



EMPLOYMENT TRIBUNALS

Claimant: Mrs E Conway

Respondent: Camden & Islington NHS Foundation Trust

Heard by CVP on: 19 October 2020

Before: Employment Judge Martin
Ms Gledhill
Ms O'Hare

Representation

Claimant: Ms Gilbert - Counsel
Respondent: Ms Patterson - Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant's claims of discrimination in relation to the recruitment issues are dismissed.
2. The Claimant's claim of discrimination on the grounds of maternity for not being invited to the Christmas party in 2018 succeeds

REASONS

1. By a claim form presented to the Tribunal on 27 January 2019 the Claimant alleged that the Respondent had discriminated on the basis of her taking maternity leave in not appointing her to the role of Senior Psychological Wellbeing Practitioner ("PWP") and not inviting her to the Christmas party in December 2018. The Respondent accepts the Claimant was not appointed to the position and that it did not invite her to the Christmas party (which it accepts is unfavourable treatment) but disputes that the reason for this treatment is that she took maternity leave.

2. The essence of the Claimant's case is that she was not successful at interview because of collusion by those interviewing to deny her the role because she was on maternity leave. Her case is that the process from shortlisting to interview was specifically designed to disadvantage her. The Respondent denies this on the basis that it expected her to be successful at interview but that she did not perform as well as the successful candidate at her interview. The Claimant's complaint about not being invited to the Christmas party was defended by the Respondent who said the reason for this was not because of the Claimant being on maternity leave but because of error and oversight.

Agreed issues

3. The Claimant claims under section 18 of the Equality Act 2010, the unfavourable treatment relied on being:
 - a. A decision not to appoint her to a part time position for which she was interviewed on 23 October 2018 and she was then told that she had not been successful about 2 days later;
 - b. Not inviting her to the department Christmas party in December 2018.
4. The Respondent accepts that the Claimant was unsuccessful in her application for the part time post and that she was not invited to the Christmas party. It also accepts that this was, in each case, unfavourable treatment.
5. The only remaining issue on liability is whether the treatment of the Claimant was because she was on maternity leave, which the Claimant asserts, and the Respondent denies.

The Law

6. s18 Equality Act 2010

18 Pregnancy and maternity discrimination: work cases

- (1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.
- (2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —
 - (a) because of the pregnancy, or
 - (b) because of illness suffered by her as a result of it.
- (3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.
- (4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has

exercised or sought to exercise, the right to ordinary or additional maternity leave.

- (5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).
- (6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—
 - (a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
 - (b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.
- (7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—
 - (a) It is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or
 - (b) it is for a reason mentioned in subsection (3) or (4).

The Tribunal's findings of fact

7. The Tribunal has made the following factual findings on the balance of probabilities. These findings are limited to those that are relevant to the issues and necessary to explain the decision reached. All evidence was considered even if it is not specifically referred to.
8. The Respondent is a National Health Service Foundation Trust that provides adult mental health services, mental health care for older people, substance misuse services, and care for people with learning disabilities.
9. The Claimant was employed by the Respondent as a Band 5 Psychological Wellbeing Practitioner (PWP) from 22 September 2014. On 4 September 2017, the Claimant started a fixed term contract for one year to cover another member of staff who was on maternity leave in a Band 6 Senior PWP role. The Claimant went through a competency-based interview process for this position in accordance with the Trust's policy. The Claimant went on maternity leave on 15 July 2018. She was due to return to work at the start of August 2019.
10. On 31 October 2018, the member of staff for whom the Claimant was covering on the fixed term contract returned to work on reduced hours (three days per week). This led the Respondent to advertise for a 0.4 FTE Band 6 Senior PWP post between 28 September and 8 October 2018. There were four applicants for this role. All were shortlisted and progressed to the

interview phase of the recruitment process. The Claimant was not successful.

11. The Respondent has a recruitment policy which stipulates (as relevant to this case) that a minimum of two people should be on the interviewing panel; that shortlisting is done on an anonymous basis and the short listers must only use information on application form. The policy further stipulates: ***“Merit: The best possible candidates will be short-listed and recruited to vacant posts based solely on merit at assessments against objective criteria laid down in the person specification”***.
12. It also provides that ***“All posts, including fixed-term contracts, should be approved through our [establishment control process]. At this stage job descriptions and person specifications should be updated and revaluated, as appropriate. This ensures all posts are budgeted and are designed to best meet patient requirements before we seek candidates. In exceptional circumstances, where a Trust faces a highly urgent need, the Director of HR/Workforce or nominated deputy can agree a deviation from this process”***.

