



EMPLOYMENT TRIBUNALS

BETWEEN

Claimants

Respondent

Mr J Mason

AND

Let's Clean North East Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Newcastle

On : 12 and 13 March 2018

Before: Employment Judge Shepherd

Members: Ms Wright

Mr Wykes

Appearances

For the Claimant: Mr Morgan

For the Respondent: Mr MacLean

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim of unauthorised deduction from wages is dismissed upon withdrawal.
2. The claim of sexual orientation discrimination is not well-founded and is dismissed.
3. The claim of disability discrimination is not well-founded and is dismissed.

REASONS

1. The claimant was represented by Mr Morgan and the respondent was represented by Mr Maclean.

2. The Tribunal heard evidence from Joshua Mason, the claimant and Malcolm Forster, the respondents Managing Director.

A written witness statement was provided by Jacqueline Clarey, another employee of the respondent. However, Mr Morgan indicated that he did not wish to ask any questions of Ms Clarey and the respondent did not call her to give evidence.

3. The Tribunal had sight of a bundle of documents which was numbered up to page 134. The Tribunal considered the documents to which it was referred by the parties.
4. The issues that the Tribunal had to determine had been identified in a preliminary hearing on 7 December 2017 and were as follows:

4.1. Preliminary issues

- Has the claimant presented his harassment claim within the prescribed time limit?
- Do the allegations set out in the claim form part of a continuing act under section 123(3) (a) EA 2010?
- If not, would it be just and equitable to extend the limitation period?
- Has the claimant presented his unlawful deduction from wages claim within the prescribed time limit?
- If not, was it reasonably practicable for him to present his claim within the time limit?

4.2. Unlawful deduction from wages

- Has the claimant suffered any unlawful deductions from his wages contrary to the provisions of section 13 ERA 1996?

4.3 Sexual orientation discrimination: Section 26 EA 2010 – Harassment

- Was the claimant subject to unwanted conduct related to a protected characteristic?
 - - i. From employees of the respondent?
 - ii. By the respondent's alleged failure to deal with complaints of such harassment from employees?
- If so, did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?

4.4 Disability discrimination

- Does the claimant have a disability as defined by section 6 EA 2010?
- Did the respondent know or ought to have known of the disability? If so from what date?
- If so:

4.5 Section 15 EA 2010 - Discrimination Arising from

- Did the respondent treat the claimant unfavourably?
- If so, was the unfavourable treatment because of something arising in consequence of the claimant's (alleged) disability?
- Can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?
- Was the claimant forced to resign because of something arising from his alleged disabilities contrary to section 15?

4.6 Section 20 and 21 EA 2010 - Failure to make reasonable adjustments

- Did the respondent owe the claimant a duty to make reasonable adjustments?
- Was there a provision, criterion or practice / physical feature / lack of an auxiliary aid, which put the claimant at a substantial disadvantage in comparison with persons who were not disabled?
- Could reasonable adjustments have been made by the respondent to remove, alter or provide a reasonable means of avoiding that disadvantage?
- Did the respondent fail to make reasonable adjustments for the claimant or did the respondent comply with its duty to make reasonable adjustments?

The claim of unauthorised deduction from wages was withdrawn by the claimant and Mr Morgan consented to it being dismissed upon withdrawal.

The respondent accepted that the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 at all material times.

With regard to the issues identified in respect of time limits and the jurisdiction of the Tribunal, there was no evidence provided in this regard and no submissions. In those circumstances and, on the basis that the Tribunal found that the claims of disability discrimination and sexual orientation discrimination were not well-founded, it was unnecessary for that issue to be determined.

5. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that the Tribunal made from which it drew its conclusions:

5.1. The claimant was employed by the respondent as a cleaner from 12 January 2017.

5.2. The respondent accepts that claimant was a disabled person at the material time. He was diagnosed with dyspraxia primary school and he also suffered from learning difficulties and anxiety.

5.3. The respondent carries out cleaning services and the premises which the claimant was employed to work as a cleaner were Wetherspoon public houses for which the respondent held a contract to provide cleaning services.

5.4. The claimant completed a health questionnaire sometime after he commenced employment with the respondent. On the form he did not refer to any physical or mental impairment in the relevant section but he did indicate that he had dyspraxia.

5.5. On 19 February 2017 claimant was involved in an altercation with another employee. This was with regard to a disagreement in respect of some boxing tickets. The exact nature of the argument between two employees was not clear but it was with regard to payment for some boxing tickets. The altercation commenced in the claimant's car on the way to the premises in which he two employees were working. It continued onto the premises and was captured on CCTV footage.

