EMPLOYMENT TRIBUNALS

Claimant: AB

Respondent: Minster Law Ltd

HELD AT: Leeds **ON:** 13 – 15 October 2020

BEFORE: Employment Judge Wade
Mr W Roberts
Mrs L Hill

REPRESENTATION:

Claimant: In person
Respondent: Mr P Wilson (counsel)

JUDGMENT

The claimant's complaints of Equality Act contraventions (disability discrimination, harassment and failures to make reasonable adjustments) are dismissed.

REASONS

Introduction

1. The claimant's complaints related to a short period of employment with the respondent from 18 December 2019 until 27 January 2020. The claimant is in his late thirties and has had cerebral palsy from birth. He suffers with short term memory impairment. Prior to this employment the claimant appeared from his CV to have had stable employment with a number of different employers from 2006, which was within a couple of years of completing mainstream education.

2. We were told that the claimant's father had assisted with completion of the claim form on line, and that he had told his father noteworthy things that had happened at work prior to the claim being presented. Unfortunately, we had no statement or evidence from the claimant's father.

3. The claimant had indicated a complaint of disability discrimination but the only details provided were these:
   I applied for a job at minster law which asked on the application form if I had a disability which I put yes (cerebral palsy). When I was struggling with my work they said they didn't know how to help me as then when I spoke to HR they said Id not told them I had a disability as they didn't ask, HR also said they don't have to apply any disability laws as they are not under the two-tick scheme."

4. The claimant answered "no" in the claim form to this Tribunal, when asked if he had a disability, nor make any observations about the adjustments he would need to take part in a hearing. In its response the respondent did not admit that the claimant was a disabled person, on which the claimant later relied as material from which we should make adverse findings.

5. In March 2020 the claimant sent evidence of his condition in the form of a recent specialist attendance at hospital, and sought to amend his claim form to that effect. That application was granted and the respondent's subsequent amended response accepted that the claimant was a disabled person within the Equality Act definition.

6. On a review of the claim and response the claimant had been ordered to set out in table form the complaints he made. He indicated he had difficulty with that exercise. His claims were instead clarified in a case management hearing by telephone on 7 April 2020.

7. They were described in the case summary as follows:

EQA, section 15: discrimination arising from disability

   7.1. The claimant says that because of his cerebral palsy he has short term memory problems. This means that he sometimes forgot instructions about how to do things which were part of his job. He says that because of that he might not have done things correctly.
   7.2. The claimant says that because he did not get things right Ms Oldroyd criticised his work.
   7.3. The claimant also says that because of his condition it is important that he was assessed quickly to see what help he needed to do the job properly.
   7.4. The claimant says that the respondent did not assess him quickly and he had to chase HR to arrange for an assessment.

8. Reasonable adjustments: EQA, sections 20 & 21

   8.1. The claimant says that he needed instructions to carry out his job, which was new to him.
   8.2. The claimant has short term memory problems so it is particularly hard for him to learn new jobs as compared to people who don't have those problems
   8.3. The claimant says that the respondent knew this.
   8.4. The claimant says that he needed the respondent's managers to write down instructions when he was shown a new job. He says this did not happen. He also says that he needed to know who he could go to to ask for help. He says that for a week over Christmas and New Year he did not know who he could ask because his normal mentor was on holiday and he had not been told who would be covering.

9. EQA, section 26: harassment related to disability.

    9.1. The claimant complains that Ms Oldroyd was overheard saying to a colleague that it was a “pain in the arse” having to help the claimant. He also complains that Ms [Oldroyd] told him that she did not know how to explain the work to him. The claimant was so upset by this that he left work.

10. Both at the 7 April case management hearing and subsequently the claimant indicated difficulty in being able to produce a witness statement and, after a further case management hearing, the Tribunal made arrangements for his statement to be dictated and typed. The claimant told us that he was told that he only needed to put in his statement new things that he had not already told the Judge.

11. The claimant told this Tribunal that in addition to memory impairment he struggled with writing and that is consistent with the brevity of written emails both on the Tribunal’s file and to his employer. The claimant’s reading and analysis appeared to the Tribunal to be consistent with him being able to fully take part in a hearing, and we had medical evidence before us to the effect that he had capacity: we had no' concerns of that kind, but nonetheless, because of memory impairment, he was a memory impaired adult attending proceedings alone and we had to put in place arrangements to address that.

