



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondent

Mr R Webb

**The Chief Constable of
Sussex Police**

REASONS

(requested by the claimant on 13.4.17)

1. These are the written reasons for the tribunal's judgment of 12.4.17.
2. By a claim form presented on 22 July 2016, the claimant complains of disability discrimination pursuant to sections 20 and 15 of the Equality Act 2010. (EqA). The claimant suffers from Fibromyalgia, CNS Hypersensitivity and Sciatic type lower back and right leg pain all arising from a car accident in 2015. The claimant contends, and it is conceded by the respondent, that as a result of these conditions, he is disabled within the meaning of section 6 EqA.
3. The claimant gave evidence on his own behalf. The respondent gave evidence through Mr Gareth Byrd, Chief Technical Officer. The parties presented a joint bundle of documents and references in the judgment in square brackets are to pages within that bundle.

The Issues

4. The issues are set out in the Agreed List of Issues and are referred to more specifically in our conclusions below. [28a-c]

The Law

5. Section 20 EqA provides that where a person applies a provision, criterion or practice (PCP) which puts a disabled person at a substantial disadvantage compared with non disabled persons, the respondent is under a duty to take such steps as are reasonable to avoid the disadvantage.
6. A failure to comply with a section 20 duty constitutes discrimination against a disabled person (s.20 EqA)
7. Section 15 EqA provides that a person discriminates against a disabled person if they treat them unfavourably because of something arising in consequence of the person's disability and they cannot show that the treatment is a proportionate means of achieving a legitimate aim.

8. Under the Code of Practice on Employment, the definition of something arising in consequence of disability includes anything which is the result, effect or outcome of a disabled person's disability.
9. In considering the issue of proportionality, we must ask ourselves whether the treatment of the claimant was reasonably necessary to achieve the stated aims. Allonby v Accrington & Rossendale College and others [2001] EWCA 529. Put another way, could the aims reasonably have been achieved by a less discriminatory route and do the respondent's aims outweigh the discriminatory impact of the treatment/measures.
10. We remind ourselves that unlike unfair dismissal, the test of proportionality is not "band of reasonable responses". Rather, we must reach our own view on whether the action of the respondent was an appropriate and necessary means of achieving the legitimate aim. That involves a balancing of the reasonable needs of the business against the effects of the respondent's actions on the claimant.

Findings of Fact

11. In or around October 2015, the claimant applied for the post of Technical Architect with the respondent. The role was to work within a team in the ICT department, providing technical expertise and support to the Sussex and Surrey police forces. The respondent was seeking to recruit to 4 such positions as at the time as the department was under-resourced and overworked. Following interviews on the 10th and 15th December 2015, the respondent offered the claimant the job, subject to security and health checks.
12. Following a medical referral, Occupational Health (OH) issued a report on the claimant. [112-114] The report indicated that he was fit for work subject to a number of recommended adjustments, which are set out in bullet points in the report. OH recommended that these be discussed with the claimant and that an assessment made as to how they can be accommodated. [112-114]
13. The claimant confirmed to us that he believed the report to be reasonable and that the adjustments recommended were the ones that needed to be made.
14. On receipt of the report, Mr Gareth Byrd, Chief Technical Officer, became concerned as to the claimant's ability to carry out the role and on 3 March 2016, he had a telephone conversation with the claimant to discuss the report and his concerns. Aspects of that conversation are in dispute. The claimant says he was told by Mr Byrd that none of the adjustments could be accommodated. Mr Byrd's evidence is that he told the claimant that they were able to provide a suitable chair, a light laptop and a parking space close to the building. These were some of the adjustment recommended by OH.
15. Whilst there were no contemporaneous notes of the conversation, we have seen Mr Byrd's email account of it sent to Shauna Smith of HR on the same day. In it he confirms telling the claimant that they were able to provide an appropriate chair, desk, lightweight computer and arrange parking. [118] That is also subsequently confirmed to the claimant in a letter of 8 March [154] and an email of 15 April [220]. These were not challenged or queried by the claimant.

