EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104574/2018 (P)

Held in Glasgow on 19 and 20 January 2021

Employment Judge M Robison
Tribunal Member A Ashraf
Tribunal Member D Calderwood

Mr A Morton	**Claimant** **In Person**
Royal Mail Group Limited	**Respondent** **Represented by** **Dr A Gibson** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim does not succeed and is therefore dismissed.

REASONS

Introduction

1. The claimant lodged a claim with the Employment Tribunal on 4 May 2018, claiming disability discrimination. The respondent entered a response resisting the claim.

2. This case came to a final hearing following a long procedural history, the details of which are recorded elsewhere and are not relevant to the issues to be decided at this hearing, with one exception.

3. That relates to the decision of Employment Judge Docherty dated 15 June 2019, that at December 2017 the claimant was a disabled person in terms of section 6 of the Equality Act 2010, as a result of the impairment of left foot drop.

4. By the time of this hearing, the following issues remained outstanding for determination by the Tribunal:

   a. Did the respondent know, or could reasonably have been expected to know, that the claimant had a disability?

   b. If so, did the respondent discriminate against the claimant by treating the claimant less favourably than the respondent treats or would treat others because of the claimant's disability in terms of section 13 of the Equality Act (direct discrimination), the alleged less favourable treatment being contacting the claimant's employers (Blue Arrow) and requesting that they no longer assign the claimant to work at the respondent's Scottish Distribution Centre.

   c. If the Tribunal finds that the respondent knew, or was reasonably expected to know that the claimant had a disability, did the respondent discriminate against the claimant by treating the claimant unfavourably because of something arising in consequence of the claimant's disability, which treatment the respondent cannot show was a proportionate means of achieving a legitimate aim in terms of section 15 of the Equality Act, the alleged unfavourable treatment being contacting Blue Arrow and requesting that they no longer assign the claimant to work at the respondent's Scottish Distribution Centre.

   d. Did the respondent discriminate against the claimant by applying to the claimant a provision, criterion or practice (PCP) which was discriminatory in relation to the claimant's disability, where the PCP was emptying a trailer of yorks without assistance, that is which puts or would put those who do share the claimant's disability at a particular disadvantage, and put or would put the claimant at that disadvantage; and the respondent cannot show it to be a proportionate means of achieving a legitimate aim, all in terms of section 19 of the Equality Act 2010.

5. During the hearing, the Tribunal heard evidence from the claimant and from Mr Galloway, transport manager for the respondent. Their evidence in chief was furnished to the Tribunal through witness statements. The Tribunal was referred by the parties to a number of productions from a joint file of productions. These documents are referred to by page number in this judgment.

Findings in Fact

6. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved:

7. The claimant is a qualified LGV transport driver, having held his LGV licence since 1991, and having made a living from LGV driving since 2008, since which time he has worked as a driver on a series of agency contracts.

8. From 20 October 2017 to 15 December 2017, he was employed by Blue Arrow Ltd, which is an employment agency.

9. The claimant initially contacted Blue Arrow Ltd for driving assignments because he was aware that they supplied drivers to the Co-op, where he had formerly worked. He attended at their offices on or around 9 October 2017 when he met with Ms Soreya Hakeem. He was advised that they were no longer supplying the Co-op but he was encouraged to put himself forward for an assignment with the respondent. This involved a security check and a driving assessment followed by an induction.

10. During the interview, a medical questionnaire was completed (page 112-113). The questions were read out by Ms Hakeem, and the form was signed by the claimant. The “no” column was ticked in regard to all of the questions, including the following relevant questions:

    i. Does the claimant suffer from “back trouble or other muscle or joint trouble”;

    ii. “should we be aware of any matter affecting your ability to stand, sit , walk, lift, climb stairs, use your hands?”

iii. "should we be aware of any matter affecting your ability to work at heights on ladders/staging, work in confined spaces, ability to drive a motor vehicle or mechanical equipment?"

iv. to his knowledge did he have any physical mental or other condition that should be considered when offering him work.

11. On 20 October 2017, the claimant attended at the respondent's Scottish Distribution Centre (SDC) in Wishaw where he completed a successful driving assessment.

12. On 22 October 2017, the claimant returned and undertook induction provided by Mr Paul McNulty (page 114 -120). This included training on safe systems of work protocols, include on loading and unloading of vehicles.

