EMPLOYMENT TRIBUNALS

Claimant: **Mr I Odewale**

Respondent: **London Underground Limited**

Heard at: **East London Hearing Centre**

On: **24 and 25 November 2022**

Before: **Tribunal Judge Brannan, acting as an Employment Judge**

Members: **M Daniels**
D Clay

Representation
Claimant: Mr P O'Callaghan (counsel)
Respondent: Ms C Urquhart (counsel)

JUDGMENT

The claimant's claim of direct discrimination because of race is dismissed.

REASONS

1. These are the written reasons of the Tribunal following the request of the claimant for written reasons after the unanimous judgment and reasons were given orally at the hearing.

Background and Agreed Facts

2. The claimant has been employed by the respondent since 13 June 2012. He became a train operator in 2013. Following an incident where he opened the doors on the wrong side of a train he initially faced a sanction of dismissal which was changed to demotion to a Customer Services Assistant 2 (CSA2) on 7 April 2017. He was informed that after 52 weeks he would be eligible to apply to be a train operator again. The specific sanction said:

> *A return to Train Operator is not automatic after 52 weeks from the date of this sanction, however you will then be eligible to apply for the role of Train Operator but this will only be possible if there is an active recruitment campaign underway*

at that time and your subsequent successful requalification by completion of the normal recruitment/training requirements for that role.

3. Within the disciplinary policy of the Respondent is a further stage of appeal called a Directors Review. Under the disciplinary policy trade union representatives can take exceptional cases to this stage. The Claimant's disciplinary process did not go to the stage of Directors Review.

4. The Respondent has an agreement with the train operators called the Train Operator Resourcing Agreement ("TOPRA"). Under the heading "Disciplinary Decisions" it says:

> *8.1 If a T/Op is reduced in grade and wishes to return to the Train Grade the rate of pay for a T/Op will recommence at the end of the period of reduction or on re-qualification* ***if this was stipulated at the Company Disciplinary Interview****. The T/Op will then be placed at the top of the waiting list for their home depo and be able to seek T/Ops vacancy elsewhere until a vacancy arises at their home depo. On return to their original home depo they will take up their position in the pool based on their previous depo seniority frozen from the date they ceased to be a T/Op.*
>
> [our emphasis added]

5. It should be noted that TOPRA has changed over time resulting in the paragraph number of this provision changing but the substance remaining the same.

6. The Respondent argues before us that paragraph 8.1 only applies if the Company Disciplinary Interview stipulates it to apply, which it did not for the Claimant. Earlier in TOPRA is an explanation of general recruitment for train operator vacancies, which the Respondent argues the Claimant needs to succeed in to return to being a train operator.

7. The Claimant applied twice to become a train operator again and was unsuccessful. He was successful in taking on other safety critical roles with the Respondent.

8. After not being successful the Claimant came to believe that 8.1 of TOPRA meant he should not be required to apply to become a train operator once again but should rather be automatically reinstated to that role. He wrote to his manager on 22 July 2021 requesting he be retrained as a train operator with reference to TOPRA. On 10 September 2021 Darren Bill of Operational Resourcing of the respondent refused that request. This was referred to as "Claim 1" at the hearing.

9. Believing himself to have been refused for discriminatory reasons, the Claimant then raised a complaint under the bullying and harassment policy of the Respondent on 7 December 2021. The Respondent refused to consider the complaint under the bullying and harassment policy, confirming this by email on 10 December 2021. This was referred to as "Claim 2" at the hearing

10. On 23 January 2022 the Claimant raised claims with the Tribunal for direct and indirect race and sex discrimination. He subsequently withdrew all claims but those for direct race discrimination. These were based on the facts of Claim 1 and Claim 2, and the treatment of comparators to whom we will return.

Issues

11. The parties agreed a list of issues in the following terms:

Jurisdiction

1. When did the act(s) complained of take place?

The Claimant relies on allegedly discriminatory acts/omissions he says took place on 10 September 2021 and 10 December 2021.

The Respondent accepts that the dates of 10 September and 10 December 2021 are in time, but says that the first complaint, said to arise on 10 September, is in fact a complaint about a decision made by the Respondent in April 2017, and so is far out of time.

