



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Carroll

**Respondent:** Thames Water Utilities Limited

**Heard at:** Reading **On: 20, 21, and 22 October 2020**

**Before:** Employment Judge Gumbiti-Zimuto  
Members: Mrs C Baggs and Mr D Palmer

## Appearances

**For the Claimant:** In Person  
**For the Respondent:** Miss Ferber, counsel

## RESERVED JUDGMENT

The claimant's complaints are not well founded and are dismissed.

### REASONS

1. The issues to be decided in this case were discussed with the parties and recorded by the employment judge at the preliminary hearing on the 6 November 2019. The claimant makes complaints of disability discrimination and unfair dismissal. The respondent defends the case and in doing so contests that the claimant has established that he is a disabled person within the meaning of the Equality Act 2010.
2. The claimant gave evidence in support of his own case and also relied on the witness statements of Mr Keith Ebsworth and Mr Barry Murphy (whose evidence was not challenged and so did not attend the hearing). The respondent relied on evidence from Ryan Marlow, Angela Redstone, Rosemary Moss, Sophia Kolokotroni and Mark Handcock. All the witnesses produced statements which were taken as their evidence in chief.
3. There arose to be decided by the Tribunal the question whether the claimant's complaints should be struck out because of a failure to comply with the employment tribunals orders.
4. The Respondent contended that it was not possible to have a fair trial and it was not in the interests of justice to adjourn the hearing. Counsel for the

respondent carefully laid out for the Tribunal the procedural history of the claim and correspondence that had taken place between the parties. In short she said that the claimant was dismissed in 2017 and the claim presented in February 2018: a preliminary hearing was originally listed to take place in December 2018 but was unable to proceed on that date and a case management preliminary hearing took place on 6 November 2019. A number of case management orders were made, including that the parties disclose relevant documents by the 7 February 2020, that the claimant confirm the documents he wants to be included in the trial bundle by 6 March 2020 and that an exchange of witness statements take place by the 21 September 2020. The claimant did not comply with those orders. There was timely correspondence from the respondent to the claimant regarding compliance with the Tribunal's orders and eventually an application for an unless order was made by the respondent. It was not until the week before the final hearing that the claimant began to respond to the correspondence which had been coming from the respondent since March concerning compliance with orders.

5. The claimant gave an explanation for the non-compliance with orders which pointed out that he had deliberately disengaged from the process in March 2020 believing that he had complied with the orders, and that the next action required from him was the exchange of witness statements. There was unfortunately a typographical error in the case management order which gave the wrong date for the final hearing and this appears to have led the claimant to believe he had more time to prepare for the hearing that he in fact had but did not infect his reasoning.
6. The claimant eventually produced three statements, his own, and one each from Mr B Murphy and Mr K Ebsworth. In these witness statements there was a considerable focus on events that occurred in 2011 to 2012. The respondent has not prepared its case to deal with those events. In discussion with the claimant it became clear that the claimant considered that these events, this history, should have been taken into account and he was to contend that the respondent had failed to any account of it. The claimant said he was "*not asking the Tribunal to make any ruling about what happened back then*".
7. We considered the application and came to the conclusion that a fair hearing was still possible. The Tribunal note that there has been significant failure to comply with the orders of the employment tribunal the most serious of which is the failure to provide the respondent with copies of witness statements. However, considering the issues in the case it was still possible for a fair hearing between the parties. The claimant's witnesses' evidence was going to be relevant to background matters only as was much of the claimant's own witness statement. We decided that it was in the interests of justice to proceed with the hearing because the respondent in fact was in a position to address all the issues to be decided in the case and was not being ambushed by the claimant's evidence notwithstanding the late presentation of the claimant's witness statement.

