



# EMPLOYMENT TRIBUNALS

**BETWEEN**

**Claimant**

**AND**

**Respondent**

**MR D O'DONG**

**LONDON NORTHERN EASTERN  
RAILWAY LIMITED ("LNER")**

**Heard at:** London Central, by CVP

**On:** 22-24 February, 2023

**Before:** Employment Judge O Segal KC  
Members: Ms G Carpenter; Dr L William

**Representations**

**For the Claimant:** In person

**For the Respondent:** Mr J Heard, counsel

## **JUDGMENT**

The unanimous judgment of the Tribunal is that the claims of discrimination and harassment fail and are dismissed.

## REASONS

1. The Claimant (C), who identifies as black of African origin, was employed by Atalian Servest Limited (“Servest”). He brings claims of direct discrimination/harassment because of his race, as a contract worker against the Respondent (R) as principal, for whom he was working overnight as part of a team at Kings Cross station tasked with cleaning trains operated by the Respondent.

2. At a PH on 8 February 2022, C’s claims against R were clarified as follows:-

2.1. That Stuart Fletcher (SF) a Train Dispatcher working for R, ordered C out of room 207 on 14 April 2021 (the date was clarified later as 13 April 2021) as an act of direct discrimination because of C’s race, alternatively harassment related to his race. As regards that incident, C relies on a white, Eastern European comparator Angel Zaharev (AZ) who was in room 207 at the time and also ordered out, but whom C was told had been allowed to remain in that room by SF on previous occasions when AZ had been on his own.

2.2. That R had treated C less favourably in the way it dealt with/failed properly to deal with a complaint C had made in April 2020 to R about SF, than it would have dealt with a similar complaint brought by a white contract worker.

### Evidence

3. We had an agreed bundle of documents.

4. We had witness statements and heard live oral evidence from:

4.1. the Claimant (C);

#### For the Respondent:

4.2. Mark Gaeta (MG), Fleet Presentation Manager;

4.3. Stuart Fletcher;

4.4. Gary Smithson (GS), Station Manager at Kings Cross;

4.5. Suhayb Patel (SP), Station Delivery Manager;

5. C also presented written statements on behalf of four witnesses who did not attend. In light of our findings, it is important that this written evidence is described in detail and that we explain what weight we gave that evidence.

5.1. There were statements from two cleaners in the team, Elvis Martinez and Emmanuel Bassau – they were signed, but ‘the wrong way round’; that is, each had signed the other’s statement. C explained that neither was literate in English and that he had taken down their statements, given them for signature and had not noticed that they had signed the wrong statement. The gist of the evidence given by both was that SF regularly behaved in an unnecessarily officious and challenging way to cleaning staff (without distinction as to nationality, it seemed) and regularly complained about them without sufficient reason – much more so than his colleagues. Despite the non-attendance of these witnesses (and the errors in the signatures), that evidence was broadly consistent with the evidence of other witnesses and as documented – save that from the Respondent’s perspective, SF’s officiousness and regular complaints were simply a reflection of his rule-oriented approach to his job, which was not inappropriate given the significance of health and safety to R, and did not reflect a discriminatory attitude. Mr Martinez referred to C as “*our spokesperson [who] insisted to the managers for space for the staff to isolate but he was not listened to!*”. This too was consistent with other evidence. The tribunal was in the circumstances prepared to give these two statements some credence.

5.2. C provided a signed statement from Nathaniel Okine (NO), a nightshift supervisor for Servest, who is black. NO still works for Servest and C explained his non-attendance in terms of his being anxious for his job if he gave evidence against R and his not being able to afford losing wages for taking time off work. C did not say that NO had refused to attend, nor did he seek a witness order to secure his attendance. NO’s statement also states that SF was unpleasant to work for and that “*every member of our staff feels scared and intimidated*” by SF. NO also stated that SF would sometimes not communicate with NO by radio as expected, though communicated normally with a white colleague, Donna, an “*English lady*”, who was briefly appointed assistant supervisor. Again, much of that evidence is of a piece with other evidence. However, the evidence about SF

being prepared to communicate by radio with an English supervisor more appropriately than with NO, was not supported by other evidence and was denied by SF. Given the potential relevance of that evidence and that NO did not attend to be cross-examined, the tribunal felt it could only give limited weight to that particular part of NO's statement.

