing, three further documents were added. The claimant asked to include documents which the respondent had rejected from inclusion in the bundle. On review of these documents, they were documents which were in the bundle but the claimant's versions had his highlighting and comments. We proceeded using the respondent's bundle.
9. It was suggested on several occasions by the claimant's representative that English is not the claimant's first language and that must be taken into account. As a general observation, we make no finding regarding the claimant's level of English but we had no problems understanding him on the first day of the hearing, either while discussing the issues at the start of the hearing or while being cross examined. We are not aware of him ever raising language problems as an issue, either during his employment or during these proceedings.

Hearing

10. The hearing was conducted by remote video (CVP). Part way through the first day, the claimant's camera connection failed. Despite assistance from the tribunal's technical support team, this issue was not resolved. The claimant's camera was functioning at the start of the second day but then failed again. In the circumstances, the parties agreed to continue with the claimant on audio only.

11. The claimant represented himself on the first day of the hearing, when we clarified the issues and he gave his evidence. On the second day, Edward Nestfield, RMT Representative, appeared on his behalf and cross-examined the respondent's witnesses and made submissions. There were some connection issues with Mr Nestfield on day two but these were resolved by day three.

Facts

12. The respondent operates part of Network Rail, including the station at Kings Cross. The claimant began working for the respondent in October 2016.

13. During the course of 2020 the claimant had some absences due to difficulties in finding childcare. He requested a change to his hours so that he could manage his childcare responsibilities better. A meeting to discuss this had been arranged for Monday 14 December 2020.

14. In late 2020, there was an altercation between the claimant and Kieran Wier following the claimant's late return from a break. There is a dispute between the parties regarding the date of the incident. The claimant maintained that it was Wednesday 4 November 2020 and the respondent's position was that it took place on Sunday 13 December 2020. We do not think much turns on the actual date but both parties were adamant that their date was correct so we will make a finding on the issue.

15. We find that the incident took place on 13 December 2020 and we reach this finding on the following basis:

- 15.1. contemporaneous investigation documents refer to an incident on the 'Sunday' or 13 December 2020, including email from Kieran Weir and notes of meetings with the claimant and Mellissa Fitzsimmons;
- 15.2. contemporaneous documents showing the 'working hours' meeting being fixed for 14 December 2020 – the claimant accepts that this was scheduled for the day after the incident;
- 15.3. a holiday chart showing Kieran Weir was absent on 4 November 2020 and roster showing the claimant had a rest day on 4 November 2020;
- 15.4. CCTV footage of 13 December records an incident which matches the accounts given by the claimant and Kieran Weir;
- 15.5. the claimant's sickness absence prompted by 'stress at work' started on 16 December 2020.

16. Conversely, the only evidence relied on by the claimant to support the incident taking place on 4 November 2020 is his own recollection and a comment by Gary Smithson in March 2022 referencing a grievance which the claimant had raised 'in circa November 2020'. This was in response to an email from the claimant in which he referred to his surprise that Gary Smithson was not aware of the incident of 4 November 2020. We find that Gary Smithson had no

independent recollection of the date and his reference to November 2020 was entirely derived from the information the claimant had provided to him.