8. The Tribunal had to consider as a preliminary issue whether the claimant was disabled within the meaning of the section 6 of the Equality Act 2010.
9. On the issue of disability the claimant was ordered to provide to the respondent a statement setting out the impairment relied on, the precise nature and extent of the effects the impairment has or had on the ability to carry out normal day to day activities; the periods over which those effects lasted; and whether or not there has been treatment for the impairment and what difference, if any, such treatment had on the effect of the impairment.
10. The claimant provided to the respondent a statement on disability and also provided copies of his GP notes. The respondent wrote to the claimant setting out their stall in response to the information that the claimant had provided. They explained that they did not concede that the claimant had a disability within the meaning of the 2010 Act. The claimant was informed that the information he provided failed to include a diagnosis of Autistic Spectrum Disorder (ASD) and further the statement did not provide an explanation of the impact of the condition on the claimant. The claimant provided further information to the respondent; this included a letter from his GP referring to the claimant being diagnosed with ASD, some other reports from the claimant's childhood which though making no mention of ASD the claimant relied upon as showing that he had the mental impairment as a child (even though it remained undiagnosed as ASD). The claimant pointed out in submission to the Tribunal that a diagnosis of ASD was not likely to be made when he was child but the letters from his childhood clearly evidence an impairment. The respondent maintained its position in respect of disability.
11. We have been required to make a decision on whether the claimant is a disabled person within the meaning of section 6 of the Equality Act 2010. A person has a disability if the person has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities.
12. The claimant relied on the medical records and letters he produced in particular a letter from Guildford Rivers Practise. The respondent pointed to the lack of diagnosis for ASD. The respondent stated that the letter from the Guildford Rivers Practise was not sufficient to evidence that the claimant in fact had ASD. The letter referenced a diagnosis but failed to reference who made the diagnosis or whether they were qualified to make such a diagnosis which is typically made by an appropriately qualified psychologist. The respondent says that the claimant has failed to show the existence of a mental impairment.
13. The Tribunal came to the conclusion, having regard to all the material before us including the claimant's own evidence, the GP letter and letters relating to the claimant from his childhood, that we can be satisfied on balance of probabilities that the claimant has a mental impairment namely ASD.

14. The respondent submitted that the difference between autism and other disorders is that the high functioning autism disorders are characterised by behaviours we all have an element of these things can be quite normal but, in some people, give rise to an impairment. The respondent says of the impact statement that it contains a list of symptoms which people with autism suffer from but is missing any explanation, detail or examination of things affecting the claimant personally or how they affected the claimant at the time. The respondent pointed to the case management order saying that it is not a technically worded document and the claimant has not engaged with what was required by describing what happens to him: what he has produced is a generic list, there is nothing about the basic question of adverse effects on day to day activities.
15. In response the claimant said that the matters listed in his statement are not impairments they are characteristics of the condition of autism. The claimant said that *"it does not affect me in my daily life as long as I am within a certain environment it does not impair me, but once pushed outside the environments I am comfortable with it becomes an impairment"*. The characteristics are not impairment in themselves, *"but they are relevant I why I became stressed"* and then become impairments. The claimant distinguished his condition with more extreme versions of ASD.
16. We came to the conclusion that the claimant has not shown that his mental impairment is a disability within the meaning of section 6 of the Equality Act 2010. The parties agree that autism is described as being a spectrum. We have not been told where the claimant sits on the spectrum, save that the claimant tacitly accepted that there are more extreme versions of the condition his own. In the claimant's case he has listed a series of characteristics which may be found in any person autistic or allistic. The question whether the claimant is a disabled person for the purposes of the section 6, it has to be shown that a person has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on the person's ability to carry out normal day-to-day activities.
17. The evidence that has been presented by the claimant establishes an impairment but does not address how the characteristics listed by the claimant, in the claimant give rise to an impairment that has a substantial and long-term adverse effect on the claimant's ability to carry out normal day-to-day activities. In his evidence the claimant said that the condition does not generally impair his life but it depends on the environment, however, the claimant's evidence fails to set that environment or describe the impairment in the claimant so that it can be understood whether if such an impairment arises it is substantial, that is more than minor or trivial. The claimant has the burden of proving his disability and has not discharged it.

18. In the circumstances where the claimant has not shown that he is disabled, in this case, the claimant's complaints of disability discrimination cannot succeed and are dismissed.
19. The claimant was employed by the respondent from 29 September 1997, until his dismissal on September 2017. The claimant progressed with the respondent into a number of different roles and at the point of his dismissal the claimant was employed by the respondent as a system operator.
20. In about 2011 the respondent located the control centre to Kemble Court in Reading.
21. The claimant's view is that the control centre, based in Reading, was in a completely unsuitable building. *"From a purpose built control room, we were to be relegated to a "control area", a section of an open-plan floor in an office building of typical design, that made no concessions whatsoever to the unique requirements of a control centre. It didn't even attempt to meet the standards for control room design that our previous facility had been built to."* In addition the claimant saw that his job was *"progressively changed from one of technical experts empowered to make decisions, to operators following pre-defined schedules."*
22. From 2011/2012 the claimant raised issues with management where he saw problems with his working arrangements. From about November 2016 the claimant was on long term sickness absence. In about 2017 the claimant was referred to the respondent's occupational health department, around this time the claimant also saw his GP who diagnosed the claimant as having ASD and a Generalised Anxiety Disorder. The claimant's GP advised that the claimant be redeployed and similar advice was given by occupational health.
23. The claimant was unable to return to his role, there were no adaptations to the role that could be made to enable him to return. At a sickness absence review meeting held on the 23 May 2017 it was agreed that the claimant was placed in the respondent's redeployment pool to try to find him an alternative role.
24. Being in the respondent's redeployment pool meant that there was a 4-week period for the claimant to be found a suitable alternative role. If at the end of this period a suitable role could not be found there would a sickness absence management meeting where a possible outcome was dismissal on notice.
25. The claimant was provided with lists of vacancies within the respondent during this period when the claimant was in the redeployment pool. The claimant was taking note of the vacancies available. A role of Process Controller at Beddington became available during this period. The claimant was put forward for the role but was not shortlisted by the recruiting manager.

