



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr D Bryce

Respondent

1. Capita Business Services Limited
2. L Hodgson
3. A Roberts

REASONS

HELD AT Manchester on 1 October 2018.

EMPLOYMENT JUDGE Warren

Representation

Claimant, in person

Respondent: Mr M Brain, consultant

REASONS

A judgement having been promulgated in this case, reasons have been requested by the respondent.

1. The Issues:-

- 1.1 The issue which was agreed at the start of the hearing was whether any or all of the respondents in this case had actual or imputed knowledge of the claimant's disability for the purposes of his claims of direct, indirect discrimination and a failure to make reasonable adjustments.
- 1.2 It was agreed that the claimant was, at the material time a disabled person by reason of his condition of depression.
- 1.3 If there was no knoweldge or imputed knowledge should the case be struck out as having no reasonable prospects of success

2. The Evidence

3.1 I heard from the claimant in person and from Mrs Hodgson on behalf of the respondents.

3.2 There was an agreed bundle of documents to which page references herein refer.

3.3 I preferred the evidence of Mrs Hodgson to that of the claimant. The claimant accepted in cross examination that he had not told the truth on his application forms to the respondent. He then expanded his evidence to include information about the way in which he took daily medication, which he had not included in his claim, further and better particulars of claim or his witness statement. Even allowing for the fact that the claimant was representing his own interests, this was a surprising omission. Mrs Hodgson gave evidence in accordance with her statement, was unshaken in questioning and provided thoughtful and credible accounts of what had happened. I tested the evidence against the civil test, the balance of probabilities.

3. The Law

Section 15 (2) Equality Act 2010 – ss(1) of section 15 of the Equality Act 2010 does not apply if the employer shows that it 'did not know, and could not reasonably have been expected to know' of the employee's disability. There is no explicit duty to enquire about a person's suspected or possible disability, but the EHRC Employment Code does state that an employer must do all it can reasonably be expected to do to find out if a person has a disability.

4. The Facts

4.1 The claimant is a very highly experienced Human Resources professional who had been head of HR for a very large international organisation. His CV described a remarkable success rate at supporting the organisation in Employment Tribunal claims. He was made redundant and there followed a 10 month job search.

4.2 The claimant applied for a lower grade job with the first respondent, and after interview, was appointed. He worked to Mrs Hodgson, his line manager. He was placed on 6 months' probation.

4.3 The claimant accepted that before he was employed by the respondent he failed to declare in his application that he had a long term depressive illness. He further failed to declare on appointment, on a health form, that he had a long term prescription for anti-depressants. He declared he was not disabled (and genuinely believed that to be the case at the time).

- 4.4 During the probationary period Mrs Hodgson had a very structured approach to reviews. There were discussions 4 or 5 times a week when holidays did not intervene and there was a structured monthly meeting to review his progress and give feedback. In the feedback the claimant was required to indicate how he felt about the process and his manager. Mr Bryce gave her glowing feedback, but at the Hearing alleges that he lied about it and actually thought very little of her. This was thus a dishonest relationship created by him.
- 4.5 It is really unfortunate that the claimant did this, Mrs Hodgson is not only CIPD qualified but also has specialist knowledge of handling mental health issues, and could have been a real support to the claimant.
- 4.6 The claimant had actually asked his GP for counselling, before he commenced work with the first respondent
- 4.7 The claimant began counselling in the middle of his probationary period, and came into work late following it, on the Monday morning on which Mrs Hodgson returned from annual leave. She explained in her evidence that she was not concerned about his late arrival as she knew that he worked hard, and longer hours than he was contracted for. She did however ask him where he had been and he indicated that he had started counselling in relation to issues she would understand because of her jury service. Mrs Hodgson had been on jury service and had dealt with 2 cases of child abuse. She naturally assumed therefore that he was having counselling for issues that had arisen from his childhood.
- 4.8 Later the same day Mrs Hodgson and the claimant met in a private room for a review. At this meeting the claimant asserted that he was 'chasing demons' from his last dismissal. The claimant repeated this assertion in an email. The issue to be decided today is whether Mrs Hodgson and the other 2 respondents should have been able, from those two comments to have knowledge of an existing disability of depression, should they have known it was a long term condition and that it had a substantial adverse impact on day to day activities.
- 4.9 The claimant agreed that he came to work every day, and that he completed the work given to him to a better or lower standard. He felt he was micromanaged. I remind myself that he was on probation, and that a number of quite serious issues arose from his work in the style in which he worked and the quality of his work. The claimant accepted that his work deteriorated over the 6 month probationary period. Mrs Hodgson felt his style of work was not as collaborative as the company would have wanted. She believed at the outset that this was

simply a different way of working, but as time passed the claimant did not change and she became more concerned.

- 4.10 The claimant asserts that the deteriorating work, comments about 'chasing demons' from his dismissal, and the fact that he was having counselling, should have alerted the respondents to the fact that he was a disabled person at the material time.

5. The Conclusions

- 5.1 I am not satisfied on the balance of probabilities that telling a line manager that you are having counselling for childhood issues is in itself sufficient to alert the manager to a disability of depression, or that further enquiries need be made. Counselling can be used for such a wide range of situations – some short term, some long term, and some of which may have no medical significance at all.
- 5.2 I am similarly unimpressed with the claimant's assertion that Mrs Hodgson should have understood him to be disabled, because he was 'chasing demons' as a result of his dismissal from his last job. This would be natural fall out from an individual being out of work for a period of time before obtaining new employment. Without anything further I do not consider it to be sufficient, to impute a knowledge of disability. I remind myself that at the outset of his employment that the claimant had several opportunities to explain that he considered himself to be a disabled person, to explain his condition of depression, and to describe his treatment. He chose rather to hide his mental state from his new employer. There was nothing in what Mrs Hodgson was told to alert her, to a possible issue beyond what she had been told. She believed she had a good relationship with the claimant, that there was mutual trust, and no reason to think he was lying to her within that relationship.
- 5.3 I therefore conclude that the respondents did not have actual or imputed knowledge of the claimant's depression, and hence his disability, at the material time in this case.
- 5.4 Without that knowledge or imputed knowledge, the claimant's case against his employer fails as no duty arises under section 15 EqA, Section 13 EqA and under indirect discrimination, applying the judgement of Mr Justice Elias in *Eweida v British Airways plc* 2009 ICR 303 (EAT). An employer cannot be expected to consider the potential discriminatory impact of its policies on beliefs it knows nothing about. This would equally apply to knowledge of disability for the purpose of an indirect discrimination claim.
- 5.5 I therefore conclude that the claimant's claims have no reasonable prospect of success.

Employment Judge Warren
9 January 2019

JUDGMENT SENT TO THE PARTIES ON

11 January 2019

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FOR THE TRIBUNAL OFFICE