5.6. On 19 February 2017 the claimant wrote to the respondent. The letter was headed "Letter before action" and entitled "Subject: Complaint". In the letter the claimant referred to having informed the respondent of his dyspraxia at the commencement of his employment. He referred to the incident on 19 February 2017 when he said that he had been threatened and intimidated by another employee. He referred to the Equality Act 2010 and protection against unlawful discrimination and that he believed that reasonable adjustments had not yet been fully considered or implemented. It was indicated that there should only be one supervisor to give instructions and deal with any problems in the workplace. The claimant also requested reinstatement and not to be removed from the site he was working at and he stated "because I am stable in my job".

5.7. The letter indicated that if the matter was not resolved he would make a claim to the Employment Tribunal and to the County Court. There was also reference to giving further instructions to a law firm to apply for a non-molestation order.

5.8. It was also stated in the claimant's letter of complaint that:

"I would like to point out my Sexual Orientation if I do get Discrimination again I will bring a claim against the company for their employee actions also please note I will report the incidents to the police as crime what happen on the 19th February 2017.

I will also inform Acas and follow the proper legal route."

5.9. Malcolm Forster, the respondent's Managing Director held a grievance meeting with the claimant on 20 February 2017. He took a number of statements and viewed the CCTV evidence of the altercation between the two employees. He told the Tribunal that he had not received the letter of complaint dated 19 February 2017 at the time he dealt with the grievance and that the hearing was limited to the incident that had occurred on 19 February 2017.

5.10. The evidence with regard to the meeting on 20 February 2017 was confusing and contradictory with regard to who limited the discussion to the incident which had occurred on 19 February 2017. However, it does appear that the only issue investigated, and on which conclusions were provided, was the argument between the claimant and the other employee.

5.11. On 3 March 2017 Malcolm Forster wrote to the claimant providing the outcome of the grievance meeting. Some of the contents of this letter were confusing. However, it was found that the claimant's work colleague had acted in an aggressive manner towards the claimant and that work colleague was removed from the site at which the claimant was working and did not work with the claimant again.

5.12. The claimant arranged to have an Occupational Health report prepared. The Occupational Therapist visited the site at which the claimant was working on 17 March 2017. The conclusion in the report was that:

“Joshua's dyspraxia causes a mild motor skill impairment and sensory processing disorder which had a minimal impact on his ability to complete the activities I observed during this assessment in his workplace at Bishop Mills. In my opinion, the difficulties do not prevent Joshua from engaging in his role as a cleaner for Let's Clean North East Limited. I have made some recommendations which will provide Joshua with further support and enable the employer to have a greater understanding of his needs.”

5.13. The recommendations in the report included giving the claimant a clear and regular routine and checklist, continuing to allow the claimant to clean the toilets, to avoid asking him to complete tasks in large areas, providing supervision, providing support to lift or carry heavy awkward objects should he struggle.

5.14. The respondent did not receive the Occupational Health report until after the claimant had resigned and left the respondent's employment. Malcolm Forster had a lengthy discussion with the Occupational Health assessor and was advised that the claimant could perform his duties and that it would be beneficial for him to be provided with small work areas, a clear routine and checklist, additional support with unfamiliar tasks and additional time to

complete tasks. Malcolm Forster said that these adjustments were already in place at the time.

5.15 The claimant moved from the premises in which he was working, Bishop's Mill, to another of Wetherspoon's public houses, the Water House. The Tribunal had sight of a letter dated 30 March 2017 in which it was confirmed that, on 1 April 2017 claimant would move to the Water House. In that letter it was indicated that this was "as per your requested move to a smaller site." The claimant said that he did not receive this letter.

5.16. The Tribunal had sight of a number of text messages and social media communications. Within these messages the claimant asked for, at various times, more work, extra hours, time off and he provided information about a period in which he was off work sick. There were some intemperate exchanges with claimant's supervisor which were unpleasant and insulting. The exchanges with Malcolm Forster were friendly at times and mostly civil.

5.17 The claimant's probationary period had been extended from three months to six months. The claimant was invited to a performance review meeting to take place on 31 May 2017. In the messages the claimant raised issues with regard to the amount he had been paid and asked whether he would be returning to work on a Monday. The response was that the wages were correct and that the money owed and the role would be explained to the claimant. It was stated that Mr Forster had work for the claimant but not at the Water House where the claimant had been working and that Mr Forster needed to explain it to the claimant.

5.18. The meeting that had been arranged with the claimant did not take place as the claimant was unwell.

5.19. On 12 June 2017 the claimant sent a message to Malcolm Forster stating:

"Had long think I'm not coming back could you please pay me up what you owe me as my 1 week lie on and any money own to me ASAP the to conclude the matter once leave on good terms as their no prospect with let's clean"

5.20. The claimant asked for a reference and he was informed that there would be no problem.

5.21. The claimant told the Tribunal that he left the respondent's employment because he had found another job. During re-examination, when asked why he started looking for another job, the claimant said that it was because he was not allowed back to the Water House.

