Case Number: 3202211/2018

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EMPLOYMENT TRIBUNALS

Claimant: **Mr. D Birmingham**

Respondent: **Abellio East Anglia Limited**

Heard at: **East London Hearing Centre**

On: **Thursday 25 July and Wednesday 11 September 2019**

Before: **Employment Judge McLaren**
Members: **Mrs P Alford**
Mr L Purewall

Representation

Claimant: Mr. G Kirk (Counsel)

Respondent: Mr. P Livingston (Counsel)

JUDGMENT

It is the unanimous judgment of the Employment Tribunal that the claimant's complaints of direct discrimination, discrimination arising from disability and disability related harassment do not succeed.

REASONS

Background

1. The respondent is a train service operator and the claimant a train driver based at the Southend Victoria. Depot. The claimant has been employed since 10 June 2002 and remains an employee of the respondent.

2. The claimant brings three claims of discrimination arising from his disability. These all relate to an incident on 19 June 2018. He claims direct discrimination under section 13 of the Equality Act, discrimination arising from disability under section 15 of the Equality Act and disability -related harassment under section 26.

3. The claimant gave evidence on his own behalf. He was also supported through the witness statements of three other colleagues, Derrick Marr of the National Union of Rail Maritime and Transport Workers, Clayton Begg, appointed representative for the Associated Society of Locomotive Engineers and Firemen (ASLEF) and Kenneth Turner, the local drivers' representative for ASLEF. We were also provided with an agreed bundle of some 201 pages. Michael Smithson, Lead Driver Manager for the respondent, gave evidence in support of the respondent's position.

4. In reaching our decision we took account of the witness evidence that we heard and such of the documents to which we were directed. We were also assisted in our deliberations by helpful submissions from both counsel.

The issues

5. At the outset of the hearing the issues of fact and law we must determine were confirmed by the parties as those set out in the case management discussion of 4 February 2019:-

Admitted conduct

5.1 On 19 June 2018, Mr Smithson:

5.1.1 On receipt of such information from the claimant, informed the claimant that he had contributed to the delay of the train because he had gone to the toilet;

5.1.2 Requested the claimant to add to the delay report that he had gone to the toilet.

Direct discrimination (s.13 EA)

5.2 Does the admitted conduct amount to less favourable treatment of the claimant by the respondent? The claimant compares himself to a hypothetical comparator. The correct hypothetical comparator is a non-disabled employee who takes frequent toilet breaks which cause delays to the service.

5.3 If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the difference in treatment was because of the claimant's disability?

5.4 If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Discrimination arising from disability (s.15 EA)

5.5 Does the admitted conduct amount to unfavourable treatment of the claimant by the respondent?

5.6 Did the claimant's need for a toilet break arise in consequence of his disability?

5.7 Was the conduct because of the claimant's need for a toilet break?

5.8 If so, was the treatment a proportionate means of achieving a legitimate aim, namely the need to ensure an efficient and timely service?

Disability related harassment (s.26 EA)

5.9 Does the alleged conduct amount to unwanted conduct for the purposes of s.26(1) EA?

5.10 If so, is the unwanted conduct related to the claimant's disability, namely his need for a toilet break?

5.11 If so, did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Relevant Law

6. There was no dispute on the relevant law. Section 13 describes Direct discrimination as:

"(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."

7. Discrimination arising from disability (s15) is set out as follows:

"(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability".

8. Three forms of behaviour are prohibited under S.26 EqA, which is entitled 'Harassment' 'general' harassment, i.e. conduct that violates a person's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment – S.26(1) sexual harassment – S.26(2), and less favourable treatment following harassment – S.26(3).

9. The general definition of harassment set out in S.26(1) applies to all protected characteristics, except marriage and civil partnership and pregnancy and maternity. It states that:

"*a person (A) harasses another (B) if: A engages in unwanted conduct related to a relevant protected characteristic – S.26(1)(a), and 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"* – S.26(1)(b).

S 26(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."

10. We reminded ourselves of Richmond Pharmacology v Dhaliwal [2009] IRLR 336 in which the EAT considered the definition of harassment and set it out this way:

(1) The unwanted conduct. Did the respondent engage in unwanted conduct?

