



EMPLOYMENT TRIBUNALS

Claimant: Mr P Anthony
Respondent: Gladiator Removals Ltd

Heard at: London South

On: 10 August 2017

Before: Employment Judge Fowell
Ms S Dengate
Ms S Evans

Representation

Claimant: Unrepresented
Respondent: Mr Morton (Solicitor) of Cardinal Solicitors

JUDGMENT

Mr Anthony's complaints of disability discrimination are dismissed.

REASONS

1. The unanimous decision of the tribunal is as follows.
2. The claimant, Mr Anthony, brings complaints of disability discrimination against the respondent company following their refusal to offer him a job as a Removals Driver. He says that this was because he is deaf.
3. At a preliminary hearing on 6 March 2017 the issues were set out in the following terms.
 3. The Claimant applied for a job as a van driver with the Respondent. He attended an interview on 27 June 2016 with the Respondent's manager, Mr Pink. He was invited to come back the next morning for a driving trial. He returned on 28 June 2016 and undertook a driving trial in one of the Respondent's vans. The Claimant says that he arrived on time and that his driving during the trial was appropriate. He says that the trial was more difficult than it could or should have been because, rather than tell him the destination or the route to follow in advance, the supervisor who accompanied him, Mr Botterill, just pointed each time he wanted the Claimant to change direction.

4. At the end of the trial the Claimant was told that there was no job for him. He says that he was told by the Mr Pink that it was because of his hearing impairment. The Respondent denies this and says that the Claimant was not offered work because he was late for the trial drive and his driving during the trial was not appropriate.

5. The Claimant's claims are as follows:

5.1 Direct discrimination (EqA, S13): he says that he was not offered the job because of his disability;

5.2 Discrimination arising from disability (EqA, S15): he says that if the reason he was not offered the job was not his disability itself then it was because of something arising in consequence of his disability, namely his hearing and/or speech impairment;

5.3 Failure to make reasonable adjustments (EqA, S21): he says that the provision, criterion or practice applied to him was the driving trial, that it put him at a substantial disadvantage in comparison with non-disabled people in that he could not hear or understand instructions easily and that it would have been a reasonable adjustment to give him the intended destination and/or route in advance by means of a map or GPS or otherwise.

4. We heard evidence from Mr Anthony and from Mr Pink. We also had a bundle of about 150 pages although the number of key documents were few. A witness order was sought by the respondent, and was issued, to secure the attendance of Mr Botterill, but although he gave a witness statement he failed to appear. The respondent was content to proceed in his absence rather than have to come back again, since the hearing had been adjourned once already. They accepted that we could not place the same weight on his statement as we might have done on his evidence in person.

5. Mr Anthony was assisted by two British Sign Language interpreters, who, in accordance with their normal practice, shared the work involved between them. With their help he was able to take an active part in the hearing, sometimes emphasising his sign language with a few spoken words at little more than a loud whisper.

6. Mr Anthony relied on the statement he submitted with his claim form. It is relatively short and may conveniently be quoted as defining his case. The relevant sections dealing with the second day and the driving test are as follows:

I arrived at the offices the following day a few minutes before my start time of 8am. I signed myself in at reception and was informed by the receptionists to make my way up to 'the bosses' office. In order to get to the office I had to wait for the lift to arrive, use the lift and make my way down a long corridor before arriving. It took some minutes to get there. When I arrived there, I noticed 'the bosses' office door was open. I stood by the door and saw 'the boss' was speaking to 3 people. 'The boss' was sitting in his chair. He looked up to me and said "you are late, can you wait outside my office? I said yes and sat on a chair outside his office. I waited there for 15 minutes. I then noticed the supervisor walk into 'the bosses' office, whilst the 3 other people were there. They were all in there

for another 5 minutes before the supervisor walked out of the office. He looked at me and said "come with me." I then followed behind him to the van outside. No conversation took place between us, there was complete silence.

The supervisor walked me to a 7.5 tonne van and not the 3.5 tonne van I was told I would be driving, by 'the boss' the day before, during my interview. The supervisor handed me the keys and said "just drive."

The supervisor and I got into the van. I was not provided with any information as to where I should be driving towards. Instead, the supervisor pointed in a particular direction and I assumed that I was required to drive in the direction of the supervisor's hand gestures. I did get rather confused by the pointing as I was concentrating on my driving. I wear hearing aids and did ask the supervisor to speak loudly so I could hear where he wanted me to go but his voice was not loud enough. I did ask the supervisor if we could reconvene the trial when an interpreter was there as I was finding it difficult to understand where the supervisor wanted me to go. I have been a van driver for 25 years and drive rather well, and thought my driving during the trial was good enough, despite the confusion of where the supervisor wanted me to go. Nevertheless I did think the process of the trial drive was unprofessional. Usually, a driving trial requires a candidate to drive to a particular area such as 'drive to Wimbledon town centre.' The supervisor would then just observe me driving and not speak until I reach the destination.

