



EMPLOYMENT TRIBUNALS

Claimant

Mrs M Rouse

v

Respondents

(1) MP Resourcing Limited
(2) Mrs Colleen Ward
(3) Mr Julian Ward

Heard at: Watford

On: 3 & 4 April 2018

Before: Employment Judge Hyams

Members: Mr S Bury
Mrs J Smith

Appearances:

For the Claimant: Mr I Van Maanen, Representative

For the Respondents: Mrs R, Towill, Representative

UNANIMOUS JUDGMENT

The claims of disability discrimination, contrary to sections 13, 15, 20 and 39 of the Equality Act 2010, do not succeed.

REASONS

Introduction; the claimant's claims

- 1 In these proceedings, the claimant at first claimed "disability discrimination because I was refused an interview after mentioning I need a walking stick." In the details of the claim attached to the ET1 claim form (at pages 7-8, i.e. pages 7-8 of the hearing bundle), the claim was stated as one of "direct disability

discrimination, including a failure to make reasonable adjustments and discrimination arising from disability.”

- 2 There was a case management hearing on 8 November 2017, held by Employment Judge George. Mr Van Maanen represented the claimant at that hearing. He is a Citizens’ Advice Bureau volunteer. As indicated above, he represented the claimant at the hearing before us. We were grateful for his assistance.
- 3 At the case management hearing of 8 November 2017, it was clarified that the claimant’s claim was of direct disability discrimination, contrary to sections 13 and 39 of the Equality Act 2010 (“EqA 2010”) and of disability discrimination contrary to sections 15 and 20 of that Act, i.e. unfavourable treatment because of something arising in consequence of the claimant’s disability which is not a proportionate means of achieving a legitimate aim, and/or a failure to make reasonable adjustments for that disability. The claim of discrimination contrary to section 13 was (see page 31) that “[w]ithdrawing an offer of an interview on 2 March 2017” occurred because of the claimant’s disability. The claim of a breach of section 15 was (see the same page) that “[w]ithdrawing the offer of a job on 2 March 2017” was unfavourable treatment in consequence of the claimant’s disability. We return below to the claims of breaches of sections 15 and 20, where we state our conclusions.
- 4 The claimant’s disability is psoriatic arthritis. The respondents accepted that the claimant was disabled within the meaning of the EqA 2010. The claimant is unable to walk for any lengthy distances; she requires a walking stick. However, she has no difficulty in driving to and from work.
- 5 We heard oral evidence from the claimant on her own behalf and, on behalf of the respondents, from the second respondent, Mrs Colleen Ward, who is the first respondent’s founder and one of its directors, and from the third respondent, Mr Julian Ward, who is the second respondent’s husband and the first respondent’s other director. We also read the documents in the bundle put before us. Having heard that oral evidence and read those documents, we made the following findings of fact.

The facts

The first respondent’s business and premises

- 6 The first respondent’s business is that of a recruitment agency. It described itself in the job advertisement (of which there was a copy at page 59) as “a fast-growing Recruitment Agency”. It was established in 2014, when Mrs Ward started its business while working from home. She then rented an office at 99 Milton Park, which is a business park situated about 4 miles from the centre of Didcot. Mr Ward joined the business in September 2016. He told us (and we accepted) that he had registered a number of company names in addition to

that of MP Resourcing Limited, presumably by establishing a series of companies, with the letters “MP” in the names of the companies. Those additional companies were MP Jobs Limited, MP Commercial Limited, and MP Recruitment Limited. Mr Ward told us (and we accepted) that he paid £99 per month to rent a pigeonhole at 99 Milton Park so that all correspondence in relation to those companies could be sent and retrieved from that address. Mr Ward told us (and we accepted) that of those other companies only MP Jobs Limited has ever traded. It owns a “job board”, which is a place on the internet for listing vacancies. It has no staff and no operational address.

