



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr Christopher Warwick

AND

Respondent

Patterson Law Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter

ON

12 March 2018

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person

For the Respondent: Miss S Hornblower of Counsel

RESERVED JUDGMENT

The judgment of the tribunal is that:

1. The correct name of the respondent is Patterson Law Limited and the record is amended accordingly; and
2. The claimant was not a disabled person at the material times and his claims of disability discrimination are dismissed; and
3. The claimant's application to amend his claim to include direct sex discrimination is refused; and
4. The respondent's counterclaim is dismissed on withdrawal by the respondent; and
5. The claimant's remaining claim for breach of contract will proceed in accordance with the attached case management orders.

REASONS

1. This is the judgment following a preliminary hearing to determine whether the claimant was a disabled person at the material times, and whether (and if so when) the respondent knew of the claimant's disability. This judgment also deals with the claimant's application to amend his originating application. There was no need to consider the respondent's application for strike out and/or deposit orders for any remaining claims.
2. I have heard from the claimant, and from Ms Zoe-Katarina Ling on his behalf. I was also asked to consider statements from each of Ms R Naughton and Mrs R Gibbs-Pearson on behalf of the claimant, but I can only attach limited weight to these because they were not here to be questioned on this evidence. For the respondent I have heard from Ms C Hudson, Mr D Smith and Ms E. Patterson.
3. The claimant's credibility. I did not find the claimant to be a credible witness for the following reasons. In general terms the weight of evidence was against the claimant, whereas the evidence of the respondent's witnesses was both measured and consistent with the contemporaneous documents. On the other hand, on a number of occasions the claimant's evidence was not consistent with the contemporaneous documents, and he made a number of assertions which were far-fetched to say the least. As is explained in more detail below, on one occasion the claimant asserted that the respondent had deliberately created a role based in Nottingham simply in order to allow his alleged comparator Rebecca Taylor the opportunity to work remotely, when he was denied the same opportunity. I find that to be an absurd suggestion given that Rebecca Taylor resigned her employment on moving to Nottingham for family reasons, and the respondent then allowed her to work remotely in order to retain her services. More importantly however is the fact that I find that the claimant deliberately and dishonestly altered the content of a Study Aid and Study Strategies Report from Staffordshire University to assist a subsequent application for assistance in connection with his CILEx Legal Executive exams. In addition, despite clear explanation at a previous case management preliminary hearing, and clear orders as to what information and documents the claimant was required to disclose for this hearing, the claimant failed to comply fully with those orders. For all of these reasons whenever there was a conflict between the claimant's evidence and/or assertions and the respondent's evidence, I preferred the evidence of the respondent.
4. Accordingly I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
5. Background Facts: The respondent company is a firm of solicitors which specialises in the defence of criminal motoring offences. It has two directors, Emma Patterson and Dominic Smith from whom I have heard, and it employs approximately 37 staff. The claimant commenced work for the respondent on 18 July 2016 as a Case Progression Officer (CPO). His duties eventually included advising clients, and corresponding with clients, the Police, the Court Service and the CPS, preparing briefs to counsel and general file management. The respondent's office is in Newton Abbot in South Devon, and the claimant lived away from Newton Abbot which required a daily commute of approximately one hour each way. The claimant's partner Ms Ling, from whom I have heard, also worked for the respondent.
6. The claimant was a difficult and demanding employee who took up a lot of management time. He had a poor sickness record, and his sickness absence often coincided with his partner's absences from the office. He had repeated late attendance, and he had a number of disagreements with work colleagues. His general performance required higher levels of supervision than ordinarily should have been the case. He would repeatedly express opposition to the respondent's methods of working and was very demanding. He often asked for pay rises, and for payment towards his Chartered Institute of Legal Executives (CILEx) qualification, which he had chosen to undertake voluntarily, and