Shortlisting

13. The shortlisting was done by Ms Dewsnap and Ms Prout. The application forms were given to them on an anonymised basis although they could work out who was who from what had been written in them. The applications were marked, and the Claimant received 17 out of 20 marks. The Claimant along with the other three applicants were moved forward to the interview stage. The Claimant complains that she was not given full marks in the shortlisting process.
14. Ms Dewsnap gave the Claimant full marks. However, this was based on her personal knowledge of the Claimant and not solely on the application form as the policy requires. Ms Prout marked the Claimant less than Ms Dewsnap on the basis that the application form did not have examples and did not evidence work in clinical settings other than at the Respondent. In any event, the Tribunal finds that the marks given on the shortlist were not given to those interviewing. Although Ms Prout would have known them, there was no evidence of her telling her colleagues on the interview panel the scores at shortlisting.
15. Ms Prout says that in general she marks more harshly than Ms Dewsnap and that this has happened on many previous interviews and shortlisting processes they have done together.

The interview processes

16. The Respondent was mindful that all the applicants were internal applicants and therefore known to a greater or lesser extent by the managers. It wanted to ensure that the process was fair to all and therefore there was a discussion about who should be on the interview panel.
17. The policy says ***“Consideration should be given by the hiring manager to the participation and diversity of the members of the panel. It is best practice for one panel member to be from another department for internal recruitment processes to ensure fairness and equality of opportunity. The participation of service users and staff***

representatives is encouraged in general and also required for specific roles, for example, mental health roles.

18. The evidence, which is accepted by the Tribunal was that there were detailed discussions about who should be on the panel. It was necessary for either Ms Prout or Ms Dewsnap to be on the panel and it was decided that Ms Prout would be the most appropriate as she only had moderate knowledge of one person, Ms Chips (who was ultimately successful) who she saw only once a month for 30 minutes for supervisory sessions. Ms Chips had not been employed for long by the Respondent. Ms Dewsnap knew all the candidates. The only other person who could have been on the panel was the Clinical Lead and it was decided that this was not appropriate for a recruitment exercise at this level as the Clinical lead was many grades higher. Although the policy states that a minimum of two people are required to be on the interview panel, the evidence was that it was common practice to have three, and that in any event either Ms Dewsnap or Ms Prout would have had to be included.
19. The Claimant says the panel was deliberately chosen to disadvantage her as the Respondent did not want her to succeed as she was on maternity leave. She said that Ms Prout favoured Ms Chips as she knew her. This would however be true for the other two applicants who were only known to Ms Dewsnap. The Tribunal find that the Respondent thought carefully about who should be on the panel and the decision reached was reasonable. The Claimant's suggestion it was deliberately orchestrated to disadvantage her is rejected.
20. Before the interview there was a discussion about how to deal with things if the Claimant was appointed. All those interviewing the Claimant expected her to be successful as she had the most experience and was doing the role being interviewed for on a fixed term basis. It was discussed that the person who came second would be offered a fixed term contract to cover the Claimant's leave.
21. The policy says that all positions including those on a fixed term should go through the whole selection process. The evidence from Ms Dewsnap was that in her experience they could back fill from the other interviewees, but she would have taken HR advice before doing this. There was no reason to doubt this was her genuine belief. The policy envisages departure from this general principle in exceptional circumstances indicating that this has been done on occasion.
22. There were various examples given in evidence both by the Claimant and the Respondent which shows that the Respondent does in practice depart from the strict wording of the policy. For example, the Claimant said she had been on some recruiting panels before where the panel would manipulate the process by not marking independently to get their candidate of choice. She said that if someone did not fit, they would knock off points to score lower. Ms Dewsnap did the shortlisting based on what she knew of the candidates rather than the application form only as the policy stipulates. On this basis there is no reason to doubt what Ms Dewsnap said.