- 7 In August 2016, the first respondent’s main operations were moved from 99 Milton Park to 1a Station Road, Didcot. The first respondent’s registered address, however, remained 99 Milton Park.
- 8 During January 2017, the first respondent obtained a contract to supply agency staff to Rudolph and Hellman (“RH”), who (RH) work as a logistics partner of BMW, storing and supplying parts to BMW’s Mini factory at Cowley. RH have a 9-year contract with BMW in that regard, and employ over 1000 staff, of whom approximately 400 are supplied through temporary recruitment agencies. Under the contract entered into in January 2017, the first respondent was appointed as one of four suppliers of agency workers.
- 9 In order to fulfil that contract, the first respondent rented a single-room office in Oxford, and appointed (1) an Account Manager, and (2) one other employee, whose sole role was to liaise with RH in connection with the agency staff supplied by the first respondent to RH. That room was easily accessible, but it had no private area in which payroll administration could be carried out. There were in the room two desks and a table at which at most 6-7 persons could sit at one time. The first respondent used that table as a place at which to conduct inductions (which usually took about 2 hours) for new agency staff to be supplied to RH.
- 10 The first respondent’s main premises at 1a Station Road, Didcot are part of a small commercial block, which has two stories. The building is in the shape of a horseshoe. There are four sets of premises on the first floor, and six on the ground floor. The four sets of premises on the first floor are split into two separate sets: one on each side of the horseshoe. The top floor has stairs on each side, but the stairs in each case lead to only two of the premises, and there is no access from one of the two sets of premises to the other. The ground floor’s additional two sets of premises have nothing above them.
- 11 There is no lift at the premises. They are owned by a large commercial property owner, Hammersons. Mr Ward told us, and we accepted, that a lift could be installed only at the expense of commercial space.

The claimant’s application and relevant employment history

- 12 The claimant is a qualified and highly experienced payroll administrator. On 2 March 2017, at 11:47, she sent the first respondent a curriculum vitae (“CV”) in support of an application for a part-time vacancy of Payroll & Accounts Officer. That role was first advertised by the first respondent (as Mr Ward said in paragraph 18 of his witness statement) on 27 February 2017. We return to that advertisement below.
- 13 The claimant first became aware of neurological difficulties in 2003 (we saw from page 38). In one previous job, her employer installed a stairlift for her. In her current role (which she obtained after the events we describe below), her employer adapted a ground-floor room for her to use in the course of her employment, instead of requiring her to use the employer’s first-floor accounts and finance office.

The sequence of events that led to this claim

- 14 On 8 February 2017, RH made its first request to the first respondent to supply agency staff. In the following weeks, the first respondent experienced a number of serious (using the word in Mr Ward’s email of 21 February 2017 to RH at page 60) “Teething Problems”.
- 15 The advertisement to which the claimant responded on 2 March 2017 was at page 59. It stated that the role was that of “Part time Payroll & Accounts Officer”, for “MP Resourcing - Didcot”, and that the first respondent was “looking for an experienced Payroll & Accounts Officer to join our busy, friendly team based in Didcot.”
- 16 In response to the claimant’s application for the post, at 3.45pm on 2 March 2017, Mrs Ward telephoned the claimant and left a voicemail message on her mobile telephone. The claimant had transcribed the message, and the transcription was at page 62. It was in these terms:

“Hi Michelle, My name is Colleen, I am calling from MP Resourcing. You sent your CV through to us regarding the part time position. I am not sure if you are overqualified and whether our salary is the right sort of money for you but can you give me a call on 01235 330110, thank you.”

- 17 The claimant responded to that request by calling Mrs Ward. The sequence of events was subsequently described by the claimant in an email dated 6 March 2017, the whole of which we set out below. Mrs Ward’s evidence (in paragraphs 10 and 11 of her witness statement) about that conversation was in these terms:

“10. ... Mrs Rouse requested more information on the job role and despite me telling her that the role and salary in MP Resourcing was far too junior for someone with her qualifications, I was unsure

of the motivation of someone with such a skill set wanting to take such a junior position.

