



EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT

V

RESPONDENT

Mr B Kenbata

Surrey County Council

Heard at: London South
Employment Tribunal

On: 18 September 2019

Before: Employment Judge Hyams-Parish
Members: Ms J King and Mr W Dixon

Representation:

For the Claimant: Did not appear

For the Respondent: Mr P Doughty (Counsel)

JUDGMENT

The claim of unfavourable treatment in consequence of disability under s.15 Equality Act 2010 fails and is dismissed.

REASONS

Claim

1. By a claim form presented to the Tribunal on 29 July 2018, the Claimant brings a claim of unfavourable treatment because of something arising in consequence of his disability pursuant to s.15 Equality Act 2010 ("EQA").

Legal principles relevant to the claims

2. Section 15 of EQA provides:

A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

3. It is a condition of bringing claims under s.15 EQA that the Claimant was at all material times disabled within the meaning of s.6 EQA. Section 6 of EQA defines disability as follows:

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

4. It is also clear from the definition under s.15 EQA that before the Respondent can be liable for disability discrimination, the Tribunal must be satisfied that the Respondent knew that the Claimant was disabled or ought reasonably have known that he was disabled.

5. The issues in this case were agreed by the Respondent as follows:

- a. Was the Claimant a disabled person by reason of depression and Polyarteritis Nodosa? This is not accepted by the Respondent.
- b. Did the Claimant know, or ought they to have known, that the Claimant was, at the relevant time, a disabled person?
- c. Did the Respondent treat the Claimant unfavourably, by withdrawing its provisional offer of employment as a Traffic Engineer on 20 April 2018, because of the Claimant's absence record at Brent Council?
- d. Did the Claimant's absence arise in consequence of his disability?
- e. Was the unfavourable treatment justified?

Preliminary matters

6. By 10.00am on the first day of the hearing the Claimant had not arrived. The Tribunal reviewed the file and noted that there was an email that had been sent in to the Tribunal by the Claimant on 14 September 2019 at 12.52 which in addition to the Claimant objecting to certain evidence being included in the bundle, also stated the following:

I request the first day of the hearing is used for the tribunal to determine the applications made by the parties to amend the trial bundle and my application to postpone the hearing and the issue the tribunal wished to determine concerning whether the deposit order was made on time.

I regret I will not be able to attend the hearings and will not be represented because of the way the case has been managed by the Employment Tribunal.

I request the tribunal then postpones the second day of the hearing as I do not believe it reasonable for the employment tribunal to conduct the case the way it has chosen to do so and to expect a disabled claimant without a lawyer to attend court and present his claim with all these issues unresolved and with only having witness statements so late.

7. No decision had been made on any application by the Claimant to grant a postponement of the hearing listed today and therefore in the absence of any decision, the Tribunal considers that the Claimant ought to have attended.
8. In November 2018 at a preliminary hearing, Employment Judge Harrington made a deposit order that the Claimant pay the sum of £200 to continue with his claims because it was considered that the claim had little reasonable prospect of success. It is understood that the deposit was in fact paid.
9. Attempts were made by the Tribunal staff to contact the Claimant at 10.02, 10.46 and 11.20 but the calls went straight through to voicemail. The Tribunal staff were asked to check emails to ensure that the Claimant had not written to the Tribunal to inform the Tribunal that he could not attend, but there was no recent correspondence apart from that referred to at paragraph 6 above.
10. The Respondent was called in to the Tribunal and asked how they wanted to proceed. The Respondent made an application that the Tribunal proceed to hear the case in the absence of the Claimant.
11. The Tribunal decided to proceed and hear the case in the Claimant's absence. In reaching this decision, the Tribunal had regard to the fact that the Claimant had indicated that he would not be attending, despite there being no order postponing the case. The Tribunal had regard to the overriding objective to deal with cases justly and fairly and avoiding unnecessary delay. It noted that the allegations were already a year old and if the case were to be listed again, there would be further significant delay. Finally, the Tribunal noted that the Respondent had attended with three witnesses, an in-house solicitor and Counsel, all at significant cost.

Hearing

12. The Tribunal received witness statements and heard evidence from three witnesses on behalf of the Respondent: Nick Healey, Peter Shimadry and Brijesh Mehta.
13. The Tribunal was also referred to documents in a Hearing Bundle extending to 280 pages.