17. The altercation arose from the claimant being asked to complete a 'please explain' form after returning late from a break. The claimant asserts he was three minutes late although in the contemporaneous documents he states that he cannot say exactly how late he was. Kieran Weir told us it was 20-25 minutes late. We find, based on the email of Simon Cooper, Duty Team Leader, sent within a few hours of the incident, that the claimant was 19 minutes late. The reason for his lateness was that he was talking to his union representative in advance of the meeting the following day about changing his hours of work.
18. When the claimant returned to his position on the gateline, Simon Cooper asked him to fill out a 'please explain' form. This is a form which gives the employee an opportunity to explain why they are late. It is not intended to be a disciplinary sanction, but it can be used for disciplinary purposes. We note that claimant's attendance was being reviewed and he may have been concerned that a 'please explain' form would be used against him.
19. His explanation for refusing to fill out the form was that he thought it was excessive bearing in mind the minor length of his lateness. Simon Cooper asked the Station Delivery Manager, Kieran Weir, to come to the gateline to speak to the claimant. Kieran Weir came and asked the claimant to complete the 'please explain' form, which he refused to do. They had an altercation with raised voices. The claimant's case is that he was called a 'terrorist' by Kieran Weir in this altercation. The contemporaneous documents refer to the claimant telling Mellissa Fitzsimmons that Kieran Weir told him that he was 'not safe to be at Kings Cross', which 'made him feel like a terrorist'. Kieran Weir's account of the altercation is that the claimant refused to complete the form and accused Kieran Weir of picking on him and not understanding 'immigrant life'. This upset Kieran Weir as he thought he was being accused of being a racist as he was a white man.
20. Following this incident, the claimant left work and had been told by Kieran Weir not to return unless told to by management. He called Mellissa Fitzsimmons, his manager, to ask if he should come back to work. She told him to attend as normal the following day, which he was not rostered to work due to the scheduled meeting about changing his working hours. She said that they could discuss the incident after that meeting.
21. Also on that day, Kieran Weir telephoned Mellissa Fitzsimmons to inform her of the altercation and she asked him to send her an email setting out his version of events.
22. When Mellissa Fitzsimmons came to work on 14 December 2020, she spoke to her manager (Gary Smithson) about the incident and he authorised her to carry out an investigation into the incident. She told us that she regarded the

investigation as being into two grievances raised about the same incident – one from the claimant and one from Kieran Weir.

23. When Mellissa Fitzsimmons met the claimant to discuss the changes to his working hours on 14 December 2020, they agreed to discuss the altercation the following day.
24. On 15 December 2020, the claimant met with Mellissa Fitzsimmons with a notetaker present. The meeting took place face to face, although the notetaker was present on Teams video. The claimant gave his account of the events. He described Kieran Weir asking him to give him his lanyard with his ID and pass as he was 'not safe' to be at Kings Cross. The notes reflect the claimant saying that this made him feel like a terrorist. He said he had only been a few minutes late back (he couldn't remember precisely how late) and that he thought it was excessive to be asked to complete a 'please explain' form. He conceded that he might not 'be in the right' but he felt it had not been dealt with fairly.
25. He was asked specifically about any racist language and he confirmed that he did not recall anything racist said by either party.
26. The claimant was not given a copy of the notes to check that Mellissa Fitzsimmons had understood his grievance correctly. Mellissa Fitzsimmons confirmed that this was not the respondent's normal practice. We note that there is nothing in the bundle which sets out the claimant's grievance in his own words and it would have been helpful if the claimant had been given an opportunity to review and confirm Mellissa Fitzsimmons's understanding of his grievance.
27. The claimant alleges that he submitted a written complaint (written in Mellissa Fitzsimmons's office) in which he accused Kieran Weir of calling him a terrorist. The respondent denies that there was such a note. We note that the claimant has never made any reference to this note in the meetings at the time, nor did Mellissa Fitzsimmons, and we find that it is more likely than not that there was no such note.
28. If the claimant's position is that he wrote a handwritten formal letter of grievance, there would be a lesser need for the notes of the meeting to be shared with him to establish what his complaints were, which is a criticism made by the claimant of the respondent's process.
29. The following day, 16 December 2020, the claimant started a period of absence due to sickness (work related stress and anxiety).
30. On 30 December 2020, Mellissa Fitzsimmons requested the CCTV footage of the incident.
31. On 3 February 2021, Mellissa Fitzsimmons interviewed Simon Cooper. His account was that the claimant was 19 minutes late from his break and he

refused to fill out a 'please explain' form. He called Kieran Weir to attend the gateline and he was aware that the claimant and Kieran Weir had an altercation with raised voices, but he did not hear what was said.