12. It was also apparent that the claimant’s statement included a new matter which was not in the claim summary above, nor his claim form – an allegation that he had not been permitted to attend work late two days per week to enable a swimming course recommended by his doctor to address limb or back pain. The Tribunal explained that he would need to apply to amend his claim to add that further matter. There was no objection from the respondent and the Tribunal announced its permission for the complaint (as a reasonable adjustments’ complaint) to proceed before the evidence commenced.

13. It became apparent on the first day that by 2.40pm limb pain was affecting the claimant’s evidence and we ended the hearing early for that reason. We then limited the hearing to the same length on our second day. The Tribunal provided a written outline of how the hearing would be undertaken after we had completed our reading, both for the claimant to refer to and for him to take home to his family for support they could give. Mr Wilson provided short written submissions which were also provided at the end of the second day, again, so that the claimant could discuss those with family and be supported on the third day to make any final points of argument that he wished to make. He told us that unfortunately mother, father and sister all worked and it was too short notice for them to attend with him.

14. On the third morning we heard those final points the parties wished to make. We explained our reasons for not giving an oral decision later that day, given the claimant’s memory impairment, and we directed an email be sent explaining the possibility of a Rule 50 anonymisation order. The claimant’s initial response when it was discussed with him was that he was not concerned, but on discussion with his father the Tribunal were then informed that he did seek anonymisation for the reasons the Tribunal had explained. There was no objection from the respondent and Mr Wilson, applying the overriding objective, fairly and properly described the claimant’s initial response as ill advised.

Evidence

15. The Tribunal had a short file of relevant contemporaneous documents which were almost entirely consistent with the evidence heard from the respondent witnesses. We heard oral evidence from the claimant, and considered he was reliable on some matters, when engaged and on comfortable territory, but not on others, largely because of their inherent unlikeliness, but also because he had a tendency to misconstrue or manipulate what was said to him when "venting" or expressing his frustration or anger; and then remember the misconstrued version as fact; and that was exhibited before the Tribunal.

16. Mr Wilson conducted his questioning of the claimant with the degree of sensitivity, consistent with the overriding objective, that the Tribunal would have expected and the Tribunal considered a fair hearing of the evidence had taken place. Having said that, matters may have been clearer had there been contemporaneous evidence from the claimant's family about any matters relayed to them at the time.

17. On behalf of the respondent we heard from Ms Oldridge (by video link), with whom he was to work, and who, with another manager, had interviewed and appointed him; Ms Hodsdon his line manager; and Ms Broadley, the respondent's Junior HR Business partner. We considered these witnesses were giving honest and reliable evidence to the Tribunal.

Findings of fact

18. The claimant is a gentleman with cerebral palsy who suffers with memory impairment and some limb weakness. He completed mainstream school and further education and between 2006 and 2019 was in stable employment largely working in IT.

19. At the end of his last job his GP recommended he undertake a swimming course to aid with pain and general movement. He did that twice a week from 8am to 9am for five or six weeks in November and December.

20. The claimant applied for a post with the respondent completing an application form and attaching his CV and disclosing his cerebral palsy.

21. The fixed term post was to work closely with a colleague Ms Oldridge, who was running a project to assist with accurate allocation of costs to different phases in litigation. Ms Oldridge and another manager interviewed the claimant. Ms Oldridge was impressed with the claimant's cv and he was appointed after interview, an offer letter and contract documentation being sent on 10 December 2019.

22. On 11 December the claimant signed a contract confirming his manager was Ms Hodsdon, and that was the person he was instructed to ask for on his first day on arrival at 9am, which was to be 18 December 2019.

23. On 13 December, HR emailed Ms Hodsdon to confirm that the claimant had cerebral palsy, which affected his short-term memory, suggesting a display screen equipment assessment ("DSEA") and to have a meeting to understand what else could be done to assist.

24. On 18 December Ms Oldridge and Ms Hodsdon conducted a long and detailed meeting and went through how they could help the claimant because of memory impairment. It was agreed that information and instructions would be provided in writing. They also worked together to produce various bespoke prompts and documents to help the claimant fulfil the role and to learn further as his experience developed. Ms Hodson raised the possibility of an occupational health referral but the claimant did not think that was necessary at that stage and he would use Outlook and other tools to remind him of deadlines and appointments.