16. There are no documents supporting the claimant's version. Although he says he took a note of the telephone conversation, we have not seen this. Further, these particular adjustments are barely mentioned by the claimant after the 3 March which suggests that they were no longer contentious.
17. Taking all of those matters into account, we prefer the respondent's evidence and find that the claimant was told that the adjustments relating to furniture, laptop and parking could be accommodated.
18. That left 2 outstanding adjustments and these were the ones that presented most difficulty from the respondent's point of view. They are to a certain extent interrelated as one affects the other.

Driving

19. It was recommended by OH that when driving, the claimant would need to break his journey every half hour to rest because of pain and fatigue and should avoid journeys where possible – by using telephone or conferencing as an alternative.

Home Working

20. There was also the issue of working from home. The report clearly states that this was the main adjustment sought by the claimant. It does not indicate any particular pattern or period for home working and that was not canvassed with the claimant by Mr Byrd during their 3 March conversation. In his then current employment the claimant was working 3 days a week from home and the claimant's case before us is that he would not have been able to work more than 1½ days a week from the office. In other words, he would need to work 3½ days from home.
21. Mr Byrd's position was that the claimant needed to spend 80% of his time in the office. That had an impact on the amount of driving the claimant would be required to do, which Mr Byrd considered unmanageable given the OH report and the impact on his health. The typical journey time was in at least 45 minutes which he considered to be in excess of the claimant's pain threshold. It was Mr Byrd's view, having undertaken the journey numerous times, that during rush hour, there would be little opportunity for the claimant to get out of the car for a rest. In light of those concerns, Mr Byrd withdrew the job offer.
22. There is a dispute about when the offer was withdrawn. The claimant says it was withdrawn on 3 March. Mr Byrd said that he simply told the claimant on that occasion that they were not able to proceed. In our view, that is a distinction without a difference. Further, it seems clear from the final paragraph of Mr Byrd's email to Shauna Smith of 3 March which reads: "*Robin does not accept that the travel element is not manageable and he has asked for a formal statement as to why the offer is being withdrawn*" that the decision had been made by that date [118].
23. Nevertheless, that was not the end of the matter. There was a subsequent exchange of correspondence during which the claimant sets out his position on the adjustments. For example, in the letter at page 136, he sets out alternative adjustments relating to travel and home working. [136] He suggests flexible start and finishing times to facilitate travel and flexibility in home working and use of video and conferencing as an alternative to face to face interaction. Mr Byrd considered those proposals but rejected them and his

reasons for doing so are set out in his letter to the claimant of the 18 March. [154] In the same letter, Mr Byrd said that he was prepared to reconsider his position if the claimant were able to work from the office 4 days a week.

24. The claimant requested a meeting to discuss the OH report and the respondent was amenable to that. Attempts were therefore made to find a mutually convenient date but that proved impossible. In the meantime, Mr Byrd again sought confirmation from the claimant that he could work from the office 4 days a week. [198] The claimant did not respond.
25. On 15 April, with no meeting having been arranged and in the absence of the confirmation sought, Mr Byrd wrote to the claimant withdrawing the offer of a meeting. [223]

Application to amend evidence

26. On day 2 of the hearing and after the parties had closed their cases the previous day, the claimant made an application to amend his evidence on the basis that he had misspoken. He claimed that when he had said in evidence that he could only work 1½ days from the office, he meant to say that he needed to work 1½ days from home. In other words, he would work 3½ days from the office. The respondent objected to the amendment.
27. Having considered the application and the respondent's objections, the application was refused for the following reasons:
 - a. It would have amounted to a second bite of the cherry for the claimant after the case had concluded. This should only be allowed exceptionally and we are not satisfied that there were exceptional reasons in this case.
 - b. The reason we tell witnesses not to discuss their evidence with anybody while they are still under oath is so that they are not influenced by any outside factors. Any new or revised evidence of the claimant would inevitably be tainted by the fact that he had discussed it with his legal representatives, who would have been in no doubt as to the damage caused to the claimant's case by his so called misspoken evidence.
 - c. The claimant says he misspoke because he was tired and in pain because of his disability. There were a number of occasions during the course of the evidence when he was indeed in tired and in pain but none of the rest of his evidence was so affected. The evidence was given in response to a straightforward question put to the claimant in re-examination so he does not even have the excuse that he was unwittingly led down a particular path in cross examination.
 - d. The proposed change of evidence is inconsistent with the case presented to the respondent at the time and before us. At paragraph 5 of the claim form, the recommended adjustment is stated as home working for 3 days. [13] Whilst this is not specifically recommended by OH, this was the claimant's work pattern at the time and OH did refer to home working as being the main adjustment sought. Working in the office 1½ days a week is more consistent with 3 days working at home than the alternative evidence proposed.
 - e. In all the circumstances, we would have struggled to find the changed evidence credible.