32. On 1 February 2021, the claimant returned to work.
33. On 11 March 2021, Mellissa Fitzsimmons held a grievance investigation meeting with Kieran Weir. The notes are on page 94 onwards. We accept that the notes of meetings which are included in the bundle are an accurate, albeit not verbatim, account of the meetings.
34. On 19 March 2021, Mellissa Fitzsimmons held a further investigation meeting with the claimant. The notes of the meeting record that the claimant was feeling 100% better about everything and he was not a person to dwell on the past. He mentioned mediation, given that time had elapsed since the incident itself. He repeated his account that neither party said anything racial to the other. Mellissa Fitzsimmons told him she would review the CCTV but we find that she did not promise to share this with him.
35. On 22 March 2021, Mellissa Fitzsimmons finished her investigation and passed her findings and supporting documents to an independent manager, Chris Stevens, for his review so that he could determine the next course of action. Her finding was that the evidence was inconclusive either way.
36. Chris Stevens decided that there was no case to answer. He made recommendations as follows:
 - 36.1. mediation between the two parties to mend the working relationship;
 - 36.2. review the 'please explain' process;
 - 36.3. walk through the incident to discuss learnings and best practice.
37. Neither the claimant nor Kieran Weir was informed of the outcome of the grievance.
38. The claimant was off sick from August 2021 to March 2022. He returned to work on 8 March 2022.
39. On 15 March 2022 there was a protected conversation between the claimant and Gary Smithson during the course of which the claimant pointed out that he had not received a grievance outcome following the incident in 2020.
40. Gary Smithson looked into the issue of the grievance outcome and informed the claimant of Chris Stevens' recommendations, apologising for the delay.
41. The claimant raised a further grievance on 16 March 2022. That grievance and subsequent events are not relevant to the issues in this case.

Law

42. The relevant law is as follows: Direct discrimination means less favourable treatment in comparison to a comparator because of a protected characteristic. Section 13 of the Equality Act 2010 defines direct discrimination as.

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.

43. Section 136(2) and (3) of the Equality Act 2010 provide that:

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.

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

44. Section 23 of the Equality Act 2010 provides that:

“(1) On 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.

45. In *Madarassy v Nomura International plc* [2007] ICR 867, the Court of Appeal held that there must be ‘something more’ than a difference in treatment between the claimant and the comparator to show a prima facie case of discrimination.

46. Guidance on the burden of proof was given by the Court of Appeal in *Igen v Wong* [2005] ICR 931. In *Igen* the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal’s satisfaction (i.e. on the balance of probabilities) is the second stage engaged, whereby the burden then ‘shifts’ to the respondent to prove — again on the balance of probabilities — that the treatment in question was ‘in no sense whatsoever’ on the protected ground.

47. The definition of harassment is contained in section 26 of the Equality Act 2010, which provides:

“26. Harassment

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

(4) *In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –*

- (a) the perception of B;*
- (b) the other circumstances of the case;*
- (c) whether it is reasonable for the conduct to have that effect.”*

Determination of the issues

Direct race discrimination

Allegation 1

48. We find that Kieran Weir did not use the word ‘terrorist’ in late 2020. The contemporaneous documentation shows that the claimant said that he was made to feel like a terrorist because Kieran Weir said he was not safe to be at Kings Cross. We cannot say exactly how the conversation went on the basis of the information before us but it is clear that the incident escalated beyond what would be proportionate in addressing a late return from lunch. Kieran Weir’s response was an overreaction, which may have been triggered by the claimant’s attitude in refusing to sign the ‘please explain’ form, rather than the lateness itself. From the evidence before us, we can see no reason why Kieran Weir would consider the claimant to be an unsafe presence at Kings Cross but we accept that he said something to that effect to the claimant. However, we find that he did not use the word ‘terrorist’.

49. In any event, we do not necessarily accept that the word ‘terrorist’ would be a racial slur against a black African and no reason was put forward why we should reach that conclusion.

50. We also note that the claimant did not regard the altercation as being related to race, despite being asked specifically by Mellissa Fitzsimmons in two separate meetings.

51. Even though it is not an issue before us, we do not find that the claimant called Kieran Weir a ‘racist’. Even on Kieran Weir’s own account, it is his interpretation of comments the claimant made (denied by the claimant) that Kieran Weir felt he was being accused of being racist.