25. For those first days at work the claimant sat closely next to Ms Oldridge and she passed him lists of costs entries to work through and re-categorise to the right phase. She was pleased with his progress and the correctness of his work.

26. On 24 December the DSE took place with the facilities and health and safety manager. There was only one issue noted in response to a question on the form about illness, aches or pains: the claimant's response was "back issues connected with illness". The claimant asked if the respondent could do anything with Occupational Health on that and the manager said they did not know but would check.

27. The DSEA was signed by the claimant and again confirmed his manager was Ms Hodsdon. The claimant did not mention swimming to the DSEA assessor at this point. We do not consider his evidence is reliable about this in context. Ms Oldridge was sitting next to the claimant as the assessment was being carried out and she fairly accepted that Occupational Health had been discussed. It is inherently unlikely that if the claimant had raised such an obvious and doable adjustment, given the speed with which the respondent was demonstrating its willingness to help him, that it would have been noted and actioned in relation to information about back pain.

28. The claimant was scheduled to be at work between Christmas and New Year – the respondent has a requirement that 50% of staff attend in that period. Ms Oldridge was not in the office Christmas Day until she returned on 6 January, but Ms Hodsdon was in the office on Tuesday 31st December and the following days.

29. The claimant was without Ms Hodsdon or Ms Oldridge for support and guidance for two days, between Christmas and New Year, but three or four other colleagues in the costs team were present in the open plan space with him. The claimant's evidence was that he was struggling before Christmas (that is in on the five working days from his first day to Christmas Eve, and had told Ms Oldridge that). That is an example of unreliable evidence – it is wholly at odds with the contemporaneous documents and Ms Oldridge's evidence and the DSEA. The claimant did make reference to struggling, but this was from 13 January.

30. On Monday 6 January 2020, Ms Broadley of HR suggested an occupational health appointment for the claimant (no doubt in response to a query being raised by the DSEA assessor). Ms Hodsdon then arranged that and the claimant signed the requisite forms – the appointment was made for the 15 January. By this stage the claimant had missed a formal "onboarding" training session and it had been agreed that he would be provided with all slides in advance of the next one. His outlook calendar invitation to the event had not been accepted.

31. Before the claimant had arrived at work on Wednesday 8 January Ms Oldridge, having been pleased with his work so far, wanted to start suggesting some deadlines for particular new pieces of work, as well as working through the backlog items. She emailed him to that effect.

32. Sadly, that day the claimant had a bicycle accident coming to work – his journey was about a mile or so and he hit a pot hole or something similar. No claim was pursued about that. He was then absent until Monday 13 January when he attended badly bruised.

33. Ms Oldridge allocated him three new file items of work. The claimant was then off work, probably having returned too soon, on Tuesday 14 January, returning to work on the afternoon of 15 January.

34. On the morning of 15 January Ms Broadley rescheduled the occupational health appointment to the next clinic in February, the claimant having not been able to make the scheduled appointment that morning because of his accident.

35. The claimant's task of working on the new file tasks and through a list of backlog cost reallocations continued that week, but the claimant had started to struggle with that work and told Ms Oldridge that. The tone and content of Ms Oldridge's communications to him were wholly supportive and displayed no lack of patience whatsoever.

36. Apart from Friday 17 January and Friday 24 January, Ms Oldridge was working next to the claimant and able to assist him during those two weeks; on those two Fridays she worked from home and responded to him by email.

37. On Thursday 23 January Ms Oldridge asked the claimant to check his work before she reviewed it - and they then sat down to discuss things because the claimant thought she was being critical – she explained that he had been doing very well before his accident. They talked through a particular example and they agreed to meet to see what other help she could provide on Monday.

38. That afternoon the claimant seemed agitated and stressed and Ms Oldridge suggested he take a walk out of the office, which, in any event, was his habit at break points in the day.

39. The next day she emailed the claimant when working from home to see if he was doing okay and she told him not to worry or words to that effect - and she rang him - and later emailed to confirm that the cases were not "all wrong".

40. The Tribunal finds that the claimant had said to Ms Oldridge, when she had asked him to check his work, that she was suggesting all the lines were wrong. She had not; she rightly wanted to explain that he had misunderstood and that was not her meaning in asking him to check his work. She had felt he had rushed things because mistakes were emerging when she looked at the first item or two.