2. Was the Claimant's claim presented within three months of the date(s) of the act(s) complained of (allowing for ACAS Early Conciliation)?

Three months from 10 September 2021 is 9 December 2021.

On 8 December 2021, the Claimant began ACAS Early Conciliation.

On 23 December 2021, the Claimant obtained an ACAS Early Conciliation Certificate.

On 23 January 2021, the Claimant presented his Form ET1 to the Employment Tribunal.

The Claimant contends that his claim was presented in time as he began ACAS Early Conciliation within three months less one day of the date of the act/omission complained of and issued his claim within one month of the ACAS Early Conciliation Certificate, pursuant to section 207B Employment Rights Act 1996.

The Respondent contends that the first complaint has been presented out of time as it is a complaint about a decision made by the Respondent in April 2017.

3. Do the act(s) complained of form conduct extending over a period, pursuant to sl23(3)(a) Equality Act 2010, and if so is the end that period in time? Or do the act(s) complained of constitute a one-off act with continuing consequences and if so is that one-off act in time?

4. If the act(s) or any of them are out of time, would it be just and equitable for the Tribunal to extend time under s23(l)(b) EqA?

Direct race discrimination (s 13 Equality Act 2010)

5. The Claimant relies on his protected characteristic of race, and describes himself as black British of African origin.

6. Did the Respondent subject the Claimant to the following detriments (the Respondent disagrees with the use of the "detriments" as being relevant to the section 13 complaint but this can be addressed at the outset of the hearing):

a. 10 September 2021: refusing to arrange training for the Claimant to re-qualify as a Train Operator; or

b. 10 December 2021: refusing to investigate the Claimant's Discrimination Complaint

7. If so, did the Respondent treat the Claimant less favourably than it treated or would have treated others ('comparators') in not materially different circumstances?

8. The Claimant relies on three comparators, known to the parties as Comparator A, Comparator B and Comparator C.

9. Is Comparator A, Comparator B, and/or Comparator C a relevant comparator?

10. If Comparator A, Comparator B, and Comparator C are found not to be actual comparators, did the Respondent treat the Claimant less favourably than it would have treated a hypothetical comparator?

11. If so, was the treatment because of the Claimant's race?

Remedy

12. If the Claimant's claims or any of them succeed, is the Claimant entitled to an injury to feelings award?

13. Is the Claimant entitled to interest on any injury to feelings award?

14. Is the Claimant entitled to an award for loss of earnings?

15. Is the Claimant entitled to interest on an award for loss of earnings?

12. With reference to issues 5 to 11 above, there was no material dispute about what the claimant and respondent had done. The nature of the dispute is about whether this was discrimination because of race. It was therefore necessary for us to consider the burden of proof provisions in section 136 of the Equality Act 2010 (the “Equality Act”). In relation to this, the respondent conceded at the hearing that the burden shifted to it in relation to Claim 1. It disputed this in relation to Claim 2.

Evidence

13. We heard evidence from the Claimant, Danny Powell, Phil Simpson and Darren Bill. They referred to a bundle of evidence of 330 pages.

14. The Claimant’s evidence was very straightforward and honestly given. He answered all of the questions that he was asked directly. Although he had made a claim initially that included four different claims, he had narrowed that before the hearing. He refrained from expanding his claim beyond the very narrow complaint that he made before the Tribunal. We commend him for that despite the obvious feelings that he felt throughout this process.

15. We are also grateful to the other witnesses for their time in giving the evidence and the advocates for their organisation that they have shown and their succinct submissions.

Law

16. The law in this case is quite straightforward. The Claimant claims that the decision not to train him as a train operator on 10 September 2021 and the failure to deal with his complaint under the harassment and bullying policy of the Respondent on 10 December 2021 was direct discrimination, contrary to section 13 Equality Act 2010. It is important to note that he accepts that the decision to demote him on 7 April 2017 following a disciplinary process was not discriminatory.