Conclusions

Failure to make reasonable Adjustments

28. Given our findings that the respondent was able to accommodate adjustments relating to furniture, laptop and parking, we find also that the alleged PCPs relating to these at paragraphs 7, 9 and 11 of the Agreed List of Issues were not in fact PCPs applied by the respondent. The reasonable adjustment claims in respect of those therefore fails.
29. We are satisfied that the respondent applied a PCP requiring Technical Architects to attend its offices at Guildford and Lewes and other sites. We are find that the respondent applied a PCP requiring Technical Architects to spend 80% of their time working from the Respondent's offices.
30. We find that the claimant would have been at a substantial disadvantage in complying with both of these PCPs because of the difficulty of travelling for over 30 minutes without a break.
31. The claimant's case was that he would only have been able to work in the office 1½ days a week and it must therefore follow that he considered a reasonable adjustment be allowed to work from home 3½ days a week or at the very least the 3 days he was working from home with his then employer.
32. Mr Byrd has given clear business reasons why this would not have been feasible and he expanded on those in his evidence. Of particular note was his evidence about the security risk associated with video conferencing or skyping from home with external vendors because of vetting requirements and the risk of information being leaked, overseen or overheard. That evidence was compelling. His reasons appeared to us to be genuine, logical and based on his extensive knowledge of the needs of the team he managed. Although the claimant made general comments about the widespread use of technology for remote working, he was not able to effectively challenge the business reasons put forward by Mr Byrd.
33. Mr Byrd was entitled to rely on the contents of the unchallenged OH report in concluding that the claimant would not have been able to manage the travel involved in attending its offices and other sites.
34. In all the circumstances, we find that the adjustments sought by the claimant would not have been reasonable. The section 20 claim therefore fails.

Section 15 claim

35. We are satisfied that the withdrawal of the job offer was unfavourable treatment arising in consequence of the claimant's disability. The issue therefore is whether this was a proportionate means of achieving a legitimate aim.
36. The legitimate aim of the respondent was for a Technical Architect who could perform that role effectively. Effective performance from the respondent's point of view required a minimum presence in the office 80% of the time in order to facilitate interaction with internal customers, peers and vendors. The claimant was unable to meet that requirement.

37. It was submitted on behalf of the claimant that as at 3 March, when the conversation between the him and Mr Byrd took place, it was not reasonably necessary to withdraw the offer as the respondent did not have a clear idea from either OH or the claimant as to how much home working the claimant would require. However, an employer is entitled to rely on a justification even if it did not feature in their decision-making processes at the time, so-called "after the event" justification: [Cadman v Health and Safety Executive 2004 EWCA Civ 1317](#), Although the [Cadman](#) case was looking at justification in the context of indirect sex discrimination, the principle is of equal application to a section 15 claim.
38. The respondent had a business need for its Technical Architects to spend 80% of their time working from their offices. The claimant would only have been able to work 1½ days a week i.e. 30% of his time, which falls far short of that requirement. We were told that the respondent had a recruitment crises at the time with a high turnover of staff and 50 out of 150 posts vacant. It therefore had a pressing need for employees who could meet this specification.
39. We have considered whether there was a less discriminatory way of the respondent achieving its aim and one suggestion put forward on behalf of the claimant was to have allowed him to serve a probationary period. In our view this would have had little, if any, practical effect as it is difficult to see how it would have bridged the enormous gap between the respondent's need for an 80% office presence and the claimant's ability to meet it. It would simply have been a case of delaying the inevitable.
40. Hence having looked at the matter in the round, we find on balance that the need of the respondent to employ Technical Architects capable of meeting its minimum requirements outweighed the claimant's need to be employed.
41. In those circumstances, we find that the withdrawal of the offer of employment was proportionate.

Judgment

42. The unanimous judgment of the tribunal is that the claims fail and are dismissed.

Employment Judge Balogun
Date: 2 June 2017

