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# THE EMPLOYMENT TRIBUNALS

BETWEEN

*Claimant*

*Respondent*

Mr P Carson

AND

The General Dental Council

**HELD AT:** London Central

**ON:** 7 to 10 March 2017

**EMPLOYMENT JUDGE:** Miss A M Lewzey

**MEMBERS:** Mr M Simon  
Mr B Tyson

## *Representation*

**For Claimant:** In person

**For Respondent:** Ms G Leadbetter of Counsel

**JUDGMENT** having been sent to the parties on 14 March 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. The Claimant, Mr Carson has been employed by the Respondent since 7 June 2010 continues to be so employed. He presented his claim to the Employment Tribunal on 1 October 2016 claiming disability discrimination. He relies on three disabilities each of which have been conceded.

### **Application for leave to amend**

2. This is an application to add a further detriment in Mr Carson's claims of harassment, victimisation and discrimination arising from disability. It relates to copying

Mr Oliver Carr into an email that included confidential documents relating to Mr Carson's grievance.

3. The relevant email dated 12 May 2016 at 17.20 (262) does not take the matter any further. However, Mr Carson has explained that he asked questions and, as a result of the answers, he was advised that Mr Carr was copied in on another email which was subsequently disclosed on 26 January 2017, which was dated 12 May 2016 at 16.09. We have not been able to find that document within the bundle, but that is not to say it is not there. Mr Carson says that this is evidence of harassment, victimisation and discrimination arising from disability. Ms Leadbetter argues that the application is made late and that there is no reasonable prospect of Mr Carson succeeding with this issue. At present, we are not in the position to say whether there is any reasonable prospect of success. There is no suggestion in either the letter opposing the application which was dated 8 February, nor today that this would prejudice the hearing and in those circumstances we allow the application to amend.

### **Application for hearing to be held in private**

4. Mr Carson applied to anonymise his name in the register. He bases his application on his article 8 rights. The article 8 right is a qualified right to respect the private and family life. The issue of whether such an order should be granted is an issue for the Tribunal, and not for the Respondent to agree. Mr Carson relies on his mental health treatment, although there is no evidence before us that that treatment would be jeopardised by his name being used in the judgment and reasons. We have taken note of the decision of Simler J in **British Broadcasting Corporation v Roden [2015] IRLR 627** that the principle of open justice is of paramount importance and derogations from it can only be justified when strictly necessary as measured to secure the proper administration of justice. Simler J quotes the judgment of Lord Reed in the Supreme Court in **A v British Broadcasting Corporation [2014] 2WLR 1243**. What is required is clear and cogent evidence to establish a basis for derogating from the public interest in full publication. We are not satisfied that this case falls within that situation. Anybody who brings a claim before this Tribunal has their name on the record unless there are very exceptional circumstances. There are no such circumstances and we refuse the application on order under Rule 50.

### **Admissibility of evidence**

5. The final matter concerns Mr Carson's statement. The Respondent opposes the inclusion of those parts of Mr Carson's witness statement which relate to protected disclosures and opposes the admission of the supplemental bundle in its entirety. The application for leave to amend to claim a detriment for making a protected disclosure was refused by Employment Judge Goodman on 25 November 2016. Mr Carson argues that he needs this evidence to demonstrate his perception that the Respondent was trying to obtain occupational health recordings because he had made protected disclosures some days earlier. Section 26 (4) of the Equality Act provides:

"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.”

The matter is not simply one of perception as there are other factors that will have to be taken into account.

6. What Mr Carson seeks to do is to introduce his protected disclosure claim to this Tribunal, although he seeks no finding. The correct approach would have been to appeal against the decision of Judge Goodman, but that has not been done. What Mr Carson seeks to include is an enormous amount of evidence that is not relevant to the issues before us. We must take proportionality into account. To allow this evidence would substantially increase the evidence before us on matters that are not relevant to the issues and would in all likelihood increase the length of the hearing. It is disproportionate and not in accordance with the overriding objective and therefore we refuse leave for this evidence to be adduced. Accordingly, we delete paragraphs 12-30, 160 and 118-146 of Mr Carson’s first witness statement. We will not be referring to the supplemental bundles.