5.22 On 10 October 2017 the claimant presented a claim to the Employment Tribunal in which he brought complaints of discrimination on grounds of disability and sexual orientation and unlawful deduction from wages.

The law

6 Harassment

Section 26 of the Equality Act 2010 states:

- (1) A person (A) harasses another (B) if –
- (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.

Sexual orientation is one of the relevant protected characteristics.

7 Discrimination arising from Disability

Section 15 of the Equality Act 2010 states:

- “(1) A person (A) discriminates against a disabled person (B) if –
- (a) A treats B unfavourably because of something arises in consequences of B's disability, and
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Sub-Section (1) does not apply if A shows that A did not now, and could not reasonably have been expected to know, that B had the disability.

8 Duty to Make Reasonable Adjustments

Section 20 of the Equality Act 2010 states:

“(1) Where this Act imposes a duty to make reasonable adjustments of a person, this Section, Sections 21 and 22 and the applicable schedule apply; and for those purposes a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements,

(3) The first requirement is a requirement, where a provision, criterion or practice of A puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where the disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid”.

9 **Discrimination arising from the consequence of a disability**

Under section 15 of the Equality Act 2010 (discrimination arising from the consequence of a disability) there is no requirement for a claimant to identify a comparator. The question is whether there has been *unfavourable* treatment: the placing of a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person; see Langstaff J in Trustees of Swansea University Pension & Assurance Scheme & Anor v Williams UKEAT/0415/14 at paragraph 28. As the EAT continued in that case (see paragraph 29 of the Judgment), the determination of what is unfavourable will generally be a matter for the Employment Tribunal.

The starting point for a Tribunal in a section 15 claim has been said to require it to first identify the individuals said to be responsible and ask whether the matter complained of was motivated by a consequence of the Claimant's disability; see IPC Media Ltd v Millar [2013] IRLR 707: was it because of such a consequence?

- 10 The statute provides that there will be no discrimination where a respondent shows the treatment in question is a proportionate means of achieving a legitimate aim or that it did not know or could not reasonably have known the Claimant had that disability.

Under sections 20 and 21, discrimination by reason of a failure to comply with an obligation to make reasonable adjustments, the approach to be adopted by the Tribunal was as set out in Environment Agency v Rowan [2008] ICR 218, where it was indicated that an Employment Tribunal must identify the provision, criterion or practice (“PCP”) applied by or on behalf of the respondent and also the non-disabled comparator/s where appropriate, and must then go on to identify the nature and extent of the substantial disadvantage suffered by the claimant. Only then would it be in a position to know if any proposed adjustment would be reasonable.

11 **Burden of Proof**

Section 136 of the Equality Act 2010 states:

“(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 sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An Employment Tribunal.”

12 Guidance has been given to Tribunals in a number of cases. In Igen v Wong [2005] IRLR 258 (a sex discrimination case decided under the old law but which will apply to the new Equality Act) and approved again in Madarassy v Normura International plc [2007] EWCA 33.

13 To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of Madarassy the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: “They are not, without more, sufficient material from which a tribunal ‘could conclude’ that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination”.

14 In Tarback v Sainsbury’s Supermarkets Limited [2006] IRLR 664 the EAT said that an employer’s failure to make an assessment of a disabled employee is not of itself a failure to make a reasonable adjustment. This was followed by the EAT in Scottish & Southern Energy v Mackay UKEAT LL75/06.

- 15 In the case of Grant v HM Land Registry [2011] IRLR 748 the Court of Appeal said that “Tribunals must not cheapen the significance of the words “intimidating, hostile, degrading, humiliating or offensive environment”. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.”
- 16 It was made clear by Mr Morgan, on behalf of the claimant, that the claim of harassment was with regard to sexual orientation and not disability. He also indicated that the section 15 claim of discrimination arising from disability was based on the same factual allegations as the claim of failure to make reasonable adjustments and his submissions were focused on the reasonable adjustments rather than the section 15 claim.

