



EMPLOYMENT TRIBUNALS

Claimant: Gary Davis

Respondent: (1) Openreach Ltd
(2) Nigel Tucker

Heard at: Exeter by Video **On:** 31 October, 1, 2 and 3
November 2022

Before: Employment Judge Smail
Members Mr D Stewart
Mrs C Lloyd-Jennings

Representation

Claimant: Mrs Davis, Wife

Respondent: Mr J Gunnion (Consultant)

RESERVED JUDGMENT

The Claimant's claims of disability discrimination are dismissed.

REASONS

1. By a claim form presented on 18 March 2021 the Claimant claims disability discrimination. At all material times the Claimant was, and remains, employed by the Respondent as a Frames Technician. His length of service stretches back to 25th January 1988 some thirty-four years. It is recognised by the Respondent that the Claimant is good at his job and is a valued member of the workforce.
2. The case is brought against the first Respondent, the well-known communications company, and also against Mr Nigel Tucker who was the Solent Frames Team Leader and Wessex Frames Lead at the time of the principal period covered by the allegations; that period is November 2020 –

January 2021. There was a subsequent grievance brought by the Claimant on 1 March 2021, his second grievance in respect of the matters, which was concluded by Mr John Rickett on 20 October 2021. Mr Rickett is the senior engineering area manager for the West Downs. The focus of that grievance was on the events in the primary period of November 2020 – 14 January 2021. The Claimant works in a team servicing the older pre-fibre copper telephone exchanges, dealing with amongst other things line faults.

3. The Claimant is and has been since the age of 11 a type 1 diabetic. He is required to inject insulin between four and seven times a day.
4. The case came before Employment Judge Rayner on 28 October 2021. The specific issues were then listed. Before this Tribunal, the Respondents now take no issue in respect of time limits and they have always conceded disability and knowledge of it. The issues which we have to determine, which we update bearing in mind what we know of the case now, are as follows:

The Issues

(1) Direct disability discrimination (Equality Act 2010 section 13)

- 1.1 Did the First Respondent do the following things:
 - 1.1.1 by Mr Tucker, the Second Respondent, continually pressurising the Claimant to attend an Occupational Health assessment from November 2020 through to January 2021?
 - 1.1.2 by the Second Respondent, requiring the Claimant to attend an Occupational Health assessment on 11 December 2020, and on 6 January 2021?
- 1.2 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who he says was treated better than she was and therefore relies upon a hypothetical comparator.
- 1.3 If so, was it because of disability?
- 1.4 Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to disability?

(2) Discrimination arising from disability (Equality Act 2010 section 15)

1.1 Did the Respondent treat the Claimant unfavourably by:

1.1.1 requiring the Claimant to attend Occupational Health so reviewing the reasonable adjustments that the Claimant had in place already;

1.1.2 threatening his continued employment, if he was not able to drive on motorways;

1.2 Did the following things arise in consequence of the Claimant's disability?

1.2.1 the need to avoid driving on the motorway arose from his disability in that when driving he would need to be able to pull over to take food, check blood sugar levels and administer insulin, as required; and avoid traffic jams so as to get home for regular meals

1.2.2 the need for reasonable adjustments

1.3 Was the unfavourable treatment because of any of those things?

1.4 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent asserts its legitimate aims were to ensure a safe and appropriate environment for its employees and/or to operate an efficient workforce.

1.5 The Tribunal will decide in particular:

1.5.1 Was the treatment an appropriate and reasonably necessary way to achieve those aims;

1.5.2 Could something less discriminatory have been done instead;

1.5.3 How should the needs of the Claimant and the Respondent be balanced?

(3) Harassment related to disability (Equality Act 2010 s. 26)

3.1 Did the Respondent do the following things:

3.1.1 Mr Tucker unnecessarily and continually pressurising the Claimant to undertake an Occupational Health review

3.1.2 Mr Tucker threatened the Claimants continued employment with the company in November 2020 and at a meeting on the 14 January 2021;