5.3. Finally, C provided an unsigned statement in the name of AZ. AZ also still works for Servest and C's explanation for and our comments about NO's non-attendance apply equally to AZ. AZ's statement deals with the incident on 13 April 2021 and to that extent his evidence is broadly consistent with that of C and SF. In describing the disagreement between C and SF about whether C was allowed to be in room 207, the statement says that SF was "*insisting that he received email from Gary [GS] telling him that we should not use room 207*", which is consistent with both with the other evidence and the relevant documents. The most pertinent part of this statement is the evidence AZ gives that he told C and another person they were with that night "*that Stuart had found me many times alone upstairs and he did not ask me to leave but whenever I am with other people, he would always ask us to [leave]*". It was this information, C told the tribunal, that convinced him that SF's conduct towards him that night (and more generally) was motivated by C's race. The tribunal accepts it to be likely that AZ did tell C something like this – that is certainly C's evidence also. However, given that AZ did not attend to give evidence without a particularly convincing explanation, the tribunal considers that it has to be wary about relying too heavily on this part of the statement, which was denied by SF in his evidence, and certainly very wary in interpreting this part of AZ's statement to imply anything more than it includes on its face. In particular, had AZ attended to give evidence, the tribunal would have wanted to ascertain: When were the occasions SF had found AZ alone upstairs and allowed him to remain, and what if anything had been said on those occasions? Who were the 'other people' AZ had been with on other occasions when all had been asked to leave, and again what had been said on those occasions?

**Facts**

6. The Servest night cleaning team comprised several men and women of different nationalities. We were told that most of the women were white, Eastern European, though there was one black female member of the team and there had been a white English female member of the team ('Donna' referred to by NO) who had left by the time of the events we are concerned with. Most but not all of the men in the team were black.
7. The team got on well with each other, well with the Network Rail security staff and well with the R managers who oversaw their work, with the notable exception of SF.
8. R is a large organisation with considerable resources.
9. We note in that context our concern that R's training on equal opportunities, and race in particular, needs to be considered more carefully and creatively than it has been in the past. We were told that in recent years that had been a certain amount of remote learning and an in-person day of training in general every year or two, but the 'proof of the pudding' is that SF told us that he was not sure if he had been provided any relevant training, and if he had he could not remember the contents of it.
10. Kings Cross station is owned by Network Rail, which lets or licenses rooms within the station to R and to contractors like Servest for their use.
11. C, as the most literate and articulate of his colleagues, was an unofficial (that is, non-union) staff rep. In that capacity, for example, he successfully raised with R an issue over potential redundancies in June 2020.
12. SF, it is common ground, took a much more stringently rule-oriented approach to the performance of his role than did his peers. In an industry where health and safety is so important, there is scope for differences of opinion as to whether a comprehensive and inflexible approach in that regard is appropriate, generally or in specific cases. However, what is clear on the documents, including in particular a summary of 'close calls' recorded by SF between October 2020 and August 2021, is that SF's somewhat pernicky approach was applied to all staff groups equally, LNER, Network Rail and

contractors such as Servest cleaners, which would have included staff of many different races including white British.

13. On a date around the end of March 2020, SF was aware that a number of Servest mainly white cleaning staff (not including C) had left shift very early in circumstances where he believed they should not have done, although all trains then in the station had already been cleaned. SF reported that to Servest. In investigating that matter Servest asked Network Rail for CCTV footage of the night in question.
14. C, wrongly believing that SF had obtained or at least requested the CCTV footage, wrote an email 20 April 2020 to SP and GS, as 'Acting Rep', on behalf of the staff then under disciplinary investigation, asking whether SF had used due process in obtaining the CCTV footage and whether it was appropriate for him to "*victimise staff*" by doing so.
15. SP replied to C the following day, having spoken to SF to establish what had happened, clarifying that SF had not obtained or supplied the CCTV footage in question.
16. C responded to that email on 21 April 2020 noting that information, but going on to raise a general 'grievance' about SF's behaviour towards Servest cleaners, including allegations of threatening and bullying behaviour, and commented that "*we are beginning to question whether its down to race or simply he wants some of our staff gotten rid off!*". C requested that SF be told to moderate his behaviour and be advised to respect the rights of others.
17. There was no reply to that email.
18. Instead, SP took the view that it was for Servest to deal with any further issue. SP told the tribunal that it was an incredibly busy time, at the start of the pandemic, C's second email had not specifically sought a response and he thought he had done enough in speaking to SF in the first instance and replying to C about the CCTV footage.