26. Angela Redstone sought feedback on the reason why the claimant was not shortlisted for interview, the feedback provide stated that the role required recent field work experience which the claimant did not have and that the role required a further knowledge of sewage treatment. On being informed of this feedback the claimant was not surprised by the rejection, recognising that the he did not have the required experience.
27. No role was found for the claimant. A sickness absence management review meeting took place on the 29 June 2017 following which the claimant was informed that he was being dismissed with notice on the grounds of medical incapability. The claimant was to be dismissed, he was given 12 weeks' notice.
28. During the notice period there continued to be a search for suitable redeployment opportunities to keep the claimant employed.
29. The claimant appealed the decision to dismiss him, his appeal was unsuccessful.
30. Shortly before the end of the claimant's notice period, another vacancy in which he was interested arose. The role was a controller at Ashford Common water treatment works.
31. In the claimant's view this was the perfect redeployment opportunity for someone with his background, it was in his view a sideways move between jobs that were formerly titled "Senior Shift Controller" and "Senior Process Controller". The claimant was interviewed for the role. The claimant was unsuccessful.
32. The claimant thought that the interview had gone very well. He was given some feedback on the interview. The claimant's view of this is as follows: "The reasons given were transparently contrived, and did not reflect reality at all. I believe the likely truth is that I was branded a "troublemaker" in back-channel conversations with my manager. "
33. The claimant was interviewed for the role by Sophia Kolokotroni. The notes of the interview have been lost. Following the interview, the notes are given to HR Support for storage, in this case they have been lost. Miss Kolokotroni therefore gave her evidence based on the best recollection unaided by any contemporaneous note.
34. Ms Kolokotroni gave evidence that the roles about the recruitment for a Process Controller at Ashford Water Treatment Works. The claimant applied for the role at Ashford. The role is a critical technical and operational roles for the business, the site is less automated meaning there is a higher reliance on manual controls. The role brings with it a great deal of responsibility, so it is critical for the business that the role holder is proficient and reliable. The claimant agreed with these points but considers that he fitted the bill for the role.

35. Ms Kolokotroni was looking for a candidate that was scientifically minded someone with the capacity to understand science & water quality. She considered that it was important for candidates to have worked on site with experience of plant and pumps.
36. Ms Kolokotroni said the following about the candidate she was looking for: *“For Ashford Water Treatment Works, if there is an issue with the disinfection process on site, the controller must be able to close the site down within 3 minutes. If water leaving the site does not meet the required standards and enters the water supply, this may be a breach of TW’s statutory obligations under the Water Act and also, potentially, cause our customers to become unwell. A role of this responsibility requires someone with not only the skills and knowledge to do the job, but the right attitude. They need to be able to think for themselves, be a good communicator to levels above and below them. The correct individual for the role would need to take responsibility for theirs and the teams actions on their shift & work alongside management to drive continuous improvement. I would estimate that it would take a minimum period of six to twelve months to train an employee on water treatment process. However, it can take three to four years before they feel comfortable and confident in the role.”*
37. Ms Kolokotroni says she was looking for a candidate with not only the right technical and scientific background, but also a positive attitude and an ability to use their initiative to resolve problems quickly to limit the impact on the supply of clean water. The candidate must display strong communication skills.
38. The claimant was interviewed by Ms Kolokotroni and a colleague, Mr Paul Downing, on 19 September 2017.
39. Ms Kolokotroni cannot recall the exact questions that were asked or the answers that were given during this interview. After the interview Ms Kolokotroni gave feedback that the claimant lacked understanding of the chlorination process. Ms Kolokotroni also said that the claimant had a confrontational and aggressive attitude and in giving his response to a question in relation to reverse parking as an example of this. She cannot now recall other specific examples but she states that she remembers feeling throughout the interview that the claimant’s *“attitude was poor”*. Her recollection is that the claimant was *“very under prepared and there was little substance to his answers”*. Ms Kolokotroni says that she was concerned about the claimant’s confrontational attitude and whether he would be able to lead and work with a small operational team in a collaborative way.
40. Ms Kolokotroni did not speak to anyone other than Mr Downing about the claimant’s application.
41. Section 98 Employment Rights Act 1996 provides that in determining whether the dismissal of an employee is fair or unfair, it is for the employer

to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Capability is a reason within subsection (2). Capability, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality. Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.