3.2 If so, was that unwanted conduct?

3.3 Did it relate to the Claimant's protected characteristic, namely disability?

3.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

3.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

The Law

5. Direct discrimination is defined by Section 13 of the Equality Act 2010. By subsection (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.
6. The comparator necessary for Section 13 direct discrimination in a disability claim is defined by Section 23 of the 2010 Act. By subsection (1) on a comparison of cases for the purposes of direct discrimination, there must be no material difference between the circumstances relating to each case. By subsection (2) the circumstances relating to a case include a persons abilities if the protected characteristic relied upon on a comparison is disability.
7. Section 15 concerns discrimination arising from disability. By subsection (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;
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
8. Harassment is dealt with under Section 26 of the 2010 Act. By subsection (1) a person A harasses another B if
 - (a) A engages in unwanted conducted related to a relevant protected characteristic;
 - (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.
9. By subsection (4), in deciding whether conduct has the effect referred to above 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. Burden of proof is important in discrimination cases. It is dealt with under Section 136 of the 2010 Act. By subsection (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. However, subsection (3) provides that Subsection (2) does not apply if A shows that A did not contravene the provision. What this means in practice is that the Claimant must show a prima facie case of discrimination. If the Claimant succeeds in that the burden transfers to the Respondent to show that discrimination played no role whatsoever.

Findings of Fact

11. The first Respondent operates a system for reasonable adjustments for disability under a scheme they call the BT passport. The latest completed passport in relation to the Claimant was dated 30 October 2019.
12. The front of the document is entitled “BT Passport for health, disability and caring responsibilities”. It states that it is to be noted that once the document has been completed, which means that it has been signed off and dated by the employee and their line manager, nothing is to be changed unless prior agreement is reached with the employee and their line manager. The relevant entries in respect of the Claimant’s passport read as follows:

“Gary has type 1 insulin dependent diabetes, diagnosed November 1974. He has to monitor his blood sugar levels during the day and needs to do a test prior to driving his vehicle. Gary already had a P&D roster in place which was changed to a business needs swap so that he attends work from 07:30 – 17:10 which allows him to return home in time to have a meal and take his medication.

I have agreed with Gary that if he picks up a tour of work that includes exchanges some distance away from his finished location, he should travel to these exchanges first and then complete the task closer to his start location so that he can better judge traffic conditions to return home at the correct time.

Gary needs to carry out a blood sugar test prior to driving and these results should be recorded as evidence that he is complying with this.

Because of the need to return home to take medication at a set time, we have agreed to give Gary a preferred working area of Southampton and set his postcode as Totton Exchange. Gary has no secondary working area as we have removed it to reduce that chance that he would be caught in traffic returning to his home exchange”.

13. The Claimant’s manager at the time was Luis Abreu Aranguren. Mr Aranguren specified that there were six exchanges that represented the

Claimant's preferred working area, and given that he had no secondary working area, this was his working area, and the six exchanges were all around greater Southampton. They included Totton where the Claimant lives, Cadnam, Ashurst, Shirley, Hampton and one other. These were determined by Mr Aranguren on 4 November 2019.

14. The Claimant has interpreted this preferred work area as meaning that he would not drive on motorways. The Claimant has explained this on the basis that the motorways in the Southampton area, in particular the M27, were renowned for traffic jams around road works introducing the smart motorway concept. Traffic jams would be typical with no hard shoulder. The reason why the motorways should be avoided, in the belief of the Claimant, is that it is much more difficult to pull over to check blood sugar levels, take food, administer insulin as necessary; and in the event of significant traffic jams, will make it difficult to get back home on time to eat an evening meal at a regular time. The passport does not expressly say that driving on motorways is excluded. It is however, a central feature of the Claimant's understanding for why only local exchanges were prescribed that he avoid driving on the motorway. It seems to the Tribunal that the six prescribed exchanges could be reached on local roads other than motorways.
15. The passport for health, disability and caring responsibilities includes an explanation of what a BT passport is. It states that -

"A BT passport is a simple word document which can be completed by any BT employee who feels their circumstances could have an impact on their ability to work either currently or at some point in the future due to health, disability or caring responsibilities. It has been developed to help individuals and their line manager record any information and agreed actions relating to the individual circumstances. BT and the BT trade unions have worked together to create the BT passport. The completion of a BT passport is voluntary on the part of the individual and there is no record of who has or has not completed a passport. The passport can be downloaded and completed at a 1-2-1 with their line manager. Its completion is aimed to provoke discussion about balancing business and individual needs and to record the outcome of that discussion. After completion, it is recommended the passport is reviewed at least quarterly or more frequently if required at the discretion of the individual and manager so that changes can be discussed and recorded. Once completed, the passport is confidential between the two signatures, but if the individual's line management changes, it is recommended the passport should be handed over to the new line manager with the new signatures maintaining confidentiality. This removes the need to repeat personal information and revisit local agreements already reached between the original line manager and the individual. The document is designed to be completed online and saved by the manager and individual with due regard to the confidentiality of the individual when completed. It is a local arrangement and does not change an individual's terms and conditions of employment".