Findings of fact

14. Mr Healey is an Area Highway Manager for the North East Area of Surrey. He has held that position since July 2012. Within his team there are three local maintenance teams and one of those is the traffic engineer team. The traffic engineer team is responsible for responding to enquiries relating to a range of concerns, including road safety, speed and traffic management, school travel, sustainable transport and congestion.
15. The traffic engineer team is a very people focused team, relying on effective working relationships to enable members of the team to do their job effectively.
16. In 2018 the Traffic Engineer Team consisted of three posts: a Senior Traffic Engineer, a Traffic Engineer and an Assistant Traffic Engineer. In early 2017 the persons holding the Traffic Engineer and Assistant Traffic Engineer posts moved on. A new Assistant Engineer started in September 2017. Mr Healey attempted to recruit a new Traffic Engineer in 2017 but was not successful. When the Respondent attempted to recruit for a second time, the Claimant applied in January 2018.
17. The Claimant was one of nine applicants to apply. On his application form he ticked the box which indicated that he considered himself to have a disability. He also ticked the box to say that he did not have any special requirements for interview or any other part of the selection procedure. No information about the disability was supplied on the application form itself and therefore Mr Healey did not know anything about the nature of the Claimant's disability.
18. Mr Healey and Mr Shimadry scored the applicants independently. By Mr Healey's scoring, the Claimant came second and by Mr Shimadry's scoring the Claimant came equal third. For both Mr Healey and Mr Shimadry the Claimant's application scored less than the minimum 58%, which is the threshold for a guaranteed interview for candidates who are vulnerable to redundancy or disabled. As team manager, Mr Healey met with Mr Shimadry to compare scores and decide who should be interviewed for the post. Both agreed that the Claimant should be interviewed with a number of other candidates.
19. The Claimant attended his interview in the week commencing Monday 19 March 2018. Mr Healey said in evidence that the Claimant presented well at interview; he seemed polite and professional, albeit a little nervous. Following the interviews, Mr Healey and Mr Shimadry agreed that they should offer the Claimant the post. The other interview candidates had been disappointing and therefore an offer of employment would not have been made to them. Mr Healey and Mr Shimadry considered the Claimant to be a good candidate. Mr Healey said in evidence, and the Tribunal accepts, there was nothing about the Claimant's presentation or behaviour during the interview to indicate that he was a disabled person. The Claimant did not mention that he was disabled.

20. After the interviews had concluded, Mr Healey attempted to call the Claimant and left a voicemail. He did not give any information in the voicemail message other than the fact that he wanted to speak to him further to the interview.
21. Mr Healey spoke to the Claimant on the afternoon of 26 March 2018. He told the Claimant that following his interview he would like to make him a provisional offer of employment. Mr Healey explained to the Claimant that he would need to take up references before the offer of employment could be finalised. At that point the Claimant told Mr Healey that there was something that he needed to let Mr Healey know. He explained that he had been dismissed from his previous employer, Brent Council. The Claimant described a situation in which a colleague had kicked him under a desk. The Claimant had raised the matter with his manager but the way things worked out, the Claimant said that he ended up being blamed by management at Brent Council as the person who had been in the wrong. Mr Healey said the clear impression he got was that there had simply been a clash of personalities and that the Claimant had come off badly and unfairly as a result. However following that episode, the Claimant was dismissed.
22. The Claimant offered to provide two further references that were not from Brent Council. He said that one of these would be from a colleague at Hertfordshire Council where he said that he had worked for several years without any problems. Mr Healey considered that it was reasonable for the Claimant to offer two additional references, as a show of confidence in his character.
23. Mr Healey said in evidence that he was left with the clear impression that what had happened at Brent Council was an isolated incident in what was otherwise a successful and uncontroversial career. For that reason, Mr Healey said that he did not feel the need to share the information that the Claimant had given him with anybody else, reasoning at the time that a person can very plausibly fall out with an employer due to a clash of personalities and Mr Healey did not want to hold this against the Claimant when his previous career history seem to have been without incident.
24. The recruitment team sought references from Brent Council where the Claimant had identified two referees. The Respondent also sent written confirmation to the Claimant of the provisional offer of employment subject to satisfactory references.
25. On 4 April 2018, Mr Healey was informed by the Respondent's recruitment team that the Claimant had ticked 'yes' to one of the Work Health Assessment questions and this indicated to Mr Healey that the Claimant would need to be referred to the occupational health provider for further assessment.