42. The claimant argues that it was perfectly reasonable to seek a control position of a similar nature to his original job, with similar pay and working hours, at a commutable distance from home. This did however mean that the claimant limited his options for finding a role to redeploy into.
43. The claimant makes a point about inconsistency in respect of the Beddington role. He submits that despite lacking relevant experience the claimant considers that his proven ability as a controller on the clean water side of the business demonstrated all the personal qualities necessary to take on the Beddington role. Although the training requirement would have been significant the respondent ought to have given further consideration. While the claimant accepts that in principle candidates should have appropriate background, in order to be fair this principle should be applied equally throughout the respondent. There is in the claimant's view an inconsistency in the respondent's behaviour as the London Water Control desks are staffed with recruits from non-technical call centre type jobs, yet no such laxity was afforded to the claimant when his employment was at stake.
44. The claimant contends that the Ashford Common role was a direct fit for him - a sideways move- there was no more suitable position in the respondent company. The claimant contends that the description that Ms Kolokotroni gives about the critical nature of the Ashford role could be applied to the London Controller role. It is undisputed that the claimant was good in his job. Any attempt to distinguish the roles is in the claimants view a false distinction.
45. The claimant states that the various managers who gave evidence "*made their decisions within a narrow focus of what they believed was their personal remit, and that none of them took an overall view of how Thames Water had acted towards me as an employee.*"
46. The respondent submitted that the claimant did not have a viable claim for redundancy payment (the claimant having accepted that he is not making a claim for redundancy payment), and the Tribunal having determined that the claimant has failed to establish that he is a disabled person, the



question to determine is whether the claimant was unfairly dismissed. It is said by the respondent that the claimant was fairly dismissed.

### Conclusions

47. We agree with the respondent that the focus of this hearing has been on the two redeployment jobs, at Beddington and Ashford Common. Critical to the case that the claimant presents is how the respondent dealt with his applications in respect of the two redeployment opportunities.
48. The claimant was dismissed by reason of his medical incapability in accordance with the respondent's sickness and absence management and medical capability policy. The claimant was advised by his GP and the respondent's occupational health advisers agreed that the claimant was unable to continue in his role based at Kemble Court. The claimant and the respondent both recognised that the claimant could not continue in that role.
49. The claimant accepts that the respondent followed its procedures in placing him in the redeployment pool. He does not suggest the procedures otherwise unfair.
50. The claimant at some points in his evidence and in his submissions said in terms that the real reason he was dismissed was because he was perceived as a trouble maker and that as a result of 'back channel' conversations his applications for redeployment in two roles mentioned were sabotaged. The people who gave evidence to the Tribunal who could have been involved in such underhand actions were asked about discussions relating to the claimant and denied that any took place. Mr Marlow and Ms Kolokotroni were both asked about this and denied that anything of the kind occurred. The claimant was unable to offer evidence of 'back channel' conversations and his evidence was to the effect that he could not prove it but suspected it.
51. The conclusion of the Tribunal is that the reason for the claimant's dismissal was because he was medically incapable of returning to his role as system operator at Kemble Court.
52. The claimant's argument was that his dismissal should be viewed in the light of all that had happened since around 2011/2012 in his employment. The various changes to the claimant's role and way of working imposed on him by the respondent resulted in his inability to continue working as system operator at Kemble Court. The Tribunal acknowledge this background which gave rise to real issues of concern for the claimant which were serious matters impacting on his ability to continue working in the role. It must however be noted that in this case we are considering the decision to terminate the claimant's employment, and in particular how the respondent dealt with the claimant's applications for the two roles.