23. Six questions were selected to be asked of all candidates. All candidates were asked the same questions for consistency. The Claimant says that the choice of questions was designed to disadvantage her. Ms Prout chose the questions. They were from typical questions asked at this type of interview and were derived from the interview the Claimant had attended to obtain the fixed term post she had when she went on maternity leave. The questions were tweaked so that they were not exactly the same so as not to disadvantage the other applicants.
24. The first question was: ***“What will be the main transitions for you moving from a qualified PWP to a senior PWP in this service? How would you manage these transitions?”***. The Claimant said this put her at a disadvantage as she had already been in the post on a fixed term basis and the question seemed aimed at the other candidates, leaving her to believe the panel had not read her application form thereby unsettling her for the rest of the interview. In answering the question, the interview notes show she said she had already done the transition however she did not give many examples of how she managed the transition.
25. The second question complained of is: ***“A new guided self-help protocol for LTC has recently been introduced that all PWP’s are expected to offer. You notice the PWP team are struggling with implementing this change and have heard that not everyone is confident delivering the protocol and some are unsure of when it should be offered. How would you manage this?”*** The Claimant complains that the other candidates had been on LTC (Long Term Care) training while she was on maternity leave thus giving them an advantage. The Respondent said it could have been any protocol they used, as this was a management and not a clinical question. This is clear as it says: ***‘How would you manage it’***. The Claimant says that there was a slide on the training course that dealt with implementation. This was not before the Tribunal so the Tribunal cannot evaluate whether this would have assisted the other candidates. In any event, the panel had not done this training and did not know the content when the questions were chosen or that such a slide existed.
26. The Tribunal has considered the scores and interview comments in some detail. The comments and scores are consistent for all questions and record that the Claimant gave what the Respondent called ‘headlines’ with few examples of how she would actually do things in practice. This was commented on by the interviewers in their notes.
27. The Tribunal does not find that the Claimant was disadvantaged by the questions, to the contrary, given she was in the role on a fixed term basis and had done the work she had an advantage in talking about actual things rather than the hypothetical.
28. It is not the Tribunal’s role to say whether the marks given by the panel were correct. The Tribunal is to determine whether the process was tainted because the Respondent did not want the Claimant to get the job because she was on maternity leave.
29. The Tribunal find that the selection of questions was made after careful consideration from a standardised list of questions used before. The questions chosen were aimed to be fair to all and were focussed on the

management element of the role rather than clinical. All the questions relate to this. Ms Prout said she used the first question in as it had been at the previous interview as it was a good question which was very relevant to the role. Her evidence was that the Claimant having been asked this question in the previous interview and having done the role was at an advantage. Even if there had been a disadvantage, there is no evidence that questions were chosen or manipulated to disadvantage the Claimant because she was on maternity leave.

30. The range of marks were:
 - a. Abbie Chips 72 (all scorers gave 24)
 - b. The second highest marked 65.5 (two gave 22 and one 21.5);
 - c. The Claimant 59 (two scored 19.5 and one 20);
 - d. The last candidate 53 (two scored 17.5 and one 18).

31. This shows very consistent marking. The evidence was that the marking was done independently before any discussion about the individual interviews. The interview notes do not show any alteration to marks or the comments which could suggest that interviewers were influenced by others. The comments indicate a lack of examples given by the Claimant in her answers. The decision was to appoint Ms Chips as she had scored highest at the interview.

32. The evidence was that the Claimant's answers were brief and lacked examples and details. The Respondent referred to her interview lasting 20 minutes whereas the other interviews lasted at least 30 minutes as the other candidates gave many more examples and details of their experience and qualifications.

Feedback

33. It was agreed that Ms Celia Healy who was on the panel would give feedback to all the candidates. The Claimant was upset that Ms Prout did not give the feedback to her. Ms Healy's feedback was that the Claimant did not demonstrate the requirements of the person specification by way of examples and that she scored third out of the four candidates.

34. The Claimant sent a text to Ms Dewsnap saying: ***"As my line manager, perhaps we can arrange a call next week perhaps as I want to think about my options moving forwards"***. On the face of it, this could be interpreted as a request for a discussion about career options. It was however appreciated that the Claimant wanted feedback directly from Ms Prout. Ms Dewsnap telephoned Ms Prout telling her that the Claimant wanted more feedback. Ms Prout said that she had a very short conversation with Ms Dewsnap from which she understood the need to feedback and also had in mind that the Claimant talked about 'moving forward' which she took to mean the Claimant's career rather than the feedback itself. The Tribunal finds that she had both these matters on her mind when she had the conversation with the Claimant.

35. There was a telephone conversation between Ms Prout and the Claimant on 31 October 2020. The Claimant recorded this without Ms Prout knowing and

a transcript was in the bundle. The conversation was clearly awkward and very difficult for both of them. The Claimant was angry and upset about not getting the job. Ms Prout described it as a very difficult conversation, she described getting curt one-word answers and a difficulty in getting any rapport or dialogue with the Claimant. She clearly struggled with the conversation as can be seen from the transcript. The feedback again was that the Claimant had not performed well enough at interview and she needed to give more explanation of what she was saying with examples and give more detail of the actual practicalities and her experience.

