# EMPLOYMENT TRIBUNALS

**BETWEEN**

| **Claimant** | **Respondent** |
|---|---|
| Miss N V Heywood | Marks and Spencer Plc |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**HELD AT Manchester on 21 June 2018 and 1 August 2018.**

**EMPLOYMENT JUDGE** Warren
**MEMBERS** Ms CS Jammeh
Mr AJ Gill

Representation
Claimant: Ms Parker, Solicitor
Respondent Ms Balmer, Counsel

**JUDGMENT**

The claims of sex and disability discrimination and harassment brought under the Equality Act 2010 are not well founded and are dismissed.

## REASONS

Background and Issues

1. The claimant brings claims against the respondent under the Equality Act 2010. ("EqA 2010").

2. She alleges:-
   Direct discrimination on the grounds of sex contrary to s.13
   Direct discrimination on the grounds of disability contrary to s.13
   Indirect sex discrimination contrary to s.19

Discrimination arising from disability contrary to s.15
Harassment related to sex contrary to s.26
Harassment related to disability contrary to s26 and
Health enquiries under s. 60

The Evidence

3. We heard evidence from the claimant, and her husband, Mr M Wharton, on her own behalf and from Ms. M Alili (customer service assistant); Mr D Letherman (section manager); and Ms. J Weston (store manager), on behalf of the respondent.

4. We preferred the consistent evidence of the respondent witnesses. We found that the claimant and her husband were neither consistent with their statements, nor in the case of the claimant, consistent with her earlier written statements. In particular, in her complaint to the respondent on 4 September, she stated that she reflected on her interview, on her walk home and believed that it had gone well. In her witness statement and in cross examination, she alleged that she had walked home crying and deeply upset. In her witness statement she asserted that Mr Letherman asked her inappropriate questions relating to her childcare. She made no mention at all of that in her statement of complaint on 4 September. Perhaps most tellingly though, she and her husband gave different accounts of a telephone conversation whilst she walked home from her interview. The claimant described crying and talking to her husband. Her husband said he did not answer the phone, but rang her back hours later. The claimant alleged that she had never received an apology from the respondent (paragraph 38 and 41 of her statement). In cross examination, she admitted to receiving 3 separate apologies in writing and orally. When further challenged she asserted that they were not the right kind of apology. The Tribunal found her to be exaggerating for effect. At paragraph 27 of her statement to the Tribunal the claimant alleged she had never been treated in this way by an employer before. In fact she maintains a blog in which she described at least previous instance of discrimination in interviews, other than as alleged with this respondent. She admitted that there was at least one other, in cross examination. These are some examples, which led us to conclude that the claimant as less credible than the respondent witnesses.

5. There was an agreed bundle of documents. Page references herein relate to that bundle.

6. We have decided the case on the evidential test ‘the balance of probabilities’

The Facts

1. The respondent conceded that the claimant was a disabled person. She was born without a right arm. She wears a prosthetic right arm and by her own description has very few restrictions on everyday tasks.

2. In August 2017 the claimant applied to Marks & Spencer's for a job as a temporary customer assistant at the Macclesfield store.

3. The advertisement was for a number of temporary posts which were all less than 20 hours per week, with weekend only work. The vacancy that the claimant applied for was for Sunday working. The claimant did not declare her disability on the application form.

4. The claimant was invited for interview and attended on Friday, 1 September at 11am at the Macclesfield store.

5. Ms Alili, a customer assistant met the claimant. The claimant indicated that she preferred to shake hands left-handed due to her prosthetic arm.

6. The claimant then undertook a role-play exercise with Ms Alili at which she scored highly. She was advised that she had passed the first stage and would then move immediately to interview with Mr David Letherman.

7. Ms Alili advised Mr Letherman that the claimant preferred to shake hands left-handed.

8. Mr Letterman met the claimant and proffered his left hand. Ms Alili and Mr Letherman both noted to the claimant showed no signs of concern at his approach. The claimant in her evidence said that she was taken aback but also partly relieved. In cross examination she took a different stance, asserting that she has the right to tell people about her disability, and implying that Ms Alili should not have spoken to Mr Letherman. She made no mention about this in her complaint to the respondent on 4 September 2017, nor in her witness statement. This was not pleaded as a discriminatory act. Ms Alili remained in the interview and took notes but played no part in the interview itself.