16. The document goes on later to state "a passport is not legally binding and is not intended to impact on your employment rights. It should be regularly reviewed with your line manager".
17. Nigel Tucker became the line manager on the 21 September 2020. Between him and Mr Aranguren, Egan Cary had been the line manager for a while.

18. The frames system of communication is gradually being replaced by fibre. This means the old telephone exchanges are changing in nature. The need to maintain frames connections is reducing. Mr Tucker was of the view that there was not enough work to keep the Claimant fully busy across the six exchanges. Mr Tucker shared this belief with the Claimant on 18 November 2020 and proposed that the Claimant take on at least three more exchanges. Mr Tucker was of the view that referral to Occupational Health would be sensible to check the safety of that.
19. The following day the Claimant questioned the need for this expansion. He wrote in an email as follows:

“Nigel, after speaking to you yesterday concerning your issues with the difficulty you have finding me work due to the limited amount of exchanges I cover, and the only way you could find more work was to remove the [absence of a secondary working area]. This was put in place for a reason - to minimise the amount of travel I undertake daily and virtually eliminate motor driving, and to be fair this for me has worked very well. The removal of my secondary working area exclusion would put me back to the bad old days of travelling everywhere and I am not feeling comfortable about it. Predecessors of yours and others spent a lot of time in the past helping me put this in place for my wellbeing. On reflection, if some more local exchanges cannot be added to my list of exchanges I currently cover, I would like it left as it is. Despite [the suggestion of] the lack of work, I up until now have been kept busy daily. I appreciate as you have told me yesterday, on a daily basis “hard pins” my work, but once [secondary working area exclusion] is removed and if you left the group, I have no safeguards in place”.

20. Mr Tucker replied to that also by email on 19 November 2020, stating he appreciated the Claimant’s concern:

“I think the best course of action at this stage is to do a review of the restrictions to make sure that what is in place is accurate. From talking to you yesterday it seems as though the previous preferred working area was put in place without your knowledge and agreement, and as discussed that was not right. My suggestion is that we send you for an Occupational Health review which will highlight the restrictions that you need, and we can put them in place. If they recommend no motorway driving or a reduced exchange load as you suggest, then of course we can accommodate that, along with any other restrictions they recommend. I will get the review raised and the OHS people will be in touch to arrange an appointment with you to complete the review”.

21. The Claimant replied the following day by email expressing his reservations about this proposal. He wrote:

“Nigel, restricted motorway driving was put in place because of the way this company works for me. I am absolutely shattered most nights going home and it is me that will end up under an articulated lorry if anything goes wrong. Everything has worked fine since this was put in place and I don’t appreciate interference now. Every time I inherit a new manager this happens. The night I sent you this email I could not sleep, worrying about it and had to get up in the early hours of the morning to send you this letter. Stress is the main factor in driving my blood sugars low and yes I do monitor my illness extremely closely now but I have no control over people constantly trying to spoil the things put in place that make my working life manageable”.