Allegation 2

52. We find that there was a failure to share information although this was how the respondent dealt with these matters and there was no right under the respondent’s policies for the claimant to receive information. More importantly, we find that the claimant and his comparator, Kieran Weir, were treated in the same way as regards sharing information.

53. We also note that this is not a disciplinary situation and there was no natural justice imperative to share information as there would be if a sanction was being imposed or other disciplinary action being contemplated.

54. We are satisfied that the reason that information, in particular CCTV footage, was not shared with the claimant was nothing to do with his race. The claimant has not put forward any basis on which we could conclude that this was related to his race. In any event, he was treated in the same way as his comparator and in accordance with the respondent's standard practice.

Allegation 3

55. It is accepted that there was a delay in dealing with the claimant's grievance in the sense that he was not informed of the outcome until March 2022. Given that the incident took place in December 2020 and the grievance outcome was reached in April 2021, it is not in dispute that the delay was excessive.

56. However, we do not find that the reason for the delay was linked to the claimant's race. We note that Kieran Weir also was not given the outcome by Chris Stevens in April 2021 and there was no evidence before us to suggest that the claimant's race was a factor in this delay.

57. The claimant referred to white people being treated more favourably in relation to grievances but there was no information about this before the tribunal and the claimant did not put this to the respondent's witnesses.

Allegation 4

58. Chris Stevens failed to uphold the grievance which meant that neither the claimant's grievance against Kieran Weir nor Kieran Weir's grievance against the claimant were upheld. Chris Stevens found that there was no case to answer. Although there was an altercation, he did not feel able to apportion blame as it was a 'he said/he said' situation without a clear witness.

59. In the circumstances, we find that this conclusion was the natural conclusion to draw on the basis of the limited evidence. We do not find that Chris Stevens reached this outcome on the basis of the claimant's race.

60. No evidence was put forward by the claimant to suggest why race would be a factor. For these reasons the claimant has not shifted the burden of proof.

Harassment

61. Based on our findings above, we find that the claimant was not called a terrorist. Therefore, his harassment claim fails.

62. Even if such a comment was said, the claimant has failed to show that it was based on his protected characteristic. In describing the events, he made it clear that he did not regard the altercation as being related to race.

Time points

63. We find that the harassment claim is out of time. It is a stand-alone claim relating to an incident in December 2020. No explanation has been given for the delay in bringing the claim.
64. We have taken into account the respondent's argument that Allegation 1 should be severed. If that is correct it is clearly out of time and no submissions were made why time should be extended.
65. If it is to be seen as part of conduct extending over a period, because the incident was the seed that led to the grievance process, then in our view the claim would be in time.
66. We find that the relevant time limit runs, in relation to Allegation 4, from the date the claimant became aware of the grievance outcome. That claim is therefore in time.
67. Given that we have not found for the claimant, it is not necessary for us to resolve the time point.

Costs application

68. At the end of the hearing, the respondent made an application for costs on the basis that they had prepared for the hearing on the basis that the claimant's claim related to the failure to uphold the second grievance. It was pointed out on behalf of the respondent that the claimant could have clarified the matter at an earlier stage which would have saved the respondent the costs of preparing to answer an allegation which was not being pursued.
69. It is the unanimous decision of the tribunal that no costs award should be made. The misunderstanding regarding the detail of the claims being pursued is partly down to the tribunal's misunderstanding. The claimant was, until part way through the hearing, a litigant in person. The claim that the respondent prepared to answer was a legitimate claim which the claimant could reasonably have pursued. He chose not to. The respondent has not been put to the trouble of defending that claim in a hearing. We do not find that the claimant deliberately misled the respondent so that they would incur unnecessary costs and we do not find that his conduct has been unreasonable such as to attract an award for costs against him.

Employment Judge Davidson
Date 21 March 2023

JUDGMENT SENT TO THE PARTIES ON

21/03/2023

FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

CVP hearing

This has been a remote which has been consented to by the parties. The form of remote hearing was Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.