19. All the events with which we are concerned took place during the pandemic. Although government guidelines and advice changed over time, the following relevant aspects are an important part of the background:

19.1. It was important that public transport, including rail, continued to provide a reduced service, even during periods of lockdown, so that essential workers could travel to/from and on work. For that purpose, trains had to be cleaned at least as carefully as before the pandemic.

19.2. Social distancing was to be enforced in workplaces, both during and outside of periods of lockdown, until at least the latest relevant date in this matter, in April 2021. This meant that fewer people could use the same room(s) than before social distancing was in place.

19.3. As part of social distancing and in order to reduce the spread of infection more generally, many employers and organisations, including R, made efforts to segregate groups of staff, so that one group would not come into contact with other(s).

20. It is that last matter, evidenced on the documents and described in evidence by GS and SF, that caused R to designate certain rooms for the sole use of certain groups of either their own staff (eg 'train crew') or for contractors such as Servest.

21. This, as might be expected, did not always work perfectly and C raised an issue by email dated 26 October 2020 to MG, as unofficial 'staff rep', copied amongst others to John Doughty (JD), MG's boss. C referred to there not being enough space/rooms to use as messrooms for the Servest staff, rooms which had been available to them having been removed for other use, including '212' which was apparently no longer being rented by R from Network Rail; C also mentioned the increased risk to BAME workers presented by COVID.

22. JD acknowledged R's duty to provide a safe working environment, noted that some of the rooms designated for LNER use were not being used much and asked MG to look at options. That was passed on to GS, who wrote that Servest staff had been allocated mess-rooms, two rooms including 212 were allocated to LNER staff and "*there needs to be separation of teams as far as possible*". An additional room, 205,

was provided for Servest staff use; however, this could only accommodate about three people at a time socially distanced and was a noisy space because of a rack of computers in the room.

23. In the event, the response to C's email was provided to him by Servest's Regional Operations Manager, Simon Vitali, who criticised C for raising the issue with R rather than his own management at Servest, recorded the adoption of a measure to avoid shifts crossing over, as well as the release of room 205 by R for Servest staff to use as a mess-room, and instituted staggered breaks (which, on C's evidence, seemed not to have been adopted, at least for much of the time, in practice).
24. In January 2021, a Briefing was sent by the Station Manager to all staff and contractors, which inter alia dealt with mess-room provision, notifying recipients that 205 was allocated for Servest overflow and 207 for LNER staff overflow.
25. We were told that the primary mess-room (canteen) used by Servest cleaners was, in effect, reserved for the female cleaners. The men, at least if they did not stagger their breaks, did not have adequate space if social distancing was to be observed. As a result, the men had taken to using room 207 at times, which they had been allowed to access by Network Rail security, even though in theory that room was designated for the sole use of LNER train staff.
26. In March 2021 C pursued a grievance within Servest, part of which was concerned with the inadequate provision of mess-room space. The grievance was not upheld.
27. That was the background to the events of 13 April 2021.
28. The more immediate background was this. During the night-shift 11/12 April, SF sent an email at 9:30 pm to SP, copied to GS, asking for confirmation of which rooms Servest staff could use, in light of a disagreement with C who had said Network Rail security staff were allowing them to use room 207, whereas SF's understanding was that they should not use 207 but only 205. SF referred to safety issues. He said he had been trying to get clarity for about a month and something in writing should be sent to him and to the contractors.
29. There were two replies to that email:



- 29.1. About an hour later, SP replied to say that 205 was the right room for them to use, but it seemed they hadn't been using it recently.
- 29.2. Minutes later, GS wrote simply stating that 205 was for use of overflow Servest cleaners and attached a copy of the Briefing referred to above.
30. The following night (12/13 April), SF, whilst doing his rounds, came across Servest staff on breaks in two rooms which SF understood they should not have been using, including C and AZ in room 207. SF, accompanied by a member of the security team, told them they had to leave, there was a confrontational exchange, during which C accused SF of being a racist, but C and AZ did leave room 207.
31. SF sent an email to SP shortly afterwards (2:30 am 13 April) summarising what had happened and noting that he had subsequently spoken to NO and showed him the most recent emails from SP and GS. He ended by observing that Mr Brown of Network Rail security "*has given them authority to use 207 but told nobody else*".
32. C himself also emailed SP and GS early on 15 April to complain about SF's behaviour, which he described as "*unreasonable at best or downright racist at worst*".