9. After the formal pre-prepared and scripted interview, in which the claimant performed well, she was asked if she could be flexible in her working hours. She volunteered that she had two children and with adequate notice would be flexible.

10. A negative answer to this question would have not ruled her out as a candidate, it was simply information that would be used on appointment.

11. Mr Letherman then asked questions about her abilities - for example ‘can you operate a till’? ‘Would you pick up items and scan them’? ‘Can you pack bags’? And ‘can you move stock cages’? These questions were asked of all candidates, because there were a number of vacancies in store, and the answers would be used to create the best fit. They were asked after the formal interview was complete and had no bearing on whether a candidate would be appointed or not

12. As the claimant left the interview she was advised by Ms Alili that there were more interviews on the Monday and she would hear on Monday afternoon.

13. The claimant walked home, and contrary to her evidence that she rang and spoke to him on her journey home, actually spoke to her husband later in the day. She and he gave evidence that she was distressed and crying. However, the claimant’s account in her complaint to Marks & Spencer’s on 4 September (page 105) was that whilst walking home she reflected on her interview and felt that it went well and that she had answered all questions well. We find this to be the more likely account.

14. The following day, Saturday 2 September the claimant received an email from the respondent. Ms Alili had advised her HR department that the claimant had passed the selection process, and along with others in the same position asked that an ‘on hold’ email be sent to them all. This was because she had others to interview on the Monday. Mrs Alili did not know the content of an ‘on hold’ email. She simply knew that it was always sent to successful candidates when there were further interviews to be conducted.

15. In this case the claimant received it within 24 hours of her own interview, and at a time when she knew that further interviews would be held within 48 hours.

16. The email stated (page 102) that the claimant had successfully passed her assessment but unfortunately there was no suitable vacancy to offer her at that time. Her application would remain valid for 6 months and she would be contacted if the respondent felt that they had a role suited to her, however all vacancies are advertised, so if she saw a vacancy advertised that she would like to be considered for she should contact the respondent.

17. The claimant quite reasonably read this as a rejection, even before the selection process was complete.

18. Ms Alili and Mr Letherman had never seen this ‘on hold’ letter. They simply ticked one of three boxes – an offer/ on hold/ decline. All of the

successful candidates up to the end of the Friday of interviews, received the 'on hold' letter pending completion of the selection process on the Monday.

19. The HR department who sent out the 'on hold' emails had no knowledge of the content of the interview and could not at that stage have been aware of the claimant's disability or her answers to questions about flexibility in working hours.

20. On 4 September, and before she had heard further from the respondent, the claimant wrote to the respondent. She did so on the understandable but mistaken belief that her application had been rejected.

21. Her letter of complaint (pages 105 – 6) praised Ms Alili for her approach and criticised Mr Letherman's emphasis on her disability. She alleged that she had been discriminated against because Mr Letherman saw her as unable to carry out the job, from the very beginning. She asked that Mr Letherman be given training in interview techniques and that Ms Alili be thanked for being kind and fair throughout the interview and afterwards. Subject to Mr. Letherman being given training, she would like to be considered for another role. She asked for feedback and indicated that if that was inadequate, she would look to take legal action.

22. Upon receipt of the claimant's letter of complaint, the respondent placed her job application on hold until they had provided her with a response.

23. On the 11 September the store manager Ms Weston explained in an email to the claimant, that the original on hold email was not supposed to advise the claimant of a rejection, but meant to advise her that the vacancies had not yet been filled. (p.107)

24. The claimant emailed the respondent challenging these assertions.

25. On 27 September Ms Weston admitted in an email that it had been unnecessary to send the on hold email, and that it did read as though the claimant had been unsuccessful (p.113 – 115)

26. On 16 October the claimant and Ms Weston met in the café in the Macclesfield store, 6 weeks after the claimant's complaint and nearly half way through the period that would have been her temporary appointment, had the respondent not received the letter of complaint on 4 September.

27. Ms Weston was accompanied by Mr Carberry, an elected employee representative who assisted with recruitment. Ms Alili was unavailable.

28. Ms Weston did not keep notes of the meeting. The claimant wrote hers up a week later. Ms Weston did not agree with the claimant's notes. She did note however that the claimant who in evidence asserted that Ms Weston had said 'we all get discriminated against' did not mention that in her notes. Ms Weston denied making such a comment, and was not challenged by the claimant on this.