As soon as the trial ended I drove back to the employer car park. I parked the van. I got out of the van turned towards the back of the van and noticed 'the boss' walking towards me. He walked directly to me, shook my hand and said 'thank you, we can not take you on.' I asked him why and he said "because you are deaf." He also said he would email me confirmation that I did not get the job but he never did. ...

I left and started to cry as I was extremely upset by what was said. It was very degrading, especially since I have been a professional driver for over 25 years.

7. The 'boss' here is Mr Pink and the supervisor is Mr Botterill.

Findings of Fact

8. Having considered all of the evidence in the round we made the following findings of fact.
9. The respondent operates a fleet of about six 3.5 tonne vehicles, carrying out smaller removal jobs. This appeared from the insurance documentation provided. Mr Anthony applied for the job via a website called Jobs & Talent, to which he uploaded a profile making no mention of his deafness. He accepted that the company had no knowledge of it until he attended for interview. The advertised position was said to involve manual handling, packing and driving duties.
10. At the interview on 26 June 2016, Mr Pink, a director of the company, noticed that Mr Anthony had a hearing aid, and having experience of a deaf uncle, soon realised that he had to speak slowly and clearly, whilst facing Mr Anthony. He recounted to us very vividly their discussions in which he checked at each stage that Mr Anthony understood him.

11. He got Mr Anthony to fill in an application form and took copies of his driving license and other documents. Whilst at the photocopier he made the experiment of speaking out loud to Mr Anthony and realised that he could not hear him, since there was no response. He therefore continued to speak slowly and with emphasis, face to face. The interview was said to have lasted about 30 minutes. From Mr Pink's account, much of this time must have been taken up in completing the application form. Surprisingly, given his communication problems, Mr Anthony recorded on that form that he had a strength in English communication and in speaking well. We conclude from this, and from the fact that at no time did Mr Anthony draw any attention to his deafness or difficulty in understanding – a point he accepted - that he was trying to downplay his difficulties in order to help his prospects of getting the job.
12. Despite realising that he had serious hearing difficulties, Mr Pink was impressed with his application form, which showed that Mr Anthony had 25 years driving experience. However, Mr Anthony conceded at the hearing that he has not had a similar driving job since 2001, and since then any driving duties have been confined to forklift trucks.
13. The company was very short of drivers and Mr Pink told Mr Anthony that although he had seen four other applicants, he was the preferred candidate and told him to come back the next day at 8 o'clock. We were quite satisfied that Mr Pink genuinely did prefer Mr Anthony and wished to recruit him. We note that the job is modestly paid - £9 per hour – and is on a zero hours contract basis, so to attract an experienced driver was a bonus for the company. Mr Pink confirmed more than once with Mr Anthony that he should return the next day at 8 o'clock. His intention was that Mr Anthony would be setting off as part of a team of three, under a supervisor, for a removal job. This was to see first how he settled in and to see how he managed the manual handling aspects of the work.
14. Mr Anthony did not arrive at 8.00 a.m. Contrary to his original statement, he accepted that he had in fact arrived a few minutes late. We are satisfied in fact that he was at least 15 minutes late. The team had already left without him, which they would not have been in a position to do on the stroke of 8.00.
15. There was in fact a stark disagreement in the evidence about what happened that morning, with Mr Anthony stating that he made his way to the fourth floor of the office building, where Mr Pink had his office, and was made to wait outside in silence and confusion before being wordlessly escorted outside by Mr Botterill; whereas Mr Pink said that Mr Anthony was simply waiting outside when he emerged from the office building at about 8.20 a.m. and would not have been able to access the office building at any stage. Nor, he said, were there any chairs outside his office.
16. His account was supported by the witness statement of Mr Botterill, and having considered the evidence in the round, including a number of contradictory statements from Mr Anthony, as set out below, we prefer the evidence of Mr Pink on this point.

17. Despite his lateness, Mr Pink's reaction was not simply to tell Mr Anthony that he had missed his chance. Instead, he arranged for him to have a test drive with Mr Botterill. To repeat, this had not been the intention the day before.
18. The company attaches considerable importance to driver safety and competence, not least because of the spiralling cost of motor insurance, and Mr Botterill was an experienced member of staff, used to making these assessments. On Mr Anthony's account he was simply given the keys, pointed to the van and told to drive. Mr Pink's account, supported by Mr Botterill's statement, was that he told Mr Botterill that Mr Anthony was very hard of hearing but was an experienced driver he was looking to take on, and wanted him to check his driving ability, describing the route he should take. All this was in Mr Anthony's presence or at least within a metre or two of him. Again, we prefer Mr Pink's account. We accept that Mr Pink did in fact wish to recruit Mr Anthony and it would be most unusual to have progressed his application this far, arranged a test drive despite his late arrival and then to ignore him in the way suggested. There would also be a safety issue in simply telling a member of the public to drive off, without more.
19. In the course of his evidence, Mr Anthony also downplayed the discrepancy contained in his statement over the size of the vehicle, where he claimed it was 7.5 tonnes. He said it was similar to a 3.5 tonne van, but seemed a bit bigger. Mr Pink said that they only have 3.5 tonne vehicles or cars, and so again we concluded that this was the case.
20. Similarly, although Mr Anthony at first maintained that Mr Botterill was near-silent throughout the test, he went on to describe the various gestures and instructions he gave, such as to stop the vehicle, reverse, get out to check the parking and other steps; which also suggested to us that Mr Botterill was aware of his hearing problem and was taking steps to explain himself.
21. Mr Botterill's witness statement made a number of criticisms of Mr Anthony's driving including:
 - a. going too slow;
 - b. driving too close to parked cars;
 - c. inclining into the oncoming lane and having to be told twice to pull in;
 - d. crunching the gears;
 - e. parallel parking badly;
 - f. inspecting the parking and saying it was OK, even though it was not; and
 - g. going through two low bridges without asking about the height of the vehicle, which varies on Luton vans, something a regular driver would know.

