



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Viktor Fabian

v

City Plumbing Supplies Holdings Ltd

Heard at: Cambridge

On: 10-12 August 2020

Before: Employment Judge S Moore
Ms E Davies
Mr C Davie

Appearances

For the Claimant: In person

For the Respondent: Mrs L Randall, Employment Consultant

JUDGMENT ON PRELIMINARY ISSUES

The claims of disability discrimination under sections 15, 19, 20 and 21 of the Equality Act 2010 and of harassment related to disability under section 26 of the Equality Act 2010 are dismissed.

REASONS

Introduction

1. This is a claim of disability discrimination, namely discrimination arising from disability pursuant to section 15 of the Equality Act 2010 ("EA), indirect discrimination pursuant to section 19 EA, failure to make reasonable adjustments pursuant to sections 20 and 21 EA, and harassment related to disability pursuant to section 26 EA. The Claimant also brought claims for breach of contract and for compensation for untaken annual leave under regulation 14 of the Working Time Regulations 1998, but these had been withdrawn by the date of the hearing.
2. The Claimant gave evidence and was cross-examined. For the Respondent, Mr Peter Warriner, a Front Line Manager of Operations, gave

evidence and was cross-examined and we were also referred to a bundle of documents.

Disability

3. The Claimant is of Hungarian nationality and the bundle contains a report, translated from Hungarian, dated 9 March 1995, which appears to have been made as a result of a reference about his suitability to hold a driving licence. It further appears that the reference was made following a decision of a specialist physician of the Hungarian Army whereby the Claimant was deemed unfit for military service because of an unspecified personality development disorder. The report in the bundle contains a Psychological Opinion which states “[the Claimant] is a psycho-pathological person with average intellect. He is characterised by weak self-awareness, in conflict situations he can react with temporary limitation in his thinking and theatrical behaviour. His adaptation problems and relationship problems tire him easily.” The report further states that there was no indication of “specific harsh abnormalities” and that other than “instability, paranoid processing of experiences, no other abnormalities can be detected.” Although it is not clear from the report, the Claimant told us that he was allowed to hold a driver’s licence but told not to apply for a driver’s job.
4. The bundle also contains an Autism Spectrum Condition Diagnostic Report (ASCD Report) dated 12 August 2019. This followed a referral dated 30 January 2019 by the Claimant’s GP, Dr B Bansal, for an Autism Spectrum Condition (ASC) assessment. The ASCD Report concludes that the Claimant is a confident individual who is passionate about his interests. However, it further states that he is rigid in his thinking and displays some difficulties in social communication; in addition, he had on many occasions made inappropriate comments in the work-place which had resulted in him being asked to leave his place of work. The opinion of the ASC Diagnostic Service was that the Claimant met the criteria for a diagnosis of Autism Spectrum Condition.
5. On the basis of this evidence, prior to the hearing, the Respondent conceded that the Claimant is, and was at the material time, a disabled person within section 6 EA by reason of an Autism Spectrum Condition.

The Facts

6. The Claimant began working for the Respondent on an agency basis from 25 October 2017. He worked within the Respondent’s Omega warehouse on a “picking shift” from 2.00pm to 10.00pm on a two-man truck called a two-man Low Level Order Picker (LLOP). He would assist another warehouse colleague who trained him how to pick in accordance with the company requirements. In addition, he undertook a “collaring” task whereby he was required to prepare the pallets, by fitting collars around them. The collaring area was an unskilled area that was predominantly staffed by new starters in rotation. Generally, the Claimant worked one week on a two-man LLOP and the next in the collaring area and the Respondent had no problems with his work during this period.