7. The issues for determination by the Tribunal are those set out in the Case Management Orders (36-39) which were agreed at the Preliminary Hearing on 25 November 2016 and are as follows.

7.1 Section 26: Harassment on grounds of disability

7.1.1 Did the Respondent engage in unwanted conduct as described in paragraphs 7.1 to 7.4, 7.5 (ii), and 7.6- 7.19 inclusive of the grounds of claim?

7.1.2 Was the conduct related to the claimant’s protected characteristic?

7.1.3 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?

7.1.4 If not, did the conduct have the effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

7.1.5 In considering whether the conduct had 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.

7.2 Section 13: Direct discrimination on grounds of disability

7.2.1 Has the Respondent subjected the claimant to the following treatment falling within section 39 Equality Act: 7.1, 7.2, 7.4, 7.5(ii), 7.6-7.10 inclusive.

7.2.2 Has the Respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on hypothetical comparators.

7.2.3 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 protected characteristic?

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

7.3 Section 15: Discrimination arising from disability

7.3.1 The allegation of unfavourable treatment as "something arising in consequence of the claimant's disability" falling within section 39 Equality Act is: 7.1-7.4, 7.5(ii), 7.6-7.11 inclusive, 7.15-7.18. No comparator is needed.

7.3.2 Does the claimant prove that the Respondent treated the claimant as set out in paragraph 7.3.1 above?

7.3.3 Did the Respondent treat the claimant as aforesaid because of the "something arising" in consequence of the disability?

7.3.4 Does the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? The Respondent has not stated what the aim was or how the means were proportionate.

7.3.5 Alternatively, has the Respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability?

7.4 Section 27: Victimisation

7.4.1 Has the claimant carried out any of the following protected acts, namely:

7.4.1.1 Alleging disability discrimination as part of the grievance dated 11 May 2016,

7.4.1.2 Alleging disability discrimination in his supplementary statement of grievance?

7.4.1.3 Did the Respondent believe that the claimant may do a protected act in that they anticipated he may complain of failing to make a reasonable adjustment if not redeployed as a lay case examiner

7.4.1.4 Did the Respondent believe that the claimant may do a protected act in that they anticipated he may make a complaint of disability discrimination if the grievance handler concluded the Respondent's conduct in relation to the first medical report was unreasonable or inappropriate?

7.4.1.5 Did the Respondent anticipate the claimant would bring a claim in the Employment Tribunal under the Equality Act?

7.4.2 If there was a protected act, has the Respondent carried out any of the following treatment:

In respect of 7.1.1: grounds of claim 7.8, 7.9, 7.10

In respect of 7.1.2 grounds of claim 7.8-7.18

In respect of 7.1.3 grounds of claim 7.1-7.2, 7.4, 7.7(i), 7.10

In respect of 7.1.4 grounds of claim 7.8, 7.9, 7.10

In respect of 7.1.5 grounds of claim 7.19

## **7.5 Time/limitation issues**

7.5.1 The claim form was presented on 1 October 2015. Accordingly any act or omission which took place before 20 April 2016 is potentially out of time, so that the tribunal may not have jurisdiction.

7.5.2 Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

7.5.3 Was any complaint presented within such other period as the employment Tribunal considers just and equitable?

## **7.6 Remedies**

7.6.1 If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.

7.6.2 There may fall to be considered a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for injury to feelings, and/or the award of interest.

There is the additional detriment for which leave was granted that Oliver Carr was given copies of the grievances.