29. The claimant was offered temporary position, either Sundays only or Saturdays and Sundays. The claimant alleged that Ms Weston asserted that Sundays were steady and not too busy – implying that may be easier for an disabled person. In fact Ms Weston gave evidence that Sundays are, by the hour, in fact the respondent's busiest trading times. We accepted Ms Weston's evidence as credible. We conclude that the claimant was offered a role for the Sunday, as original advertised, or a separate available vacancy, on Saturday and Sunday ( Ms Weston's rationale being to enable the claimant to catch up the hours she had missed over the period of her complaint), her choice. She chose not to make a decision there and then.

30. The claimant indicated her intent to think about the offers and then to reply later. She had 2 further interviews available to her within 24 hours of that meeting.

31. There was no discussion about the claimant's concern over Mr Letherman's questions about flexibility, and no reference to it in the claimant's notes.

32. Ms Weston did apologise to the claimant and explained that Mr Letherman did not intend to upset her. In fact there is no credible evidence that the claimant was upset after the interview.

33. The claimant conceded in her evidence that she did receive an apology, but told her husband that she did not.

34. The claimant said that she was so distressed she felt unable to seek work, but within a month had commenced work as a modern apprentice and in fact had 2 interviews booked for the day after her meeting with Ms Weston, one of which she attended, was offered the job but rejected it in favour of attending the interview for the modern apprenticeship.

<u>The Law – as relevant to the issues in this case.</u>

Direct Discrimination

1. Section 13 Equality Act 2010 provides that a person (A) discriminates against a person (B) if, because a protected characteristic, A treats B less

favourably than A treats or would treat others. The provisions protecting those in employment are contained in section 39 in the Act.

2. Section 136 contains the burden of proof provisions namely that if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the tribunal must hold that the contravention occurred.

3. In *Igen Ltd V Wong 2005 EWCA Civ 142* the Court of Appeal considered and amended the guidance contained in *Barton v Henderson Crosthwaite Securities Ltd 2003 IRLR 332* on the previous similar provisions concerning the burden of proof.

4. (1) It is for the claimant who complains of discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful .These are referred to as " such facts"

(2) If the claimant does not prove such facts the claim fails.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves.

(4) In deciding whether the claimant has proved such facts it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inference it is proper to draw from the primary facts found by the tribunal.

(5) It is important to notice the word "could". At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage the tribunal is looking at the primary facts proved by the claimant to see what inferences of secondary fact could be drawn from them and must assume that there is no adequate explanation for those facts. These inferences can include any inferences that may be drawn from any failure to comply with any relevant code of practice. It is also necessary for the tribunal at this stage to consider not simply each particular allegation but also to stand back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.

(6) Where the claimant has proved facts from which inferences could be drawn that the respondent has treated the claimant less favourably on the proscribed ground, then the burden of proof shifts to the respondent and it is for the respondent then to prove that it did not commit, or as the case may be, is not to be treated as having committed that act.

(7) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities that the treatment was in so sense whatsoever on the proscribed ground. This requires a tribunal to assess not merely whether the respondent has proved an explanation for such facts, but

further that it is adequate to discharge the burden of proof on the balance of probabilities that the proscribed ground was not a ground for the treatment in question.

(8) Since the facts necessary to prove an explanation will normally be in the possession of the respondent, a tribunal will normally expect cogent evidence to discharge that burden of proof. In particular a tribunal will need to examine carefully explanations for failure to deal with any relevant code of practice.

*5.* The Tribunal has applied the guidance offered by the Employment Appeal Tribunal in *Laing v Manchester City Council 2006 IRLR 748* and *Network Rail Infrastructure v Griffiths-Henry 2006 IRLR865.* The reasoning in the former decision has now been approved by the Court of Appeal in *Madarassy v Normura 2007 IRLR 246 CA.*

6. The Tribunal has considered the guidance contained in the statutory Code of Practice.

Discrimination arising from Disability s.15 EA 2010

7. A person (A) discriminates against a disabled person (B) if
   (a) A treats B unfavourably because of something arising in consequence of B's disability and
   (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

   It is for the claimant to establish that there has been unfavourable treatment and that the reason for such treatment was something arising from her disability. The burden of proof would then shift to the respondent to justify the treatment as a proportionate means of achieving a legitimate aim.