- which was not a requirement of his role with the respondent. He would argue both verbally and via emails with the respondent's directors about these topics, and complain to other members of staff if his demands were not met. He would return to the same subjects weeks after the matter had been concluded to continue to argue the same points. This resulted in almost daily meetings and discussions with and/or about the claimant, and not surprisingly the respondent became increasingly exasperated.
7. One issue which was repeatedly discussed was that of remote working. In about early 2017 one of the claimant's colleagues, namely Rebecca Taylor, resigned her employment on moving to Nottingham for family reasons. She was a valued employee and the respondent did not wish to lose her services. The respondent persuaded her to withdraw her resignation and she was permitted to work remotely, not least because it was impossible to commute from Nottingham to South Devon on a daily basis. The claimant did not enjoy his daily commute of one hour each way, and he made a number of requests to the respondent to be allowed to work remotely from home. Mr Smith discussed the issue of remote working with the claimant on a number of occasions. At no time did the claimant suggest this was required because of any health difficulties. Mr Smith remained opposed to the request, partly because of the expense, and partly because he wished to ensure that there was proper supervision of the claimant's work. This issue arose in December 2016, January 2017, May 2017, and July 2017. Mr Smith decided that it was right to refuse the request for remote working because of the respondent's serious concerns regarding the claimant's work. Mr Smith and the claimant exchanged emails on 4 August 2017, and Mr Smith explained his reasons for refusing the request.
 8. On 4 August 2017 the claimant stated that he wished to raise a formal grievance, but resigned later that day. The claimant's resignation was accepted, and there was then a debate about the extent to which the claimant was required to work his three months' contractual notice. By 8 August 2017 the relationship had broken down irretrievably, and the claimant posted a number of apparently offensive Facebook posts, and the respondent decided to dismiss the claimant for gross misconduct with effect from 8 August 2017.
 9. On 18 September 2017 the claimant issued these proceedings claiming unfair dismissal and disability discrimination, relying on post-traumatic stress disorder (PTSD) as the relevant disability. The unfair dismissal claim was dismissed because the claimant had insufficient service to bring that claim. A case management preliminary hearing then took place on 8 January 2018 and the disability discrimination claims were identified as being for harassment; direct discrimination; discrimination arising from disability; and in respect of an alleged failure by the respondent to make reasonable adjustments. The claimant also pursues a wrongful dismissal claim in respect of his notice period which is not the subject of this judgment. The claims are all resisted by the respondent who does not accept that the claimant was disabled. The claimant has since made an application to amend his claim to include a claim of direct sex discrimination, and this preliminary hearing was listed to determine whether the claimant was a disabled person at the relevant times; whether the respondent had the requisite knowledge of that disability; to consider the contested application to amend the claim; and to consider whether any surviving claims should be struck out as having no reasonable prospect of success, or be subject to the payment of a deposit order as having little reasonable prospect of success. The respondent had also made an employer's counterclaim, which is now withdrawn.
 10. The Disability Issue: In order to assist the tribunal to determine whether the claimant was a disabled person at the relevant times, he was ordered to produce copies of his GP medical records, and any other reports upon which he wished to rely, and to prepare an "impact statement" setting out the effect which the alleged disability is said to have on his normal day-to-day activities. He has failed to do so on anything approaching a convincing basis. His GP notes have not been disclosed, and the claimant suggests that this is because they may have been mislaid between different surgeries. His impact statement does not address any adverse affect on his normal day-to-day activities, other than to make simplistic general comments such as: "the symptoms continue to this day and have

- an impact on my daily life however they are much more manageable unless I am encountering a period of high stress and demand”.
11. The available medical evidence which I have seen is as follows. In late 2011 whilst he was at Staffordshire University the claimant applied for financial assistance in connection with his studies, and an educational psychologist prepared a diagnostic assessment report on 10 January 2012. The report notes "This assessment was undertaken for educational study purposes and is not appropriate for any other situation or environment." It also notes: "Chris did not report any current health problems that may affect his study and did not recall any sensory or developmental difficulties as a child". The report noted: "Chris presents a profile consistent with specific learning difficulties based on a weakness with his short-term memory in relation to his underlying abilities." A letter dated 28 March 2012 from Mr Burrows, a psychological well-being practitioner, also confirms that the claimant attended a mental health assessment on 16 January 2012 when he received two treatment sessions before being “stepped up” for cognitive behavioural therapy (CBT).
 12. The claimant then had a further assessment in April 2012, which resulted in a Study Aid and Study Strategies Report for the purposes of his studies at Staffordshire University. The purpose of the report was to identify any additional expenditure the claimant was obliged to incur as a result of any disability whilst attending his course. The report recorded that the claimant had reported suffering from dyslexia (specific learning difficulty), and PTSD. Dyslexia was said to have been evidenced by the educational psychologist’s report noted above. The PTSD relied upon the letter from Mr Burrows and the referral for CBT. The report records the claimant had described his symptoms of PTSD as having difficulty sleeping, experiencing nightmares and flashbacks, and feeling severe anxiety in crowds working social situations. The claimant subsequently relied upon this report during his employment with the respondent when seeking additional time to complete his CILEx examinations. It was at this stage that the claimant changed the conclusions of the report. He changed the diagnosis of dyslexia to one of ASD, which presumably he felt better served his purposes at that stage. He was unable to provide a satisfactory explanation for so doing, and I find that he deliberately and dishonestly doctored the findings of this report.
 13. I have seen a statement of fitness for work dated 30 April 2012 which refers to the claimant suffering from "anxiety states". A further statement dated 12 June 2012 refers to "anxiety state - ?PTSD". This follows a letter dated 8 May 2012 in which the claimant’s GP Dr Damam suggests: "On review of his symptoms we think Mr Warwick is most likely to be suffering from post traumatic stress disorder. We have requested the Healthy Minds Network to consider a referral to a psychiatrist for a formal diagnosis for his above symptoms. He is currently on the waiting list for CBT ...” A further sickness certificate dated 27 July 2012 refers to anxiety, and a letter from his GP Dr Awan on 2 May 2013 records: "This is to confirm that Mr Warwick has been seen in the surgery with symptoms of PTSD which have been affecting him for a number of weeks ...” The claimant has also adduced an undated letter from Dr Hopes suggesting that the claimant had been seeking help for "mental health issues". In addition I have seen one recent extract only from the claimant’s GP notes dated 10 August 2017 which suggests that the claimant was "struggling with his mental health - feels PTSD symptoms have worsened with flashbacks and nightmares ...” This was immediately after his dismissal on 8 August 2017. All of this information is therefore before the claimant commenced employment with the respondent, and the one instance immediately after his employment was terminated. The information available to the respondent during the claimant’s period of employment, which is the relevant period for the purposes of his claims, is different, and is as follows.
 14. Before commencing work with the respondent, the claimant completed a job application questionnaire in which he was asked: "Is there anything concerning your medical history or state of health that is relevant to your application?" The claimant answered in the negative. He had a large number of sickness absences during his employment with the respondent, none of which related to PTSD or other mental health issues. On 31 January 2017 the claimant sent an email to Ms Naughton of the respondent, who dealt with their

