



EMPLOYMENT TRIBUNALS

Heard at: Bristol (by video) **On: 4 February 2021**

Claimant: Mr Schauker

Respondent: Mr J Moon

Before: **Employment Judge Fowell**

Representation:

Claimant: In person

Respondent: In person

JUDGMENT

1. The complaint of direct discrimination on grounds of disability is dismissed
2. The complaint of discrimination arising from disability is dismissed

REASONS

Introduction

1. This case is brought by Mr Schauker against Mr Moon for disability discrimination. It follows a row they had in June 2018. The main thing that I have to decide is what happened on the day in question. Before setting out my conclusions I will set the scene, explain something about the legal history of this case and then the legal issues involved. And because neither party is legally represented I will avoid legal jargon as far as possible.
2. Mr Schauker was working at a recycling centre run by the council – in this case Bath and North East Somerset Council. He came through an agency - Smart Solutions (Recruitment) Ltd – but was only there about three weeks before he left,
3. His disability involves learning difficulties. At an earlier stage of these proceedings the council, who were also acting at the time on behalf of Mr Moon, admitted that

he had this disability, and so that is no longer an issue.

4. Mr Schauker says that because of his learning difficulties Mr Moon told him to go, i.e. leave, and added that nobody liked him. That is why he walked out. Mr Moon says that he had no idea that Mr Schauker had any learning difficulties and did not say this. They agree that there was a row between them on 19 June 2018, when Mr Schauker came in to ask for a new pair of gloves. He should have brought with him his old pair in order to get a replacement but did not. Mr Moon refused, and the row resulted.

The relevant legal tests

5. Turning to the legal issues, the relevant sections of the Equality Act 2010 have been identified as sections 13 and 15. Section 13 covers “direct discrimination” as follows:
 - (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
6. The question here is whether Mr Moon, treated him less favourably than he treated or would have treated someone else in the same circumstances apart from his disability.
7. The test under section 15 Equality Act is as follows:
 - (1) A person (A) discriminates against a disabled person (B) if—
 - (a) A treats B unfavourably because of something arising in consequence of B's disability, and
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
 - (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”
8. So, this involves unfavourable treatment as a result of “something arising” in consequence of Mr Schauker’s disability. I will come back to that to explain the sort of cases that it covers.
9. In both cases the person discriminating has to know about the disability, or they ought to have known. They don’t have to know that the person had a condition which amounts in law to a disability. If the disabled person had, say, a hearing problem, it would be enough to know that they had it, even if they did not realise it was so bad as to amount to a disability.

The parties

10. Mr Moon was a supervisor at the depot. He was employed directly by the council. So, there were four people or organisations involved altogether: Mr Schauker and the agency on one side and Mr Moon and the council on the other. Mr Schauker had a contract with the agency and Mr Moon had a contract with the council – in his case a contract of employment. There was also a contract between the agency and the council, to supply workers, but there was no contract or direct connection between Mr Schauker and Mr Moon.
11. How is it then that Mr Schauker is bringing a claim against Mr Moon directly in an employment tribunal? Without going into too many technicalities, agency workers have protection under the Equality Act if they are discriminated against at the place they are sent by the agency. Section 41 provides that the council must not discriminate in various ways, including by “not allowing the worker to continue to work” or what is described as “subjecting the worker to any other detriment.” So, even though there is no direct connection between Mr Schauker and the council, there is a legal obligation on the council not to discriminate against him.
12. Section 109 says, in a nutshell, that anything done by Mr Moon, their employee, is also treated as done by the council. If it is an act of discrimination, i.e. a detriment, the council is liable too. Some defences may be available to the council, but they are not relevant here.
13. Section 110 then says, in short, that if the council are responsible, Mr Moon is responsible too, so in that roundabout way he is also made directly liable to Mr Schauker for any acts of discrimination that take place in the course of employment.
14. Employment Judge Livesey explained what happened to the council and the agency in his case management summary on 26 November 2020. The claim form, which was presented on 26 June 2018, very shortly after the events in question, brought claims against Mr Moon only. Later on the agency was added as a second respondent. But there is no obvious claim of discrimination against the agency and that was later withdrawn. In May 2019 the council was also joined as a party to the proceedings. And not long after that Mr Schauker reached an agreement with the council under which they paid him £1500. The claim against them was then dismissed.
15. The fact that the council are no longer involved in this case makes no difference to Mr Moon. Making such a payment does not mean that they admitted any liability and it does not mean that Mr Moon is automatically liable too. So it is that only Mr Schauker and Mr Moon are left.

