EMPLOYMENT TRIBUNALS

Claimant: **Mr A Kumar**

Respondent: **Department for Work and Pensions**

HELD AT: **Leeds** **ON: 28 November 2018**

BEFORE: Employment Judge J M Wade

REPRESENTATION:

Claimant: **In person**
Respondent: **Miss R Mellor (counsel)**

Note: The written reasons provided below were provided orally in an extempore Judgment delivered on 28 November 2018, the written record of which was sent to the parties 29 November 2018. A written request for written reasons was received from the claimant on 7 December 2018 and referred to me on 27 December. The reasons below are now provided in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 28 November 2018 are repeated below:

JUDGMENT

The claimant's complaint of victimisation is dismissed, there being no reasonable prospects of it succeeding.

REASONS

Introduction

1. The claimant notified ACAS on the 7th of August 2018 of a matter arising between the parties and a certificate was issued on 8 August. He presented his claim to the Tribunal on 7 September 2018.

2. The events about which he complains are very clearly set out in his claim form and for reasons which will become apparent I record them in their entirety here.

   "*I had applied for vacancies for Administrative Officer DWP operations/Birmingham job reference number 1582602 and Executive Officer DWP operations/Birmingham job reference number 1582609 in May 2018.*

   After completing the necessary formalities and meeting other application requirement as per job advertisement eg obtaining acceptable scores in online tests I was duly invited to attend interviews for both the vacancies at Birmingham on 24 May 2018 in the afternoon.

   That upon turning up for attending the interviews at the venue DLA Child Centre, Five Ways House, Islington Row, Middleway, Edgbaston, Birmingham B15 1SL I was prevented from appearing at the said interviews on the orders of a senior manager despite having met the conditions and requirements set out in the job advertisements.

   Then on 8 June I received identical emails for both jobs stating that my application for both posts had been unsuccessful as I didn't attend my interview for these posts which was completely untrue given the fact that I had actually turned up at the interview venue at Birmingham on the interview date but was prevented from attending my interviews.

   Most significantly this unlawful act of preventing me from attending my interviews was carried out at a time when I had already performed the protected act of bringing a claim of disability discrimination against the same department ie Department for Work and Pensions in the Employment Tribunal at Manchester."

3. The "legal label" that the claimant attached to his complaint is set out at page 6. He ticks the box, "I am making another type of claim which the Employment Tribunal can deal with", and "claim of victimisation" is, quite properly, the entry.

4. The respondent entered a robust response defending the claim on 9 October 2018. This case was listed, as ordinarily would be the case, for a case management hearing. An Employment Judge subsequently reviewing the claim and response decided that it was appropriate, given that the response suggested the claim had little prospects of success on the facts, there be a public preliminary hearing. The case management hearing fixed for 1 November was postponed in order for today's public hearing to be convened. The notice for that hearing said as follows:

   "Employment Judge Lancaster has directed that there will be a preliminary hearing to consider whether the claim has no or little reasonable prospect of success and only if appropriate will case management orders then be made".

5. There was, subsequent to that notice of hearing, correspondence from the claimant indicating that he would wish the preliminary hearing be heard at the Sheffield Employment Tribunal, and he provided to the Tribunal the respondent's open letter indicating an application for costs in relation to his pursuit of this claim, the respondent relying on its grounds of response in that respect. The letter said: "*I believe your claim as pleaded has no reasonable prospects of success. There is clear documentary and witness evidence that your applications… were withdrawn by the recruitment team on the basis that they knew you would have failed the required DBS check due to your live criminal conviction, and not because of any knowledge of your discrimination proceedings. On the evidence,*

it is not credible that you were not aware of this when your brought your claim. You were informed of the real reason that the vacancies were withdrawn by telephone on 23 May 2018 and by letter dated 23 May 2018….Furthermore I believe your claim is vexatious, as it is the second Tribunal claim you have brought against the Respondent for being unsuccessful in obtaining a job, despite the fact that in each case the respondent has clear evidence that you were unsuccessful due to a failed DBS check."

6. The claimant's request for this preliminary hearing to be heard in Sheffield was made on the basis that there is digital recording of Tribunal hearings in Sheffield and that would enable him to be certain about the events in the hearing as they took place.