## **Evidence**

8. We have heard evidence from Mr Carson, who gave evidence by means of a written witness statement.

9. We heard evidence from the following witnesses on behalf of the Respondent, each of whom gave evidence by means of a written witness statement:

Mr P Harrington, Interim Head of Human Resources;  
Ms F Keen, Head of Illegal Practice; and  
Ms L Rea, Solicitor at Bates, Wells and Braithwaite (“BWB”).

10. We also have an agreed bundle to which we refer by reference to the relevant page numbers.

**Material Facts**

11. Mr Carson started his employment on 7 June 2010. He was promoted to the role of Senior Hearings Officer, Committee Secretary on 1 August 2013. In early 2015 Mr Carson notified the Respondent that he had been diagnosed with dyslexia and dyspraxia and requested a workplace assessment which took place on 18 March 2015.

12. On 22 March 2016 Mr Carson informed the Respondent that he had been diagnosed with Non Alcoholic Steatohepatitis, otherwise known as NASH.

13. On 23 March 2016 Mr Carson emailed HR (167) requesting a transfer to fill an existing lay case examiner role as a reasonable adjustment. He attached a four page rationale (168-171).

14. On 4 April 2016 (173) Ms Faulkner asked for Mr Carson's CV and supporting statement.

15. On 12 April 2016 Mr Carson was referred to occupational health. The Respondent's occupational health function is undertaken by an organisation known as Cordant. We have the reference (181-186) which refers Mr Carson's disabilities. One of the questions that has been ticked is (185) is:

"Is there a need to seek an alternative post. If yes, have you any specific recommendations you wish to make about this."

16. At the Occupational Health referral, before Dr Ryan, Mr Carson completed a consent form (190). He ticked the box that said:

"I do wish to receive a copy of the final report before it is sent to my employer".

17. On 12 April 2016 an occupational health report was issued by Dr Ryan (191-194) which states (193):

18.

"Based on the clinical picture that presents itself, I would support Mr Carson's move to the case examiner role. This should be for a minimum of 3-6 months, during that time he will undergo further medical tests in relationship to his liver disease. In addition, ongoing coaching for his dyslexia and dyspraxia would take place. The benefits of the alternative role will be observed by his employer.

.....

Mr Carson has discussed with his employers an alternative post, the case examiner role, which I would support him in carrying out. I have explained the reasons above as to why this should take place.

.....

You may wish to offer him this opportunity within 6 months of the recommended changes to his role at work."

19. On 13 April 2016 (198) Mr Carson emailed Lisa Faulkner as follows:

"Hi Lisa just to update you, I attended Dr Ryan yesterday afternoon, I am awaiting sight of his report, but he advised me at the consultation that he considers me to be disabled and will be recommending that I be transferred to the case examiner role."

Ms Faulkner emailed Ms Wyatt, also of the HR Department, reporting this and saying:

“I am not quite sure how they came to this decision, especially as the OH Doctor did not have sight of the CEJD and all I asked was how Paul would cope with increased stress.”

In response to that, Ms Wyatt said (197):

“Could you get on to OH today please and let them know Paul has informed you of this. Can you state they have not seen a JD so you will not be expecting them to make this kind of recommendation particularly without the employer seeing the report.”

Ms Faulkner responded:

“Will do - I think we decided not to send the JD and just ask that specific question about stress so as not to give them too much ammunition, also because they would not really be able to understand the role and their differences.”

Eleven minutes later, Ms Faulkner emailed Mr Cox of Cordant (199) and said:

“This would be an organisational decision not a medical decision and we would not expect this to be included in such terms in the report.

.....

I have obviously not seen the report as the appointment was only yesterday and I only have Paul’s view on this, could you please investigate before the report is produced and feedback to me”.

Cordant sent Ms Faulkner the report at 14.21 on 13 April. Ms Faulkner then emailed Ms Wyatt as follows (202):

“Cordant have put a block on the OH Report going to Paul, Philip Cox is going to be speaking to Dr Ryan to see if he can get the report readdressed and the information we have given today.”