The evidence and procedure

16. At the last hearing Employment Judge Livesey gave orders for Mr Schauker to provide all of the documents he had to Mr Moon. Mr Schauker made clear that he did not want to rely on any documents himself and so did not intend to copy them. He sent them to Mr Moon who did not understand what was expected of him and has not prepared a bundle or sent any documents back to Mr Schauker or to the tribunal. Despite that they were both happy to proceed with the hearing. There are in fact no original documents with shed a great deal of light on what happened, with the possible exception of a text message from Mr Schauker, not long after he walked out, sent to Mr Moon and asking for his job back. I will come to that shortly.
17. Both of them had also confirmed in writing that they were happy for the case to be dealt with by a judge sitting alone.
18. The only documents I had in relation to this case therefore were:
 - a. the claim form;
 - b. the response form;
 - c. a witness statement from Mr Moon made in August 2019;
 - d. a statement from Mr Schauker,
 - e. his impact statement, about his disability and the effects on him of losing his job;
 - f. the last case management order;
 - g. two letters supplied by Mr Moon confirming that the policy on gloves was to provide new for old, but that is not in dispute.
19. I then heard evidence from each of them. Since both were unrepresented I questioned each of them myself about their statements before checking on each side whether there are any points I had not covered. On the basis of that exercise I was able to form a clear idea about the situation and I will set out now my findings of fact.

Findings

20. The depot in question is the base for the council's recycling operation. It involves about 30 vehicles who go out collecting recycling and most vehicles have a driver and a loader, but the driver helps with the loading too. There are of course a lot of different routes and when the vehicle is full they go back to the depot to empty the vehicle. This is done at the tipping shed. There are many routes and the council

uses agency staff to cover for illness, holidays and other absences, so agency drivers and loaders are often switched from one route to another. When they start there is an induction which lasts about half a day. Mr Moon was a supervisor at the depot and had been with the council for about seven years in all, four of them as a supervisor, so he was used to carrying out the induction training. For Mr Schauker's induction he was one of three people being trained that day. The other two were drivers but they still have to go through the same training on manual handling, moving around the vehicle, making sure they have three points of contact and so on. None of them had to bring any paperwork with them and Mr Moon did not see anything from the agency telling him, for example, that Mr Schauker had learning difficulties or that any special arrangements should be put in place for him. In fact, Mr Schauker does not suggest that any such special treatment was required.

Knowledge of disability

21. Mental health problems are not always obvious. Mr Schauker seem to think at this hearing that it was obvious that he had mental impairments, and that he was different from other people. That is a very difficult thing for me to comment on, particularly on the basis of an hour or two spent on a video hearing. It is always more difficult to form a view of somebody over a video, especially in such a formal setting.
22. I will say however that Mr Schauker coped well with this hearing. He struck me as quite intense and forceful, and as someone convinced of his own case. He did not stumble over his words or have any difficulty explaining himself. His witness statement and texts have plenty of spelling mistakes, but otherwise they are also clear and forceful.
23. In his claim form he does not go so far as to say that it would have been obvious to Mr Moon that he had a mental impairment, but he says in his statement that he told Mr Moon and other on many occasions that he had learning difficulties and anxiety. He gives examples from the induction:
 - a. Firstly, he says that Mr Moon belittled him because he was lifting the green boxes in an incorrect way. But it is not clear why lifting boxes would be more difficult for him than anyone else and he does not say there that he specifically raised it with Mr Moon at that point.
 - b. He also said that he had problems reversing the lorry, but again, he does not say in his statement that he told Mr Moon why that might be.
 - c. It goes on to say that he told people in the office that he had problems when he changed into his PPE because he was continually sweating and had shakes, but again he does not state that he told Mr Moon about this, and again it is difficult to understand how that sweating and shaking relates to

learning difficulties.

24. These are all examples of times when he had problems, not when he told people about them. I asked him directly how he thought Mr Moon was supposed to know that he had a disability and whether he could recall specifically telling him about it, either at the induction or some other time, and he told me that he was always explaining himself to people, that part of his condition is that he interrupts people and can mis-read them and come across as aggressive, and that is why he needs to explain himself. But he could not describe any particular time or situation in which he had made this clear to Mr Moon.
25. I have to be wary about reaching conclusions on the basis of my observations of the witness, but it did not seem to me that it was obvious at all. As I have mentioned, Mr Schauker has, for example, a tendency to interrupt, but having pointed this out himself he listened patiently throughout the questions that I put to Mr Moon. He did seem quite intense and emphatic in the points he was making but that is not particularly unusual or an indication of mental ill-health or of any underlying processing condition.
26. So, in the absence of any written information supplied to Mr Moon at any stage, and without any evidence about a specific situation when it was raised or explained, I cannot see any basis to conclude that Mr Moon actually knew about it or ought to have known. It is just not sufficiently obvious.