7. That was a reasonable application for a litigant in person to have made, but the request was refused not least because of the judicial resources and the capacity of the Employment Tribunal in Sheffield in accommodating a request for the transfer of a hearing. The claimant did not set out that the request was being made on grounds of disability, but, as confirmed today, because of mistrust in the fairness of the Tribunal.

8. That request was refused by Regional Employment Judge Robertson, who also addressed the claimant's concerns of apparent bias, including in the Tribunal's notice for this public preliminary hearing. The claimant was informed that the notice simply reflects the language of the Employment Tribunal's rules, and in particular Rules 37 and 39.

9. At the start of this hearing the claimant was clear to me, as he had indicated in previous correspondence, that because of his concerns of bias, and perhaps also because of a concern that the hearing would not be subject to electronic recording, he was not willing to participate. His words were: "Ma'am, I decline to speak in this biased, illegitimate hearing lest it be said I legitimise it through my participation". He was subsequently able to clarify a couple of points in response to my questions, albeit I sought to respect his wish to say little. For example, he made it very clear to the Tribunal in a closing statement that he considered that the respondent's letter notifying its intention to apply for costs against him was very unwelcome.

Issues

10. In these circumstances, the Tribunal exercises its discretion as to whether to proceed with a hearing, to adjourn (possibly to secure a transfer to Sheffield), or to strike out the claim in circumstances which appear to me to be akin to absence (Rule 49).

11. My exercise of discretion has been to proceed with the hearing on the basis that the facts that I have relayed, set out in the claimant's claim form, are taken as read, and at their highest (in fact they were not in dispute). I have done so when I might equally have proceeded within our rules if the claimant had given the same reason as a reason for absence (that the Tribunal is biased). It seems to me that the expense to the tax payer (be it funding the Tribunal or the respondent's costs) are not best served, nor is the overriding objective served, by delay and adjournment and yet further cost. A sense of bias, whether misplaced or not, is like trust lost: it is unrealistic to think that delay will repair it.

12. The only real issue then becomes the extent to which the undisputed facts could give rise to any inference, suggestion or "something plus" to suggest that the reason for the withdrawal of the opportunity to take part in an interview on 24 May was at all influenced by the claimant's protected act in bringing proceedings in the Manchester Employment Tribunal, taking into account the other undisputed facts which appear in the response. Can it be said the claimant's case has little or no reasonable prospects of success at this stage?

13. The narrative in his claim form does disclose one fact which appears, at first sight, odd: it was untrue for the respondent to write to him and record, as it did, that the reason to no longer progress his participation in interview was because he had not attended that interview. Clearly, he had attended on the day required; he was not permitted to participate and was asked to leave. The reason for sending a false communication might, or might not, generate an inference about a real reason for not permitting participation further in the recruitment process.

Evidence

14. For the reasons above, I was not able to hear oral evidence from the claimant, nor was the respondent's counsel in a position to ask him questions about his case. On the other hand the respondent relied on witness statements from Mr Brown, who was responsible at the time for liaising with the government recruitment service ("GRS") and also its third party supplier, Capita, for the purposes of DBS and other checks, and from Ms Schwan, who took the decision not to permit the claimant's applications to proceed further. I also had a bundle of the relevant documents prepared by the respondent and copies of relevant documents from the claimant. Given the concise nature of the case, I had the material that would have been available at a final hearing, albeit no orders for disclosure had yet been made.

Undisputed summary

15. The undisputed facts, not all of which were included in the claimant's claim summary, but which the respondents witnesses and documents confirmed, were as follows.

16. In 2017 the claimant had applied for an Executive Officer post with the respondent in Blackpool, for which he had been unsuccessful following a disclosed unspent conviction. He brought Employment Tribunal proceedings in connection with those matters.

17. The claimant then applied for a post in Birmingham in 2018 (Vacancy A), and was made an offer, subject to satisfactory pre-employment checks, on 6 April 2018; the pre-employment checks were then underway including a "DBS" check. The vacancy was for a post in the Disability Living Allowance Child Service Centre.