Ms Wyatt responded:

“Thanks, did they agree with us?”

to which Ms Faulkner responded:

“They did Dr Ryan is going to rewrite the report and remove the section as he was unaware of the differences between the job roles.”

20. On 13 April 2016 Cordant reissued the report. The revised version (203-205) omits the reference to the lay case examiner role.

21. On 14 April 2016 Mr Carson emailed Mr Cox (230) as follows:

“ I am happy with the substance of the report but would like to propose some minor amendments and corrections before the report is released to my employer.”

He received the following response:

“Thank you for your email and confirming receipt and Dr Ryan was clear in his instruction that the report was to be released to both parties at the same time in this instance, therefore your employer already is in receipt of a copy.”

22. On 14 April 2016, Mr Carson emailed Ms Faulkner (226) as follows:

"I understand that you may now be in possession of Dr Ryan's report a copy of which was supplied to me this morning. I had not actually consented to its disclosure. There has been a failure on the part of Cordant who have acted in breach of the Access to Medical Reports Act 1988. .... However I am happy with the substance of the report and hope it assists the GDC in relation to my request."

23. On 20 April 2016 Mr Carr, who was at the time the Head of Investigating Committee, assessed Mr Carson for the Lay CE Role (231-238). He concluded that that role was not suitable for alternative employment for Mr Carson.

24. On 21 April 2016 Ms Faulkner notified Mr Carson that it would not be a reasonable adjustment to appoint him to the role.

25. On 21 April 2016 Mr Carson raised an informal grievance with Jonathan Dillon (240.). He put in a statement in support (243-244). The informal grievance meeting took place on 25 April for which there are notes (247-249).

26. On 6 May 2016 Ms Faulkner emailed Mr Carson following the informal grievance listing a number of adjustments and stating that the grievance was not upheld. As a result, Mr Carson raised a formal grievance on 11 May (258-261). The grievance policy was incorporated into Mr Carson's contract and therefore it obliged the Respondent to hold a hearing. Ms Keen was asked to deal with the formal grievance. She held an investigation meeting with Mr Carson on 25 May lasting two hours (266-285). During the meeting there was a discussion of a recording of the consultation with Dr Ryan. Mr Carson's evidence was that Dr Ryan dictated his report in Mr Carson's presence. There was never a recording of the whole consultation. The notes record (268):

Ms Keen asked Ms Faulkner to obtain a copy of the recording.

27. On 26 May 2016 Ms Faulkner emailed Mr Cox and asked for the recording. Mr Cox responded that he had no knowledge of any recording. It is clear to us that there was some confusion between the dictation of the report in Mr Carson's presence by Dr Ryan, and a recording of the whole consultation, which did not take place.

28. On 2 June 2016 Ms Keen conducted grievance investigation meetings separately with Mr Dillon (297), with Mr Carr (297) and with Becky Wyatt (301). In the interview with Becky Wyatt (305-306) it is recorded:

"BW ...In the first version we received the doctor recommended that PC should be redeployed. However, this is not the job of the doctor to make this decision. Redeploying employees is an organisational decision and it was not the question that we had asked. This was something that PC had brought up in conversation with the doctor during their meeting. We fed back to the doctor that this was not appropriate and he had overstepped the boundaries.

.....

BW Yes. We did not commission the report for the LCE role, but to ask whether PC is fit to undertake his current role of SHO. The Doctor made a sweeping assumption as he has no knowledge of the organisation of the role and this was unhelpful and inappropriate.

.....

BW ... If PC is not capable of doing the job with training, then he is not suitable for the role. PC's disabilities did not come into it at this stage. There are some parts of PC's NASH disorder that would not suit the LCE role. The role would exacerbate his health issues."



The Tribunal notes that the Doctor made no recommendation, he merely said that he supported the action.