The argument

27. As a result, Mr Moon cannot be liable, but I will go on to deal with the incident itself as best I can, given that it is one person's word against the other's. There is a good deal of agreement about what happened to begin with. Mr Schauker was getting through about one pair of gloves a week. The work is hard and the gloves soon disintegrate. He came into the office about 11 o'clock that morning, after the first delivery was done and the vehicle was back for unloading, to ask for a new pair. There were about three office staff in there, plus Mr Moon. Mr Moon asked where his old gloves were. He said that they were still in the lorry. He was told to go and get them, but Mr Schauker said that he couldn't, because the lorry was in the tipping hall and he wasn't allowed in. That should not have been a real problem. He only needed to wait a few minutes before he could go and retrieve them. Instead, Mr Schauker, in his own words, began to kick up a fuss. He complained about all the work he was doing, and said that was being given the hard and unpopular routes by Mr Moon.
28. At that point the disagreement started, and the accounts of what happened differ. According to Mr Moon he had been about to reach into the cupboard to get a new pair of gloves anyway when Mr Schauker started to have a go at him, so he changed his mind. Mr Schauker accused him of giving him all the bad routes because Mr Moon didn't like him. Mr Moon responded with words to the effect that

it wasn't because he didn't like him, and those were the rules (about the gloves) and if he didn't like it he knew what he could do, or words to that effect. Mr Schauker then left, muttering as he went. Mr Moon did not know whether Mr Schauker had walked off the job or just gone back to his work. It was only when the vehicle driver came into the office to say that he'd lost his loader that he realised that Mr Schauker had gone. He then got in touch with the agency to let them know. As far as he was concerned, Mr Schauker had let them down and was not welcome back.

29. Mr Schauker described this as an utter lie, particularly the idea that he first raised the question about not being liked. He says Mr Moon raised this, and said if he didn't like how it was he could walk through the door. Mr Schauker wasn't going to do that but Mr Moon went on to say words to the effect "go on, no one likes you anyway" and he repeated it.
30. Again, it is very difficult to choose between the two versions of events. There was the text message from Mr Schauker to Mr Moon a few days later which I was shown, held up to the videoscreen. That too is a mixed bag. It contained a sort of apology from Mr Schauker but also made the point that Mr Moon had told him that no one liked him. That last point is the point that Mr Schauker insisted on above all.
31. On the face of it, it is a very unlikely thing for Mr Moon to have done. He is a council employee. It is a regulated and safety conscious environment. Although Mr Schauker was only recently hired as a temporary worker it would be extremely rash of any manager to tell somebody to go, just because of the way the manager was spoken to, let alone to send them on their way with the explanation that nobody liked them. It was also in public. If Mr Moon had told him to go in that way, he might himself have been in disciplinary trouble.
32. They both agree that afterwards they were efforts to find Mr Schauker another job in the depot working for another supervisor and the council also offered him work elsewhere, which he turned down. On the other hand Mr Moon seemed to accept that he lost his temper and he certainly did say words to the effect that those are the rules and if you don't like it you can leave.
33. It seems to me more likely, simply from the context, that the words about not being liked did start with Mr Schauker, when he began to kick up a fuss about his routes and hard work. It makes sense for it to be said then. One thing may have led to another. It may well be, putting it no higher, that in the heat of the moment Mr Moon did give some parting shot along the lines, "no one does like you."
34. If so, that would in my view amount to a detriment under section 41, although he was still expecting Mr Schauker to carry on with his work. Does that therefore amount to direct discrimination or discrimination arising from disability?

35. As to direct discrimination, it still has to be shown, under section 13, that this was less favourable treatment *because of* his disability. Not only do I find that Mr Moon did not know about the disability, but disability was not the reason for any comments made in the heat of the moment. It seems to me clear that the reason was because, in Mr Schauker's words, he kicked up a fuss about his routes and workload and the way he was treated.
36. The other complaint is under section 15 which is discrimination arising from his disability. I cannot see how that applies in this circumstance. For direct discrimination only two things necessary – the disability and the less favourable treatment. If the one is because of the other that is discrimination. Section 15 covers the more usual situation where there is another element to the equation. The most common type of case involves someone with a disability who is off sick for a long period of time and is then dismissed as a result of that absence. Another example, though much rarer, might be if someone had a terrible temper because of the disability, and was dismissed for the outburst of temper. (If so the employer could still argue that it was justified in the circumstances.)
37. There is relevant guidance for tribunals from the Equality and Human Rights Commission Code of Practice, who give a similar example:
- “A woman is disciplined for losing her temper at work. However, this behaviour was out of character and is a result of severe pain caused by cancer, of which her employer is aware. The disciplinary action is unfavourable treatment. This treatment is because of something which arises in consequence of the worker's disability, namely her loss of temper. There is a connection between the 'something' (that is, the loss of temper) that led to the treatment and her disability. It will be discrimination arising from disability if the employer cannot objectively justify the decision to discipline the worker.”
38. So there has to be a disability, some other feature like the temper, the employer has to know about the disability and the connection with the pain (and hence the temper) and the action taken has to be unjustified. Here there is no other feature like the pain or the temper. It is essentially a complaint of direct discrimination, and for the reasons already given that cannot succeed.
39. So, the main reasons for finding against Mr Schauker are that Mr Moon did not know about his disability, and anything said in their argument was not because of his disability.

Employment Judge Fowell

Date 04 February 2021

Judgment and Reasons sent to the parties: 11 February 2021

FOR THE TRIBUNAL OFFICE