EMPLOYMENT TRIBUNALS

Claimant: **Mr G Townley**

Respondent: **Autism Hampshire**

Heard at: **Southampton** **On: 2 September 2020**

Before: **Employment Judge Reed**
Members Mr D Clement
Ms L Simpson

Representation
Claimant: **In Person**
Respondent: **Mr K Sonaike, counsel**

JUDGMENT

The unanimous judgment of the tribunal is that the claimant was not unlawfully discriminated against on the ground of age or disability.

REASONS

1. In this case the claimant Mr Townley alleged that he had been unlawfully discriminated against on the grounds of age and disability.

2. At the commencement of the hearing and during its course we were called upon to make rulings in relation to two matters. Firstly, Mr Townley wished to record the hearing. He is disabled by reason of mental health issues. He told us that he wished to record his cross-examination of witnesses, so that he could later review that evidence with a view to asking further questions.

In essence, he wanted to record the evidence in order to cross examine on two occasions.

3. He was able to take notes of evidence. We were also happy to provide that he could, if he wished, take a break at the end of cross-examination in order to review those notes and see if he wished to ask further questions. It would not be satisfactory if witnesses had to be recalled at a later occasion to deal with further issues. In the circumstances, we concluded that he should not be permitted to record the hearing.

4. In addition, Mr Townley sought to expand the grounds upon which he claimed disability discrimination beyond those that were set out in the case management orders in this matter issued in August and November 2019. We address this further, below.

5. Mr Townley's claims were of indirect age discrimination and direct disability discrimination. He claimed that, by virtue of his age, he was disadvantaged by certain practices of the respondent, Autism Hampshire, when he applied for a job with them, and furthermore that although he was a disabled person, by reason of his mental health issues, he would have been treated more favourably by the respondent had he been autistic.

6. In all respects, his claims were resisted by the respondent.

7. We heard evidence from Mr Townley himself and, on behalf of the respondent, from Ms Houghton and Mrs Bray, who were managers employed by the respondent and who participated in the exercise that led to Mr Townley's job application being rejected. Our attention was also directed to a number of documents and we reached the following findings.

8. Towards the end of 2018 the respondent sought to recruit a Service Administrator and an advertisement was published. The deadline for applications was 4 November. A three-person panel was set up to assess applications and determine who should be shortlisted, that panel including Ms Houghton and Mrs Bray. It was decided that any applications received before the deadline would be assessed by the panel as a whole but any received that after that date would in the first instance be referred to Ms Houghton alone. If she felt any application was meritorious she would refer it to the panel but she could reject an application by herself.

9. Mr Townley applied for the position and his application was received on 8 November. Ms Houghton considered that his application should be rejected without reference to the panel and Mr Townley was informed that fact on 9 November.

10. He complained about his treatment and as a consequence an investigation was undertaken into his rejection. In the course of that investigation he supplied further documents and effectively Mrs Bray repeated the exercise carried out by Mr Houghton, coming to the same conclusion, namely that Mr Townley should not be shortlisted.

11. Mr Townley attempted to escalate his complaint but without obtaining a satisfactory resolution and accordingly he commenced proceedings.

12. The Equality Act 2010 provides that there are a number of "protected characteristics", which include age and disability. Under s19 of the Act a person discriminates unlawfully against another if he applies to that other a provision, criterion or practice which he would apply to persons who do not have the characteristic in question: which would put persons with whom he shares the characteristic at a particular disadvantage and which puts him at that disadvantage. It is a defence to such a claim if the application of the provision, criterion or practice was a proportionate means of achieving a legitimate aim.

13. Under s13 of the 2010 Act a person discriminates directly against another if, because of a protected characteristic, he treats him less favourably than he would treat others.

14. Mr Townley said he was indirectly discriminated against on the grounds of age and identified two provisions, criteria or practices which he said the respondent applied, which would disadvantage anyone in his age group (over 40) and which disadvantaged him.

15. Both practices that he put in issue related to the specific grounds on which his application for employment had been rejected. The job specification against which applications were assessed indicated that it was essential that the successful applicant should have a particular qualification namely "minimum Business Administration/Secretarial NVQ/QCF or equivalent".