13. The claimant commenced work with the respondent as an agency driver on 28 October 2017. This was a short term assignment to cover the peak period until Christmas.

14. This assignment required the claimant to work independently and to drive to various locations, such as delivery offices, and be required to load and unload the vehicle which he drove.

15. The claimant did not advise anyone of his impairment because he did not think they needed to know, given he was able to perform his duties. In particular, he did not advise Mr McNulty at induction of his impairment although staff are specifically asked during induction if there are any aspects of the work they may not be able to do due to a physical or mental impairment.

16. Prior to 11 December 2017 he completed approximately 14 shifts, which included loading and unloading the vehicle.

17. During this time the claimant saw Mr Galloway on two or three occasions at the transport/dispatch office. The claimant did not raise with Mr Galloway or with any other manager any concerns about his ability to undertake his job including loading and unloading.

18. The task of loading and unloading for the respondent would require drivers to move so-called “yorks” – which were essentially two sided cages for transporting mail on four caster wheels – which would be full of mail, from inside the trailer to the tailgate of the vehicle or the docking bay at the rear of the vehicle. The yorks would be lowered using the tailgate or pushed down the docking bay and then taken to the appropriate location within the SDC. While it was possible for workers to get some assistance to do the maneuvering of the yorks whilst on the ground, the task of moving these yorks in and around the vehicle would be the task of the driver alone. This was because non-drivers are not permitted to enter the rear of the trailers due to the working at height regulations.

19. It was the driver’s responsibility to load the trailer in a safe manner and then strap the load down and adhere to load plans. While not necessarily an easy task, this is normally understood not to be a two-man job but was performed regularly by single drivers.

20. In or around the first week of December, Mr Galloway had cause to confront the claimant, as well as other agency drivers, regarding the state of their vehicles.

21. On 11 December 2017, the claimant was tasked with taking an empty trailer to collect empty “yorks” from Perth. Once at Perth, staff there commenced the loading operation of empty cages onto the tail lift, which is a hydraulic powered platform attached to a trailer which can raise or lower a load into or from the trailer. The claimant raised the tail lift and moved the cases into the trailer.

22. He then returned to SDC and was instructed to empty the trailer by Mr Hugh O’Donnell. He reversed the trailer to the warehouse door up to and against the door stops, to a dock leveller which is a hydraulic operated steel bridging plate which facilitates transfer of load from a trailer’s floor onto the warehouse floor and vice versa. He went inside the warehouse and started offloading the cages. The claimant had difficulty offloading the cages, because the straps had become tangled during the journey. He found this to be a troublesome and time consuming job.

23. The claimant sought assistance from a warehouse manager but he was told that they were too busy to spare anyone at that point. The claimant understood that

the trailer would be emptied by others later. He then collected his keys from the LGV unit, removed his digital card and collected his belongings. The claimant returned the keys to the loading bank and went to the transport/dispatch office.

24. While at the transport/dispatch office the claimant was asked by Mr Jonathan Neilson whether he had emptied the trailer to which he advised that he had not. Mr Neilson requested that he complete the task of emptying the trailer. The claimant refused to do so and when asked again, retorted "Aye no fucking bother" and exited the office.

25. Later that day or early the next day, the respondent contacted Blue Arrow Limited and informed them that given the claimant's bad attitude, his swearing and his refusal to carry out a reasonable task before walking out of the office, the respondent did not wish him to return to work within the SDC.

26. Around 10 am on 12 December 2017 the claimant had a telephone conversation with a member of staff at Blue Arrow when he was advised that he could not continue his assignment with the respondent because he refused the client's instruction to fully empty a trailer of nested yorks.

27. On 15 December 2017 (page 121) the claimant followed up that telephone call with a letter to Blue Arrow which included the following:

"the day in question – Mon 11/12/2017 - after emptying some yorks from the Trailer – I approached a Warehouse Manager to ask him to provide assistance for me to empty the Trailer – he told me they were too busy at this time to spare any one – I advised that I cannot manage the task myself – he advised he did not expect me to do so and if I leave the Trailer he will have it emptied later.