17. Section 13 of the Equality Act says, as relevant:

> **13 Direct discrimination**
>
> (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) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
>
> (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
>
> (4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
>
> (5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

18. The parties agree that the burden of proof provisions and section 136 Equality Act potentially apply to this claim. This says, as relevant:

> **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.
>
> (5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

19. We had in mind two cases in relation to this which we think are particularly relevant.

20. The first is *Igen Ltd v Wong* [2005] EWCA Civ 142 which makes two points about the burden on the respondent to show that it did not contravene any provision. First, *Igen v Wong* says that the employer must prove the less favourably treatment was in no sense whatsoever because of the protected characteristic. The second point is that because the evidence and support of the employer's explanation will usually be in the possession of the employer, the Tribunal should expect cogent evidence for the employer's burden to be discharged.

21. The second case which we particularly have in mind is *Komeng v Sandwell and Metropolitan Borough Council* UK/EAT/592/10. This said that it can be an easy defence for the employer to hold its hands up and say was just disorganised, inefficient or unfair but a Tribunal must carefully test such explanation.

22. Having looked at these legal points, we turn to the claims of the Claimant.

Findings

Claim 2

23. We look first at Claim 2. This is the claim relating to failing to deal with a complaint under the harassment and bullying policy. We find this to fall at the first hurdle as we are not satisfied that the decision was connected with race. We heard the evidence and read the documents. We find that Tom Morris looked at the complaint and saw that it did not specify any bully or harasser. We think it would have been good practice for Mr Morris to speak to the Claimant about what the Claimant was complaining about. It seems to us to have been bad management not to do so. But our conclusion based on the evidence is that it would have happened to anyone of any race.

24. We can entirely understand why the Claimant is aggrieved by this because his concern really was discrimination and we can see why he thought that it could fit under the harassment and bullying policy particularly as it was different from a previous grievance he had submitted. But we do not have evidence that race played any role in this part of the decision making and for that reason, we do not find in favour of the Claimant in relation to that Claim 2.

Claim 1

25. The part of the claim that was more complex to us was Claim 1 relating to the decision of the 10 September 2021. We have been presented to four comparators for us to consider. Our approach to looking at those was rather comparator centric, looking from comparator to comparator to work out how they illustrate the points that the parties make. It is helpful to set out the material circumstances of each comparator.

26. Comparator A was a white male train operator. He caused a safety critical incident on 9 March 2017 by opening the train doors for too short a time resulting in an elderly passenger falling onto the platform. He moved off while that passenger lay motionless.

He was initially dismissed but the sanction was reduced to demotion following an appeal, in similar terms to those imposed on the claimant. His case went to a Directors Review which resulted in an automatic return to being a train operator after 52 weeks.

27. Comparator B was a white male train operator. He caused a safety critical incident on 1 September 2018 by leaving a station with the train doors open. His sanction was initially a suspended dismissal and demotion. He would need to return to a safety critical role in the "normal way". That sanction was upheld on appeal. His case went to a Directors Review. The director purported to apply 8.1 of TOPRA (albeit it had a different paragraph number then) but said that Comparator B should return to a train operator role at the earliest opportunity after the 52 week demotion (i.e. without needing to apply).

28. Comparator C was a white male train operator. He caused a safety critical incident on 5 March 2019 by passing a signal at danger and concealing that it had happened. He was initially dismissed but on appeal the sanction was reduced to demotion, in similar terms to those imposed on the claimant. After completing 52 weeks he managed to return to being a train operator without going through the application procedure envisaged in TOPRA. The request had been sent to Mr Bill but he referred it on to another colleague, Mike Smith, who approved the return to being a train operator.

29. Comparator D was a black female train operator. She caused a safety critical incident on 26 May 2015 by opening the doors on the wrong side of the train. Her sanction was a suspended dismissal and demotion. She successfully applied to become a train operator again through an open recruitment process.

30. Our conclusion is that Comparator A is of no assistance because of the materially different circumstances. This is because Comparator A went through the director's review process which the claimant did not go through. In addition, there was no reference to TOPRA within the process so it is uninformative on the correct interpretation of TOPRA.

31. TOPRA is relevant to Comparators B, C and D. We are satisfied that paragraph 8.1 of TOPRA is intended to apply only to people who have a disciplinary outcome that does not require them to reapply for the role of train operator (i.e. not the claimant).