Indirect Discrimination

8. Section 19 EA 2010

(1) A person (A) discriminates against another (B) if A applies to B a provision, criteria or practice which is discriminatory in relation to a relevant protected characteristic of B's

(2) For the purposes of ss(1) a provision criteria or practice is discriminatory in relation to a relevant protected characteristic of B';s if:-
   (a) A applies, or would apply, it to persons with whom B does not share the characteristic
   (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
   (c) it puts or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

9. The claimant must establish that any provision criteria or practice ("PCP") would place individuals with a disability at a particular disadvantage compared to others – *Eweida v British Airways [2010] ICR.890*. The tribunal must then consider whether she has been placed at a particular disadvantage.

Harassment.

10. Section 26 EA 2010

(1) A person (A) harasses another (B) of –
(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

*Richmond Pharmacology v Dhaliwal [2009] ICR 724*
There are three elements to be considered in turn
Did the respondent engage in unwanted conduct?
The conduct must be such as can be said to have the purpose or effect set out in s.26 (1) (b) (i) and or (ii)
The conduct must be related to a protected characteristic.

Health Related Questions.

11. Section 60 EA 2010
(1) A person (A) to whom an application for work is made must not ask about the health of the applicant (B)-
(a) before offering work to B or
(b) where A is not in a position to offer work to B, before including B in a pool of applicants from whom A intends (when in a position to do so) to select a person to whom to offer work
(6) This section does not apply to a question that A asks in so far as asking the question is necessary for the purpose of –
(b) establishing whether B will be able to carry out a function that is intrinsic to the work concerned.

<u>The Submissions</u>

12. The respondent supplied written closing submissions, and addressed the Tribunal as well. The written submissions were longer than this judgement

and deal in detail with the law and evidence. The Tribunal has read and considered everything that Counsel for the respondent wrote and said. It is neither proportionate nor necessary to repeat the detail of the submissions here. The Tribunal agreed with the respondent on all of the submissions made on the law, and has dealt with the submissions on the evidence in the conclusions.

13. The claimant's solicitor asserted that that she had met the requirement for a prima facie case on all allegations, shifting the burden of proof to the respondent. There were no records of adequate training for the interviewers. The interviewers accept that flexibility was discussed, and questions asked about capability even if they say the questions were not relevant to appointment. The claimant was actually rejected by email on 2 September before the rest of the interviews had taken place – that must be because of her disability or sex. Ms Weston was advised to offer her a job, to silence the claimant, having seen her blog. The meeting led to further discrimination with Ms Weston suggesting Sunday work, when the shop was less busy. The job offer on 16 October was not meaningful and was delayed from 4 September because she had complained. All of the claimant's detailed submissions were considered by the Tribunal. In summary it was asserted that she had told the truth, and having done so the respondent could not justify any of their conduct.

Conclusions

14. Direct, indirect and harassment on the grounds of the claimant's sex.

15. These issues revolve around the questions asked about flexibility in the claimant's interview. Having heard the evidence we are satisfied that whilst the claimant was asked if she could be flexible if offered additional work, this was not in itself discriminatory, but simply a means of knowing if she would be interested in additional hours should they be available. It was the claimant who volunteered information about her children. The discussion was calm and friendly, and concluded with the claimant indicating that given sufficient notice she would be happy to work extra hours. She did not object to the conversation at the time, nor in her formal letter of complaint, or at the meeting on 16 October. This was raised for the first time in her ET1.

16. Direct discrimination

17. We conclude that the claimant's application was actually rejected. The on old letter made it clear that she had not been selected for a current vacancy. This was unfavourable treatment. She had scored highly. Ms. Alili expected her to be offered a job at the end of the selection process on

4 September. It was sent by a department who did not know that she had children. All of the successful candidates from the interviews on 1 September were sent the same letter. It was the normal business practice of the respondent. It was not sent because of her sex, but because of the fragmentation of the process in an organisation where one hand did not know what the other was doing.

18. The 'on hold' email was sent from a department which had no knowledge of the claimant's children and could not therefore be said to be because of her sex. The 'on hold' email was the option always used by the respondent for successful candidates pending completion of the selection process regardless of their sex. The evidence was that Ms. Alili asked for the on hold letter to be sent to all of the successful candidates, she did not select by sex in so doing. She did not appreciate the way in which the letter could be understood, as she had never seen its contents. There was therefore no unfavourable treatment on the basis of the protected characteristic of sex.

