



EMPLOYMENT TRIBUNALS

Claimant: Mr L Davis-Cawood

Respondents: 1) Royal Mail
2) Ms J Roberts
3) Mr S Flannery

Heard at: Leeds **On:** 26 September 2017 and
5 December 2017 (in chambers)

Before: Employment Judge Bright
Mr D Dorman-Smith
Mr K Lannaman

Representation

Claimant: In person
Respondents: Mr D Summers (non-practicing barrister)

JUDGMENT

The claim of disability discrimination fails and is dismissed.

REASONS

The claim

1. By a claim form submitted on 25 April 2017 the claimant claimed disability discrimination. It is not in dispute that the claimant meets the Equality Act 2010 (“EQA”) definition of disability by reason of achondroplasia, which is a form of short limb dwarfism.

The issues

2. At the preliminary hearing on 2 August 2017, and again at the outset of this hearing, it was agreed that the issues to be decided in the claim were:

Time/limitation issues

- 2.1. Were the complaints presented within the time limit or within such other period as the employment tribunal considers just and equitable?

Harassment

- 2.2. Did Mrs Roberts make the alleged remark “you’re too small” or “too small” to the claimant?
- 2.3. Did Mr Flannery make the alleged remark “he can only do one job” to Mr Ghafoor about the claimant?
- 2.4. If so, were either of those comments unwanted conduct related to the claimant’s disability?
- 2.5. If so, did the conduct have the purpose of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?
- 2.6. If not, did the conduct have the effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

Direct discrimination

- 2.7. If Mrs Roberts and/or Mr Flannery made the remark alleged, and it is not found to be harassment, was it less favourable treatment because of the claimant’s disability?
- 2.8. Was Mr Flannery’s decision not to appoint the claimant less favourable treatment because of disability?

Indirect discrimination

- 2.9. Did the first respondent apply a provision, criterion and/or practice (“the provision”) generally that appointees be able to do “more than one job” or work unaided above a certain height?
- 2.10. Does the application of the provision put other people with the claimant’s disability at a particular disadvantage when compared with persons who do not have that protected characteristic – namely, they cannot work unaided beyond the limits of their height which is likely to be less than the first respondent’s threshold height?
- 2.11. Did the application of the provision put the claimant at that disadvantage, in that he could not work unaided beyond the limit of his height?

Discrimination arising from disability

- 2.12. The “something arising in consequence of the claimant’s disability” advanced by the claimant is the inability to work unaided beyond the limits of his height or, in the words alleged to have been said by Mr Flannery, “he can only do one job”.
- 2.13. Does the claimant prove that Mr Flannery’s decision not to appoint him was materially influenced by him only being able to “do one job” or the limitations of his height while working?

Submissions

3. The claimant made oral submissions which I have considered with care but do not rehearse here in full. In essence, in the course of the hearing, it was submitted that:
 - 3.1. The allegations are true. Mr Ghafoor corroborated the claimant's account of the comment by Mrs Roberts and her evidence is unreliable. Mr Ghafoor's evidence is the key evidence to support the allegations.
 - 3.2. Mr Ghafoor told the claimant that Mr Flannery made a comment about the claimant being 'only able to do one job'. Mr Ghafoor's evidence at the hearing is unreliable, contradicts the audio recordings and the respondent has pressured him not to tell the truth.
 - 3.3. Mr Flannery did not appoint the claimant because of his disability. The claimant did his best at the interview, but was unable to perform well because of the comment made by Mr Flannery which Mr Ghafoor had reported to him.
 - 3.4. The claimant made a complaint to the respondent's human resources department but they failed to investigate.
 - 3.5. The person who recruited him as a 'temp' had no problem with his disability, but Mr Flannery's failure to appoint him was evidence that Mr Flannery had concerns about his disability.