- HR issues. He stated in that email: "This email is private and confidential and the contents of which I do not want discussing or passing on to anyone else within the company ... I suffer from PTSD - nightmares, flashbacks, cold sweats and severe anxiety ... I can deal with most of that fine, I've learned to cope". In addition, on 24 March 2017 the claimant sent an email to Ms Hudson, from whom I have heard, attaching the educational psychologist's assessment from 2012, the contents of which the claimant had altered himself. He referred to the fact that he was suffering with issues from ASD and dyslexia and wanted the respondent to agree to allow him to attend extra study sessions for the purposes of his CILEx exams.
15. The claimant asserts that as a result of these emails, and other discussions, that his PTSD was common knowledge throughout the office and was discussed repeatedly. I accept the respondent's evidence that the contrary is true. Ms Naughton left the respondent's employment shortly after that email in January 2017, and I accept the respondent's evidence that she must have respected the claimant's request for that email to be kept strictly confidential, and that no one else in the respondent knew about it. I also accept the respondent's evidence that there were no discussions, and it was not common knowledge, that the claimant suffered from PTSD or any other mental health issues. It was never raised by the claimant despite continual discussions about the claimant's working practices, sickness absences and difficulties. The only evidence of the matter having been raised with the respondent is effectively the email to Ms Hudson on 24 March 2017 which was in the context of the claimant's discussions with CILEx and his request to attend further training.
 16. Having established the above facts, I now apply the law.
 17. The claimant alleges discrimination because of his disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct disability discrimination, discrimination arising from a disability, failure by the respondent to comply with its duty to make adjustments, and harassment.
 18. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
 19. As for the claim for direct disability discrimination, under section 13(1) of the EqA 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.
 20. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA 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. This 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.
 21. The provisions relating to the duty to make reasonable adjustments are to be found in sections 20 and 21 of the EqA. The duty comprises of three requirements, of which the first is relevant in this case, namely that where a provision criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, there is a requirement to take such steps as it is reasonable to have to take to avoid that disadvantage. A failure to comply with this requirement is a failure to comply with a duty to make reasonable adjustments. A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
 22. Under paragraph 20(1)(b) of Schedule 8 of the EqA A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know – (a) in the case of an applicant or potential applicant, that an interested disabled person is or may be an applicant for the work in question; (b) ... that an interested

- disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.
23. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.
 24. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
 25. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.
 26. I have been referred to and have considered the cases of Goodwin v The Patent Office [1999] IRLR 4 EAT; Gallop v Newport City Council [2014] IRLR 211 CA; Selkent Bus Co Ltd v Moore [1996] ICR 836; Hammersmith and Fulham Borough Council v Jesuthasan [1998] ICR 640; Thomson v East Dunbartonshire Council & Anor UKEATS/0049/13/jw; us CIC UKEAT/0510/13/JOJ; British Coal v Keeble [1997] IRLR 336 EAT; Robertson v Bexley Community Service [2003] IRLR 434 CA.
 27. Conclusions on Disability: My conclusions on the disability issue are as follows. The respondent asserts that the claimant has failed to prove any diagnosis of PTSD, which is the disability upon which he relies. I agree with that general assertion, but nonetheless a person can meet the definition of disability without any specific diagnosis. The test requires a physical or mental impairment which has a substantial and long-term adverse affect on normal day-to-day activities. Despite the absence of a formal diagnosis, and the absence of the claimant's medical records, it seems likely on the balance of probabilities that the claimant has suffered with some mental health symptoms which were recorded from early 2012. There does appear to be evidence of anxiety related issues, and there is reference to treatment for mental health issues and CBT. I am satisfied for this reason that claimant has suffered from a mental impairment both before and immediately after his employment with the respondent.
 28. However, there is no cogent evidence, and I cannot find, that during the period of his employment with the respondent the claimant suffered from any impairment which had a substantial adverse affect on his normal day-to-day activities. Despite repeated and continual discussions about his work record and working practices, the claimant never reported that he had any mental illness, nor raised with the respondent the possibility of him suffering any adverse affects because of any mental impairment. The possibility of any adverse affect arising from any impairment simply did not feature during the claimant's progressively difficult period of employment.
 29. In circumstances where I find that there was no substantial adverse affect on the claimant's normal day-to-day activities during his period of employment with the respondent, I find that the claimant was not a disabled person within the meaning of the statutory definition at the relevant times. Accordingly I hereby dismiss his disability discrimination claims.
 30. In any event, even if the claimant had met the statutory definition of disability, I would have dismissed his claims because of the lack of requisite knowledge by the respondent of any disability and/or any alleged substantial disadvantage. The direct disability discrimination claim is on the basis that the claimant was forced to resign (and/or was dismissed for a false reason) because of the refusal to allow remote working. That claim must fail where the respondent did not know that the claimant was disabled because the

- dismissal cannot in those circumstances be because of the claimant's disability. The claims for discrimination arising from disability, and for reasonable adjustments, both relate to the respondent's refusal to allow remote working. Throughout all of the discussions concerning that aspect the claimant never raised the suggestion that he required remote working because of any illness. The respondent was unaware of any disability and in particular unaware of any alleged substantial disadvantage caused by that disability. Those two claims must fail for that reason. Finally, with regard to the harassment claim, despite being ordered to do so the claimant has failed to particularise the extent of his harassment claim. Originally it was loosely related to repeated discussions and requirements to work at the office despite requesting remote working to alleviate the symptoms of PTSD, and failure to allow the claimant to withdraw his resignation. In circumstances where the respondent was not aware of the alleged disability, or the alleged symptoms, any such conduct cannot be said to be related to the claimant's protected characteristic namely his alleged disability.
31. In conclusion therefore the claimant's claims for disability discrimination are all dismissed.
 32. Application to Amend: I now turn to the claimant's application to amend his claim to include a claim for direct sex discrimination. That application was opposed by the respondent as being an entirely new claim and one which is now presented out of time. The proposed new claim is on the basis that the respondent's decision to allow Rebecca Taylor to enjoy remote working, when the claimant was not allowed to do so, is an act of direct sex discrimination. Rebecca Taylor is relied upon as the claimant's actual comparator.
 33. In deciding whether to allow such an amendment one must consider the balance of prejudice, injustice and hardship between the parties. The respondent asserts that it is an entirely new claim and not the re-labelling of an existing claim. I am not convinced by that argument given that the facts are effectively identical to the alleged direct disability discrimination claim. The facts relate to the claimant's perception that Rebecca Taylor was allowed remote working in comparable circumstances to his own when he was not. Even though the amendment is out of time, if the direct disability discrimination claim had survived, there would have been no real prejudice to the respondent to allow the amendment because it would always have been in the position of having to explain the circumstances of Rebecca Taylor's remote working and was not prejudiced by the passage of time in so doing.
 34. However, during the course of this hearing, the claimant conceded that Rebecca Taylor is not a true comparator. I agree with that concession. It seems to me obvious, and I so find, that Rebecca Taylor was never a true comparator. She was a valued employee who resigned her employment for family reasons and moved to Nottingham, from where it was wholly impossible to commute on a daily basis. The respondent persuaded her to remain in its employment, but obviously on the basis that she would be working remotely. The circumstances of the claimant were very different. The claimant was a difficult employee who needed close supervision and close management. Effectively the respondent did not trust him to work remotely at home. He was able to commute to the office on a daily basis. At one stage the claimant suggested that the respondent had deliberately created an important position based in Nottingham, and then appointed Rebecca Taylor to it, and allowed her remote working from there, because she is a woman and the claimant is not. In my judgment that assertion is preposterous. In my judgment the claimant's claim that Rebecca Taylor was allowed remote working as a woman, and the claimant is in truly comparable circumstances was denied remote working because he is a man, to be wholly without merit. For this reason, balancing the prejudice and hardship between the parties, I refuse the claimant's late application to amend these proceedings.
 35. Finally, a further case management order is attached which relates to the claimant's remaining wrongful dismissal claim.

Employment Judge N J Roper
Dated 16 March 2018

Judgment sent to Parties on

