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EMPLOYMENT TRIBUNALS

Claimant: **Mr. V Pareek**

Respondent: **Department for Work & Pensions**

Heard at: **East London Hearing Centre**

On: **7 – 8 November 2018**

Before: **Employment Judge Ferguson**

Members: **Ms. M Long**
Mrs. P Alford

Representation

Claimant: In person

Respondent: Ms L Robinson (Counsel)

JUDGMENT having been sent to the parties on 12 December 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

INTRODUCTION

1. The Claimant has brought four separate claims against the Respondent. The first claim (3200788/2016) was presented on 27 August 2016 and subsequently dismissed upon withdrawal. The second (3201254/2017) was presented on 30 September 2017 and was also dismissed upon withdrawal. They both included complaints of disability discrimination. This judgment relates to the third (3201614/2017) and fourth (2200477/2018) claims presented on 28 November 2017 and 9 February 2018 respectively. Following a preliminary hearing on the 3 May 2018, all of the complaints in

Claim 3 were struck out by a judgment sent to the parties on the 9 July 2018 except for a complaint of victimisation (set out below) and a complaint of unauthorised deduction from wages.

2. At a preliminary hearing on 10 September 2018, Employment Judge Jones noted that Claim 4 was identical to Claim 3, except for a number of new allegations made against Civil Service Resourcing ("CSR", formerly Government Recruitment Service). The claim against CSR was rejected because the Claimant had not obtained an early conciliation certificate in relation to CSR. Employment Judge Jones rejected the Claimant's application for reconsideration of that decision.

3. The Claimant confirmed at the start of the hearing that there was no separate complaint of unauthorised deduction from wages; the claim for loss of wages arose from the victimisation complaint. The consequence is that the only live complaint to be determined is the victimisation complaint made in Claim 3 (repeated in Claim 4) against the Respondent relating to the process of pre-employment checks for the Claimant's promotion to his current role in the Home Office.

4. The agreed issues to be determined are as follows:-

4.1 The Respondent accepts that the Claimant did protected acts by presenting his first three Employment Tribunal claims.

4.2 Did the Respondent subject the Claimant to a detriment by failing to provide sickness absence details in September/October 2017 to allow pre-employment checks to be completed for the Claimant's new role in the Home Office?

4.3 Was any such detriment because the Claimant had undertaken a protected act?

4.4 (Relevant only to remedy) But for the victimisation, when would the Claimant have been appointed to his role in the Home Office and what would his salary have been?

5. We heard evidence from the Claimant and, on behalf of the Respondent, from Michelle Peacock and Peter Morgan.

THE LAW

6. Sections 27 and 136 of the Equality Act 2010 ("EqA") provide:

> **27 Victimisation**
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because--
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act--
> (a) bringing proceedings under this Act;
> (b) giving evidence or information in connection with proceedings under

this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(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.

…

7. As to proving the reason for the treatment, a number of propositions have been established by Section 136 and the case law (in particular *Igen Ltd v Wong* [2005] ICR 931, CA). To summarise, so far as relevant for the present case:

7.1 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 by virtue of Section 39 of the Equality Act 2010.

7.2 If the claimant does not prove such facts he or she will fail.

7.3 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.

7.4 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 inferences it is proper to draw from the primary facts found by the tribunal.

7.5 It is important to note the word “could” in Section 136 of the Equality Act 2010. 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 a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

7.6 In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

7.7 Where the claimant has proved facts from which conclusions could be

drawn that the respondent has treated the claimant less favourably because of a protected act, then the burden of proof moves to the respondent.

7.8 Where the claimant has proved such facts, the burden of proof moves to the respondent who must show that the treatment was in no sense whatsoever motivated by the protected act.

FACTS

8. The Claimant commenced employment at the DWP on 15 September 2008. Sometime in 2017 he applied for a role in the Home Office at a higher grade. On the 28 July 2017 he was informed that he had been placed on a reserve list for the position. On 1 September he was issued with a provisional offer subject to pre-employment checks. Where a Civil Servant successfully applies for a role in another government department pre-employment checks are undertaken by CSR, previously called the Government Recruitment Service ("GRS"). For roles in the Home Office there are broadly three aspects to the process: (i) identity and right to work checks, (ii) security checks which, for the role the Claimant was offered, involved a counter terrorism check ("CTC") and (iii) checks relating to the Claimant's employment history, salary, holidays, sickness record, etc.

9. The Claimant's identity and right to work checks were completed by 6 September and GRS informed the Home Office that pre-employment checks would now commence. The first stage was for the Claimant to complete some forms, which he did by 11 September 2017.

10. Unrelatedly, the Claimant was transferred to DEFRA on 11 September 2017. This was a level transfer and does not appear to have required the same level of pre-employment checks.