4. Mr Summers for the respondents made oral submissions, which I have considered with equal care, but do not rehearse here in full. In essence, it was submitted that:
 - 4.1. The harassment claim should fail. Mrs Roberts' evidence was credible that she remembered the claimant and remembered not making any comment to him. Mr Ghafoor had a motive for making the allegation against her, because she had got him into trouble with a manager and he wanted to get even.
 - 4.2. Mr Flannery's evidence is clear and the tribunal should accept his evidence that the claimant did not get the job, along with others who had longer service than the claimant, because he was not one of the best candidates. The claimant accepted that the scores given to him by Mr Flannery reflected his performance at the interview. It beggars belief that Mr Flannery would have risked his lengthy career, pension etc, to refuse to employ the claimant because of his disability.
 - 4.3. The claimant has not set out in his claim form some of the key evidence given today. Some of what has been said today is diametrically opposed to what is set out in the claim form. The case of **Chandhok v Tirkey (UKEAT/0190/14)** confirms that the parties must set out their case in their claim form.
 - 4.4. The section 13 claim must fail. The evidence of the witnesses is crystal clear and there is no basis on which to draw an inference of discrimination. The claimant was engaged by the first respondent as a 'temp' and the reason he did not get the job was because of his poor performance at interview.
 - 4.5. The section 19 claim must fail because Mr Flannery did not make the comment alleged and there is no provision that employees must be able to do more than one job or for any kind of 'threshold height', as evidenced by the claimant's employment as a 'temp'.

- 4.6. The section 15 claim must fail because there is no evidence that the claimant can only do one job or cannot work above a certain height or that that had anything to do with his failure to be appointed.

Evidence

5. The claimant gave evidence on his own behalf and called, by witness order, Mr Irfan Ghafoor, a former colleague. At the outset of Mr Ghafoor's evidence in chief it became obvious that his evidence did not support part of the version of events given by the claimant and the claimant indicated his wish to cross examine Mr Ghafoor. Mr Ghafoor was therefore declared a hostile witness and both the claimant and Mr Summers were permitted to cross examine him.
6. The respondents called:
- 6.1. Mrs T Roberts, Operational Post Grade and Second Respondent; and
- 6.2. Mr S Flannery, Work Area Manager and Third Respondent.
7. The parties presented an agreed bundle of documents. References to pages in these reasons are references to the page numbers in the bundle of documents. The claimant also presented (by consent) two audio recordings on his mobile phone, which were listened to in the course of the hearing.

Facts

8. We made the following findings of fact on the evidence. Where there was a conflict of evidence we have resolved it, on the balance of probabilities, in accordance with the following findings.
9. We did not doubt the account given by the claimant (at paragraphs 1 to 5 of his witness statement) of some of the difficulties and prejudice he has faced throughout his life as a result of his disability and the impact of that treatment on his mental health. However, our task is to determine the facts at dispute in this claim on the balance of probabilities, taking account of the evidence provided. That is what we set out to do here.
10. The claimant started work for the First Respondent on 28 November 2016 as a Christmas 'temp' at the First Respondent's sorting office in Leeds.
11. It is not disputed that the claimant's manager, Mick Brown, after seeing his work, recommended that he apply for a permanent post when a vacancy came up. The claimant applied and was short listed. It is not disputed that the claimant was told by Mr Brown a few days before the interview that another manager, Mr Flannery, would be holding the interviews.

Mr Flannery's comment

12. The claimant says (at paragraph 12 of his witness statement) that Mr Ghafoor told him he had overheard Mr Flannery telling another employee that the claimant would not be getting the job because of his disability, that he was "too small and would only be able to do one job". Mr Flannery denies making that statement.
13. The claimant says (at paragraph 13 of his witness statement) that another colleague, named Parvin, informed him that she had been told (probably by

her husband who was a manager at the First Respondent) that Mr Flannery would not give the claimant the job because he was “too small and can only do one job”. However, neither Parvin nor her husband were called to give evidence and there is no mention of either in the claimant’s claim form.

14. During cross examination and in his claim form, the claimant placed great reliance on Mr Ghafoor’s anticipated evidence that Mr Flannery had made the alleged comment to Mr Ghafoor and Mr Ghafoor had reported it to the claimant. However, when asked to give his oral evidence, Mr Ghafoor denied that Mr Flannery had made any such comment to him or that he had reported it to the claimant.
15. The claimant then sought to rely on the audio recordings as evidence that Mr Ghafoor’s oral evidence was incorrect. We listened carefully to the audio recordings. We find that the first audio recording of a telephone conversation between the claimant and Mr Ghafoor begins with the claimant reminding Mr Ghafoor of the alleged comments made by Mrs Roberts and Mr Ghafoor. We find that the whole tenor of the conversation is the claimant pushing Mr Ghafoor to agree with his account that Mr Flannery has discriminated against him. At no point does Mr Ghafoor actually agree with the claimant, but instead makes non-committal noises.
16. The second audio recording records the claimant again reminding Mr Ghafoor and asking him to “back him up”. Mr Ghafoor complained in cross examination that the claimant was trying to put words into his mouth during the two conversations.
17. The claimant submitted that the text messages at page 126 indicated that Mr Ghafoor had been pressurized not to get involved in the dispute by the first respondent. However, we accepted Mr Ghafoor’s evidence, which is supported by the wording of the text message, that he initially felt pressurized by the claimant and tried to evade the claimant by refusing to supply his phone number. When pressured further by the claimant, he consulted his manager at the first respondent for advice and was advised to avoid getting involved and, latterly, to tell the truth. We found Mr Ghafoor’s evidence in relation to Mr Flannery to be credible and consistent with the audio recordings and email at page 126. It also accorded with Mr Flannery’s evidence. We conclude, on the balance of probabilities, that Mr Flannery did not make a comment to Mr Ghafoor that the claimant was too short, could only do one job or would not be employed because of his disability. We accepted Mr Ghafoor’s evidence that he did not report any such comment to the claimant.