7. On 1 October 2018 the Claimant commenced employment directly with the Respondent, working in the same warehouse. His job title was Omega Warehouse Colleague and the job description states that the main responsibilities will include “order picking, using LLOPS, goods-in, and put away duties, dispatching orders, unloading, stock control, hygiene and other general warehouse duties”. The Claimant’s employment was subject to a six-month probationary period, which had to be completed “to the satisfaction of the appropriate manager”. His contract stated that during this period his “time-keeping, conduct, performance and satisfactory attendance will be monitored”. The Claimant’s line manager was Mr Peter Warriner.
8. The Claimant completed all of the necessary induction training stipulated by his employment contract that he had not already completed. Prior to his Lift Truck Operators training he completed a medical questionnaire (dated 13 September 2018) and was asked to disclose “any medical condition you feel is relevant to MHE operation”. He did not disclose anything. The form also asked if he had a disability and he ticked the box ‘no’.
9. The Claimant said that he did not regard himself as having a disability but that at some point after starting his employment he spoke to Mr Warriner about his autism and personality development disorder, and further said that he found it hard to concentrate and that he struggled with complex tasks that required a lot of instructions, such as picking. Mr Warriner categorically denied this conversation had ever taken place. The Claimant was asked several times to provide details of this conversation, and in particular what Mr Warriner had said in response, but was unable to do so. At one point he said he told Mr Warriner about his condition in the context of a conversation about veganism, about which the Claimant is passionate. At another point he said he told Mr Warriner in the context of a conversation about plastics in the ocean, he said he likened himself to Greta Thurnberg and said that he had her condition. Mr Warriner said he remembered the Claimant talking about veganism and plastics in the ocean, but he had no memory of the Claimant mentioning Greta Thurnberg and that he didn’t know who she is. He was adamant that the Claimant had never said he had a condition or compared himself to someone who did.
10. On 8 November 2018, the Claimant had his first Probationary Review. Mr Warriner noted that the Claimant was a strong performer in collaring, but noted that he had a limited skill set, and “didn’t seem to grasp picking on his own”. In this respect, since becoming employed by the Respondent the Claimant had been required to use, and had encountered difficulties, using and picking from a one-man LLOP. The one-man LLOP was used in the biggest area of the warehouse, termed M1; at any one time about 40-50 workers were using a one-man LLOP, while about ten workers used two-man LLOPs and two further men worked in the collaring area. Mr Warriner’s action plan, noted on the Probationary Review Form, recorded that the Claimant was happy working in the collaring area and that at the present time he saw no reason to move him but noted this might change with the demands of the business.

11. At one point in the hearing the Claimant said he must have told Mr Warriner about his condition after an incident outside work on 23 December 2018 because complaints had been made about his behaviour and when relating this incident to Mr Warriner, he would have referred to the fact that his behaviour was because of his condition. Mr Warriner could not remember any such conversation and was again adamant that if the Claimant had told him he had autism or a personality development disorder or similar condition he would have taken immediate action.
12. At the Claimant's next review on 17 January 2019, Mr Warriner again noted as an area for improvement the Claimant's limited skill set, namely that he only worked on collaring or as a second man on a LLOP. He also noted as an area for improvement that the Claimant had been late on three occasions and regularly clocked in the last minute. The action plan recorded on the Probationary Review Form stated that he was happy for the Claimant to remain in collaring at the present time, though this might change with the needs of the business, and that the Claimant needed to make sure he gave himself enough time to get to work on time and prevent lateness.
13. In or about January and February 2019 the Claimant asked for the times of his shifts to be changed so that he could attend a hearing in a claim he had brought against his previous employer. Mr Warriner agreed to this and said in evidence he was aware of that litigation. However, since the Claimant told us this was a claim of unfair dismissal and he had not brought a claim of disability discrimination, there is no reason why these conversations would have alerted Mr Warriner to the fact of the Claimant's disability.
14. On 30 January 2019, the Claimant's GP, Dr B Bansal made a request for an ASCD assessment. Dr Bansal's notes on the referral form state "case on going about what he has done; his solicitors advised this mental health assessment and someone there thinks he has autism". As regards questions, "Does the person have any physical health conditions/disabilities?" and "Has the person been diagnosed with any mental health/neurodevelopmental conditions?" Dr Bansal has ticked the box, no. The Claimant said that the GP had made a mistake, and further that he had been seeking an ASCD referral since January 2018.
15. Notably, for the purposes of Dr Bansal's referral, the Claimant had to complete a self-assessment form in which he had to indicate his agreement or disagreement with certain statements on a scale from "Definitely Agree" to "Definitely Disagree". In response to the statement, "I find it easy to do more than one thing at once," he ticked, "Slightly Agree", and in response to the statement, "If there is an interruption, I can switch back to what I was doing very quickly," he ticked, "Definitely Agree".
16. Mr Warriner was unaware of the referral.
17. In February/March 2019 the Respondent took on a number of new unskilled warehouse colleagues who, to commence their training, started in

the collaring area. The Claimant was therefore moved back to the two-man LLOP.