11. On 19 September Laura McKeswick of GRS emailed Peter Morgan, the Claimant's line manager at DWP, requesting specific information about the Claimant's employment history and terms and conditions. This included his sickness record for the past two years. Immediately on receipt of the email Mr. Morgan telephoned Shared Services Connected Limited ("SSCL"), a contracted-out HR function used by a number of government departments including the DWP, DEFRA and the Home Office. Mr. Morgan was told that such requests for information should be sent to SSCL, so he forwarded GRS's email to them that morning.

12. There seems to have been some confusion about whether SSCL required the Claimant's permission to release the information requested. The DWP team within SSCL said that they needed the Claimant's permission and asked GRS to get the Claimant to call them. The Claimant then appears to have telephoned the DEFRA team in SSCL who said they do not need permission to respond to such request from GRS. On 27 September, Ms. McKeswick emailed SSCL (DWP) again to request the information in her original email.

13. By 5 October Ms. McKeswick had not received a response and asked the Claimant to chase up SSCL. She told the Claimant that what she was waiting for was the "staff data form".

14. On 6 October SSCL (DWP) wrote to Peter Morgan to request a reference for the Claimant. Mr. Morgan returned the reference the same day.

15. On the 9 October the Claimant asked Ms McKeswick for a copy of the staff data form so that he could chase the matter up with SSCL. She replied saying that she could not provide this because it has to go between HR departments. The Claimant therefore asked her to re-send the request to Annique Gauton at SSCL (DEFRA), the person who had sent him his contract of employment at DEFRA.

16. On 10 October Christine Davidson of SSCL sent Ms. McKeswick the document she described as the "completed checklist". It would appear that the document was missing the 2-year sickness record so Ms. McKeswick replied on the 12 October asking for that information. She also on the same day emailed the Claimant asking for his line manger's email address so that she could obtain the sickness record. The Claimant initially queried whether this was really required but when told that it was, on 14 October he emailed Ms. McKeswick setting out what he believed were the dates of his sickness absence at the DWP. He had not been off sick since the transfer to DEFRA.

17. On 28 October Gavin Wilson of GRS (now CSR?) emailed the Claimant in response to the Claimant's email of 14 October asking him to get his manager to confirm his sickness record. The Claimant replied explaining that because of his recent transfer to DEFRA his manger could only confirm his sickness record after 11 September 2017.

18. The Claimant's CTC was completed on 30 October 2017.

19. On the same date the Claimant emailed Christine Davidson at SSCL requesting details of his sickness leave for the last 12 months. The request was passed to Gareth Taylor who emailed the Claimant later that day saying that his sickness record had not been sent to CSR:

> "because we are not permitted to release absence data for the purposes of pre-employment checks. The only circumstance we are permitted to release this data is if a transfer is confirmed and it is to build a historical pay record. In addition, as far as I am aware it is unlawful to ask pre-employment questions about a person's absence history under the Equality Act 2010."

The Claimant forwarded that email on the same date to Ms. McKeswick and Mr. Wilson.

20. Ms. McKeswick emailed the Claimant on 1 November asking for his line manger's email address so that she could confirm his sickness record. The Claimant responded re-iterating the reply he had had from SSCL about sickness records and querying why the information was required when it was not requested for his transfer to DEFRA. Ms. McKeswick replied saying that she did need the information and that all departments complete different checks. She works in the Home Office pre-employment checking team and could not advise about other departments.

21. The Claimant also responded to Gareth Taylor of SSCL asking whether the DWP had sent them his absence record for the last 24 months, and asking for it to be provided to him. Christine Shann of SSCL responded on 1 November saying that their

payroll section (for DEFRA) had never received his sickness absence details from DWP.

22. On or around 5 November (the email chain is not entirely clear), the Claimant provided Ms. McKeswick with the email address of his line manager at DEFRA.

23. On 13 November Jack Holding of CSR emailed the Claimant's line manager at DEFRA requesting his sickness record for the last two years. The Claimant's line manger replied saying that he could not provide the information because the Claimant had only been with DEFRA since 11 September.

24. On 17 November, Kieran Richardson of CSR emailed the Claimant asking for the email address of his previous line manager at DWP. Later the same day Mr. Richardson emailed the Claimant again saying, "Please disregard this email as I have been able to find the information from DWP". On the same day Mr. Richardson emailed the Home Office to say that the Claimant had completed pre-employment checks and they could now contact him to agree a start date and confirm his working pattern.