11. Mrs Rouse continued to suggest that the role would be suitable, and it was the flexibility in working patterns that was important. She explained that she had an autistic son and needed any employer to be flexible with regards to hours and time off at short notice. I explained that the role was on 20 hours a week, the only time critical function was the input of payroll data other than that we would be flexible outside of these hours. I agreed to discuss Mrs Rouse's application with Julian [i.e. Mr Ward] and said I would call her back."
- 18 Mrs Ward told us, and the claimant agreed, that she (Mrs Ward) was sympathetic to the claimant's difficulties arising from having an autistic son, as Mrs Ward has a friend whose son is autistic.
- 19 Mrs Ward then discussed the claimant's application with Mr Ward. Mrs Ward's oral evidence, like that in her witness statement, was that she thought that the claimant was over-qualified for the post for which she had applied. Not least because Mrs Ward indicated that in her voicemail message to the claimant before they first spoke (see paragraph 16 above), before knowing that the claimant was disabled, we accepted that evidence of Mrs Ward.
- 20 In paragraph 21 of his witness statement, Mr Ward said this:

"On the afternoon of Thursday 2nd March 2017 I received a telephone call from Colleen regarding an application she had received from the advert for the Part Time Accounts/Payroll Officer. I made the decision that we would put the position on hold due to the on-going issues at Rudolph & Hellmann. The number of temporary staff currently on site at BMW was 10. I had been running the payroll and accounts system and therefore with such small numbers and retention issues it was not financially viable to continue with the role. I requested that any applicants be informed that we would not be taking their enquiries any further."
- 21 That evidence was consistent with the documents at pages 60 and 61, and we accepted it. In fact, the first respondent, via Mr Ward, formally withdrew from offering recruitment services to RH on 5 May 2017 (in an email of that date, at page 67). However, we learnt at the hearing (i.e. this was not foreshadowed in the respondents' witness statements and documentary evidence) from Mr Ward that RH had persuaded the first respondent to continue with the contract, and that by the time of the hearing, the contract was being operated successfully by the first respondent. Mr Ward told us too in oral evidence that he had initially carried out the payroll function of the first respondent for the RH contract, and that he had simply continued to do so throughout the period of the contract. He said that RH supplied the raw data in a very helpful format, and that he (Mr Ward) was now spending only approximately half a day per week in running the

payroll programme on a computer in the first respondent's Didcot premises. That computer was not connected to the first respondent's intranet, although it is connected to the internet, he said. The first respondent's Didcot premises consist of two office rooms, and a kitchenette and water closet. The main room is an open plan office, in which 6 people work. The other office is a small, private, room. The payroll computer is kept and operated only in the small private office. That is for data protection purposes. We accepted all of that evidence of Mr Ward. In fact, the claimant accepted also that the payroll computer had to be kept and operated separately in the manner described by Mr Ward.

- 22 Returning to the sequence of events of 2 March 2017, Mrs Ward telephoned the claimant a second time at (the claimant recorded, as described below) 4.08pm. In paragraphs 13-17 of Mrs Ward's witness statement, she described that conversation. We found elements of that description to be ambiguous and we therefore approached those paragraphs with particular care. The claimant's email of 6 March 2017 was sent at 10:07 and was at pages 63-64. It was in these terms:

'To Coleen Ward and/or Management,

Following my below application you left a voice message for me on Thursday 2nd March stating your interest in me but concerned I was overqualified and the salary may not be what I would be looking for.

I spoke with you Thurs 2nd March 4.08pm. I explained that the hours and location were my main concern and the salary was fine. I gave my availability to interview and you had to check your colleague's diary and would phone me back.

I received your return call 4.47pm offering me an interview on Thursday 9th March at 10am, you would forward the details by email.

I accepted and then noted I was disabled and used a walking stick.

To which the response was "oh ... That's a shame".

I then asked "is that an issue?"

Response given, "yes, stairs, there are stairs".

I then asked "is there not a lift, ramp or disabled access?"

Answer: "no sorry."

"Would there be the opportunity to work remotely/elsewhere?"

Answer "no". "Thanks anyway, bye"

"Ok then,bye".

I have spoken with ACAS this morning and have been advised to document the above and ask that you provide a response to the following within the next 14 days:

What reason led you to stop and revoke the invitation to interview, as initially very interested in my knowledge/skills?