### **The Law**

33. As to the claims of direct discrimination, s. 13 EqA 2010 (the Act) provides that
- (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.*
34. Section 136 of the Act provides, as to the burden of proof, that
- (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.*

35. Although the two-stage analysis of whether there was less favourable treatment followed by the reason for the treatment can be helpful, as Lord Nicholls explained in Shamoon at [8], there is essentially a single question: “*did the claimant, on the proscribed ground, receive less favourable treatment than others?*”
36. The Tribunal is required in many cases, as in this, to consider how a hypothetical comparator would have been treated. In answering that question, the treatment of non-identical comparators in similar situations can assist in constructing a picture of how a hypothetical comparator would have been treated: Chief Constable of West Yorkshire v Vento (No. 1) (EAT/52/00) at [7].
37. A claimant does not have to show that the protected characteristic was the sole reason for the decision; “*if racial grounds or protected acts had a significant influence on the outcome, discrimination is made out*”: Nagarajan v London Regional Transport [2000] 1 AC 501 at pp512-513. The discriminator may have acted consciously or subconsciously: Nagarajan at p522.
38. We refer to well-known remarks of Mummery LJ in Madarassy v Nomura International Plc [2007] ICR 867, [56-58] on the burden of proof issue, albeit in the context of a claim that the claimant had been treated less favourably than actual comparators: that for stage 1 of the burden of proof provisions to be met, what is required is that “*a reasonable tribunal could properly conclude*” from all the evidence, that discrimination occurred.
39. As to harassment, s. 26 of the Act provides:
- (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.*

40. The “*related to*” test is broader than the “*because of*” test in s. 13. However, ss Underhill LJ explained in Unite the Union v Nailard [2018] IRLR 730 at [108]-[109], the tribunal is required to make findings as the motivations and thought processes of the individual decision-makers as to whether their actions were ‘related to’ the protected characteristic.

### Discussion

70. Mr Heard provided written submissions and supplemented those orally. C made oral submissions. We do not set out those submissions in detail here, but will refer to them as necessary.

#### The complaint relating to the April 2020 email

71. Mr Heard’s first submission on this issue is that the List of Issues set out after the PH in February 2020 refers to an allegation that SP and GS “*failed to respond to the Claimant’s grievance of 20 April 2020*”, whereas SP had responded to that email. The only email to which there had been no response was C’s email of 21 April 2020.

72. We find that it was probably always the intention that the List of Issues should specify, or at least include the 21 April email, which unlike the 20 April email refers to ‘grievances’. In any event, the tribunal has no difficulty in adding the 21 April email to the list of issues if necessary. The issue of how it was received and dealt with/not responded to was the subject of evidence given by both parties, included in their witness statements, and subject to cross-examination.

73. Mr Heard’s second submission is that any complaint about the failure to respond to the 21 April email is well out of time. C’s submission is that it was part of an “act extending over a period” because the ‘grievance’ involved a complaint about SF and the subsequent ‘in time’ claim (see below) was about SF; and/or that it would be just and equitable to extend time if necessary.

74. We find that this complaint is substantially out of time and that it would not be just to extend time in this regard. As to whether the act complained of against SP and GS was an act extending over a period by virtue of linking it to the complaint against SF almost a year later, we cannot agree with C. These are complaints about different

people and different types of act, and the time elapsing between the two, being almost a year, is substantial. Given that C told us he was well aware of tribunal processes, including time limits, and gave no real explanation for not making a claim about this first matter within the time limit, and given the extent to which this claim is out of time, we do not consider it just and equitable to extend time to allow us to determine it.

