



# EMPLOYMENT TRIBUNALS

**Claimant:** Richard Lum

**Respondent:** The Jubilee Mint Ltd

**Heard at:** Southampton **On:** 16 and 17 January 2019

**Before:** Employment Judge Housego  
Ms A Sinclair

Mr R Spry-Shute

## Representation

Claimant: In person

Respondent: Mr A Peck, of Counsel, instructed by Aldridge Brownlee, solicitors

## JUDGMENT

The claim is dismissed.

## REASONS

1. The claimant brings a claim against the respondent asserting direct disability discrimination<sup>1</sup> in the conduct of an interview for a job, which he attended at the respondent's premises on 26 September 2017, and attributes the fact that he was not offered employment wholly or partly to the conduct he asserts took place.
2. The claimant says that the last two questions in the interview were inappropriate, and affected the outcome. He says that the penultimate question was to ask if he had a disability, to which he says he replied that he suffered from anxiety and depression. He says that the last question was how much time he had off work in the last 12 months by reason of sickness, to which he replied none. The claimant was told later on 26 September 2017 that his application had not been successful.

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<sup>1</sup> S13 of the Equality Act 2010

<sup>2</sup> Section 6.

This is the only relevant date, as the claimant accepts that the respondent had no prior knowledge of anything medical about him.

3. The Tribunal heard evidence from the claimant, and for the respondent from Paul Meade who conducted the interview, and from a director of the respondent, Michael Byrne, and considered an agreed bundle of documents. It paid careful attention to the submissions made, which are reflected in the findings of the Tribunal.
4. In assessing the evidence the Tribunal has had to rely largely on its assessment of the claimant's evidence, as (entirely credibly) Mr Meade said that he had no recollection of the claimant or the interview. The claimant raised no objection until approaching Acas for an early conciliation certificate in December 2017, some 2½ months later. That is entirely the claimant's right, but does make lack of recollection entirely understandable, as Mr Meade interviewed well over 200 people in 2017. The Tribunal found the claimant largely to be a credible witness as to matters of fact, but did not find the case he built on the facts to be credible or plausible.
5. The Equality Act 2010 makes discrimination on the ground of disability unlawful<sup>2</sup>: it is a protected characteristic. If less favourable treatment is in any sense whatsoever tainted by disability discrimination the claim succeeds<sup>2</sup>. The burden of proof is on the claimant. However the burden of proof shifts to the respondent if it is shown that there are circumstances where the causation might be discrimination. The issue of inappropriate questioning is specifically dealt with in S60. It is not permitted to ask such questions (but if they are asked an individual has no cause of action for that reason alone) and asking such questions is not itself discriminatory, but S60(5)<sup>3</sup> means that for burden of proof purposes the allegation is to be treated as fact, and the respondent must show that the allegation is not true<sup>4</sup>. This is much harder for the respondent than the usual test of whether to draw an inference.
6. Even if the claimant is not disabled, he is to be treated as if he were, if that is what the respondent thought at the time.<sup>5</sup>
7. There are a series of decisions for this Tribunal to make in determining this appeal.
  - 7.1. Were the questions and answers as the claimant asserts? If no, the claim fails.
  - 7.2. If yes, is the claimant disabled by reason of anxiety and/or depression? It is for the claimant to show this, on the balance of probabilities. If no the claim fails, unless the fourth question is answered affirmatively.

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<sup>2</sup> IGEN Ltd & Ors v Wong [2005] EWCA Civ 142, Madarassy v Nomura International Plc [2007] EWCA Civ 33, Laing v Manchester City Council [2006] UKEAT 0128\_06\_2807

<sup>3</sup> (5) In the application of section 136 to the proceedings, the particulars of the complaint are to be treated for the purposes of subsection (2) of that section as facts from which the tribunal could decide that A contravened the provision.

<sup>4</sup> S136(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.