Why was I told there is no disabled access? Clearly the premises has disabled parking, access and some lifts by reception.
Is the position still available?

I look forward to hearing from you.

Regards,

Mrs Michelle Rouse'

23 Mrs Ward's witness statement included (in the second part of the first sentence of paragraph 15) a statement that the claimant had asked her "about disabled access as she used a walking stick". In paragraphs 16 and 17, she said this:

"16. Mrs Rouse then asked about working remotely or elsewhere [**see page 63 of the bundle**]. This question was completely out of context as we were not discussing the job role just the access to the office, this took me by surprise and I answered the question in isolation.

17. It was at this point Mrs Rouse ended the conversation leaving me a little confused as to how it had been left. However as there was no immediate job role I felt there was no need to follow up the conversation at this time." (Original bold text.)

24 We accepted that evidence of Mrs Ward. However, she did not say in terms to the claimant that "there was no immediate role".

25 During the conversations which the claimant had with Mrs Ward on 2 March 2017, the claimant said that the reason why she was more concerned about the location of the job and the hours and time of day that she would be working than about the pay, was because she wanted to be able to maintain some flexibility in regard to the transporting of her son to school. The claimant told us that she referred in one of the conversations to the fact that the school was just the other side of the roundabout. Mrs Ward did not recall that, but in any event (we find as a fact) she did not ask to which roundabout the claimant was referring. We also find as a fact that the claimant did not say in terms that she thought that the job would be based at Milton Park.

26 Mr Ward said in paragraph 23 of his witness statement that he sought to speak to the claimant by telephone in response to her email of 6 March 2017 as he thought that he was "best placed to explain why the job had been withdrawn". He was unable to reach her by telephone, so he left her a voicemail message, asking her to call back. He then took some legal advice from the first respondent's professional association's legal adviser, and was advised to send an email, which he did at 15:46 on 6 March 2017. The email was at page 63 and was in these terms:

'Dear Mrs Rouse,

I left you a voicemail message today as I would like to ascertain the exact allegation you would like me to respond to. I would also like to obtain the ACAS case reference number for our legal officer at the REC <https://www.rec.uk.com/>

I am also seeking clarification on last line of the email below and I quote "Clearly the premises has disabled parking, access and some lifts by reception" you may be under the misapprehension that we are based on Milton Park, this is our registered address not our trading address. Our trading office, and the location of the role we are looking to recruit for, is la Station Road, Didcot, unfortunately this building has no parking attached, lift or any reception area. The office is located on the 1st floor of the 50's build block above the shops on the corner Broadway and Station Rd. Access is via a steep staircase located between the Newbury Building Society and Vouge Hair and Beauty salon Please contact me directly if you require further clarification [and he gave his telephone number].

I look forward to receiving your reply.

Kind regards

Julian'

- 27 The claimant did not again telephone the first respondent. Nor did she reply to Mr Ward's email of 6 March 2017. The next relevant event was that the claims made in these proceedings were initiated.
- 28 Mr Ward's evidence (which we accepted) was that the advertisements to which the claimant had responded by applying to the first respondent for the job of Payroll & Accounts Officer, remained in place after 2 March 2017, but only because the advertisements were placed for a period until an expiry date. Mr Ward said that if anyone else had applied for the post in response to any of those advertisements, then the first respondent would have taken action and withdrawn the advertisement, but no other application had been made before the expiry of the originally-agreed period for the advertisement. We accepted that evidence of Mr Ward.
- 29 Mrs Ward's witness statement and oral evidence were to the effect that while she did not intend to appoint the claimant to the advertised role of part-time Payroll & Accounts Officer with the first respondent, she was interested in interviewing the claimant so that she could offer the claimant as a candidate for roles with clients of the first respondent. However, it was clear that she did not say that to the claimant.