Conclusions

- 17 The claim of unauthorised deduction from wages is dismissed upon withdrawal.
- 18 There was no credible evidence that the claimant was subjected to harassment related to his sexual orientation. The claimant referred to there having been remarks about his sexual orientation from fellow employees during the course of his employment with the respondent. However, he did not inform the respondent of these remarks.
- 19 He said that he was extremely embarrassed when giving evidence before the Tribunal and, after a significant amount of pressing by the Tribunal, revealed one alleged comment. This was not referred to in the claimant’s complaint to his employer, the only reference to sexual orientation was “I would like to point out my sexual orientation if I do get discrimination again I will bring a claim...”
- 20 The particulars of claim attached to the claim presented to the Tribunal provided no specific allegation of the wording of any remarks relating to sexual orientation. The claimant’s written witness statement provided for the Tribunal hearing did not refer to any specific remarks. Once again, merely referring to derogatory comments.
- 21 The Tribunal is not satisfied that the claimant has shown that he was subjected to harassment on grounds of his sexual orientation. The claimant’s evidence in this regard was vague and provided no credible evidence of such harassment. There was evidence of arguments with other employees and some abusive text messages. However, these were not shown to be related to the claimant’s sexual orientation. The particulars of claim referred to harassment as being the failure to take any reasonable steps to prevent the harassment occurring which was demonstrated by the respondent failing to investigate and address the claimant’s complaints of bullying related to his sexual orientation. The claimant did not show that he had been subject to harassment or that he had made a complaint of harassment to the respondent.

- 22 With regard to disability discrimination, it is accepted that the claimant was a disabled person at the material time. The allegation within the particulars of claim was that, as a consequence of his disability, the claimant was unable to perform his role without reasonable adjustments. It was stated that the respondent failed to make reasonable adjustments and provided no reasons for failing to do so. It was alleged that the claimant's forced resignation amounts to discrimination arising from his disability.
- 23 There was no credible evidence of any less favourable treatment because of something arising consequence of the claimant's disability. The claimant did not establish that he was forced to resign as alleged in the particulars of claim attached to this claim presented to the Tribunal. The claimant resigned because he had been offered new employment with a different employer.
- 24 With regard to the claim of a failure to make reasonable adjustments, the provision criterion or practice alleged to put the claimant at a substantial disadvantage was said to be:
- Not providing written instructions in a clear format to employees
 - That a number of different supervisors gave instructions to employees on work to be completed.
 - That all employees should work to a full workload.
- It was said that this placed the claimant had a substantial disadvantage as:
- He had difficulty comprehending and following oral instructions.
 - He had difficulty comprehending and following complex instructions from different supervisors.
 - That he had difficulty completing his tasks at the same speed as a non-disabled employee.
- 25 The Tribunal is not satisfied that the claimant was placed at a substantial disadvantage. Some of the alleged PCPs were applied to all employees.
- 26 The respondent said that there were written instructions in the form of a checklist provided by Wetherspoon's. This was towards the end of the evidence and the Tribunal did not have sight these written instructions and is not able to make any findings with regard to their clarity. However, it was not established that this placed the claimant at a substantial disadvantage compared to non-disabled employees. He managed to complete the tasks. There was no credible evidence that a lack of clear written instructions placed him at a substantial disadvantage compared to non-disabled employees.
- 27 It was not established that instructions were given by a number of different supervisors. There was one supervisor at a time. The claimant's evidence was that he received instructions from his supervisor and was also told to carry out tasks by other employees who were on the same level as him. The respondent's evidence was that the claimant could carry out his duties although he needed extra training and his probationary period was extended in order that he could reach a satisfactory standard.

- 28 All employees were required to work to a full workload. The claimant completed the work required of him. The respondent said that the claimant, or any other employee, was allowed extra time if needed. The Tribunal is satisfied that this extra time was provided if required.
- 29 The conclusion of the Occupational Health Therapist was that the claimant's disorder had a minimal impact on his ability to carry out the work and the recommendations made were such that they were substantially in place at that time. The Tribunal is satisfied that the claimant managed his tasks and was allowed extra time if needed.
- 30 The Tribunal finds that the claimant was not placed at a substantial disadvantage when compared to non-disabled people by the PCPs that were applied. Substantial means more than minor or trivial. The Occupational Health assessment was carried out when the claimant was working at Bishop's Mill. There was no substantial disadvantage shown as a result of any PCP applied at that time and the Tribunal is not satisfied that any further PCP was applied during claimant's time working at the Water House. The claimant said that he was moved to the Water House against his will. The respondent said that it was as a result of the claimant's request to move to a smaller site. At one stage, the claimant indicated that the reason he looked for other work was that he thought that he was not allowed to return to work at the White House. He wished to continue working at the White House and there was no credible evidence that the claimant was placed at a substantial disadvantage as a result of the PCPs identified at either place of work.
- 31 In the circumstances, there was no duty on the respondent to make reasonable adjustments. If there had been such a duty then the Tribunal is satisfied that the adjustments that were made were reasonable and there were no further reasonable adjustments that should have been made that would alleviate any substantial disadvantage. The claimant was provided with work in a small area, given a clear routine and sufficient time to complete the tasks.
- 32 In the circumstances these claims are dismissed.

Employment Judge Shepherd
23 March 2018