53. The claimant's case was recorded at the case management hearing in the following way at paragraph 9.3 of the case management summary: (a) over a period of time the respondent made changes to the claimant's role (e.g. when the claimant's role was at risk): the changes in the role had the cumulative effect of causing the claimant to suffer from an anxiety disorder which led to the claimant being unable to attend work for an extend period of time.
54. It is however of note that the claimant was not making a case that there were adjustments that could have been made to the system operator role at Kemble Court so that he could return to the role. The claimant accepted this was not an option. The claimant had discussed with Mrs Moss, at his case review on 23 My 2017 the recommendations from occupational health and he considered redeployment was appropriate. It was made clear to the claimant that he could return to his old role but he made it clear that he did not want to return or consider adjustment to the role. The claimant was clear that it was the physical environment at Kemble Court that made it impossible for him to return.
55. Mrs Moss was unable to do anything about this, the position at Kemble Court had come about as a result of a company wide restructure which had involved the claimant and others being required to move away from working in small hubs to working in a large open plan office. That reorganisation had by 2017 taken place some five years previously, it had been introduced in the face of some protest from employees. The claimant had raised issues about matters arising as they affected him and these had been considered and dealt with. While the claimant's concerns were not assuaged by management efforts, by 2017 the position was settled. Mrs Moss considered the claimant's concerns about the way his role and working environment had developed matters raised by claimant and consider that they did not form part of her remit but in any event had been dealt with by other managers through concluded internal processes.
56. We have had to consider whether in the circumstances the respondent behaved reasonably. We are satisfied that the respondent's behaviour in this regard was reasonable. The reorganisation had taken place five years ago, the claimant had raised issues, they had been addressed and dealt with, while the claimant was not satisfied with the resolution, the matters had been concluded. In our view this was an approach that a reasonable employer was entitled to take in the circumstances.
57. The claimant says that the failure to redeploy him meant that his dismissal was unfair. In respect of the Beddington role it is clear that the claimant accepted the reasons given for the failure to shortlist him. The claimant did not challenge the evidence of Mr Handcock that the claimant was only a 40% match for the role and that was the reason it was not taken forward at the time. This appears to remain the claimant's position.
58. The claimant says that the decision not to shortlist him to the Beddington role was inconsistent with the way that training is done for process control

staff at Kemble Court. This was not accepted by the respondent's witness Mrs Moss who said that while it was fair to say people come from different backgrounds to the roles there is a training package put in place depending on existing competence which can be between 3-6 months, followed by a period monitoring and mentoring. Her evidence was the situations were comparable and she denied the suggestion of inconsistency in approach.

59. This point is not one that we are able to resolve there are differences between the claimant and the respondent which cannot be squared on this issue. What we have done is look at the way that the respondent has acted and considered whether the respondent acted reasonably in this regard. We are satisfied that on the information before us that the decision not to shortlist the claimant for the Beddington role was reasonable, in our view failing to shortlist an employee for a role for which he was only 40% suited is a decision that a fair minded employer could reasonably have taken.
60. The way that the respondent considered the claimant's application for the Ashford Common process controller role is the main area of contention in this case. The Tribunal heard from Ms Kolokotroni about the nature of the role at Ashford Common, and her view of how it compared with the role of London Water Controller. The claimant does not accept this evidence. Whether Ms Kolokotroni is correct in her views about the London Water Controller role in comparison to the Ashford Common role that they were her genuinely and honestly held views as to what the role was and what it required.
61. It was Ms Kolokotroni's conclusion that the claimant did not display the skills required for the role in the interview that resulted in the decision to reject his application. In our view it is likely that the claimant did have a skill match that meant he was a viable candidate for the role, however, after the interview Ms Kolokotroni formed the genuine belief that he did not have the core skills.
62. In coming to the conclusion that Ms Kolokotroni formed this view genuinely we take into account that her memory of that interview is not good, and that she was not capable of being assisted by the notes that she and her colleague took of the claimant's interview which have been lost. There is though the feedback which was given contemporaneous to the interview. The feedback pointed out that the claimant lacked understanding of the chlorination process and that the claimant came across as confrontational and aggressive. These broad points given the day after interview support the evidence that Ms Kolokotroni gives about her conclusions on the claimant. Taking into account the evidence of Ms Kolokotroni that the role was a critical role for the business, something the claimant accepted, we consider that it was reasonable for Ms Kolokotroni to decide that the claimant should not be offered the role if she considers that he did not have the core skills.

63. We agree that it was reasonable for the claimant to seek a control position of a similar nature to his original job, with similar pay and working hours, at a commutable distance from home. This limited his options for finding a role in the redeployment process. The consequence of that is that there were only two roles that the claimant considered in a 16 weeks covering the redeployment period (4 weeks) and the notice period (12 weeks). We note that there were many roles that came up in this period which the claimant did not consider suitable but which he could have been a viable candidate for.
64. Having regard to all the circumstances of this case we consider that the decision to dismiss the claimant was within the range of responses of reasonable employer faced with an employee who was incapable of continuing in his role for medical reasons.
65. The claimant's complaints are not well founded, and his claim is dismissed

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Employment Judge Gumbiti-Zimuto

Date: 18 November 2020

Sent to the parties on: .....26.11.2020....

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For the Tribunals Office

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