22. We now know that what the Claimant was fearing was that these adjustments and indeed his driving licence could be under threat if reviewed by an unsympathetic Occupational Health physician. We know that he had lost his licence before. He understood he needed to be mobile so as to work within this group.
23. On 20 November 2020, the Claimant had a confidential discussion with Human Resources expressing his concerns. We have a transcript of that conversation which we believe is produced by the Claimant. The Claimant was advised to escalate the matter to the second line manager if he thought it appropriate. He was also given contact details for confidential employee counselling services. The Claimant did not escalate the matter to Mr Cleugh, the second line manager, because he assumed that Mr Tucker would have consulted Mr Cleugh in the first place.
24. Notwithstanding this, it seems that the Claimant did agree to take on a number of additional local exchanges, believed to be three in number.
25. On or around 20 November 2020, the Claimant refused to travel to Winchester and Chandlers Ford, exchanges further away from greater Southampton, because they involved motorway travel. The Claimant reminded Mr Tucker that day that he would not go to jobs that required motorway travel.
26. Mr Tucker, the second Respondent, completed a referral to Occupational Health. In addition to standard questions ticked on a dropdown menu, Mr Tucker posed additional questions namely: Is Gary safe to drive on all types of roads? What is considered as a safe radius of travel from Gary's start location? Are there any restrictions to Gary's hours or days that would help him manage his condition better? Is Gary able to complete the full range of duties required of a frames engineer? What support if any does Gary require to keep his health stable and therefore keep him at work long-term?
27. On or around 25 November Occupational Health tried to make contact with the Claimant, they contacted his wife instead by email. The Claimant emailed Occupational Health asking could they explain why he had been referred and by whom. The Claimant would have known the answers to that but he was making a point. He continued

“Can I briefly explain my perspective on my health so that when we speak you are aware of it. I have had a health passport for a number of years now. Due to having a heavy workload not unlike any other worker on Openreach, I was passing out late in the afternoon. My wife was driving to remote exchanges to find me after not returning home of an evening. I passed out on the last occasion in Shirley exchange and an ambulance was called and I lost my driving licence at the time. The passport has worked well for me which I understand was the idea of the passport to reduce stress to an employee when a change of line manager appeared which for me is frequent. My present line manager is challenging my passport and causes me enormous stress while still not performing best at my job. I hasten to add that I do not have any light duties. I had a triple heart bypass, two cataract [operations]. I narrowly avoided having my toes amputated. According to the professional this was due to too much sugar. Before the passport I had

supplied myself sugar to make sure I got home from work. Getting stuck in a traffic queue at the end of the day is a real threat”.

28. The Claimant reminded them that he was covered by the Equality Act 2010. The Claimant was essentially saying was that his existing adjustments were serving him well and he did not see the need for the matter to be reviewed.
29. Occupational Health contacted Mr Tucker via HR with the invitation to make it clear to the Claimant why he was being referred. That prompted Mr Tucker to contact the trade union. The Claimant had already contacted Mr Holder of the trade union objecting to the prospect of being referred to Occupational Health. The Claimant suggested there was a material change in attitude in the trade union official stance on the matter. At first, he suggested the trade union official opposed the suggestion of a referral, sympathetic to the Claimant’s stance. Eventually, at a meeting on 3 December 2020, the trade union official backed the suggestion to refer the Claimant to Occupational Health. The Claimant seemed to agree. Mr Tucker thought it was agreed. Following the meeting on 3 December 2020, the Claimant terminated his dealings with that union official believing he was more like a manager than a trade union official.
30. In a subsequent grievance – the second grievance brought on the 1 March 2021 - this was examined by Mr Rickett. Mr Rickett interviewed Mr Holder on 16 September 2021. Mr Holder on that occasion suggested it was his idea – Mr Holder’s - that the Claimant go to Occupational Health. He said it was agreed by all three – the Claimant, Mr Tucker and himself – that it was appropriate for the Claimant to talk to Occupational Health. According to Mr Holder’s recollection, the Claimant had been off because of his health, his eyesight was becoming pretty bad and his diabetes was playing up, although it had settled down previously. There were other health issues as well, recalled Mr Holder. He could not recall what they were but the idea of referring to Occupational Health was so that the passport could be amended accordingly. Mr Holder continued

“It is standard that the passport is to be reviewed quite often; some things do not need to be reviewed and some things do. He was not getting any younger and they just wanted to know whether it was getting worse or not and he agreed at the time that it was a good thing to do and they left the meeting all on the same page.”

They were therefore waiting for a report to come through from Occupational Health where they could move on from there. Mr Holder then received a message that the Claimant did not want him to represent him anymore because he thought he sounded too much like a manager.

31. Therefore, the trade union official at the time representing the Claimant and attending a meeting with Mr Tucker on 3 December 2020, thought it entirely appropriate, indeed necessary, that the Claimant be referred to Occupational Health. As far as Mr Tucker was concerned, following the meeting on 3 December 2020, it was agreed also by the Claimant that there be a referral to Occupational Health.
32. A telephone Occupational Health referral had been arranged for 11 December 2020. The invitation to the telephone call was accompanied by “A

guide to your independent telephone medical assessment". That guide included the following:

"If you are not happy for this call to occur, you should advise your line manager or your HR representative immediately, but this may mean that health management is not able to gather the information that they would need in order to advise on your case and in those circumstances your employer would not have the benefit of Occupational Health advice which is unlikely to be in your best interest".