26. Mr Healey said in evidence, and the Tribunal accepts, that he was not the least bit fazed by references to needing further assessment by occupational health. Indeed, Mr Healey said that he was very comfortable with this, having had previous experience of making reasonable adjustments to working hours and locations for team members to undertake their roles, for example, during pregnancy, or when recovering from an operation.
27. The occupational health report finally came back on 18 April 2018 and stated that the Claimant was fit for work and would only need a standard display screen equipment test to be undertaken for him. Mr Healey took from this that although the Claimant might have health needs, there was no disability issue that he needed to take account of.
28. A reference for the Claimant was received from Brent Council on 16 April 2018 and there were certain pieces of information on that reference that were of concern to Mr Healey. They included disciplinary concerns and the number of days taken as sick leave in the previous two years. There was no information about the reasons for those absences.
29. Mr Healey was surprised that Brent Council had given so much information regarding the disciplinary concerns. In his experience he said that it was highly unusual for an employment reference to provide anything but the scantest of detail. He said in evidence that the fact that this information had been given was a "*sit up and take notice moment*".
30. Reading the reference Mr Healey said that it was clear to him that there were a number of incidents involving a number of colleagues at Brent Council. The reference stated that the Claimant had received a written warning regarding his conduct towards other members of staff. The reference suggested that the Claimant's interpersonal skills were poor and it also referred to poor relationships and a number of 'incidents'. Mr Healey felt that he had been misled by the Claimant and that he had given a false impression of the situation he experienced at Brent Council. Mr Healey said that it wasn't the levels of absences that concerned him, it was the apparent difficulties and problems with colleagues that was of concern. This led Mr Healey to undertake a Internet search of the Claimant and he found that the Claimant had been involved in two previous employment tribunal cases. When Mr Healey read those cases, he was extremely alarmed at the picture painted of the Claimant. Indeed one of those cases was against Brent Council and appeared to cover the same incident that the Claimant had referred to except that the judgement gave very different facts to those given by the Claimant. What disturbed Mr Healey was that the case referred to problems that the Claimant had with a number of employees and that this hadn't simply been a personality clash as the Claimant described.
31. Mr Healey was concerned that the role of traffic engineer required an ability to maintain good relationships with people and that this skill was vital to the role. Such relationships might include colleagues at a range of different levels, partner organisations, elected councillors, residents, resident groups and people who may be supportive of, or hostile to, the council. The

combination of the reference received from Brent Council, together with the additional information that he had found on the Internet, resulted in Mr Healey concluding that the Claimant was entirely unsuitable for the role not only because of his apparent difficulties working or establishing good relationships with people, but also the fact that he had not been completely honest during the interview process.

32. Mr Healey discussed the situation with Mr Shimadry and his group manager. A decision was taken to withdraw the offer of employment to the Claimant due to the fact that his references were not satisfactory

Analysis, conclusions and associated findings of fact

33. The Tribunal could not be satisfied, on the evidence available to it, that the Claimant was at the relevant time a disabled person. It had no medical evidence or an impact statement from the Claimant. The Tribunal notes that the burden of proof was on the Claimant in this respect and he was not present to do so. The claim therefore fails at that point.
34. Even if the Tribunal had found that the Claimant was disabled, it was in no doubt, and finds as fact, that the reason the Respondent withdrew the offer of employment was because Mr Healey believed that the Claimant had misled them about the circumstances of his dismissal and what they learned about the Claimant from the Tribunal case against his previous employer, which gave them serious concerns about the Claimant's ability to build relationships with colleagues. The Tribunal is satisfied that the decision to withdraw the offer had nothing at all to do with the Claimant's levels of sickness absence at his previous employment.
35. The Tribunal also notes that there was no evidence provided by the Claimant in relation to his s.15 EQA claim from which the Tribunal could, in the absence of evidence from the Respondent, find in his favour. Therefore, in the Claimant's absence this claim was doomed to fail, but in any event, the Tribunal was satisfied that the reason for the withdrawal of the job offer related to his lack of probity and what appeared to be difficulties building relationships with colleagues.
36. Finally the Tribunal is satisfied that the Respondent did not know, neither ought they have known, on the basis of information available at the time, that the Claimant was a disabled person.
37. For all of the above reasons, the claim brought by the Claimant must fail and is dismissed.

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Employment Judge Hyams-Parish
22 October 2019