22. Mr Anthony's starting position was that he had driven reasonably well but he rather lost confidence in this claim when discussing what happened next. Asked about the statement he attributed to Mr Pink - that he could not take him on because he was deaf - he conceded that it was "more a matter of body language". And when pressed about why he interpreted his body language that way, and whether this might have been due to concerns over his driving performance, he accepted that that was possible. We think that more likely.
23. However candid this evidence, we cannot overlook such a major change, and this has materially affected our view of whose evidence to prefer. On this aspect, Mr Pink's account was that Mr Botterill came over to debrief him, told him that Mr Anthony was not up to the required standard – a verdict he accepted – and he then went over to Mr Anthony who was waiting by the vehicle, shook him by the hand and told him that he could not take him on, and why.
24. We have a good deal of sympathy for Mr Anthony, who has struggled to find employment, and so felt understandably that it would be better for him not to mention his deafness when applying, and only raised it of necessity in interview. Having questioned him directly we established that the hearing aid alerts him to loud noises but is of little use in making speech intelligible and so in such situations he relies on lipreading. At the risk of labouring the point, at no time did he say that he was struggling to understand, but no doubt he found the whole exercise difficult to follow. He would have been nervous about the interview and also about carrying out the driving test having not driven such a vehicle for at least 15 years. He no doubt wanted to downplay his problems, but in bringing his claim he has also misrepresented key aspects of what occurred and cast unnecessary blame on the respondent.
25. One final aspect relates to the proposed reasonable adjustment. His case is based on the claim that if he had been given his proposed route in advance and/or a map or GPS, his difficulty would have been overcome or made manageable. We also accept that although Mr Pink explained the route to Mr Botterill in his presence, he did not follow what was said.
26. Since the company was aware of Mr Anthony's disability, there was an onus on them to make reasonable adjustments.
27. Although not challenged directly on the point, since Mr Anthony accepted that he did not make any mention of his deafness or ask for any assistance, we concluded that he did not ask, as claimed in his witness statement, to reconvene the test when an interpreter was present.
28. We questioned Mr Anthony on any particular difficulties caused by not knowing the route or having no map or GPS, given that the criticisms of his driving related to such matters as gear-changing, parking, or driving too close. He could not suggest any specific difference. The route itself was a simple rectangular circuit lasting about 20 minutes. We concluded that not knowing where he was going added to some extent to Mr Anthony's existing anxiety about his interview and in following instructions but did not materially affect any of these aspects, and so made no

difference in practice to the outcome.

Conclusions

29. Our conclusions follow with very little elaboration from these findings. We conclude that the reason why Mr Anthony was not offered the job was that he did not do well enough on the driving test, and so there was no direct discrimination under section 13 of the Employment Rights Act 1996 (“the Act”)
30. In forming that conclusion we have had regard to the burden of proof, as set out in section 136 of the Act, but can find no facts from which, in the absence of an explanation from the respondent, we could conclude that he had been the victim of direct discrimination, and so the burden of proof did not shift to the respondent. Something more is required than the fact of Mr Anthony’s deafness and the outcome, and in showing this “something more” he relied mainly on the inconsiderate treatment he suggested from Mr Anthony and Mr Botterill, but we do not accept that that was the case.
31. The claim under section 15 of the Act, of disability arising from discrimination, appears to us to be misconceived. It was not suggested that Mr Anthony’s deafness affected his driving ability.
32. The main focus of the hearing was on the claim under section 21 of the Act that the company failed to make reasonable adjustments. As the hearing developed, the criticisms made by Mr Anthony changed and he referred repeatedly to what he said was a breakdown of communication. It is, however, important to be clear in advance of a hearing what steps it is said that the employer should have taken, so as to give them the opportunity of responding, and here the adjustment referred to was confined to the driving test, and knowledge of the route. On this aspect, Mr Anthony could not point to any specific difficulty, and we conclude that this failure did not put deaf people at a substantial disadvantage.
33. It follows therefore that for all the reasons set out above the complaint must be dismissed.

Employment Judge Fowell

Date 5 September 2017