Mrs Roberts’ comment

18. The claimant says Mrs Roberts said to him, while he was in the company of Mr Ghafoor, “you’re too small” (paragraph 15 of his witness statement). He says Mrs Roberts walked towards him and Mr Ghafoor, glaring at the claimant, and pointing straight in his face, said the words “too small” in a belittling manner and walked on past. The claimant says (paragraph 17) that the comment made him feel he had just been “stabbed and salt rubbed in the wound, to make sure he felt as worthless as possible”.
19. Mr Ghafoor agreed, in cross examination, that Mrs Roberts had said “you’re too small” to the claimant. He stated that he clearly heard that comment as

she walked past. Mrs Roberts denied making the statement in both her witness statement and cross examination. She gave evidence that she only recalled the occasion when prompted by Mr Brown reminding her that the claimant was particularly short. Once she recalled the occasion, however, she accepted that she had passed the claimant in a corridor and then seen him at a workbench. She also recalled that she was not looking directly at the claimant when she walked past him. She said that Mr Ghafoor's evidence was invention in retaliation for an occasion when she had got him into trouble with management. When asked why the details given at the hearing were not in her witness statement, Mrs Roberts blamed her representatives. We were surprised that this detail did not appear in her witness statement and we were also surprised by the level of detail Mrs Roberts was now able to recall about an occasion when she says she merely walked past the claimant in a corridor and did not say anything.

20. We preferred the evidence of Mr Ghafoor that he recalled her making that comment. Mr Ghafoor readily conceded that he had a patchy relationship with Mrs Roberts and Mrs Roberts, although she alleged that Mr Ghafoor was easily led and told lies, did not proffer any examples of that behavior. None of the misbehavior she reported by Mr Ghafoor related to his truthfulness.
21. More significantly, the audio recordings made by the claimant corroborate Mr Ghafoor's evidence. Although the claimant is heard prompting Mr Ghafoor to agree with him about the allegations, Mr Ghafoor makes two key, unprompted comments in the course of the two conversations. In the first conversation, when reminded by the claimant that a woman had said he was 'too short', Mr Ghafoor volunteers Mrs Roberts' name without being prompted, suggesting that he too recalls the same incident. He also tells the claimant to complain about it. In the second conversation, Mr Ghafoor agrees "yeah, she said 'you're too short'" and also adds, entirely unprompted, "and she tapped you on the head". Although the claimant now disputes Mr Ghafoor's recollection of that latter action, we find from Mr Ghafoor's unprompted recollection of the incident that, more likely than not, Mrs Roberts made the comment to the claimant that he was "too short". It is not clear to us what her motive was in making the comment. The claimant said he found the comment highly offensive. We accepted his evidence that the comment was capable of causing offense and did cause offence. That was corroborated by Mr Ghafoor's evidence (at the hearing and in the audio recordings) that he told the claimant to complain at the time. Mr Ghafoor evidently felt that the comment was inappropriate and potentially or actually offensive.

Time limit

22. There was no evidence of precisely when Mrs Roberts made the comment. The claimant implied in his evidence that Mrs Roberts' comment occurred at the time of the interviews and that it related to his failure to get the permanent job. However, we accepted Mr Ghafoor's evidence that it did not occur at the time of the interviews for the permanent vacancy. Mr Ghafoor gave evidence that he told the claimant to complain at the time, "not ten months later" and that "a few months after it happened" the claimant gave him a call and "made it fresh again". We conclude that the comment was made some time before the start of the interview process and some months before presentation of the claim.