36. The Claimant specifically asked for feedback relating to question 1 and the other question the Claimant now complains of. However, there was nothing from the Claimant to indicate she felt wrong footed by the first question or that she felt the questions were designed to disadvantage her.
37. Quite a long way through the call, the transcript records:

KATHRYN: But, you know... I know, I know that's one thing I know, I don't know,[inaudible 00:12:26] obviously you're , on your, kind of, you know, your maternity leave and I don't know where you're at with, kind of, thinking about coming back here or, you know, obviously, we would... yeah, I don't know... I mean that's just a conversation for... as of... you know as in, in kind of what you're thinking in terms of your next steps really.

EMMA JANE: So, I still have a job I assume?"

- a. The Claimant complains this is discrimination based on maternity. Ms Prout says it was in response to the message she had that the Claimant wanted to discuss the way forward and that having completed the feedback she moved on to this. The notes record that Ms Prout said: "**Fleur said you wanted to talk about your future here**". Ms Prout realised that what she had said had been taken the wrong way and sought to reassure the Claimant that her job was safe and that what meant was that they recognised that returning to work could be difficult for her, in that she had not been appointed and that they would do all they could to help her. The Claimant was still angry and upset. The Claimant asked if there had been complaints about her and she was told not and that they had been happy with her in the post. Ms Prout was surprised this question had been asked and had not anticipated it. Ms Prout had encouraged the Claimant to apply and expected her to get the job. Ms Prout said "**so, sorry if you just felt that you were thinking you didn't have a job here, that was not my intention with that**" and the conversation ended soon after this.

Grievance process

38. The Claimant initiated the grievance procedure by making an informal grievance. The grievance said:

"I recently applied for the permanent Senior PWP position and was unsuccessful in obtaining the role. I believe that this is because I am currently on maternity leave.

I believe the job should have gone to the strongest candidate and I do not think this has been the case for the following reasons;

- *Prior to going on maternity leave, I had spent a year working as the Senior PWP on a fixed term contract. During this time all the feedback I received about my performance was positive and there were never any complaints or concerns raised about my work. The successful applicant had no previous experience in a Senior PWP role.*
 - *I have been a Qualified PWP for 4 years and have been a Clinical Supervisor for 2 years. The successful applicant qualified in September 2017 and has only just begun their supervisor training. They have yet to supervise the clinical work of any other PWPs.*
 - *Prior to going on maternity leave, I was the Clinical Supervisor for the successful candidate, who will now be my superior when I return to work”.*
39. The grievance complained about the two questions which are discussed above and about the feedback from Ms Prout which is also set out above. She set out her belief that her maternity leave was taken into consideration when recruiting for this role. She said it was very uncommon for a supervisee to be promoted above their clinical supervisor, and for the successful candidate to have vastly less experience and be less qualified than an unsuccessful applicant.
40. The Respondent commenced an informal investigation and provided a response to the informal grievance on 21 November 2018. The Respondent concluded that there was no evidence of maternity discrimination and that the interview process had been fair and unbiased.
41. The Claimant issued a formal grievance on 25 November 2018. An investigation took place and all those involved were interviewed. The Claimant’s grievance was dismissed.
42. The evidence given to the Tribunal was consistent with the evidence given to the grievance investigation. In the grievance the Claimant refers to her experience and qualifications generally saying she was the best person for the job, but she does not refer to how she performed at the interview. The Tribunal accepts that the Claimant may well have been the best person for the job given that the interviewing panel thought she would be successful given her experience and that she had been doing this band 6 role on a fixed term contract. However, the Tribunal finds that the criteria for selection was not based on their general knowledge of her expertise and experience, but on how the candidates presented at interview.

Christmas party

43. There was a Christmas departmental party in December 2018. The invitation to the party was sent to staff on a mailing list ‘to all staff’. The Claimant was not on this mailing list when the invitation was sent as she had asked to be removed from this list when she went on maternity leave. As a result, she was not invited.
44. On 5 November 2018, a reminder was sent to ‘all staff’ and there was a list of names attached and a further reminder on the 9 November 2018. The Claimant’s name was not on that list. At this time Ms Dewsnap was dealing with the Claimant’s informal grievance which had been submitted on 3

November. Ms Dewsnap said she did not check the list of names to see if the Claimant was included and it did not occur to her to do so. Her evidence is that she would have liked the Claimant to have attended. This situation did not only affect the Claimant as one other member of staff on maternity leave and a member of staff on a career break were also not invited as they were not part of this distribution list.