41. She further suggested he highlight with the highlighter those entries that posed difficulties for him and they agreed to meet to discuss those on Monday.

42. Also on Friday 24 January Ms Hodsdon met with the claimant to talk about his concentration as he appeared to be playing on his mobile telephone phone during the working day. They went through some of the work he was doing – and she provided him with some more help and guidance.

43. On Monday 27 January, as planned, Ms Oldridge met with the claimant in an adjoining "pod" where they discussed the detail of the work and why it was posing him problems. Ms Oldridge was trying to get to the bottom of what the problems were when the claimant had had a good start before Christmas. She said that was her aim at the beginning of the meeting and she also said in that context that it was difficult for her to help him if she could not know what he was struggling with (and that was in the context of the claimant replying, "I don't know" in response to her enquiries. Ms Oldridge did not give up but went onto make suggestions and amendments to the claimant's instruction documents, and she went through entries with him. The session went on for about an hour and a half and covered a good deal of helpful ground.

44. Towards the end of that meeting there was a discussion in relation to hours of work because the claimant had left early on a couple of occasions – those occasions had been doctor's appointments with which there was no difficulty provided he let Ms Hodsdon know. The claimant also asked about doing physiotherapy sessions twice a week in the mornings for which he needed to adjust his hours by half an hour or so and again Ms Oldridge said it there should not be a problem but just to check it with Ms Hodsdon - it was not within Ms Oldridge's remit as a colleague, but not the claimant's line manager, to say yes or no to hours flexibility. Ms Oldridge did not say "he couldn't do it", which was the claimant's evidence.

45. The meeting appeared to end amicably enough and Ms Oldridge remained in the pod for a few minutes. The claimant returned to his desk and within ten minutes or so had sent a resignation email to Ms Hodsdon saying words to the effect that he was leaving there and then and "it's not for me as the help is not right" and "if you want to speak to me here is my number". He then threw his security pass on the desk when Ms Oldridge returned saying I hate working here – and walked out, which shocked her.

46. There was some correspondence following that with HR giving time for the claimant to reconsider his resignation, but ultimately the claimant maintained his decision and did not return. On 7 April 2020 in the case management hearing the claimant alleged that Ms Oldridge had said it was a "pain in the arse" having to help him.

47. The claimant in his evidence could say only that this had happened sometime between 17 December and 28 January. When pushed he said it was "probably" later on. He could not give any indicators of context, or to whom this was allegedly said, other than it was to another person and Ms Oldridge had her back to him when she said it and was about four metres away (by reference to the Tribunal room). The claimant said he told his father about it the day it happened, and that his father had reminded him about it "yesterday and the day before".

48. The claimant may possibly have heard Ms Oldridge say something was "a pain in the arse" and interpreted this as applying to him – he undoubtedly attributes malign motive to ordinarily reasonable actions. Ms Oldridge did not recall using that term

at work and considered she would not have said it, and certainly not about the claimant. We take into account it is a term in common usage, and in a costs environment where re-categorising of a backlog of work had to be done, it may well have been said by her. However, the Tribunal does not accept that Ms Oldridge said those words about her helping the claimant. It is simply improbable that she would do so when, on the one hand, she was so impressed by the claimant as to appoint him to a project for which she was responsible, after interview, and then on knowing he had memory impairment, put so much effort into trying to give him tools to assist, and then be happy with his work, and then after his accident give him further support when his work took a turn for the worse.

49. The remark is not proven.

Conclusions

50. Applying the law to the facts, it is convenient to address the allegations in reverse order.

Section 26 Harassment

51. The claimant has not proven that Ms Oldridge said it was a pain in the arse having to help him. This complaint is dismissed.

52. Ms Oldridge did say she did not know how to help him if she did not know what he was struggling with. That was a remark related to the claimant's disability because when the claimant answered, "I don't know" in response to her questions, the likelihood was that he could not remember why he had not correctly allocated the item to a phase, or whatever the question was.

53. We accept it was an unwelcome comment to the claimant, but its purpose was not to violate his dignity or create for him an intimidating, hostile, degrading, humiliating or offensive environment. Neither can we conclude that was its effect. The claimant perceived it did so, and remembered it such as to include it in his claim form some two or three weeks' later. But it is not reasonably to be perceived as doing so in the context of the support which Ms Oldridge had provided to him, the respondent's approach to seeking to make adjustments to assist him, the promptness of the DSE and occupational health assessments which were arranged.