33. In the event the Claimant was unable to attend the telephone call arranged for 11 December 2020, by reason, he says, of pressure of work.
34. A further telephone medical assessment was arranged for 6 January 2021 with Dr Claire Piper. On 21 December 2020, Mr Tucker informed the Claimant that absence had been built in for him to attend the call and he said "lets make sure we do not miss this one".
35. A telephone call duly commenced with Dr Piper and the Claimant on 6 January 2020. The Claimant did make a recording of it but has declined to produce it in proceedings. The Respondent did ask him for it; however, the Respondent did not make an application for its disclosure. We do not have it here. The Claimant did give an account of the conversation to Mr Rickett in the investigation of his March 2021 grievance. He explained that the subject of his driving licence came up in conversation and the meeting became difficult as a consequence. Dr Piper had indicated that she would have to write to the DVLA. The Claimant terminated the call suggesting Dr Piper had said that the conversation was going nowhere. As we say, we only have an account of this call from the Claimant as he gave it to the investigation by Mr Rickett.
36. That day Dr Piper did contact the Respondent with the effect that his former line manager Mr Egan came out to check on him at work to see if he was ok. Dr Piper sent a letter on 6 January, it seems not received by the Respondent until a week later, in these terms:

"Thank you for referring Mr Davis for an Occupational Health assessment. I had a telephone consultation with Mr Davis on 6 January 2020, Mr Davis terminated our consultation and I was not able to obtain his consent.

I am writing from a safety and duty of care perspective to recommend that he is restricted from all safety critical work, including driving, working at height and lone work.

If Mr Davis were to consider and consent to an HO assessment in the future. We would be happy to arrange this".

37. Upon receipt of that letter on 13 January 2021, Mr Tucker arranged for a meeting by Teams video with the Claimant the following day. It was Mr Tucker's intention to include the trade union representative but the Claimant had withdrawn his instruction of Mr Holder by then. A conversation took place between the Claimant's wife Mrs Davis and Mr Tucker.
38. Mr Tucker shared the Claimant's view that what Dr Piper was saying about driving might be wrong. He stood the Claimant down from duties that day

and pencilled in such a period of informal suspension for a period of a fortnight but did say to the Claimant that if he could get a letter from his own GP saying he was safe to drive, the informal suspension would be terminated. It is said by the Claimant that in the course of this conversation Mr Tucker said 'no licence, no job'.

39. In the event, speedily, the Claimant managed to get a letter from his GP Dr Becky Broomfield. It read as follows:

"As you are aware, he has type 1 diabetes treated with insulin. I can confirm he is fully aware of all safety precautions that should be taken when driving whilst using insulin and I have full confidence in his ability to check his blood sugars before driving or performing other activities such as climbing ladders. He is fully aware of how to manage his diabetes and treatments to maintain a safe level of blood sugar whilst driving and has had no incidents in recent years.

I therefore see no reason why his diabetes as it is currently should in any way prevent him from driving. He is regularly monitored here at the surgery and his observations and testing is all stable with no recent change to warrant a change in his behaviour. I hope this information assists and with the patient's permission you may contact me for further information".

The Claimant was stood down for only one day. Upon receipt of that letter he was restored to duties.