(2) The purpose or effect of that conduct. Did the conduct in question either

(a) have the purpose or

(b) have the effect of either

(i) violating the claimant's dignity or

(ii) creating an adverse environment for her?

(3) The grounds for the conduct. Was that conduct on the grounds of the claimant's race (or ethnic or national origins)?

11. We were referred to the EAT decision in Private Medicine Intermediaries Limited V Hodkinson & Ors UKEAT/0134/15/LA:

"*unfavourable treatment suggests the placing of a hurdle in front of, or creating a particular difficulty or disadvantage for, a person because of something arising in consequence of their disability".*

Burden of proof

12. Igen v Wong Ltd [2005] EWCA Civ. 142, [2005] ICR 931, CA. remains the leading case in this area. There, 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 must 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.

13. The Court of Appeal explicitly endorsed guidelines previously set down by the EAT in Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT, albeit with some adjustments, and confirmed that they apply across all strands of discrimination.

Findings of Fact

Knowledge of disability and its impact

14. It was accepted at the preliminary hearing on 4 February 2019 that the claimant suffers from overactive bladder syndrome and that he is disabled within the meaning of the Equality Act 2010. It was also accepted that the respondent had knowledge of this disability.

15. We were referred to several medical reports. On 25 September 2014 a specialist medical assessment report form was completed (page 30 of the bundle) which identified that the claimant was affected by symptoms attributed to an overactive bladder. This report suggested an adjustment, namely restricting routes to those where turnaround times were longer so that in the event of a delay there was enough time to allow him to visit a toilet. This report also stated that the prognosis was very variable, but the condition may well persist for at least several years. Page 31 to 32 of the bundle was a letter from occupational health to a team organiser at the respondent organisation which appears to be a response to a request for such a report. That sets out in some detail the claimant's medical issues and again suggests a way of addressing the issues by amending the routes that he drives to allow longer turnaround times.

16. We were referred to reports at pages 33 ,34 and then 35 which are a specialist medical report, a review of a specialist report and review of the medical report. These appear to relate to a one-off incident of chest pains. They state that the claimant is fit for full and normal duties. We do not find that this is inconsistent with the respondent being aware of the earlier medical issue. We note that the 2014 medical assessment report form specifies, despite it noting the claimant's medical condition with overactive bladder, that he is fit for full and normal duties. We do not find that the absence of reference to the bladder issues means that the respondent could assume that such issues no longer existed. We find that the reports carried out in 2015 related to a specific health issue only.

17. We were also taken by the respondent to page 39 of the bundle, a medical assessment report form of 24 February 2017. This is a periodic medical. Again, this notes that the claimant is fit for full and normal duties and makes no reference to his bladder issues. We find that this did not mean that as at 2017 the claimant no longer had any medical issues, or that the respondent could reasonably assume the 2014 medical report no longer applied. We find it simply did not address the matter. In the absence of an express report stating the matter was no longer an issue the respondent could not assume the 2014 report was out of date.

18. Mr Begg and Mr Turner gave evidence of the respondent's knowledge. Mr Begg related that Mr Smithson would discuss the claimant's late running of trains due to his need for frequent toilet breaks that he required longer turnaround times at various

stations because of his medical condition. Mr Turner similarly stated that the claimant's performance record was discussed on a number of occasions at management meetings in relation to lost time and late running trains, it being common knowledge that the claimant had a medical condition. We accept the evidence of Mr Turner and Mr Begg. This was contradicted by Mr Smithson in his evidence to us who stated that details of the claimant's medical issue were not discussed in meetings. He pointed to the fact that this was not recorded in minutes. It was agreed by all, however, that such sensitive information would not be put in a minute because these were public documents. The absence of this in the minutes does not mean it was not discussed and on balance we think it more likely than not that it was and prefer the evidence of Mr Turner and Mr Begg on this point.

19. We find that, despite his evidence to us, Mr Smithson did have knowledge that the claimant suffered from a medical issue. At page 37 of the bundle is an email from Mr Smithson at 30 September 2016 in which he states that the claimant suffered from cancer and occasionally had an issue with requiring personal breaks. Then in May 2017 he received a copy of the letter (page 44 the bundle) which the claimant specified that "as they were aware, he had a medical condition". There is no response from Mr Smithson questioning this.