18. In early May the claimant then applied for two more posts (numbered "..602" and "..609" respectively) - Vacancy B and Vacancy C in the same centre (although advertised as generic posts). He was invited to interview at the Centre. In the meantime, Mr Brown, also involved in following up the pre-employment checks on Vacancy A, learned from Capita of the previous disclosure of a conviction and sought a copy of that, dated 14 March 2018, (the disclosure was from Disclosure Scotland), which was emailed to him on 22 May 2018. He referred the disclosure to Ms Schwan, who had authority to conduct a risk assessment required for the

respondent's processes; she decided to withdraw the offer for vacancy A and recorded her decision was "due to previous unspent conviction..".

19. On 23 May Mr Brown realised the claimant was due to attend for interview for vacancies B and C (they were Administrative Officer and Executive Officer supporting the same department as Vacancy A). Ms Schwan then telephoned the claimant to tell him that the offer was withdrawn for Vacancy A, the reason (as above) and that Vacancies B and C would also be withdrawn and he need not attend for interview the next day. She advised the reason for withdrawing B and C was that although checks had not been completed they would disclose the same conviction. Ms Schwan then sent the claimant a letter confirming these matters. She was the relevant operations manager, with sufficient seniority to take such a decision.

20. These are the circumstances before which the claimant was turned away when he attended for interview, first by the receptionist and then by Mr Brown on 24 May. The claimant then told Mr Brown of his proceedings concerning the 2017 application.

21. On 25 May GRS sent an email to the claimant confirming the Vacancy A offer had been withdrawn.

22. Mr Brown then included the claimant wrongly in lists of candidates who had not attended for interview in respect of vacancies B and C on the respondent's system, such that the claimant was sent two emails by GRS on 8 June and 11 June respectively telling him that his applications had been withdrawn for that reason (namely non attendance at interview).

The respondent's explanation for the 8 and 11 June emails

23. Mr Brown's sworn evidence was that he had already talked to the claimant on 24 May and set out the more detailed circumstances in which the interview was withdrawn. Including the claimant's name and candidate number in a list of others who had not attended for interview was pragmatism on his part, simply to be able to get the results out as quickly as possible, and nothing more than that, because of the way the respondent's systems worked. He accepted his communications to GRS were not an accurate representation of the circumstances in the claimant's case. He was in error, he accepted.

The reason why question

24. I also heard sworn evidence from Ms Schwan. She took the relevant decision having never had to take such a decision of this kind before. She told me she took the decision not to progress the claimant's appointment without knowledge of the distinction between a spent or unspent conviction. Risk assessing the conviction information that she had, from March 2018, she considered that it was a risk to the respondent to progress the claimant's employment, given that the post holder, if appointed, would, in dealing with Disability Living Allowance claims, have access to detailed information and personal information about families and their children. She had no knowledge of the claimant's previous proceedings when she made that decision, and nor did Mr Brown.

Consideration and discussion

25. In these circumstances, I have to accept the facts in the claimant's claim form as they stand, and without having the opportunity to understand from him whether

there are any other different, or further facts, upon which he relies to challenge the evidence recorded above. I have asked questions of the two witnesses which, had the claimant had a representative, that representative might have asked. I have had the opportunity to hear directly from those whose minds would need to be established to have been influenced by knowledge of the Manchester Tribunal claim, in order for his claim to succeed. Taking into account the undisputed chronology and the matters above, there are no reasonable prospects of the claimant establishing that knowledge or influence in these circumstances. It is difficult to envisage what further evidence might be available at a full and final hearing, other than the claimant's own evidence or perspective on these matters. That perspective might alert the Tribunal to a number of other matters, for example in relation to whether the wrong rules have been applied by a third party supplier concerning whether the conviction was spent or unspent, but, it seems to me, such matters can have no prospect of relating to the "reason why" question in these circumstances.

26. For these reasons and applying Rule 37, the claimant's complaint that "this unlawful act of preventing me from attending my interviews" was an act of victimisation within the Equality Act section 27", has no reasonable prospect of success and is dismissed today. There is no prospect of the claimant demonstrating that the prevention was, because of, or materially influenced by, his previous bringing of Equality Act proceedings in the Manchester Employment Tribunal.

Employment Judge JM Wade

Date 14 January 2019

REASONS SENT TO THE PARTIES ON

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