29. On 2 June 2016 Ms Keen attempted to print some documents concerning Mr Carson's application for the LCE role. She sent the documents to the printer, the printer ran out of toner, she cancelled the job, but when the toner was replaced it printed the documents anyway. The finder of the documents gave them to Mr Carson, who told Ms Keen the following day. The evidence is that Mr Carson said that printers have a mind of their own and that he shredded the documents.

30. Ms Keen wrote the investigation report on 20 July 2016 (327-347). She recommended that the matter should be referred to a full grievance hearing and made certain other recommendations (346) concerning matters that arose from the occupational health assessment.

31. On 22 July 2016 Mr Harrington sent the report to Mr Carson and invited him to a grievance hearing. On 25 July Mr Carson requested copies of the handwritten notes. After some exchanges Mr Harrington sent those notes on 29 July.

32. The grievance hearing was conducted by Mr Higgs, the Head of Registration on 2 August 2016. Mr Harrington was present. Mr Carson wanted to make written submissions after the meeting which he did on 3 August (377-384). Mr Higgs did not give evidence before us. His decision dated 17 August (396 to 400) and was notified to Mr Carson on 18 August. Mr Higgs did not uphold the grievance.

33. On 18 August 2016 Mr Carson said he would appeal and asked for the handwritten notes. He lodged his appeal on 19 August (403).

34. On 22 August 2016 Mr Harrington notified Mr Carson of the appeal meeting before Gurvinder Soomal, Director of Registration, and that Louise Rea, a solicitor of BWB who attended to perform a HR function.

35. On 13 September 2016 the grievance appeal hearing took place (429-432). Mr Carson complains of the questions put by Ms Rea and her demeanour. The grievance appeal outcome was issued on 28 September (439-44)3 and dismissed the appeal.

## **Submissions**

36. We have a written skeleton argument from Ms Leadbetter, which she has supplemented orally. Mr Carson has addressed this orally. Mr Carson has appeared here in person. He has understood the issues and procedure and is to be complemented on his understanding on the conduct of these proceedings.

## Conclusions

### Jurisdiction

37. The first matter is the time issue. The ET1 was presented on 1 October 2016, the early conciliation notification was on 19 July 2016 and the early conciliation certificate was issued on 30 August. Matters that predate the 20 April are out of time. 20 April was the date on which Mr Carr assessed Mr Carson's suitability for the LCE role. The bulk of the occupational health report matters are out of time, so the issue for us is whether they form part of the continuing act. We take into account the guidance given in **Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686**. The issues that are raised concerning the occupational health matters include the matter of the alleged recording of the consultation. The request for that recording was made on 25 May 2016 which is within time. We are satisfied that there is a continuing course of conduct and there is jurisdiction to consider the complaints.

### Harassment

38. The harassment complaint is a complaint under Section 26(1) of the Equality Act 2010 which provides:

- "(1) A person (A) harasses another (B) if—
- (a) A engages in unwanted conduct related to a relevant protected characteristic, and
  - (b) the conduct has the purpose or effect of—
    - (i) violating B's dignity, or
    - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

39. The matters complained of as acts of harassment are at paragraphs 7.1-7.4, 7.5(ii) and 7.6-7.19 of the grounds of claim, together with the additional matter concerning Mr Carr and his knowledge of the grievances. In relation to the matters that concern the occupational health report, the complaints are of interference with the report, obtaining the report without consent, after being notified that Mr Carson had not consented to the release of the report continuing to suppress it, and subsequently attempting to obtain a recording. These matters are clearly unwanted conduct. It is clear to us that Mr Carson wanted to see the report first. Cordant were in breach of their duty of confidentiality and indeed negligent, but this claim is not against Cordant. The report was not binding in any event.