- 30 The evidence of both Mr and Mrs Ward was to the effect that the receipt of the claimant's email of 6 March 2017 the text of which we have set out in paragraph 22 above together with the fact that the claimant did not respond to Mr Ward's email in response, or contact the first respondent again, caused the first respondent to decide not to send the claimant by email details of the interview which Mrs Ward had, before receiving the claimant's email of 6 March 2017, intended to have with the claimant.
- 31 Before making her application to the first respondent on 2 March 2017, the claimant went to 99 Milton Park and noted that it had disabled parking and a lift. The claimant at no time went to 1a Station Road, Didcot, but there were in the bundle photographs of the staircase via which access to the first respondent's offices there had to be gained. Those photographs were at pages 49-52 and the claimant, having seen those photographs, accepted at the hearing that she could have gone up and down the stairs for an interview, but only with considerable difficulty, and that she could not in practice have worked at those premises.
- 32 During oral evidence, Mrs Ward said that she loved people, and that was why she was in the recruitment business. She said also that it would be contrary to her own commercial interests to treat disabled people less favourably because they were disabled. She denied strongly having treated the claimant less favourably because of her disability.

The relevant law

- 33 Section 13 of the EqA 2010 applies where one person treats another person less favourably "because of a protected characteristic".
- 34 Section 23 of that Act provides:
- “(1) On a comparison of cases for the purposes of section 13 ... there must be no material difference between the circumstances relating to each case.
- (2) The circumstances relating to a case include a person's abilities if—
- (a) on a comparison for the purposes of section 13, the protected characteristic is disability”.
- 35 Section 136 of the EqA 2010 applies “to any proceedings relating to a contravention of this Act”. Subsections (2) and (3) provide:
- “(2) 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.

- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

- 36 Section 20 of the EqA 2010 applies where there is a provision, criterion or practice (“PCP”) which puts an employee or applicant for employment at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, in which case the employer is under a duty to take such steps as it is reasonable to have to take to avoid the disadvantage.

Our conclusions, and our reasons for them

The claims as clarified at the case management discussion and during the hearing before us

- 37 Mr Van Maanen accepted (in fact he volunteered, in response to our initial thoughts, as expressed during submissions) that it is very difficult to think of a true comparison for the purposes of section 13 of the EqA 2010 in circumstances such as these. He relied on a hypothetical comparator in saying that the claimant was treated less favourably because of her disability.
- 38 The claimant’s case as clarified at the case management discussion was (see page 32) that the respondent (i.e. the first respondent) applied a PCP in the form of a requirement that “the job and/or interview be at 1A Station Road, Didcot”.
- 39 Mr Van Maanen accepted, after a careful discussion with us, and an opportunity to discuss the matter carefully with the claimant, that no reasonable adjustment could be made to enable the claimant to work at the first respondent’s offices at 1a Station Road, Didcot. He clarified that it was the claimant’s case in regard to section 20 of the EqA 2010 only that it would have been a reasonable adjustment to interview the claimant somewhere other than 1a Station Road, Didcot.
- 40 As indicated above, at the case management hearing, the claimant’s case under section 15 of the EqA 2010 was (see pages 31-32) agreed to be that the claimant was subjected to unfavourable treatment by “[w]ithdrawing the offer of a job on 2 March 2017.”

Our conclusions

- 41 Like Mr Van Maanen, we found it very hard to think of a true comparison for the purposes of the claim of direct discrimination. As stated above, the claim of direct discrimination was stated in paragraph 5 of the case management discussion note at page 31 to be one of unfavourable treatment in the form of

“Withdrawing of an offer of an interview on 2 March 2017”. We found as a fact that there was no such withdrawal: even the claimant’s contemporaneous email (set out in paragraph 22 above) did not include a description of an express withdrawal by Mrs Ward of the offer of an interview. At most, there was a failure by Mrs Ward to interview the claimant. We considered the claim on the basis that that was the subject of the claim of direct disability discrimination.

42 Applying section 136 of the EqA 2010 to the claim of direct discrimination through a failure to interview the claimant, we considered that there were two factors which could be relied on as justifying the conclusion that one or more of the respondents treated the claimant less favourably because of her disability, and they were these:

42.1 the fact that the first respondent did not immediately withdraw the advertisement for the post of Payroll & Accounts Officer, as described in paragraph 28 above, and

42.2 the fact that the respondents did not in the event interview the claimant despite having (through Mrs Ward) initially invited her to an interview.

