



EMPLOYMENT TRIBUNALS

Claimant. Mr Lee Gostelow

Respondent Southwest Ambulance Service NHS Foundation Trust

Heard at: Exeter On: 17 September 2020

Before: Employment Judge Hargrove

Appearances

For the Claimant: In person

For the Respondent: Ms A Beale of Counsel

RESERVED JUDGMENT AND REASONS (and further case management orders) on a public preliminary hearing

1. The respondent is given permission to amend the response to add the following to paragraph 13 of the existing response: –
“The respondent avers that the claimant’s conditional offer of employment was withdrawn because of the nature and number of the convictions shown on his DBS certificate, which demonstrated a pattern of behaviour not commensurate with the trusts values, and the relatively recent date of the claimants convictions on 7 December 2015, which resulted in a total prison sentence of 18 months. The respondent avers that the relevant conditions arose from (a) an addiction to or dependency on alcohol, and/or (b) a tendency to physical abuse of other persons. The offer was therefore withdrawn because of something arising as a consequence of impairments excluded by regulations 3 and/or 4 (1) (c) of EQA 2010 (Disability) Regulations 2010, and not as a consequence of the claimant’s disability (bipolar disorder).”
2. The respondent’s application to strike out the claimant’s claim as having no reasonable prospects of success is refused.
3. Pursuant to rule 39, the claimant is ordered to pay a deposit order of £50 in accordance with the order attached, not later than 21 days from the date this Order is sent, upon the basis that the claimant’s claim has little reasonable prospect of success.
4. At the end of this hearing a hearing was listed before a full tribunal sitting with members at the Exeter Employment Tribunal, Second Floor, Keble House,

Southernhay Gardens, Exeter, EX1 1NT (or such other venue as may be notified) on **Tuesday 26 and Wednesday 27th of January 2021**. Three copies of the witness statements and of the joint bundle of documents as ordered below must be delivered to the Employment Tribunal by no later than 9:15 am on Tuesday 26 January 2021 and the hearing will commence at **11:00 am**. The claimant will give evidence first; his evidence and cross-examination to be concluded by 2:30 pm. The respondent's evidence will be completed by 4:30 pm. The parties' closing submissions, to be supported by written skeleton arguments, will be completed by 11:30 am on day 2 to allow time for deliberations, the giving of judgement, and a hearing for remedies if appropriate.

5. By no later than 1 October 2020 the respondent must send to the claimant a written form of consent to the disclosure to the respondent of his GP records from his GP, Abbey view medical, and of his psychiatric records from Dr Kit Stone, which the claimant must return to the respondent signed to indicate his consent within three days thereafter.
6. It being noted that the joint bundle of documents agreed for this public preliminary hearing will stand, with the addition of the claimant's medical records, and the claimant's schedule of loss, as the bundle for the full hearing, a paginated index must be prepared and provided to the claimant by 7 December 2020.
7. **Witness statements.** The parties must prepare and exchange by 21st of December 2020 the witness statements of all witnesses upon whom they intend to rely at the hearing. The witness statements must set out in numbered paragraphs in chronological order, and referring to the relevant pages in the bundle of documents, all of the evidence which the witness wishes to give to the tribunal. I note and record that the claimant intends to rely upon a witness statement, or written report from Dr Stone. If so advised, the respondent may apply to adduce additional expert evidence by way of reply to Dr Stone.

REASONS

1. This hearing was originally listed at a case management hearing on the 16th January 2020 to consider 4 issues including whether the claimant was disabled in respect of his condition of bipolar disorder; and whether the respondent knew or ought reasonably to have known of it. However, on 3 March 2020 the respondent conceded both points. That left only the issues (1) whether the claimant's claim should be struck out as having no reasonable prospects of success; and (2), whether, in the alternative, a deposit order should be made under rule 39 on the basis that the claim had little reasonable prospect of success.
2. The parties had agreed a bundle of 144 pages of documents which will form the nucleus of the full hearing bundle listed above. The claimant provided written submissions. In Ms Beale's written submissions she sought to raise an entirely new and unpleaded point. I required her to make a written application to amend the response. There was an argument as to whether that amendment (as set in paragraph 1 of the Orders above) should be

allowed, to which the claimant objected. I allowed the amendment and then considered the other two remaining issues. These are my reasons.