<sup>5</sup> Chief Constable of Norfolk v Coffey [2018] UKEAT ICR 812

- 7.3. If yes, did the respondent know that he had that disability?
- 7.4. If not disabled, did the respondent perceive him to have such a disability?
- 7.5. If the answer to questions 3 or 4 is yes, was the decision not to offer him a job in any sense whatsoever by reason of knowledge or perception of disability (and if the questions were asked the respondent has to prove that it was not)? As set out above the starting point is that if the Tribunal finds that the words were spoken the claimant's assertions are to be taken as fact, unless the respondent disproves them.
8. The Tribunal answers these questions as follows:
- 8.1. The questions were asked, though the first was not as baldly as stated by the claimant. It was on the lines of *"Is there anything healthwise to tell us?"*
- 8.2. The claimant has not shown that at the relevant time he was disabled by reason of anxiety and/or depression.
- 8.3. This does not apply as the claimant was not so disabled.
- 8.4. The respondent did not think that the claimant was (or might become) disabled.
- 8.5. The answer to all the questions above is academic, because the Tribunal finds that the decision not to offer the claimant employment was in no sense whatsoever tainted by disability reasons. The respondent has disproved the claimant's case.
9. As the answer to the fifth question determines this claim whatever the answers to the other questions it is dealt with first. The reasons the Tribunal so found are these:
- 9.1. The claimant had applied on four previous occasions for similar employment with a sister company (Heirloom) which has a very similar business. He does not suggest that there was any hint of knowledge or suspicion of disability in the handling of those applications. (The Tribunal has noted and taken into account the claimant's assertion that by the time of the application to the respondent he had more sales experience, but discounts it by reason of the next point.)
- 9.2. Towards the end of the interview the claimant says that another person came into the interview, and asked him some questions. One was how the telesales job which he had from July 2016 to August 2017 had ended. It was this job that the claimant said was his telesales experience. Most of his other jobs were not telesales. The claimant said that he was dismissed but that it was not to do with his performance. The claimant says that the interviewer was *"visibly shocked and animated"* by this answer.<sup>6</sup> He said in his oral evidence that they then looked at one another for a minute or so in a long silence and then moved on. The interviewer did not ask him any question about what the reason was, and the claimant thought it enough to state that it was not due to his performance. In his evidence to the Tribunal

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<sup>6</sup> Witness statement paragraph 20.

the claimant simply could not see that any potential employer would be very concerned about such an answer, given with no elaboration. It really is no answer to that point for the claimant to say (as he did) that the interviewer probably thought it was illness: this was before the questions to which the claimant objected, which he said were the last two questions asked. There is no reason for an interviewer to think that. Whatever the reason, an interviewer would expect an explanation, however brief, of the reason said to cause the dismissal, if it were not blameworthy.

- 9.3. The claimant said that he had accepted a job with another company due to start immediately. He did not say that he preferred the job with the respondent.
- 9.4. As the claimant was being shown out, the claimant says that Mr Meade asked him if he was going to walk to work in his new job. The claimant says that he told Mr Meade that he did not want to talk about that. The job for which the claimant was applying was as a telesales person whose role was to build up a rapport with a portfolio of repeat customers for the coins and medals made and sold by the respondent. It is a role that calls for considerable interpersonal skills. This was something that would make any interviewer stop and take stock as to whether this applicant was suitable.
- 9.5. The cv of the claimant<sup>7</sup> had in bold at its head "*Key Sales Skills*" which included "*Don't try and talk someone into something, listen to what they want.*" For a company selling a quintessentially non necessary product (collectors buy because they want to collect them, and the respondent says that it is meticulous in stating that the things they sell are not to be regarded as investments) this is not a positive.
- 9.6. The employment history of the claimant is of short or very short spells of employment (most are a few months only), with some long gaps in between. Employers notice this and take account of it.
- 9.7. The claimant told Mr Meade that he had a job with one firm, and that he worked for them on a Friday, but on the Monday the agency told him that they did not want him back: he did not know why. An interviewer would wonder about such a thing.
- 9.8. While the respondent takes on people regularly and it was not that there was a single vacancy, Mr Meade saw another candidate, Jean (surname redacted) on 25 September 2017<sup>8</sup> (the day before the claimant) and employed her. Her cv<sup>10</sup> is of a career in sales that is streets ahead of that of the claimant. She set the bar for the claimant: it is easy to see how she was the sort of person the respondent was looking for. While she might be at the top end of candidates, and others less good might still be acceptable, this is another factor in the factual matrix that does not indicate that disability was relevant.
- 9.9. The respondent also stated (and the Tribunal accepts) that it has successful employees who have anxiety or depression.

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<sup>7</sup> Bundle page 55.

<sup>8</sup> Bundle page 91.

<sup>10</sup> Bundle 57-58.