18. By the next review on 26 March 2019, the Claimant had been late on a further occasion (24 January 2019). Mr Warriner noted that the Claimant still clocked in at the last minute and in the action plan Mr Warriner recorded that he had advised the Claimant he did not give enough time to ensure he was ready in work on time. He also noted again the Claimant's limited skill set and recorded in the action plan that he wanted to give the Claimant the opportunity to amend this and would organise LLOP refresher training and also further training in M1. The Claimant said that at this meeting he apologised for not being very good at picking, but this was how his autism affected him and was the reason he was struggling. Mr Warriner denied that the Claimant referred to having autism at that meeting (or at any probationary review meeting).
19. After the meeting on 26 March 2019 Mr Warriner arranged a full week training for the Claimant on a two-man LLOP, picking with assistance, and a further day of specific one-one training on a one-man LLOP in M1. The Claimant was also informed that his probation period was being extended for a further three months because of his unsatisfactory time-keeping.
20. The Claimant said he was told by a colleague called Peter that normally a probationary period gets extended by 4 weeks and Mr Warriner was treating him like an idiot, and also that Mr Warriner had referred to his picking as "shit".
21. On 1 April 2019 the Claimant asked Mr Warriner if he could change the time of his 30-minute break because he had an important call to make regarding his employment case. Mr Warriner agreed, having ascertained, as the Claimant was working on the two-man LLOP, that his colleague didn't mind his break time being changed. On 2 April 2019 the colleague came to Mr Warriner's office because he was concerned the Claimant was still on the phone and he couldn't start work. Mr Warriner stated, and we accept, that when he found the Claimant and asked him to terminate his call, he refused to do so and turned his back on Mr Warriner. In any event, the Claimant was on the telephone for 75 minutes which exceeded his break time by 45 minutes. Mr Warriner issued him with a "letter of concern" dated 2 April 2019, which referred to the Claimant's previous poor time-keeping, pointed out that the Claimant had exceeded his break time by 45 minutes, and warned him that if his time-keeping didn't improve he might need to take formal disciplinary action.
22. On 12 April 2019 there was a further incidence of the Claimant arriving late and he was spoken to by another manager, Peter McGimpsey, for speeding in the car park. The Claimant said that he had arrived exactly on time but that Mr McGimpsey told him that it was OK and to attend a briefing before clocking in. Mr Warriner said that when he spoke to Mr McGimpsey, Mr McGimpsey said he had been concerned to address the Claimant's speeding in the car park and had not said it was OK that he was late. Mr Warriner regarded this as another example of the Claimant being late.

23. On 15 April 2019 Mr Warriner received an email from Mr Mark Rogers, who is tasked to check the accuracy of pickers in the M1 area, which said the Claimant had “continued to make high levels of pick errors and seemed reluctant to take advice or responsibility for his mistakes.’
24. On 15 April 2019 Mr Warriner invited the Claimant to attend another Probationary Review Meeting to discuss his work performance and time-keeping, and stated that a possible outcome could be the termination of his employment.
25. The Probationary Review Meeting took place on 18 April 2019. As well Mr Warriner, Mr John Clarkson, a Senior Warehouse Colleague, attended as a note-taker. In his statement the Claimant said that when his picking performance was being discussed he told Mr Warriner he found it hard to concentrate and follow detailed instructions because of his autism, and that he became anxious and upset that nobody was taking his disability into account. He also said that at this point Mr Warriner told Mr Clarkson to stop taking notes and Mr Clarkson then crossed out some of his minutes. He was then informed that he was being dismissed due to his punctuality and performance at picking. In his oral evidence the Claimant said that he raised the matter of his autism after he was told he was being dismissed, or, alternatively, when he was asked at the end of the meeting if he had anything else to say, and it was at this point that Mr Warriner told Mr Clarkson to stop taking notes.
26. Mr Warriner stated that during the meeting the Claimant did not refer to suffering from autism or refer to any disability or condition. Mr Warriner said he adjourned the meeting to consider his decision and when he reconvened ten minutes later he told the Claimant that he was being dismissed because he had failed to meet the standards of the probation. He further told the Claimant that he was not required to work his notice and that he would be paid in lieu. The Claimant would not look at the notes of the meeting and refused to sign them. Although his demeanour was pleasant, he said he would take the Respondent to court. As Mr Warriner escorted the Claimant to collect his belongings and then off the premises, the Claimant stated that “he would be taking the company to court for discrimination against his health.’ Mr Warriner replied “What is wrong with your health?” and the Claimant replied, “my disability, you know”. Mr Warriner said he replied, “No Viktor, what disability?” And the Claimant replied, “You know, my disability.” Mr Warriner asked if the Claimant had brought in any medical evidence from a doctor, and he said “no”.
27. After the Claimant had left, Mr Warriner immediately sent the following email to the Respondent’s Human Resources Department:

“Hi Amy and Amanda

I just wanted to put in writing some of my concerns with Viktor’s review. Through the review Viktor kept going on a tangent and more often than not it was about his money and not so much about his job. In general my head is spinning from trying to maintain focus on the subject at hand.