16. We were shown evidence, which we accepted, to the effect that an NVQ in business administration could not be obtained before 2005. It seemed to us appropriate to assume that the vast majority of job applicants would have ceased full-time education and would have obtained no further qualifications beyond, at the latest, their early 20s. Since Mr Townley was born in 1972, he would not have been able to obtain the NVQ until he was well into his 30s.

17. Of course, there was nothing actually preventing him taking a course at that age and indeed we were shown a CV of a fellow applicant which would appear to indicate he had done precisely that. The fact remained, however, the if having the NVQ was the only way that Mr Townley could satisfy this requirement, his age made it very difficult for him to do so as it would for anyone aged over 40.

18. However, it was clear that obtaining the NVQ was not the only way in which Mr Townley could satisfy this requirement. The job specification specifically states "or equivalent" and it was clear to us what that meant. Firstly, an applicant with a business administration qualification other than an NVQ might successfully apply. Mrs Bray informed us (and it seemed fairly obvious) that business administration qualifications were available at the time that Mr Townley would have been in full-time education, albeit not the NVQ. The use of the expression "or equivalent" meant the definition encompassed such qualifications. Furthermore, the way in which the provision was actually interpreted by the respondent was that the requirement would be met if an applicant could demonstrate actual experience of business administration (as opposed to a paper qualification).

19. In other words, there were other ways in which Mr Townley could satisfy the requirement in question and his age did not disadvantage him in those respects. It followed that we concluded that the provision, criterion or practice of the respondent of requiring a qualification (in the terms in which that was interpreted) did not put Mr Townley or anyone in his age group at a particular disadvantage.

20. Mr Townley did have a BTEC in IT. The second provision, criterion or practice of the respondent that he contended disadvantaged someone of his age was the alleged failure on the part of the respondent to treat that qualification as equivalent to or indeed superior to the Business Administration NVQ.

21. It was true that the respondent did not regard this as equivalent to the NVQ and the reason was obvious. It was IT focused. Clearly, there were elements of the qualification that related to business administration but it could not sensibly be regarded as a business administration qualification.

22. The refusal of the respondent to treat Mr Townley's BTEC in the way he desired might be regarded as a provision or practice. We were at a loss, however to understand how this particularly disadvantaged someone of Mr Townley's age. We were not told, for example, that such a qualification was significantly more likely to be found in the case of an older applicant. Insofar as his assertion related to an inability to obtain the NVQ, then we repeat what we have already said: he could have obtained a business administration qualification when he was in full time education or otherwise demonstrate his suitability for the role by his experience. His age, in short, did not disadvantage him at all (although for the sake of completion we should add that if it did, the respondent would have established that acting in the way they did was a proportionate means of achieving a legitimate aim. They wished to recruit someone with a business administration qualification or experience, given the nature of the role to be performed. That was clearly a legitimate aim and the proportionate way to do so was not to shortlist someone whose qualification did not indicate either).

23. We then turn to the claim of direct discrimination. In the case management discussions, it was put simply in this way: Mr Townley said that if he had been autistic he would have been shortlisted.

24. Before he sought to argue that there was a further allegation to go forward, namely that, as a disabled person himself, he should have been offered an interview. That was not a claim identified at the case management discussions, but Mr Townley insisted that he had been granted leave to take such a claim forward as a consequence of an exchange of correspondence between himself and the tribunal in January and February 2020.

25. He wrote to the tribunal on 6 January seeking to add a further allegation of disability discrimination. He makes it clear that he is seeking to add a claim of direct discrimination but does not say what the act is that he is complaining of.

26. By letter dated 12th February the tribunal indicated that his application had been granted but that amendment appeared to reflect precisely the claim he has already made - that had he been disabled with autism he would have been selected for interview. The tribunal indicates that this is a clarification or relabelling of existing facts and states that the amendment "so far as it is necessary" is granted.

27. The parties could not have taken that to indicate that the tribunal would now consider an assertion that, because of his disability, Mr Townley should have been interviewed. Apart from anything else, he made it clear that the amendment was an order to bring a claim of direct discrimination. This could not be such a claim. Essentially, it would be an assertion that there had been a failure to make reasonable adjustments. This was not a claim that the tribunal had granted Mr Townley leave to pursue and we were not prepared to hear it.