3. I refer to the useful summary of background event set out by Employment Judge Roper at paragraphs 1 to 3 of the case management notes on the 16th of January 2020. The substance of the claimant's single section 15 claim was of unfavourable treatment by the respondent in withdrawing on the 22nd of May 2019 the offer of employment as a single point of access call advisor, first made, following competitive interview, on 24th of April 2019. The claimant had by that stage disclosed that he had bipolar disorder, and that he had been convicted of a number of offences including a section 47 assault on a police constable for which he had received a custodial sentence. The offer was however subject to receipt of satisfactory references and to a DBS check. The references were, it appears, satisfactory. The DBS check, dated 14th of May 2019, is at pages 121 to 128 of the bundle. They are also usefully summarised in the table at paragraph 7 of Ms Beale's submissions. There are 27 court appearances, and convictions between 2000 and the 18th of December 2015, including seven for assaulting a PC, 4 for section 47 assault, and others for public order offences. These culminated in his sentence of 15 months imprisonment at Swindon Crown Court on 7 December 2015 for a section 47 assault on the 12th of November 2015, and a sentence of three months consecutive for assaulting a PC on the same day. I note that the effect of section 5 of the Rehabilitation of Offenders Act 1974 is that the claimant will not become rehabilitated until March 2021 (five years after the 15 month sentence was completed). There are also convictions for drink-driving. On receipt of the DBS check the file was reviewed by a member of the respondent's staff in the following terms of page 120 of the bundle: –
"DBS reviewed – please thank Lee for his honesty and full disclosure. Given the number of convictions and nature of convictions they demonstrate a pattern of behaviour not commensurate with the Trust values and behaviours. We can see that Lee is attempting to make positive change but would like more time to pass since most recent conviction. Would welcome a future application". This outcome was communicated to the claimant by letter of the 22nd of May 2019 at page 128.
4. The new legal issue raised by Miss Beale in her submissions of 9 September 2020, and copied to the claimant at or around that time, refers for the first time to regulations 3 and 4 of the EQA 2010 (Disability) Regulations. For public policy reasons, certain impairments are specifically excluded from constituting disability under the Act. These include "a tendency to physical ... abuse of other persons (Reg 4(c)), and addiction to alcohol (Reg 3(1)), which includes a dependency. Ms Beale then referred me to a series of cases (all of which are usefully summarised at paragraphs 6.64 to 6.67 of the IDS handbook volume four on Discrimination at Work). See in particular *Governing Body of X primary school v Special Educational Needs Tribunal 2009 IRLR* page 107 and paragraph A13 of the Guidance. The exclusions also apply where these tendencies arise as a consequence of, or a manifestation of, an impairment that constitutes a disability for the purposes of the Act.
5. I deal first with the amendment application, applying the Selkent principles. The claimant unsurprisingly objects upon the basis that this application is

made very late. It also sits uncomfortably with the respondent's late but unqualified admission of the claimant's disability of BPD, and the respondent's knowledge thereof. I conclude however that this is essentially a relabelling application of factual matters – the claimant's impairment and his criminal record – already within the ambit of issues which the tribunal will have to consider, in connection with the respondent's alternative justification defence. Furthermore, the claimant will have the opportunity at the hearing, having produced his medical records, to challenge the contention that he had either alcoholic dependency, or a tendency to physically abuse people, at the material time, namely April/May 2019, having turned his life round since 2015. The balance of prejudice lay in favour of the respondent's application.

6. However I refuse the respondent's application to strike out the claim as having no reasonable prospects of success. There are clearly factual issues for the Tribunal to decide. On the other hand, I consider that the claimant's chances of successfully challenging the justification defence are such that he has little reasonable prospects of success, not least because the rehabilitation period had not ended at the time of his application for employment .

**Employment Judge Hargrove
21 September 2020**

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