Viktor mentioned taking us to court a few times but on the way out he said he didn't want to cause trouble but he has no choice but to take us to court for his money, he said he will be taking us to court for discrimination against his health to which I asked, "Why, what's wrong with your health"? He replied, "My mental health, you know," to which I replied "No Viktor, what's wrong with your mental health"? He said, "you know, my mental health". This went back and forth a couple of times and he didn't actually say what was wrong with his mental health. I did ask him if he had brought anything in from a doctor as that's the advice I would give anyone with health issues to which he replied "No".

I believe we will hear from this gent again and if we do not it won't be for lack of trying."

28. Later that same day, Mr Warriner sent a further email to the Human Resources Department, stating "Correction, he said disability and not mental health."
29. By telephone on 29 April 2019 the Claimant requested the handwritten notes of the meeting of 18 April 2019, and says he was told they were not available. However, in any event, he was sent a copy of those notes by letter dated 30 April 2019. The notes support Mr Warriner's version of events in that they do not refer to the Claimant referring to his disability or autism or any condition during the meeting or contain any crossed-out sections, apart from minor corrections. The Claimant maintained at the hearing that the notes were not the ones that had been taken at the time and are a forgery.

Conclusions

30. In response to the Claimant's claims of disability related discrimination and failure to make reasonable adjustments the Respondent submitted that it did not know and could not have been reasonably expected to know that the Claimant had the disability of Autism Spectrum Condition, or any disability, which is a defence to such claims under, respectively sections 15(2) and paragraph 20 of part 3 of schedule 8 EA.
31. We accept this submission. We find that the Claimant did not tell Mr Warriner that he had autism or any disability either shortly after being taken on as an employee in October 2018, or in December 2018, or at the Probationary Review Meeting on 26 March 2019, or at any time until after he had been dismissed on 18 April 2019. In this respect we found Mr Warriner's evidence clear, detailed and convincing and we further accept that if he had been told the Claimant had the disability of an Autism Spectrum Condition he would have responded appropriately. In this respect, Mr Warriner gave evidence that two individuals with an Autistic Spectrum Condition had been successfully employed as pickers in the warehouse. We also note that none of the Probationary Review Forms, which are signed by both Mr Warriner and the Claimant, make any mention of the Claimant telling Mr Warriner that he has an Autism Spectrum Condition or any other condition. Finally we note that

the Claimant did not receive his diagnosis from the ASC Diagnostic Service until August 2019, after he had left the Respondent's employment, and that both the referral notes from Dr Bansal and the Claimant's self-assessment reveal a lack of clarity prior to that diagnosis as to the potential existence and nature of the Claimant's Autism Spectrum Condition, which is not consistent with the Claimant's evidence that he told Mr Warriner both about his condition and that he found it hard to concentrate and struggled with complex tasks.

32. In particular, as regards the meeting on 18 April 2019 we find that the Claimant did not tell Mr Warriner about his autism, or that he has a condition that impacted upon his ability to perform his job, during that meeting and/or prior to his dismissal, and we do not believe the handwritten notes of that meeting are a forgery. Mr Warriner's evidence was consistent and straightforward and entirely consistent with the email that he sent to Human Resources immediately after the meeting. Further the content of that email is consistent with Mr Warriner still being unaware at that time as to the nature of the Claimant's disability. We also note that there was little delay between the Claimant requesting and being sent the handwritten notes, and that the notes themselves have the appearance of being a contemporaneous document and written at speed with the occasional error and crossing out. Finally, we also note that in his email to Human Resources, Mr Warriner mentioned the Claimant's tendency to go off at a tangent – a tendency we ourselves observed in the hearing - and it is possible that he may have told Mr Clarkson it was not necessary to take a note of what the Claimant was saying at a particular moment, which led to misinterpretation by the Claimant.
33. As to whether the Respondent could reasonably have been expected to know the Claimant has an Autism Spectrum Condition, we find it could not have been. The Claimant had completed documentation stating he did not have a disability, or any medical condition he felt was relevant to operating lift trucks, and there was no evidence of absenteeism or a change of behaviour on the part of the Claimant such as to trigger the need to make a reference to Occupational Health. Further, in the Claimant's Disability Impact Statement, under the heading, "Describe [the effect of your disabilities] on day to day activities", the Claimant said he followed a strict routine, ate his meals at the same time every day and ensured his food was free from animal products. He also became upset at changes to his environment and enjoyed watching films 4 or 5 times in a row. As Mrs Randall submitted, the Respondent would not have been aware of any of these behaviours. Further whilst the Claimant may have likened himself to Greta Thurnberg in the course of a conversation with Mr Warriner, we find that any reference to the Claimant himself suffering from autism is likely to have been oblique and unclear and insufficient to alert the Respondent to the fact of the Claimant's disability.
34. As regards the claim of indirect discrimination, the Claimant was asked at a Case Management Hearing to identify the provision, criterion or practice (PCP) that he relied upon as putting individuals with an Autism Spectrum Condition, and himself, at a particular disadvantage. He subsequently identified it as "requiring all warehouse colleagues to complete picking tasks and applying the same standard of performance to all warehouse colleagues".