75. We do go on to say, not without a degree of hesitation, that had we found this complaint to be in time, we would have found that the failure to respond to that 21 April email or to follow up more than SP did was not because of C's race.
76. We are surprised and we criticise the fact that no further action was taken by SP or GS in response to the 21 April email, as to some extent SP acknowledged he should have done. We have not been taken to relevant R procedures, but whether they exist or not, if a contractor makes a complaint of repeated bullying & threatening behaviour potentially on the grounds of race against an employee of R, it is incumbent on R to explore that issue, save in cases where it is immediately obvious that the complaint is vexatious. That would involve speaking to C, or if there is a prohibition on R's managers talking directly to Servest cleaners, then requiring a Servest manager to act as intermediary. A reply should be given to the person making the complaint.
77. However, we find that SP did explain his failure to respond to the email as having been for reasons other than C's race. He had promptly and appropriately replied the previous day when he had received a complaint by a cleaner contractor assumed (as C pointed out) to be of black African heritage by his name alone. It was an exceptional period in terms of demands on him at work. There was no express requirement in the latter email of complaint for him to respond. We repeat that we do not accept that they are good enough reasons for the non-response, but we find them to be, in fact, the reasons.

#### The 13 April 2021 incident

78. We deal first with a time point. On its face, this complaint is a little out of time. However, we accepted C's evidence that he had contacted ACAS twice on 10 May 2021, once in respect of each of the claims he proposed to bring against Servest and

R, respectively, which evidence was supported by C's phone records. Thus, the claim is only out of time as the result of a misunderstanding on the part of ACAS. There was no prejudice to R. We therefore have no hesitation in extending time if necessary on the basis that it would be just and equitable to do so.

79. After careful consideration, and not entirely straightforwardly, we find that that the action of SF on 13 April 2021 was not because of or related to C's race.

80. This is a curious case at first blush, since C was treated in an identical manner on the date in question to the (white) person with whom he compares himself. We of course recognise that C's case is more nuanced and that he asserts that AZ being required to leave was incidental, and that had AZ been alone he would not have been asked to leave.

81. What is the evidence in this case of any differential treatment by SF? It is provided in only two places, both by witnesses who did not attend the hearing.

81.1. The first is within the statement NO, who says that SF responded less frequently and helpfully to him compared to Donna a white British employee of Servest no longer with them.

81.2. The second is that AZ says that, prior to 11-13 April, he was more than once discovered in a room allocated to LNER staff by SF who did not require him to leave; but that on other occasions he was discovered in a room with colleagues (who were probably black, since the other male cleaners were black) and they were asked to leave.

82. Both those pieces of evidence were denied by SF.

83. We have explained above what weight we accord to that evidence of NO and AZ, and why.

84. More fundamentally, we must address the complaint before us and not a more generalised complaint that SF is capable of consciously or unconsciously treating black people less favourably because of or related to their race. In other words, we must focus on the reason why SF ordered C and AZ to leave room 207 early in the morning of 13 April 2021.

85. In addressing that question, we turn to consider SF's email to his managers on 11 April. We find that whatever the position before 11 April, the tone of exasperation in SF's email to his managers of that date, prompted in part by the disagreement with C (which C could not recall, but did not deny) and in part by a lack of clarity from R, points eloquently to his needing to have a definitive answer to whether Servest staff were entitled to use room 207 as an overflow mess-room. He got that definitive answer from both managers within a couple of hours: the Servest cleaners were to 205 and not 207.
86. We asked ourselves if, following that email exchange, SF had been doing his rounds on the 13 April, and had come across, say, AZ on his own or two white female cleaners, whether he would have asked them to leave. We all decided, again not without hesitation, that the answer was 'yes', SF would have asked cleaners of any race to leave. That is our answer to the 'single question' referred to in Shamoon.
87. We considered that it would have been inconsistent for someone who is more concerned with narrow compliance with the rules compared to his colleagues, having written his email and got the responses from his managers on 11 April, then to not enforce compliance with his instructions. That view is supported by the part of AZ's evidence which records that SF was "*insisting that he received email from Gary [GS] telling him that we should not use room 207*",
88. For completeness, by reference to s. 136, we find that there were facts from which we could (not should) properly conclude, in the absence of any other explanation, that SF contravened s. 13 (the unnecessarily unyielding approach he took that evening, together with the evidence of AZ and NO referred to above). However, we find that R has shown, by the evidence of SF supported by the contemporaneous documents, that such a contravention did not occur.
89. For the same reasons, we found that, though there were facts which 'shifted the burden of proof' on the issue whether SF had harassed C related to his race, R has shown that the reason for violating C's dignity, etc, on the occasion complained of was not related to C's race.

Oliver Segal KC

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Employment Judge

10 March, 2023

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Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

13/03/2023