20. In October 2017, page 56 of the bundle, Mr Smithson then suggests that the claimant needs to be referred for his medical condition to occupational health to seek advice relating to his emergency personal needs breaks. At that time Mr Smithson completed a reference to occupational health, although on the advice of his HR colleague he did not actually make the referral.

21. Page 57 of the bundle is a note from Mr Smithson in which he confirms that the claimant discussed his medical condition and his response is that that is exactly why he was referring him to occupational health. That note does not make any reference to the fact this is the first time Mr Smithson has heard of any medical condition and we conclude that if, as his evidence to us stated he was unaware of the medical condition, that would have been clear from these memos.

22. We accept that Mr Smithson may not have known the exact prognosis of the claimant's medical condition, but we conclude that he was certainly aware that there was a medical issue that was linked to the need for PNB's.

23. Further, Page 63 of the bundle contained a report dated 10 May 2018 addressed to whom it may concern which confirmed that in the opinion of the claimant's GP he had a disability under the Equality Act and confirmed the diagnosis of overactive bladder. Mr Smithson said that he had not seen this; we have no reason to doubt that it was sent to the respondent and that they received it. While we note that the respondent has accepted that it knew of the disability, we confirm that we also find that this was undoubtedly the case.

<u>Need for timely operation of the train service</u>

24. It was accepted by both parties that the respondent, as a train operator, was subject to fines if the train service was late and that was attributable to the respondent's actions. For that reason, the respondent monitored the timely or tardy

arrival of trains and drivers were required to produce late logs if there was any delay in the service. Such logs needed to identify the cause of delay to allow the respondent to dispute any fines to which it could be subject if the cause was not on its side.

25. It appears that the adjustment recommended in 2014 was not put in place at that time. At the time of the relevant incident in June 2018 the claimant was still travelling on routes with short turnarounds which meant that the timely running of the service could be impacted by his need for a personal needs break (PNB).

Prior history with Mr Smithson

26. As context for the incident that arose in June 2018 the claimant gave evidence as to his relationship with Mr Smithson. It appeared that on 1 September 2017 the claimant was spoken to by his line manager about delays. Page 52 of the bundle then contained a log showing that a train was late on 19 September because the claimant required a PNB. Page 53 of the bundle shows that a train was late on 11 October because the driver was late to the train after visiting a toilet.

27. On the same day, 11th October, Mr Smithson asked for a breakdown of the delays attributed to the claimant over the past two years and confirmed that he would deal with the issue. This report noted that the claimant had cost the business £5,850 due to running late. This report included the comment that "these are only the ones recorded!".

28. Having received this report on 11 October Mr Smithson then met with the claimant on 12 October. At this meeting, according to his own note at page 57, he told the claimant he was worried about his health issues and wished to refer him to occupational health.

29. Mr Smithson confirmed in his evidence, in contradiction to his witness statement that he did during this conversation tell the claimant that one consequence of his health issues could be that he could be moved to a non-driving position and/or could be moved to a different route which could impact his pay. As Mr Smithson's own note of this meeting records the claimant stating that he wanted to stay on the mainline rate of pay we find that this conversation did occur. The claimant's evidence was that the meeting was unscheduled and without union representation. He also gave evidence that while he wanted to leave the room because he felt uncomfortable with the meeting, he was told by Mr Smithson that if he did so it would be gross misconduct and he would be dismissed.

30. The claimant sent a grievance letter following this meeting dated 8 November 2017, at page 61 and 62 of the bundle, which records his recollection of events. We accept the claimant's account of this meeting and the threat made. We do this because the claimant raises these issues in his grievance promptly after the meeting and because Mr Smithson contradicted his written statement in oral evidence

31. The respondent did not reply to this grievance and on 16 May 2018 the claimant asked why this grievance had not been progressed and reminded the company of the adjustment that had been suggested and of his medical condition.

32. The grievance was then investigated by the company and summarised on 7 August 2018. The outcome report confirmed that the claimant's medical condition required him to have urgent toilet breaks and that the condition fell under the Equality Act. The claimant's complaint of harassment and bullying by Mr Smithson was not upheld and it was found there was no case to support disciplinary action against Mr Smithson but the report commented that he would benefit from some coaching on how to handle requirements for reasonable adjustments in relation to the Equality Act. It also suggested that an apology would be appropriate from Mr Smithson.