35. In fact, the Claimant's job was picking, and the Respondent did not apply the same standard of performance to all warehouse colleagues, at least during the probationary period, since it was happy to, and did, provide the Claimant with extra training. Further the Claimant does not appear to have encountered problems picking on the two-man LLOP. Accordingly, having heard the evidence we consider that the PCP is better defined as "requiring employees use the one-man LLOP and pick with a high degree of accuracy".
36. The next question is whether that PCP puts people who share the claimant's characteristic of an Autism Spectrum Condition at a particular disadvantage compared with people who do not share it and we do not consider the evidence establishes that it does. To the contrary, Mr Warriner's evidence was that two individuals with an Autism Spectrum Condition had been successfully employed as pickers and further that they had been able to pick using the one-man LLOP in the M1 area. Further the medical evidence we have about the Claimant's disability is focused far more on the difficulties he has in social communication and misinterpretation, and points to rigidities in his thinking and socialisation. It is true that the recommendation in the ACSD report include statements that the Claimant may need time to process questions and information, and that if he is feeling overwhelmed the complexity of tasks/communications should be reduced and he should be allowed additional processing time. However, Mr Warriner gave clear and unchallenged evidence that the Claimant was never put under any time pressure as regards picking. There was no quota of items that had to be picked, and to the contrary he stressed to the warehouse operatives that it was better to pick slowly and accurately, and that speed would come later. Further, the Claimant had previously worked as a picker for B & Q and had at least 4 years picking experience, including on one-man LLOPs. He stated that picking at B & Q was easier because the items were smaller items like paints, rather than items of porcelain and toilets, and that B & Q used pallet cages which felt more secure. However, we cannot find any link between these differences and the condition of an Autism Spectrum Condition which would put individuals who have an Autism Spectrum Condition at a particular disadvantage when working as pickers at the Respondent's Omega Warehouse.
37. In any event, if the PCP identified above did put individuals with an Autism Spectrum Condition at a particular disadvantage, and put the Claimant at that disadvantage, we would find that the PCP was a proportionate means of achieving a legitimate aim. The evidence was that the majority of the work in the warehouse was carried out by pickers using one-man LLOPs in the M1 area, and that there were only 12 unskilled places in the warehouse, comprising 10 places on two-man LLOPs and 2 places in collaring, which were needed to be used on rotation as new workers started at the warehouse. The requirement for accuracy was also proportionate; if the wrong stock is sent out, the branches are unable to satisfy orders with consequent financial loss, potentially on a large scale. Further the Respondent was prepared to invest time and training in its employees to help them acquire the skills to pick using the one-man LLOP, and gave the Claimant a significant amount of additional training, including one-one training.

38. Accordingly, the complaint of indirect discrimination is dismissed.
39. As regards the complaint of harassment, the Claimant relied on the fact that Mr Warriner had treated him like an idiot for extending his probationary period for 12 weeks, rather than 4 weeks, and being told that Mr Warriner had referred to his picking as “shit”.
40. Mr Warriner gave evidence, which we accept, that if a probationary period is extended it is normal to extend it by 8 or 12 weeks, and he did not know of any occasion on which one had been extended by only 4 weeks. Further we note that the Claimant’s probationary period was extended for “unsatisfactory time-keeping”, and not because of his picking. Accordingly, the act of extending the Claimant’s probationary period by 12 weeks was not conduct related to the Claimant’s disability and could not reasonably have the effect of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.
41. As regards the Claimant’s assertion he had been told that Mr Warriner had referred to his picking as “shit”, since there is no evidence before us from the person to whom Mr Warriner allegedly made the comment, and Mr Warriner vehemently denies making it, we cannot be satisfied the comment was ever made.
42. It follows that the claim for harassment is also dismissed.

12 August 2020

Employment Judge S Moore

Date:

Sent to the parties on: 7/9/2020

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For the Tribunal Office