23. Given that the claimant's interview for the post occurred on 5 January 2017 we conclude that it is more likely than not that Mrs Roberts' comment was made some time between the claimant's appointment in November and, at the very latest, around the end of December 2016. The claimant says in his claim form that he did not make a complaint at the time because he did not want to be targeted for making a complaint against another member of staff, but there was no evidence that this was the case. Mr Ghafoor clearly urged him to make a complaint at the time, but we find he chose not to do so.
24. The claimant says in his claim form that he was not successful in his application for the permanent vacancy because he had been rejected before the interview because of his disability. He relies primarily on the allegation that Mr Flannery, the interviewing manager, had been overheard by Mr Ghafoor saying that the claimant would not get the job because of his height. As set out above, we do not find that any such comment was made. While Mr Summers' submission that the respondent could not have had concerns about the claimant's capability because it employed him as a 'temp', may be true of the first respondent as a whole, we did not give it much weight in relation to the allegations against Mr Flannery because it was not he who had recruited the claimant as a 'temp'. However, we did accept that it evidenced that the first respondent did not apply any requirement for employees to be able to work above a particular height. We were not presented with any evidence that the first respondent applied a provision that employees should be able to do more than one job.
25. In his witness statement (paragraph 18) the claimant stated that the whole of Mr Flannery's attitude and manner confirmed that his mind was made up beforehand and the claimant had no chance of employment. However, in cross examination, when asked about the interview, he made no reference to Mr Flannery's manner. Rather, he accepted that the scores he was given accurately reflected his performance at interview. Nor did the claimant repeat in cross examination or in his witness statement the allegation made in his claim form that Mr Flannery told him at the interview "don't think you're getting the job". Having accepted that the interview scores were accurate, the claimant proceeded to rely on an argument that, because he had been aware of Mr Flannery's prior comments about him, he was unable to perform as well as he would have otherwise done at the interview. However, that contention is not set out in the claim form. We found the claimant's evidence regarding the interview inconsistent and we preferred the account given by Mr Flannery of the interview and the reasons the claimant was unsuccessful.
26. We found it surprising that, if Mr Flannery had behaved as alleged, the claimant did not report his concerns to Mr Brown, the manager with whom he accepted he had a good relationship and who had encouraged him to apply for the role. The claimant says at paragraph 22 of his witness statement that he complained by telephone to Human Resources. However, that is not mentioned in the claim form and there is no corroborative evidence. Nor does the claimant say he followed up that complaint when he received no response. Mr Summers cross examined the claimant about his recording of the telephone conversations with Mr Ghafoor but failure to record the alleged conversation with Human Resources. We considered that the claimant's evidence regarding his mobile phone recording lacked coherence.
27. We accepted Mr Flannery's evidence that the reason he did not appoint the

claimant was that he performed less well at interview than some of the other candidates. That is clearly supported by the notes of the interview of the claimant and others in the bundle, and the scores awarded. That evidence was corroborated by Mr Ghafoor, both at the hearing and in the audio recordings, saying that some people who had been working for the first respondent for a long time were also unsuccessful in their applications. We find that the claimant's disability was simply not a factor in Mr Flannery's scoring or decision making. The claimant's temporary contract came to an end after the interview.

The law

28. Section 39(1) EQA provides that:

An employer (A) must not discriminate against a person (B) –
(a) in the arrangements A makes for deciding to whom to offer employment;
...
(b) by not offering B employment.

29. Section 39(2) EQA provides that:

An employer (A) must not discriminate against an employee of A's (B) –
...
...
(c) by subjecting B to any other detriment.

30. Section 40 EQA provides that:

(1) An employer (A) must not, in relation to employment by A, harass a person (B) –
(a) Who is an employee of A's;
(b) Who has applied to A for employment.

31. Section 26 EQA provides that:

(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.
...
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

32. Section 13 EQA provides that:

(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

33. Section 23(1) EQA provides that, on a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.

34. Section 15(1) EQA provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Section 15(2) EQA provides that subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
35. Section 123 EQA provides that a claim for discrimination must be brought within a period of 3 months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period.
36. The respondents' representative referred us to the case of **Chandhok** (cited above) in which general observations were made by the Employment Appeal Tribunal about the inappropriateness of relying on assertions as to facts not set out in the claim form when seeking to strike out part of the claim.

Determination of the issues

37. We acknowledged the general observations in the case of **Chandhok** regarding the inappropriateness of relying on assertions as to facts not set out in the claim form. However, in our findings of fact above, and in our conclusions below, we also take account of the fact that the claimant is unrepresented. In our experience, the manner in which evidence unfolds where one party is a litigant in person is frequently somewhat piecemeal and important facts may be left out at any stage of the proceedings. In this case, however, when weighing up the likelihood of the respective accounts of events, we considered that the differences and omissions in the claimant's claim form, witness statement and evidence at the hearing indicated that he had changed his story.