28. Mr Townley's sole claim of disability discrimination was, therefore, that had he been autistic he would have been shortlisted.

29. The tribunal had determined at an earlier hearing that Mr Townley was disabled by reason of his mental health issues. However, that disability was not directly relevant to his claim. He sought to put in issue a disability that he simply did not have.

30. It is certainly possible for a claimant not to be disabled and yet be able to claim disability discrimination. The obvious examples of such claims are discrimination by association and discrimination related to perception. In either case, however, the relevant disability is "associated" with the claimant. Mr Townley sought to rely upon a disability that had nothing to do with him.

31. It seemed to us that it was possible for him to take such a claim forward and we were particularly mindful of s13(3) of the 2010 Act. This provides that where the protected characteristic is disability, and the claimant is not a disabled person, the respondent does not discriminate against him because he treats disabled persons more favourably than he treats him. That appeared to us to be in acknowledgement that a claim of unlawful discrimination based upon the favouring of somebody other than the claimant with a disability can come before the tribunal, provided that the claimant himself is disabled. Mr Townley, as we have said, was indeed disabled and accordingly it seemed to us that this was a claim that we could consider.

32. Mr Townley said that if he had been disabled by reason of autism he would have progressed to the next stage of the appointment process. The evidence he suggested supported such a belief was a reference in the investigation report (produced upon his complaint) to the respondent's mission statement, effectively stating that they promote the interests of autistic people. That was hardly surprising given the nature of the respondent's undertaking. It did not seem to us to be sensible to infer from that statement that autistic applicants would be favoured in the way suggested.

33. More significantly, we heard direct evidence from both Ms Houghton and Mrs Bray to the effect that such an applicant would not be favoured. We accepted their evidence on that subject.

34. It followed that we concluded that Mr Townley had not been discriminated against on the ground of disability and his claims therefore failed in their entirety.

35. Mr Sonaike sought an order for costs. We were shown a letter sent to Mr Townley in August 2020 informing him that if he did not promptly withdraw his claim such an application would be made. The letter also contains an analysis of the merits of his claim which broadly reflects the grounds upon which we rejected them. We were invited to conclude that Mr Townley had acted vexatiously or unreasonably in taking proceedings.

36. The power to make an award of costs is contained in r76 of the Employment Tribunal Rules of Procedure 2013 and is exercised in two stages. Firstly, we would have to be satisfied that Mr Townley had acted vexatiously, abusively, disruptively or otherwise unreasonably in taking forward his claims. We were indeed satisfied that these were essentially unmeritorious claims and that it was unreasonable for him to have proceeded further having been expressly warned of the possible consequences.

37. Having taken that view, we then had a discretion as to whether to make an order for costs or not. We were conscious that the respondent is a charity and to waste several thousand pounds of their income on defending claims of this sort would clearly be a burden to them. Mr Townley also told us that he had consulted a solicitor and citizens advice in the course of the proceedings.

38. We were conscious, however, that Mr Townley was very much aggrieved by his treatment and, in certain respects, for good reason. The internal processes of the respondent provided that at least two people should be involved in the selection process at any stage, yet Mr Townley was rejected by Ms Houghton alone: the access she had to job applications was such that she was unaware that Mr Townley was disabled at all (notwithstanding that the respondent guaranteed an interview to anyone who was disabled and who met the minimum requirements): Mr Townley escalated his complaint about his treatment and then in accordance with the respondent's procedures should have received a response from the Chief Executive, yet no response was forthcoming – apparently because Mr Townley had commenced early conciliation.

39. What particularly concerned us was this was in the good faith (or otherwise) of Mr Townley. We were satisfied that he felt he had been badly treated by the respondent. While the respondent was not liable to the claimant in these proceedings, nor were its actions beyond reproach.

40. An order for costs in the Employment Tribunal is very much the exception rather than the rule. In the light of these considerations, we were not inclined to make an order in this case.

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Employment Judge Reed

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Date 17th September 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON
25th September 2020
By Mr J McCormick

FOR THE TRIBUNAL OFFICE