- 9.10. Counsel asked the Tribunal to take note of a diary of work applications kept by the claimant from 09 October 2017<sup>9</sup>. There is no contemporaneous note of this interview. The claimant could not recall why he started the diary. As it could have been required by the jobcentre, or been advised in connection with proving loss this was not a point the Tribunal accepted.
10. The reason the Tribunal found the words were spoken was that the claimant was a credible witness. His evidence was not wholly to his advantage. He gave evidence of a clear recollection of two last questions which he found unacceptable. He became animated about it. While people can be mistaken, the Tribunal did not consider that this was a total misrecollection. The appellant was not someone telling a falsehood on this point. The respondent was not helped by the practice of shredding all notes as soon as an application was refused. However the evidence of Mr Meade, that in all the interviews he has ever conducted he has never asked anyone point blank whether they have a disability is convincing. He agreed that he does have the unwise practice of asking if there is anything they might need to adjust to make employment a success (when he should only ask this question after making an offer subject to conditions such as references and health questions), and the Tribunal's finding is that it was such a question that was asked. That the claimant mulled things over in his mind for 2½ months before doing anything makes it more likely than not that while there was a question, the words of it were not as the claimant now states: that was how he perceived the question with hindsight.
11. In coming to this conclusion the Tribunal has taken full note of the extensive cross examination of the claimant which did establish that the claimant is a private man not given to volunteering personal details (this is not a criticism of him). Counsel submitted that even if such a question was asked the claimant would not have answered it, or would have evaded it, such as when he said that he did not want to talk about how he would get to his new job. The claimant's evidence was that he answered direct questions asked of him, but did not go beyond: the question about getting to the new job was outside the interview and that was why he did not answer it, with other people about. The claimant's evidence and case preparation shows him to be a man who takes things literally, and it is credible that if a health related question was put to him he would answer it accurately but minimally as he did with the question about how his last job ended (which evidence was solely from the claimant: the respondent had no information about the interview at all).
12. The reason the Tribunal found that the claimant had not shown that he is disabled as he claims are these:
- 12.1. The only medical evidence is a letter from a GP at Poole Road Medical Centre, Dr Echebarrieta, dated 27 March 2018. The claimant said that he had never met that doctor. It says that the claimant had *"specifically requested that I write the letter on his behalf to confirm that he suffers from anxiety, which was initially recorded back in July 2011."* There is no formal diagnosis, and no time period is stated for such a condition. This lack of clarity continues with regard to medication. *"he has been using on and off antidepressant medication to control his anxiety, but I understand he recently stopped his medication and was restarted when seen by Dr McKernan, locum GP at the Practice on 19 March 2018"*. This begs the question for how long he was not medicated, and as Counsel for the respondent points out the resumption of medication coincided

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<sup>9</sup> Bundle 76-78.

with the bringing of this claim. The letter is very short – two short paragraphs. There is no history of visits to the surgery and no GP records were attached. The directions given in the case management hearing expressly invited the claimant to produce his GP records. There is no way of assessing the seriousness of the condition, whether it is short term or long term, recurrent or persistent. It is not evidence upon which the Tribunal could conclude that the claimant is disabled as claimed.

- 12.2. When filling in the claim form, while claiming disability discrimination, the claimant also ticked “no” in the box at 12.1 which asks “*Do you have a disability?*”. When asked about this in cross examination the claimant said that if there were three boxes to tick, the third being “*Maybe*” that was the one he would have ticked. He had taken advice by this time, and his claim form refers to particular sections of the Equality Act 2010. He must have known the definition of disability but still was not sure he met that definition.
  - 12.3. The claimant also said in cross examination that he did not regard himself as having a disability. While many people who have disabilities within the meaning of the Equality Act 2010 do not regard themselves as disabled, it is rare to find a claimant whose claim is disability discrimination saying this, particularly after receiving legal advice about a disability claim. That was why he added perceived disability to his claim later.
  - 12.4. When asked about this in cross examination the claimant said that he thought he could ask the Tribunal to decide whether he is disabled or not. This is not how the Tribunal approaches the task: it is for a claimant to provide evidence to enable the Tribunal so to find.
  - 12.5. The impact statement was not such as to show that the effect of anxiety was more than minor or trivial. Such effect as there was is alleviated by modest lifestyle changes. The matters complained of are routine life difficulties. He finds public transport difficult with so many people on busses. He found cooking a problem when he had only a microwave. He did not like going to the launderette, but washing clothes was much easier now that he had a washing machine. He had wanted to enter a swimming competition, but the anti depressants made him tired, so he stopped taking them. He found exercise made him feel much better, and so tried to do that, and it helped when he did. He performed better at interviews if he walked to them. None of this is likely to amount to disability.
  - 12.6. In answer to questions put in cross examination the claimant said that his cv was truthful and accurate when he put in it that he can work under pressure, and he said also that his condition does not stop him working under pressure or being reliable. This has been for much of the time without medication, and is not indicative of disability.
  - 12.7. The claimant said that he felt that a lady at the jobcentre might be right. She had said that he might have Asperger’s syndrome or something similar. He said that he had been let down by his doctors over the years. Perhaps he is right on both counts, but even if he is (and the Tribunal is in no position to comment) that is not any reason to find that the claimant is disabled from some other cause.
13. The third question does not apply given the answer to the second.

14. The reasons the Tribunal found that the respondent did not perceive the claimant to be disabled from anxiety or depression are these. There was the one answer (that there was anxiety or depression) to a question that the Tribunal finds different to that put forward by the claimant, but the subsequent answer that he had no absence in the last 12 months of work would not indicate that this had any relevance to his work and would not amount to disability. As Mr Meade pointed out, the latter answer was a positive point for the claimant. The Tribunal did not find the claimant's observation that Mr Meade would think he was lying to him about that likely, and it was not a point made by the claimant in his questioning of witnesses. Secondly there has to be knowledge of or a perception of disability as defined in the Equality Act 2010 to found a claim for disability discrimination, and there is nothing to indicate that the one answer was to indicate a condition of such length or depth (or that it might progress to) such a level.
15. However all this is academic, as the answer to the crucial question – was a consideration of disability in any way part of the decision not to offer the claimant a job – is no.

Employment Judge Housego

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Date 17 January 2019