25. The only witness from CRS who gave evidence to the Tribunal was Michele Peacock. Her job title is Campaign Manager and she oversees the delivery of pre-employment checking for a number of government departments including the Home Office. Her evidence was that a "staff transfer data form" was received by CRS on 17 November, which included all information except for the two-year sickness record. There is no evidence of such a document being sent or received on that date. We note that Ms. Peacock had no direct involvement in the matter and her evidence is based only on a review of the documents and correspondence, all of which is before the Tribunal. We find that the bulk of the information requested was sent to CRS by SSCL on 10 October ("the completed checklist"). The only information missing was the two-year sickness record, and that had still not been provided by 17 November. Ms. Peacock's oral evidence was that CRS decided that because the payroll provider, SSCL, was the same for all three departments, they would be able to find the information in due course and the Claimant's appointment could proceed. She did not dispute SSCL's explanation for refusing to provide the sickness record and said that the system has now been changed.

26. It appears, therefore, that all that changed on 17 November was that CSR decided to give up on obtaining the two-year sickness record. Contrary to Mr. Richardson's second email to the Claimant, he had not obtained the information from DWP. An email of 16 January 2018 from SSCL to the Claimant suggests that the sickness absence details were only obtained from DWP shortly before 16 January.

27. By the time the pre-employment checks had been completed on 17 November the Claimant had booked a four-week holiday in India from 31 December 2017. He had booked it on 21 October. Sometime in the two weeks following 17 November, the Claimant discussed his start date with the Home Office and it was agreed that it would not be sensible for him to start before his trip to India. A start date of the 5 February 2018 was agreed.

28. The Claimant says that if his pre-employment checks had been completed sooner, before the CTC clearance had been received, he would have agreed an earlier start date. He said his line manager at DEFRA was happy to release him earlier than

the 30-day notice period.

CONCLUSIONS

29. We accept that the issue about obtaining the Claimant's sickness record did cause a delay in the pre-employment checks being completed. There were three periods in particular that caused the delay. The first was between 19 September when SSCL received the request for the employment history data and 10 October when they provided the "completed checklist". This was partly because of the confusion about whether the Claimant's consent was required.

30. The second period was between 10 October when SSCL sent the "completed checklist" to CSR omitting the sickness record and 30 October when SSCL confirmed that they could not provide the information because it would be unlawful to do so. SSCL failed to respond to CSR's email on 12 October specifically asking for the two year sickness record until the Claimant chased them on 30 October. As is happens, it would appear that they did not have the sickness record at the time but that is irrelevant. Even if they had it, they would not have provided it. We also note that it took CSR two weeks (from 14 to 28 October) to respond to the Claimant's email in which he provided his own recollection of his sickness absence, informing him that he needed this to be confirmed by his line manager. This is what prompted the Claimant to chase SSCL on 30 October.

31. The third delay was between SSCL confirming that they would not provide the information on the 30 October and 17 November when CSR decided to proceed without it. That was caused by CSR attempting to obtain the information directly from the Claimant's line manager. There was more than a week for example between the Claimant providing the email address of his line manager at DEFRA on 5 November and CSR emailing him on the 13 November.

32. We find that the primary responsibility for the delay therefore lies with CSR. It had all of the employment-related information on which it eventually proceeded by 10 October. It could have been decided on 30 October, after CTC had been issued, to complete the process. Instead it decided to pursue the matter for a further 17 days before giving up and deciding to proceed without the sickness record. There is no claim against CSR but for the avoidance of doubt we note that the Claimant has not alleged that anyone in that department knew about his Employment Tribunal claims and there is no evidence that they did. They cannot therefore have been motivated by them.

33. The only way in which DWP or SSCL acting on its behalf could be said to have contributed to the delay was in the periods up to 30 October. There is simply no basis on which we could find that any delay by SSCL was motivated by the Claimant's Employment Tribunal claims. The Claimant's only evidence that anyone at SSCL was even aware of his claims is the fact that his first ET1 brought against the DWP was sent to SSCL's postal address. That is nowhere near sufficient to establish that any individuals at SSCL, and we note that there were several different individuals who dealt with this matter, were aware of the claims, let alone that they were motivated by them.

34. There was a dispute about whether, but for the delay, the Claimant would have started at the Home Office any earlier than he did. The earliest the process could have been completed was 30 October when CTC clearance was received. In light of our

findings above, it is unnecessary for us to make a finding on this issue but we consider it unlikely, if the discussions about start date had occurred 17 days sooner than they did, that the Home Office would have agreed an earlier start date in light of the Claimant's booked holiday in India.

35. The correspondence in this case paints a rather depressing picture of bureaucracy and failure of government departments or even divisions within the same contracted-out service to share information appropriately and efficiently. But there is simply no evidence that anyone involved knew or was motivated by the fact that the Claimant had brought Employment Tribunal claims. The claims are therefore dismissed.

Employment Judge Ferguson

Dated: 17 January 2019