40. Prior to the meeting on 14 January 2021, the Claimant had addressed an email to Mr Tucker called "formal grievance". It said that it was with regret that he found himself having to bring the grievance. He said that he had three times written to Mr Tucker to protest at him trying to alter the conditions set out in the disability passport. He also protested on several occasions about being referred to the Occupational Health officer. So much so that he had contacted the union. It was suggested that only after talking to Mr Tucker did the union officials' attitude change. He suggested that he had been bullied into speaking to Occupational Health. He believed he had had no problems with his diabetes in recent times. He suggested his Christmas had been ruined because he was doubting Mr Tucker's motives. He questioned whether there was a need to expand his area of work. He repeated his position that the passport had worked brilliantly with the arrangements they enabled him to perform his job effectively. He stated that all he wanted was to continue doing his job until retirement, preferably in a stable condition health wise. The episode had caused him a ridiculous amount of stress. He was diagnosed with shingles over Christmas which was connected with stress. The Claimant stated that he would like Mr Tucker to cease trying to alter the passport to suit his own needs. He should leave the passport, so it was protecting him, which is what it was meant to do. He suggested he was working with instruction from ACAS. He stated he would like Mr Tucker's response to that letter within five working days.
41. Mrs Davis has suggested that although the email was addressed to Mr Tucker in those terms in fact Mr Tucker should have handed it to someone else in accordance with the grievance policy. That criticism is a little harsh bearing in mind the email was addressed to Mr Tucker saying the Claimant would like his response within five working days.

42. Mr Tucker did consult Human Resources and he replied on 19 January 2021 in these terms.

“I fully understand the importance of keeping you fit and well, the OHS review process was originally there to make sure you are fit and well and no additional restrictions were required or needed to be changed in order to keep you safe. The passport states that the OHS should be reviewed regularly but off the back of this email that process had been questioned and clarified, that a new OHS is only required if there is a change in your health condition which as your doctor has confirmed there has not been.

The passport and the [working areas] can be reviewed at anytime between the two of us without the need for an up-to-date OHS report, and as such I have asked you to review your passport at a time that is convenient for you to ensure it is up-to-date and relevant. If there are any amendments you would like to make then please send them over on an email.

With regards to the conversation around increasing your [work areas] then the same is also true, no changes will be made without your agreement, so if this is something you wish to continue with, then please let me know via email. I am more than happy to adjust it if you wish, or it can remain the same.

At no point was this process meant to do anything other than support for you to be the best team member you can be, however, I acknowledge that it has caused you undue stress and having gained clarification from our HR department we now have a clear way forward”.

43. Mr Tucker then had accepted what the Claimant had asked of him and having consulted HR, left the matter there.
44. As we understand it, in the fullness of time, but with other line managers, the Claimant, recognising the shortfall in work in the old frames exchanges, has agreed considerably to extend his range of exchanges to around thirty in number. This requires driving more than he used to but he tells us there is never motorway driving.
45. The reason why the matter did not end there was because the Claimant’s licence was suspended by the DVLA following receipt from a communication, we find on a balance of probability, from Dr Piper. The suggestion was that the Claimant had lost awareness of impending hypoglycaemic attacks. The DVLA would consider lifting the suspension once the Claimant could demonstrate he had regained awareness of hypoglycaemia. The Claimant’s licence was suspended from 10 February 2021 to a date in July 2021. The Claimant was off work during that period on full pay. He was signed off over this period, as we understand it. It was not a period of suspension, informal or otherwise.
46. The loss of the licence prompted the second grievance dated 1 March 2021. This grievance was set out on a prescribed grievance template and an independent manager was instructed to investigate it. At first Mr Murgatroyd was asked to investigate but as he was in the line of management for this group, it was accepted that someone from outside should come in; that was Mr Rickett. Mr Rickett held interviews with all concerned, the transcripts are

in the bundle. We have already made reference to the interview with Mr Holder, the trade union representative. Mr Rickett's conclusion in respect of the grievance was as follows:

"Following a thorough investigation, I have found no evidence to uphold the alleged breach of the diversity and inclusion policy or the harassment and bullying guide. It is clear that this has been a very difficult situation for all concerned. However, health and safety, and how we support our colleagues in respect of that, is a priority for Openreach. I am sorry that Gary felt unsupported and threatened by this process. I have not found any evidence that Nigel's intention was anything other than reviewing an existing passport and preferred working area to ensure the adjustments were still appropriate. To do this, he needed current health information, and the root to do this is via OHS.

There was clearly a breakdown in communication between Nigel and Gary. Nigel felt that they had agreed a course of action between them; however, Gary has said he did not know why he was being referred to OHS and was worried about changes being made to his passport. Gary felt that he was being harassed and bullied by Nigel. However, from the evidence, it is my view that Nigel was trying to get up-to-date advice from Occupational Health to support a review of Gary's passport and work area, as had been discussed between them. It is appropriate that the passport is reviewed regularly and up-to-date advice sought from Occupational Health to make sure that Gary is receiving the correct level of support with adjustments to his role.