Conclusions

45. Having found the factual matrix set out above the Tribunal has come to the following conclusions on the balance of probabilities.

The Recruitment processes

46. The Tribunal finds that from the outset the Respondent expected the Claimant to be successful. This is evidenced by their discussion before the interview about how they would manage the post while the Claimant was on maternity leave. They decided to offer the fixed term post to the second highest rated candidate. This conversation would not have happened if, as the Claimant alleges, there was a conspiracy from the outset to appoint someone else because she was on maternity leave.
47. The Tribunal's conclusion is that the Respondent endeavoured to manage the recruitment process fairly for all candidates and took into consideration that they were all internal candidates. The Tribunal is satisfied that the intention was to remove bias as much as possible and ensure that each candidate was treated the same.
48. It was possible for the Respondent to have asked different questions, and it was possible for the composition of the interviewing panel to have been different. However, it does not follow that the reason they chose the questions, and the panel, was related to the Claimant being on maternity leave. The Tribunal finds that their reasons for acting as they did was to create a level playing field for everyone. There was no evidence to suggest any conspiracy to disadvantage the Claimant.
49. The Tribunal does not find in any event, that the Claimant was prejudiced. She had the most experience to draw from, she had already successfully attended an interview for this band, had experience of competency-based interviews, and had experience of actually doing the work she was being interviewed for. This should have put the Claimant at a great advantage as envisaged by the Respondent prior to the interviews. The interviewers recognised her superior experience and they all expected her to perform well at interview and be appointed to the post.
50. The Tribunal considers that the Claimant focussed not on how she performed at the interview but on her having the most experience. The inference is that she knew she was the most suitable candidate in terms of experience and assumed she would be successful. She seems to have forgotten the need to demonstrate all aspects of her experience at the interview as it was the performance at interview that mattered. To be scored more highly she had to give examples of her experience. There was consistency in the marks given

and no evidence of any one interviewer trying to persuade another to give different marks the scoring being done independently before discussion.

51. The Tribunal finds that the comment made by Ms Prout during the feedback for which we have a transcript was unfortunate as the Claimant interpreted it to mean she did not have a job to return to. The Tribunal is satisfied having read the transcript that this was a very difficult conversation with the Claimant being upset, curt and not engaging in dialogue. From reading the transcript Ms Prout had exhausted the feedback she could give at that time. The feedback was quite general pointing out the lack of examples and could have gone into more detail for example suggesting what the Claimant could have said. However, the transcript shows that the Claimant did not follow up with Ms Prout and ask for example, how she could have shown her experience and skills by way of examples. The Tribunal is surprised that the Claimant did not ask more questions, as she told the Tribunal that the reason she recorded the conversation and other conversations where feedback is given is because she wants to type it up and learn and develop. If this was the case, then no doubt she would have asked more questions of Ms Prout. The Tribunal does not find it acceptable that these recordings were done covertly.
52. The comment made was in response to what Ms Prout understood the Claimant asked Ms Dewsnap about '*moving forward*' which she interpreted to be moving forward with her career. This was something specifically she believed that the Claimant wanted to discuss. This is not indicative of discrimination.
53. The Claimant's claim of discrimination in the interview process is dismissed. The reason the Claimant was not successful is that she did not demonstrate at the interview what skills were whereas Ms Chips did.

The Christmas party

54. The Tribunal finds that the Claimant was discriminated against in relation to the invitation to the Christmas party. The Tribunal does not accept the Respondent's submission that the reason for this was an oversight by the Respondent. Ms Dewsnap was dealing with the Claimant's informal grievance at the time the invitation was sent and the reminders, so the Claimant was in the forefront of her mind. The reason the Claimant was not invited is because she was on maternity leave and asked for her name to be removed from the 'all staff' distribution list. This was the same as other staff. The Respondent another member of staff on maternity leave was also not invited and a member of staff on a career break. This part of the Claimant's claim succeeds.
55. A remedy hearing will be listed however the parties are encouraged to work together and try to resolve remedy without the need for a hearing. The parties will be notified in due course of a hearing date.

Employment Judge Martin

Date: 23 October 2020