54. It is very unfortunate that the claimant's fall appears to have affected his work and approach to it, but in cannot be said that Ms Oldridge's remark in the context of a long meeting which went on afterwards to provide as much help as she could is harassment within Section 26. This complaint also fails.

Sections 20/21 Failures to make reasonable adjustments – memory impairment

55. All relevant work-related communications, information and training was written down for the claimant. This complaint cannot succeed in a general sense. The only aspect of it which is arguable on the facts above is that neither Ms Oldridge nor Ms Hodsdon wrote down for the claimant, or emailed him, to communicate that on the two days neither of them were present over Christmas, he should approach colleague X or colleague Y for help.

56. The analysis envisaged at the case management stage was perhaps this. The claimant has proven that the respondent, like all workplaces, operates a practice of communicating orally, and this put the claimant at a particular disadvantage in comparison with colleagues without his disability because he would not or may not be able to recall important information delivered orally. A reasonable adjustment to obviate the adverse effect of this was to follow up communications in writing with the claimant; alternatively, to provide him colleagues or a mentor who understood his difficulty. The claimant had Ms Hodsdon or Ms Oldridge who both had the requisite understanding at all times apart from on two days between Christmas and New Year. The claimant cannot establish anything untoward in those two days that he needed from anyone – we do not accept his evidence that he was then struggling. He complained that he would not have approached colleagues he did not know for assistance even if he had needed it. However, that reticence was not said to be a particular or relative disadvantage arising from disability. It could have applied to any new member of staff arriving just before a Christmas holiday.

57. Was it reasonable for the respondent to have had to inform him by email of the colleagues he could approach in those two days – it was not. The short duration, the lack of difficulty at that time, and the presence of others in close proximity was such that there has been no failure to make reasonable adjustments by the respondent in this respect.

Flexible start times to permit swimming

58. We permitted this amendment as a failure to make reasonable adjustments; the respondent applied a general hours of work of 9am to 5pm; that put the claimant at a relative disadvantage in comparison with other members of staff without his disability: he suffered limb pain and difficulty and was prescribed treatment by swimming, which he could not have attended without flexible start and finish times.

59. Was it reasonable for the respondent to have had to have permitted that from 24 December 2020? It was not. The respondent did not know of the claimant's prescribed treatment at that stage – he had brought no confirmation of it, nor had he raised it with Ms Hodsdon on the occasions when they met; he only raised it with Ms Oldridge on 27 January, minutes before he resigned. The Tribunal has no doubt that had he remained in employment his adjusted hours would have been accommodated for this purpose. These reasonable adjustment complaints are dismissed.

Section 15: unfavourable treatment because of something arising in consequence of disability

60. The second allegation of a failure to provide occupational health assessment cannot succeed: it was promptly provided within two working weeks of the DSEA but by reason of the claimant's bicycle accident it had to be postponed. The claimant cannot sensibly complain about this – there is no Section 39 detriment and he has a wholly unjustified sense of grievance about it.

61. That leaves the allegation of Ms Oldridge's request for him to check his work, and the meetings on 23 and 27 January as amounting to "criticism", as an allegation of detriment. Again, for the reasons above, and taking into account the full context and support provided by Ms Oldridge, this cannot amount to Section 39 detriment

or unfavourable treatment. Unjustified criticism, or discussions carried out in a high handed or rude manner can amount to unfavourable treatment, but that was not the case here at all. This complaint fails.

62. Finally, anyone hearing about the claimant's circumstances in 2019 and early 2020 (he was attacked in 2019 and had the bicycle fall in January 2020), on top of the undoubted difficulties he faces, cannot but express regret that those things happened to him, and wish him improved circumstances in the coming months and years. That said the complaints against the respondent are wholly without merit and must be dismissed. Its witnesses have been put through the stressful rigour of a full hearing in which the Tribunal asked questions of them because the claimant chose not to and was not accompanied by anyone who could do so. In Ms Oldridge's case that was in circumstances of a video link, which may have increased the strain. We wish her a speedy return to life out in the community when that is possible given the current circumstances.

JM Wade

Employment Judge Wade

Date 16 October 2020