There was no involvement from Nigel or Openreach in the decision of the Occupational Health doctor to write to the DVLA recommending revoking Gary's driving licence.

I have identified areas of learning that will support Nigel moving forward in his management skills. Gary has moved to another line manager. However, I also recommend mediation to give Gary and Nigel an opportunity to improve their working relationship.

I have recommended that the following remedial action takes place to address the learning identified.

- (1) When leading a team - or taking over a team - over a large area, to ensure everyone is aware who is the new leader of the Team. If anyone is on leave to ensure it is followed up in a timely fashion for anyone that might have missed the initial call.
- (2) Building trust when leading a team.
- (3) Managing Conflict – turn a difficult conversation into a valuable one.

47. The action points were in relation to how Mr Tucker had handled the Claimant's opposition rather than an acknowledgement or finding that referring to Occupational Health was wrong.

48. We have been referred to numerous polies and management guides reinforcing the position that Occupational Health is a management tool to guide management decisions. The relevant decision in this case, was the proposed expansion of work area given the reduction in need for this type of exchange maintenance. We know from the subsequent agreed expansion of Mr Davis' work area that this was a genuine matter.

Conclusions

Direct Discrimination

49. The direct discrimination claim is not the correct vehicle for the Claimant's claim because a hypothetical comparator would have been treated the same by Mr Tucker. The relevant comparator would be someone, having the same abilities as the Claimant, who was not disabled with type 1 diabetes but who by reason of a non-disabled condition (for example one lasting less than a year) claimed not to be able to drive to work beyond his immediate home area and not on motorways. That, hypothetically, was a potential issue because there was not enough work to keep that person fully engaged, as perceived by management. Such a person would likely also have been referred to Occupational Health by Mr Tucker for advice. The direct discrimination claim fails on that basis. The other claims of discrimination arising from disability and harassment at least provide a legal route for the Claimant to argue his case.

Discrimination arising from Disability

50. This case is about a clash of perspectives. Mr Tucker, the manager, new in post, felt he needed to expand the Claimant's work area to provide him with enough work to keep him fully engaged. As events have transpired, we know that was a reasonable position. Because of what was being said to him about travel distances including driving on motorways, he wanted to take advice on what was safe for the Claimant. Employers do owe duties of care. As an exercise of managerial discretion, he wanted a reference to Occupational Health to have answers to the questions posed. That was responsible management. The Tribunal sees that the same was as Mr Rickett.
51. We understand, however, the Claimant's concern that if his position were put under the microscope, he might have his driving licence suspended. That had happened before. It did happen again. We have not had the opportunity to listen to the Claimant's conversation with Dr Piper. It may very well be that the conversation was not constructive, with the Claimant defensively not engaging. We do not know for sure because the Respondent did not get an order for the production of the recording and the Claimant has declined to put it in evidence himself. The Claimant did terminate the conversation early and refused consent to Dr Piper to provide details. She did unilaterally write to DVLA with concerns. Those concerns are likely to have been genuine concerns.
52. What the Claimant refuses to do, however, is to see it through management's eyes. Management does have the right to manage, however. The Respondents had a legitimate interest in seeking advice that it was safe to expand the Claimant's work area and that he was safe to travel to it.

53. Turning then to the way the s.15 claim is put. As a matter of fact, Mr Tucker did not threaten his continued employment if he was not able to drive on motorways. It is, however, right that Mr Tucker referred the Claimant to Occupational Health, asking the questions set out at paragraph 26 above, in particular: Is Gary safe to drive on all types of roads? What is considered as a safe radius of travel from Gary's start location? Are there any restrictions to Gary's hours or days that would help him manage his condition better? Is Gary able to complete the full range of duties required of a frames engineer? What support if any does Gary require to keep his health stable and therefore keep him at work long-term?
54. We do not regard that as unfavourable treatment against the background of the need to expand the Claimant's working area and the Respondents' interest in making sure it was safe for the Claimant to drive in the expanded area. We note that the Claimant's challenge caused Mr Tucker to withdraw his referral when he wrote upon HR's advice:

'The passport states that the OHS should be reviewed regularly but off the back of [your] email that process had been questioned and clarified, that a new OHS is only required if there is a change in your health condition which as your doctor has confirmed there has not been.'