19. Indirect discrimination

20. The PCP alleged was the practice of asking questions about childcare. The Tribunal found as a fact that no such questions were asked. When asked about flexibility the claimant volunteered information about her children, which was duly noted by Ms. Alili. It was clear that the information given by the claimant was simply a justification on her part for the answer she gave, which was that she could be flexible. We believed the respondent witnesses when they confirmed that such answer would be of interest to them only when the claimant became an employee in any event. That being the case it has not been necessary to consider the issue of disadvantage or justification.

21. Harassment

22. The claimant was not asked questions about her children – she volunteered information about them. She did not complain at the time, nor in her email on 4 September, nor in the interview with Ms. Weston. We have concluded that the claimant's account in this regard was not credible. We do not therefore find that she has shown on the balance of probabilities that she was harassed by the respondent such that the respondent needs to justify any of its conduct.

23. Direct discrimination and harassment on the grounds of disability, discrimination arising from disability.

24. Direct discrimination

25. The claimant's job application was in fact rejected despite her passing the selection process. However our conclusions in this regard mirror those set out in paragraph 17 and 18 above. The HR department did not know of the claimant's disability,(and could not have found the same from her application form) and simply sent the on hold letter to all successful candidates. There was therefore no unfavourable treatment based on the claimant's disability.

26. At the conclusion of the meeting to resolve the claimant's complaint, Ms. Weston made a genuine offer of employment on the terms under which she had applied, which she did not accept. There was no unfavourable treatment because of her disability.

27. Discrimination arising from disability

28. The Tribunal found that the only questions asked of the claimant related to her general abilities, and were asked of all candidates, so as to place them in the best fit for the organisation. The claimant's assertions to the contrary were not credible, and were a misinterpretation at best, and more likely, an exaggeration of the facts. It was noted that the claimant did not object at the time, and her evidence about her reaction at the end of the interview was simply not credible. We found the respondent's account that these questions had no bearing on appointment, were asked of all candidates, were not asked in the emotive way suggested by the claimant, and were not asked because of her disability, to be entirely credible.

29. Harassment because of disability

30. There are two issues here – the questions asked about the claimant's ability and Ms. Weston's comments about Sunday working on 16 October.

31. Dealing with Mr Letherman's questions about ability (and here we deal with the section 60 EA 2010 issue as well).

32. We have found as a fact the claimant was simply asked if she could operate a till, pick up and move shopping, pack shopping, and use a stock crate. Questions which were asked of all candidates. We find that the questions were asked to enable Mr Letherman to place successful candidates in the right role – matching strengths to business needs.

33. If the claimant felt harassed she did not say so, nor showed any signs. Her account that she was distressed after the interview is discredited by her own account in her letter of complaint, and by her husband's account, that they did not speak immediately afterwards but sometime later. Mr Letherman, on his credible account did not deliberately offend the

claimant, nor intend to violate her dignity, offend humiliate or degrade her. Indeed we also conclude that the questions asked were inoffensive, and in line with the questions asked of all. We agree with the respondent's view, that the claimant was excessively sensitive. We take into account that at this stage the interviewer and his scribe believed her to be a very high performing candidate. Mr Letherman did not harass the claimant.

34. In that regard we turn now to the issue of section 60. As a fact we do not find that the claimant was asked any questions relating to her health or disability. There was certainly no reliance on any such perceived question. The respondent believed that the claimant was a very high performing candidate. The only reasons she was not offered the job immediately was because there were other candidates to be seen on the following Monday, and then because she had lodged a complaint. The respondent attempted to resolve the complaint, and at the same time offered her weekend work, or Sunday work, in the terms of the original advertisement. Ms. Weston did not discuss whether the claimant would cope, as alleged, nor would she have suggested Sunday was a steady day, when it is the store's busiest day.

35. We would comment that the use of the 'on hold' letter is unfortunate as it would mislead any candidate in circumstances where the selection process is only undertaken over a matter of days. We were pleased to be advised that the respondent has ceased its use in these circumstances.

36. In conclusion we find that none of the claims were well founded and they are dismissed.

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Employment Judge Warren

Signed on 27 October 2018

Judgment sent to Parties on

30 October 2018