40. Mr Carson sent the email (198) to Ms Faulkner. Ms Faulkner and Ms Wyatt panicked. We have had no evidence from either of them. They did not need to interfere as the report was not binding. They acted unprofessionally. It is quite outrageous that the Respondent should ask for the report to be changed. The purpose of the action was that the Respondent thought the report was going to say transfer Mr Carson and they did not want him to go to the LCE role. In reaching our decision, we have taken into account the guidance of Underhill P as he then was in **Richmond Pharmacology v Dhaliwal [2009] ICR 724** in which he set out the matters to be taken into account in dealing with a complaint of harassment.

41. We have considered the effect of the conduct. The conduct of Ms Faulkner and Ms Wyatt was unprofessional and outrageous in seeking to have the report changed

and in suppressing the first version. On the evidence before us, we are satisfied that this was humiliating to Mr Carson. Therefore we have to consider whether this was conduct on the grounds of disability, that is was it conduct related to a relevant and protected characteristic. The disabilities relied upon are, firstly dyslexia/dyspraxia. There is no evidence that this conduct related to that disability. The second disability is NASH. The only link to NASH is that that was the reason for seeking the occupational health referral because Mr Carson had notified the Respondent of his diagnosis. The reason for the interference, the suppression of the first version and obtaining the report without the consent of Mr Carson was because Ms Wyatt and Ms Faulkner were worried that it would say that a reasonable adjustment would be to move Mr Carson to the Lay Case Examiner role. The behaviour of these two individuals, neither of whom have attended to give evidence and explain their behaviour, and the behaviour of the Respondent is disgraceful and unprofessional and an infringement of Mr Carson's privacy. We have no power to order an apology, although one is certainly due. The fact remains that the behaviour has been totally reprehensible and no doubt the Respondent will ensure that nothing similar happens again. However, we cannot find that this conduct was related to disability and accordingly the claim for harassment fails.

#### Direct Discrimination

42. The next claim is the claim of direct discrimination under Section 13(1) of the Equality Act. This relates to the matters concerning the occupational health report, the various comments by Ms Wyatt at the grievance investigation, and other matters concerning the grievance hearing and appeal, and the matter concerning the papers left on the printer. We are satisfied that these matters are detrimental to Mr Carson so he has suffered less favourable treatment. However, the issue for us is whether there is anything from which we can infer that this was because of his disability. On the evidence before us the matters which are complained about are either unprofessional conduct or simple carelessness. There is nothing from which we can infer that this was because of any of Mr Carson's disabilities and it is therefore our unanimous judgment that the claim of direct discrimination fails.

#### Discrimination arising from disability

43. The next claim is the claim of discrimination arising from disability, that is a claim pursuant to Section 15 of the Equality Act which provides:

- “ (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.”

44. The reason for all the occupational health report matters was the desire to stop Mr Carson from moving to the LCE role. The complaints fall into three categories, the occupational health complaints, the complaints concerning the grievance and grievance appeal, and the printer complaint. The printer incident was an unfortunate error arising from IT and is nothing to do with any of the disabilities. There is nothing

that links the grievance matters to dyslexia or to dyspraxia. In relation to the occupational health matters, Mr Carson's diagnosis with NASH was the reason why the occupational health report was commissioned. This was because Mr Carson had disclosed the diagnosis and the Respondent wanted to see if there were any appropriate adjustments. However, this is not a claim about reasonable adjustments, what Mr Carson complains of is how the occupational health report was disseminated. That is not something that arises as a consequence of Mr Carson's NASH disability. In those circumstances, it is our unanimous judgment that the claim of discrimination arising from disability fails.

### Victimisation

45. The final complaint is the complaint of victimisation. This is a complaint under Section 27 of the Act. The protected act is the formal grievance of 11 May 2016 that complains of unlawful discrimination. That could amount to a protected act. All of the occupational health matters, apart from the request for the recording, predate that protected act. The matters concerning the grievance report, the recording and the printer postdate the protected act. However, there is no causal link demonstrated between those matters and either the dyspraxia/dyslexia or the NASH complaint and in those circumstances the claim fails.

Employment Judge Lewzey  
22 March 2017