I collected my belongings from the Vehicle and proceeded to the Transport Office where I was asked whether I had emptied the Trailer I advised that I had not as there was no one to provide assistance due to me having a *"bad leg and bad back"* I did not empty the trailer further. A character lounging in a seat in the back of the office (I believe he was a Mr Stevie Galloway (Spelling excepted) "retorted":– *You cannot work for me in my business if you can't empty the trailer"*

to which I responded:- *"No bother"* and exited the premises after a debrief of my working day.

I believe even a fully able bodied person would struggle to empty "nested Yorks" in a safe manner. I was never provided with training or sight of a risk assessment for such a task and thereby I was left with no option but to refuse to empty the trailer due to a high risk of injury – if I continued with the unloading of the Vehicle. I am left to ponder on whether I was discriminated against due to my disability or victimised because I was an agency worker or both.

I am somewhat bemused that no representative from Blue Arrow Ltd has approached me to ask my version of events some 5 days later.

Accordingly I will be terminating my Contract with Blue Arrow and please accept this letter as my resignation letter and a formal complaint of Royal Mail Groups actions towards me".

28. By letter dated 19 December 2017, the Executive Manager for Blue Arrow wrote to the claimant in response, including the following:

"I am sorry to hear that you felt that your assignment was not a positive one and that you have now handed in your resignation to Blue Arrow, we will raise your concerns about the matter directly with the client.

In your letter, you state that you have a disability that prevented you from emptying the trailer. After reviewing your application form I can see that this was not disclosed at the time of registration, should this have been the case we would have made the client aware so that any reasonable adjustments to the assignment could have been made on your behalf".

29. The respondent became aware only after the claimant had ceased working for the respondent that he has a physical impairment. That impairment is a left foot drop which is supported by a splint which is not normally visible to others.

Relevant law

30. Section 13 of the Equality Act 2010 states that 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.

31. Section 15 of the Equality Act 2010 states that a person discriminates against a disabled person if he treats the disabled person unfavourably because of something arising in consequence of that person's disability; unless it can be shown that the treatment was a proportionate means of achieving a legitimate aim.

32. Section 19 of the Equality Act 2010 states that a person A discriminates against another B if A applies to B a provision, criterion or practice (PCP) which is discriminatory in relation to a relevant protected characteristic of Bs. A PCP is discriminatory if a) A applies or would apply it to persons with whom B does not share the characteristic; b) it puts or would put persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it; c) it puts or would put B at that disadvantage; and d) A cannot show it to be a proportionate means of achieving a legitimate aim.

33. The relevant protected characteristic in this case is disability.

Claimant's submissions

34. The claimant made oral submissions as follows. He stressed that we should not accept the evidence of Mr Galloway for a number of reasons. In particular, he got agitated while giving evidence; his memory about the incidents was vague; and that he did not want to be pinned down. This was in particular in regard to the alleged confrontation with the claimant about the state of his vehicle. Mr Galloway could not say when that took place, although the claimant only worked week-ends and Mr Galloway's evidence was that he only occasionally worked week-ends.

35. Mr Morton stated that he had not seen the advert for the job because he was not responding to a job advert but in any event Mr Galloway confirmed that loading and unloading was not on the role requirements for the job.

36. His position was that he had not received training as stated in the letter dated 15 December 2017, by which he meant that he had not had training on how to empty a trailer with nested yorks.

37. Further Mr Galloway did say that warehouse staff do load and unload trailers. He relied on the safe system of work directions, specifically page 11, that this was a two man job. He says this is the situation in which he found himself, that is that he could not separate the yorks because of his bad leg and specifically could not use force; while he could push better, he could not pull. This was why he sought assistance. He said that he did not know it was a two man job if he was having a problem. The problem he had with the red straps is clear from page nine of that protocol. He said that he had loaded the yorks one at a time but that once he had travelled for 30 miles the yorks had become hooked together. He takes from this risk assessment document that there have been issues with this is the past.

38. He submitted that Mr Galloway was vague about who was in the office at the time of the incident. He was not even certain about the role of Mr Neilson, or what he said, and given that, the respondent could have called him to give evidence.

39. Yet in relation to some issues his memory had improved, and in particular at paragraph 23 of his witness statement he remembers the details of the discussion with Blue Arrow.

40. Mr Morton submitted that Mr Galloway contradicted himself with regard to the number of times that he had met the claimant; and when questioned about when he was said to have had the conversation about the state of the van, in his witness statement he said that it was a week before the incident on 11 December, but in evidence he said that it was a few days before. However, the claimant only worked at the week-ends, and Mr Galloway said that he only occasionally worked week-ends, so it could not have taken place.