33. The claimant was not satisfied and raised a stage 2 grievance on 12 August 2018. The outcome for this was sent to the claimant on 15 April 2019. This confirmed that the claimant was recognised as having a disability. It found that a reasonable adjustment should be made in the light of that disability and that the claimant was not expected to make up for lost time when a train was late running by shortening the specified turnaround time allowed for the length of train in question. This is in contradiction to Mr Smithson's belief that a driver is expected to make up late running by eroding the allowed turnaround time.

34. The stage III grievance outcome also confirmed that the respondent believed that Mr Smithson was aware the claimant had experienced previous medical problems and that he was aware that there were train delays which were because the claimant needed to use the toilet.

35. While this grievance procedure took many months, and overlapped with the incident which is the subject of these tribunal proceedings, it did not consider the incident that is the subject of these proceedings. The grievance procedure had started prior to that happening and focused on complaints made by the claimant in relating to Mr Smithson's referral to occupational health. They do not form part of the issues before this tribunal, but they provide a context in which to understand the June 2018 incident.

<u>The incident on 18/19 June 2018</u>

36. Mr Smithson's account was that the claimant was responsible for train delays on 4th June 2018, 6th June 2018, and then again on 18th June 2018. Given the increase in train delays in which the claimant was involved Mr Smithson decided to investigate the 18th June delay.

37. The log for 18th June at page 72A shows that the train was late leaving London Liverpool Street and comments that the platform staff advised that the driver was using the toilet. The claimant's account is that on 19th June he was in the mess room and Mr Smithson came into it while he was on his break and asked him to complete a driver's report form. He did this and set out the reasons for the late running of the service which he said were due to signal delays.

38. This report is at page 72B and initially made no reference to a toilet break. It accounted for the train delay by showing that it was 3½ minutes late leaving the station because of a 1½ minute knock-on delay from a prior train, and there was a two-minute wait at a signal. It also showed that there was a two-minute delay waiting for passenger doors to be closed and locked.

39. The claimant said that having completed this log and given it to Mr Smithson he then went out onto the platform to get himself a decaffeinated tea and Mr Smithson followed him out and said that the report he had filled in was not accurate, that he had contributed to the delay because he had gone to the toilet and he was to add PNB to the delay report. The claimant felt he was required by Mr Smithson to do this and therefore amended the report as instructed.

40. The claimant said that he explained to Mr Smithson in detail that his PNB made no difference to the late running of the train. The train was late due to signal issues which were not the responsibility of the respondent and therefore not matters which the respondent could be fined. The respondent is permitted 7½ minutes to turn a 12-carriage train, the claimant did the turnaround within the permitted time, including taking his PNB. His toilet break therefore had no impact on the lateness of the service and was not a matter for which the company could be fined.

41. The claimant told us that this was the last straw and that he felt so stressed and distressed by what he saw as Mr Smithson's behaviour towards him he felt unsafe to drive a train and therefore reported sick on 20 June. The claimant considers that Mr Smithson has singled him out and that he has treated him differently from a non-disabled driver who need to take frequent toilet breaks.

42. Mr Smithson's evidence was that that is not true. Running services on time is a priority for the business and he would therefore make enquiries of any driver involved in train delays. On this occasion what he was asking the claimant about was a discrepancy between the document 72A and the original account at 72B. He told us that the report at 72A shows that the three-minute delay was caused by the fact that the driver was in the toilet and that the train was therefore late leaving Liverpool Street because of the driver's absence. He explained that there are very complex and detailed computerised logs kept of every trains' movement through every single signal and at every station which tracks exactly where any delay occurs. Great care is taken over the accuracy of these records because they are used as the basis for attributing faults in the sense of who pays for the cost of any delay, the operating train company or the infrastructure providers.