Harassment

38. We find above that Mrs Roberts made the alleged remark "you're too short" to the claimant. We find that that comment clearly related to the claimant's disability and was unwanted. There was insufficient evidence for us to conclude that the conduct had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. However, we conclude that the conduct did have that effect. We have taken account of the factors set out in section 26(4) EQA. It is clear from the claimant's evidence that he perceived the comment in that way. The other circumstances of the case are that Mr Ghafoor clearly perceived the comment as offensive, because he advised the claimant to complain at the time. We consider that it was reasonable, given Mr Ghafoor's response and the nature of the claimant's disability, for the conduct to have that effect on the claimant.
39. We conclude, however, that that claim was presented outside the time limit set out in section 123 EQA. We find that Mrs Roberts made the comment

some time before the end of December 2016. Even if the date of that act of harassment was 31 December 2016, the claimant did not approach ACAS for early conciliation until 3 April 2017 (more than 3 months later) and the claim was not presented until 25 April 2017. The claim was therefore presented more than three months after the date of the comment and was outside the time limit.

40. In his claim form the claimant identifies that he did not make a complaint to the first respondent about Mrs Roberts' comment at the time because he did not want to be targeted for making a complaint against another member of staff. In his claim form (paragraph 17) he identifies his pending interview, not wanting to damage his prospects and his continuing employment at the first respondent as reasons for not making a complaint to the first respondent. He does not explain why he did not make a complaint to the employment tribunal or approach ACAS within the period of 3 months of the comment. We find that it was only when he was unsuccessful at interview that he commenced presenting a claim and added the allegation against Mrs Roberts. He apparently took advice from the CAB regarding the drafting of the claim form, but still did not present the complaint of harassment in a time. We find that there is insufficient evidence of any reason why it would be just and equitable for us to extend the period for presenting the claim of harassment.
41. We find as a fact that Mr Flannery did not make the remark to Mr Ghafoor that the claimant alleges.

Direct discrimination

42. The allegations regarding comments by Mrs Roberts and Mr Flannery are disposed of above. The remaining issue in the direct discrimination claim is whether Mr Flannery's decision not to appoint the claimant was less favourable treatment because of the claimant's disability. The claimant is relying on a comparison with a hypothetical applicant who does not have his disability. The key question is one of fact: what was the reason the claimant did not get the job? We considered the facts from which the claimant invited us to infer that his disability was a factor in his lack of success. He relied mainly on the allegation that Mr Flannery was overheard making the comment that the claimant would not get the job because he was too short and could only do one job. We find as a fact that that comment was not made. We also found there was insufficient evidence to find that Mr Flannery's manner towards the claimant indicated any antipathy towards him. The other relevant evidence in determining the facts from which the claimant invites us to make an inference of discrimination is that relating to the interview process. We accepted Mr Flannery's evidence, supported by the documents, that the reason the claimant was unsuccessful was his poor performance at interview. That was corroborated by the claimant's own acceptance in cross examination that the scores Mr Flannery awarded accurately reflected his performance. For that reason, we find as a fact above, that the reason for the claimant's dismissal was his poor performance at interview. There is therefore nothing from which we could conclude that the reason was, in whole or in part, the claimant's disability or that it affected Mr Flannery's decision in any way. The claim for direct discrimination fails.

Indirect discrimination

43. The claimant has not shown that there was any provision, criterion and/or practice applied by the first respondent that appointees should be able to do more than one job, work above a certain height or with any other relation to the claimant's disability. The claim for indirect discrimination fails.

Discrimination arising from disability

44. The issue identified at the outset of the hearing was whether the "something arising in consequence of the claimant's disability" (i.e. the claimant's inability to work unaided beyond the limits of his height or only being able to do one job) materially influenced Mr Flannery's decision not to appoint him. We find as a fact above that Mr Flannery did not give any consideration to whether the claimant could work unaided beyond the limits of his height, not whether he could only do one job. The reason the claimant did not succeed was his poor performance at interview. Even if those characteristics existed and were 'something arising in consequence of the claimant's disability' we would not find that they influenced the first respondent's decision to reject the claimant's application in any way. The claim of discrimination arising from disability fails.

45. The claimant's claim therefore fails and is dismissed.

Employment Judge Bright

Dated: 5 December 2017