32. In relation to this, Comparator D is a double edged sword because she is relied on by both parties to try and improve their case. To us, what it shows is that a black person managed to requalify using the process envisaged by TOPRA, but she did so before TOPRA was in place. Unlike Comparator B and C, she did have to reapply.

33. Comparator B shows TOPRA being overridden. We can see the director implementing his or her interpretation of what TOPRA does, which was actually adverse to the position the Respondent has taken in the proceedings before us and what we consider the correct interpretation to be. It surprises us that policies and procedures can be wiped out in the stroke of a pen by what Mr Simpson described as an "ad hoc" decision by a director. We find policies and procedures being able to be set aside in such a way can cause confusion about what is required. That has obviously arisen for the Claimant.

34. Turning to Comparator C, we had to carefully consider what the difference in treatment was between Comparator C and the claimant. That begins with Mr Bill's conduct. In

2020, when Comparator C sought to return to being a train operator, Mr Bill did not ask any questions about the reason why Comparator C was not driving trains. Instead he sent it on to Mr Smith to make a decision. In 2021, when the claimant did the same thing, Mr Bill did ask questions. The explanation that we have been given was that the reasons that he acted differently in 2020 and 2021 was the pressure he was under in 2020.

35. Mr Smith was not involved in decisions relating to the claimant in 2021. We have doubts about Mr Smith's account of his decision-making in an email of 14 November 2022 because it was substantially contradicted by Mr Bill's evidence. But we are conscious that this relates to the treatment of Comparator C, it does not relate to the treatment of the Claimant. It is only Mr Bill who was actually involved in the treatment of the Claimant and in the treatment of Comparator C. Mr Smith's state of mind is irrelevant to the treatment of the Claimant.

36. We found Mr Bill's evidence credible and sincere relating to the strain he was under in October 2020. All of his team except from his boss was on furlough and he says he was dealing with hundreds of secondments to cover staffing needs caused by the pandemic. In short, the difference was that he had time to think in 2021 whereas he sent the decision to another person to deal with in 2020. In 2021, he made his own decision based on the organisational process found in TOPRA and the Claimant's disciplinary outcome from 2017. We scrutinised all this evidence carefully to understand the Respondent's explanation and the conclusion we have come to was that we find that if Comparator C had sent emails in the exact same terms as the claimant, but in 2021, he would have been treated in exactly the same way as the claimant was. Therefore our conclusion is that the treatment of the Claimant was in no sense whatsoever because of the Claimant's race.

Conclusions

37. We now apply our analysis to the agreed list of issues (that remain relevant).

38. The first question in the list of issues is about jurisdiction. We are satisfied we have jurisdiction to consider the Claimant's complaints because it is clear to us that a decision was made on the 10 September 2021. This is particularly stark in light of the treatment of Comparator C where a different process was followed and it is clear that there was a difference in treatment simply by restating the letter. We therefore do not need to consider points two, three or four within the agreed list of issues.

39. Point five is not an issue in contention. Point six relates to whether there was any detriment and it clear to us that there has been detriment to the Claimant particularly in relation to the 10 September 2021 decision. The result is that he is not driving trains and there is a financial consequence to that. In relation the 10 December 2021 decision (Claim 2), there is certainly an arguable detriment although it is not material in light of our findings.

40. Question number seven is whether the Respondent treated the Claimant less favourably than it treated or would have treated other comparators if not materially different circumstances. It did treat the Claimant less favourably than Comparator C. He was the actual relevant comparator, which is issue nine. However the circumstances were not identical because Mr Bill had different pressures in 2020 and 2021. Issues eight and 10 are not relevant.

41. When we turn question 11 on the agreed list of issues for the reasons, we have explained we do not find that the treatment was because of the Claimant's race. It was because of the pressure Mr Bill was under in 2020 and the time he had in 2021.

42. It is therefore not necessary to look at the points relating to remedy under 12 to 15 of the agreed list of issues.

43. For those reasons, the Claimant's claim for direct race discrimination is dismissed.

Tribunal Judge Brannan acting as
an Employment Judge
Dated: 19 January 2023