While the Claimant successfully had the referral in effect withdrawn, the reasonableness of the referral had been agreed between Mr Tucker, the Claimant and the Claimant's union representative. It was only later that the Claimant changed his position, fearful, as he was, that his driving licence may be taken off him. We know that the Claimant believes any referral to Occupational Health is unfavourable to him, because there is a risk that his licence will be taken away, even though he agreed the referral on 3 December 2020. That subjective belief is not however objectively reasonable. He needs to acknowledge that where there is a change of circumstances, for example a proposed increase in the travel to work area, a reference to Occupational Health is reasonable.

55. We accept that reasonable adjustments in respect of driving distances arise from the disability because of the potential need for breaks to check blood sugar levels, administer insulin, and take food. Whether that involves not driving on motorways is worthy of consideration. On one view, is there a real difference between driving on motorways and dual carriageways? On another, it is the Claimant's belief he is more likely to get stuck in traffic on a motorway and not be able to pull over. The issue is worth of consideration. The passport has not expressly banned motorway driving.
56. If we are wrong, and the referral was unfavourable treatment, we find that the Respondents can justify the referral as a proportionate means of achieving a legitimate aim. Referral to Occupational Health is well recognised in the First Respondent's policies (and in industry at large) as a mechanism for promoting a safe and appropriate environment for the employees, so keeping them fit and operating an efficient workforce. All the more so when the referral was subject to a three-way agreement between Mr Tucker, the Claimant and his union representative. The claim under s.15 of the 2010 Act, therefore fails.

Harassment

57. Mr Tucker did not 'unnecessarily and continually' pressurise the claimant to undertake an Occupational Health Review. He wanted to check with Occupational Health that the Claimant could travel an expanded work area which it was necessary to give the Claimant to make sure the Claimant had sufficient work on the Frames team. Events have proved that position reasonable and valid. The Claimant has taken on approximately thirty new exchange areas since the proposal to refer him to Occupational Health was made by Mr Tucker. Human Resources having asked Mr Tucker to explain to the Claimant why he was being referred, a meeting was held with a trade union representative, and on 3 December 2020, there was an apparent three party agreement to the referral: Mr Tucker, the Claimant and the Claimant's union representative.
58. It was not reasonable, in our Judgment, for the Claimant to believe he was subjected to unwanted conduct having the effect of creating an offensive environment around the referral to Occupational Health. The referral was agreed with the Union. The questions Mr Tucker asked of Occupational Health were supportive given the need to expand the Claimant's working area.
59. Mr Tucker did not as a matter of fact threaten the Claimant's continued employment with the First Respondent in November 2020. He did say he would need to increase the number of exchange areas to keep the Claimant fully occupied. He did not suggest that was not possible.
60. We find it likely and so proved that Mr Tucker did say in a meeting with the Claimant and his wife on 14 January 2021 'no licence, no job'. The letter from Dr Piper dated 6 January 2021 had just been received on 13 January 2021. The letter advised that the Claimant be prevented from driving, given the events of the telephone assessment. That prompted the Teams meeting the following day. In that meeting, Mr Tucker advocated the idea of getting a letter from the GP suspecting that Dr Piper's position was likely wrong. That was supportive of the Claimant remaining on the Frames team. The Claimant, and in submissions his wife who represented him in a forceful and articulate manner during these proceedings, acknowledged that the phrase 'no licence, no job' is accurate insofar as working in the Frames team was concerned. A Technician has to drive. We find that the Claimant did not regard this phrase as unwanted conduct having the effect of creating an offensive environment. On the contrary, he knew the phrase was accurate and it motivated him in correcting the position with correspondence from his GP. As a matter of fact, he did not regard himself as harassed by the phrase. Even if he had have done so, it would not have been reasonable for him so to do. In fact, Mr Tucker was supportive of the Claimant getting the GP letter so as to cover his working. The Claimant managed to get the letter within 24 hours and the Claimant was restored to the rota.
61. The comment in any event addressed working on the Frames Team. It did not purport to address redeployment in the event that the Claimant had to leave the Frames Team. They were nowhere near that at the relevant point in time.

62. The harassment claims fail also, therefore.

Employment Judge Smail
Date: 28 November 2022

Judgment & Reasons sent to the parties: 29 November 2022

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