43 We then asked ourselves whether Mr and Mrs Ward (or either of them) had been to any extent motivated (in the sense discussed in paragraphs 82-86 of *Unite the Union v Nailard* [2017] ICR 121) by the claimant’s disability. We accepted that the fact that the claimant had, or might have, a disability was in the mind of Mrs Ward when she spoke to the claimant in her second conversation of 2 March 2017, if only because Mrs Ward’s evidence was that the claimant had during that conversation asked about disabled access and said that she used a walking stick.

44 Mrs Ward was adamant that she would not treat anyone differently because they were disabled. As noted in paragraph 32 above, she said that she loved people, and that was why she was in the recruitment business. She said also that it would be contrary to her own interests to treat disabled people less favourably because they were disabled. We accepted that those statements could be simply self-serving, but we accepted also that it was true that she had a commercial interest in not treating disabled persons less favourably because they were disabled, in that she (i.e. via the first respondent) would receive a fee if she placed a disabled (as with any other) candidate in a client’s employment.

45 We therefore stood back and asked ourselves whether or not either Mr Ward or Mrs Ward was to any extent, even unconsciously, motivated against the claimant because of her protected characteristic of disability.

46 As indicated in paragraphs 19-21 above, we accepted that Mr and Mrs Ward decided for reasons other than the claimant’s disability not to interview her for the post of Payroll & Accounts Officer. We also accepted that Mrs Ward was on 2 March 2017, even after her second telephone conversation with the claimant,

intending at some point to interview the claimant in order to be able to put her forward as a candidate for posts with clients of the first respondent. We concluded too that if the claimant had replied to Mr Ward's email of 6 March 2017 and asked to be interviewed at a place other than 1a Station Road, Didcot, then Mrs Ward would have interviewed her, as a potential candidate for clients of the first respondent. We also concluded that that did not happen because of the failure by the claimant to respond to that email. However, those things were not conclusive.

- 47 In any event, having heard and seen Mr and Mrs Ward give evidence, and having thought carefully about their motivation, we were satisfied on the balance of probabilities that neither of them was to any extent motivated by the claimant's disability.
- 48 Thus, the claim of direct discrimination because of the claimant's disability does not succeed.
- 49 As for the claim of a failure to make a reasonable adjustment, the only aspect of that claim which was pressed by the end of the hearing before us was that the claimant was required to be interviewed at 1a Station Road, Didcot. The email exchange of 6 March 2017 at pages 63-64 showed that there was an apparent misunderstanding by the claimant about the location of the interview and the place at which the job for which she had applied would be carried out. Thus, Mr Ward's email of 6 March 2017 reasonably pointed out the difficulty of accessing the first respondent's offices at 1a Station Road. It was in our view reasonable to await a further communication from the claimant, and while a claimant is not required to identify steps which it would be reasonable to take, the fact that the claimant did not respond to Mr Ward's email of 6 March 2017 or call him or Mrs Ward to discuss the interview and where it might take place meant in our view that there was no failure to make a reasonable adjustment in regard to the interview.
- 50 As for the claim of a breach of section 15 of the EqA 2010, we concluded, as stated in paragraph 41 above, that there was no withdrawal of an interview. There was therefore all the more clearly no withdrawal of a job offer. Thus, the claim of a breach of section 15 as pleaded had to fail. We saw that there was (at best from the point of view of the claimant) a failure to interview the claimant, but given that the claimant failed to respond to Mr Ward's voicemail message and email of 6 March 2017, it was a little difficult at first sight to see how it could be said that the first respondent had in the circumstances as a result treated the claimant unfavourably because of something arising in consequence of her disability. That, though, was not how the claim was advanced, and we therefore heard neither evidence nor submissions on a claim under section 15 on that basis.
- 51 In any event, for all of the above reasons, no part of the claimant's claims succeeds.

Case Number: 3325710/2017

Employment Judge

Date: 10 / 4 / 2018

Sent to the parties on:

.....
For the Tribunal Office