43. Mr Smithson's evidence was that he was not interested in the one &half minute knock-on delay or the two-minute waiting at signals because the system had already recorded that elsewhere. He was only asking the claimant about the three minutes that were said to be down to the driver being in the toilet. In his conversation with Mr Smithson the claimant said he had been in the toilet and it was because that was an accurate account that he asked the claimant to add that to the form. He was doing it simply so that records matched. We accept Mr Smithson's evidence on this point that his enquiry was in relation to the three minutes identified by the official log and his enquiry was about why the records did not match, particularly given the claimant accepted that he had taken a PNB. He confirmed that it was not a question of blame, nor were there any consequences arising for the claimant as a result of him noting a PNB on the form.

44. We find that whether the claimant was within or outside the turnaround time is not relevant. The enquiry was not about that but about a discrepancy between two logs which it was reasonable for the respondent to raise. Mr Smithson did so in a calm

manner and the requested amendment did no more than reflect what had happened. We accept that there were no employment consequences arising from the amendment of the report.

45. It was the claimant's position that the respondent's requirement that he continually discuss his condition over and over again is deeply embarrassing and that he felt having to add a toilet break to a log when that was not the cause of the train delay humiliated and degraded him.

Conclusion

46. It is an agreed fact that Mr Smithson did inform the claimant he had contributed to the delay of the train because he had gone to the toilet and that he requested the claimant to add to the delay report that he had indeed gone to the toilet. This tribunal is then asked to consider whether this admitted conduct amounts to discrimination.

47. While there is history between Mr Smithson and the claimant relating to prior incidents, we were reminded in submissions that the agreed issues we have been asked to consider are very narrow in scope. They relate only to one incident on one date. Even though the respondent has accepted that it did not make reasonable adjustments that were required, that does not form part of this complaint and is not a matter the tribunal can consider.

48. To determine whether this admitted conduct on the 19th June 2018 amounts to direct discrimination under section 13 the conduct must amount to less favourable treatment compared to a hypothetical comparator being a non-disabled employee who takes frequent toilet breaks which cause delays to the service.

49. We accept that the respondent is under continual pressure to keep trains running on time. We conclude that the request to amend a driver report so that it reflects something that happened, so that the report is then in line with the log that has been made via the tracking systems, is not in itself less favourable treatment. Even considering the context in which this request was made we do not find that there is a quality in the treatment that enables a complaint to be made reasonably. Further, we also consider that a non-disabled employee who takes frequent toilet breaks causing delays would also be subject to the same treatment. The claim for direct discrimination fails.

50. Looking at discrimination arising from disability, the respondent concedes that the need for toilet breaks arose in consequence of the claimant's disability and the admitted conduct was because of the claimant's need for toilet break. The respondent submits, however, that the admitted conduct did not amount to unfavourable treatment because no disadvantage was suffered by the claimant. In submissions the respondent referred to the fact that the claimant did not feel at a disadvantage because he had not raised this incident in his stage I grievance meeting or his initial stage II grievance meeting. We have already found that these grievance meetings related to incidents that predated 19 June 2018 and do not find that failure to mention this incident in those is relevant.

51. Nonetheless, we do conclude that being asked to make sure that a report and a log were both consistent when no disciplinary action or any other penalty were applied to the claimant does not amount to unfavourable treatment. In any event, even if we

had reached a different conclusion, we would find that the desire to have the logs accurate was a proportionate means of achieving a legitimate aim. We have accepted that the respondent was trying to run an efficient and timely service as it is required to do so and that a request for accuracy in logs is a proportionate action. The claim under section 15 also fails.

52. The claimant also complains of disability -related harassment under section 26 of the Equality Act 2010. The respondent again accepts that the conduct was related to the claimant's disability but submitted that it was not unwarranted conduct or that had a purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment nor was it reasonable that it should.

53. We have noted the history between the claimant and Mr Smithson, but the issue before the tribunal is limited to one exchange, rather than one in a series of incidents that amounted to harassment. We conclude that asking an individual to make sure that records align does not amount to unwanted conduct for the purposes of section 26(1) of the Equality Act 2010. Had we reached a different conclusion, we also accept that it was not Mr Smithson's intention to violate the claimant's dignity and further that it is not reasonable for this one request to create an environment that amounts to harassment.

54. For these reasons we dismiss all of the claimant's claims.

Employment Judge McLaren
Date: 7 October 2019