41. With regard to his claims under the Equality Act, he complained that he had suffered less favourable treatment because of his disability. He referenced Mr Galloway's evidence who said that others in a similar situation were offered lighter duties. When he told Mr Galloway he had a bad leg and a bad back, that was his cue to have a discussion with him to determine if he had a problem; he had a duty

to make enquiries when he saw that he was not coping and to help the claimant when he was in need of assistance. Instead he said that if he could not do it on his own that he was not good to him in his business.

42. With regard to the question of knowledge, the claimant having advised Mr Galloway that he had a bad leg and a bad back, he had a duty to make enquiries about that and had he done so he would have got the knowledge which would have determined that he was disabled.

43. With regard to the claim under section 15, the claimant said that his limitations had arisen from his disability and had the respondent done the responsible thing, they would have known about his disability, but instead they treated him unfavourably because of his disability.

44. With regard to the claim under section 19, he said that he was disadvantaged by the requirement to empty the trailer himself, which would not be a problem for someone who did not have that disadvantage. The safe system of work directions support his argument that the task requires that two people are available, but Mr Galloway said that it was a one man job.

45. Mr Morton asserted that he had responded to the medical questionnaire honestly as he understood it, given the way that the questions were asked, which gave him the flexibility to answer them in the way that he did, and he told them what he thought that they needed to know.

Respondent's submissions

46. Dr Gibson made oral submissions summarising written submissions which he lodged. He first set out the issues for determination.

47. On the question of knowledge, he submitted that this matter should be dealt with first, because if the answer is no, then the claimant's claims under section 13 and section 15 do not require further consideration. Section 15 explicitly states that it will not apply if the respondent does not know or could not reasonably be expected to know that the claimant has a disability. With regard to section 13, relying on *Patel v Lloyds Pharmacy Ltd* UKEAT/0418/12, he asserted that since

the disability itself must be the conscious or subconscious reason for the treatment, there must be some evidence that the employer knew of the disability.

48. With regard to section 19, if it is shown that the respondent did not know, such a finding would cast significant doubt on the claimant's position that emptying a trailer of nested yorks without assistance did actually put him at a particular disadvantage in comparison with others, because if he had you might have expected him to have made his employer aware of that issue from day one.

49. EJ Docherty determined in her decision of 15 June 2019 that the claimant was disabled as a result of the impairment of left foot drop, not anything to do with a sore back. She made that finding assessing the claimant's abilities in the context of him not wearing a splint, in line with part 5 of schedule 1 of the Equality Act.

50. However when this Tribunal is assessing the question of whether or not the respondent knew or could reasonably have been expected to know that the claimant had that specific disability, they have to approach the question on the basis that at all times and in all places at work the claimant was wearing his splint. That is not a matter in dispute.

51. The respondent relies on the following evidence to support their submission that the respondent did not know of the claimant's disability (or could not reasonably be expected to know):

i) The claimant ticks no to every question on the medical questionnaire which asked about past medical issues and anything which may impact on his ability to do the job;

ii) Blue Arrow assigned him to the respondent having no knowledge whatsoever of the impairment of left foot drop;

iii) The initial Blue Arrow Advert describes that role as including loading and unloading and working with efficiency and autonomy viz independently or by yourself;

iv) The claimant did the role for eight weeks without issue;

v) The claimant accepts that at no time during his induction training did he raise any issue at all in regards to his ability to perform any aspect of the role, or make reference to any impairment;

vi) With his splint the claimant walks normally and with no outward sign of any issue;

vii) He wore a splint at all times at work;

viii) The respondent's position is that the claimant did not mention any issue with a bad back or bad leg on 11 December 2017, a position supported by Blue Arrow's response that the respondent advised them not to send him to them because he had refused to empty a trailer of nested yorks;

ix) The letter from Blue Arrow makes it clear they had no idea until 15 December that the claimant had an impairment;

x) The claimant worked with the respondent without issue for two months, during which time the claimant would have loaded and unloaded trailers himself;

xi) The medical report states that the claimant is not limited in his activities of daily living and is not prevented from performing any of them as a consequence of his back or leg condition, which begs the question how the respondent's staff were meant to know he had a disability;

xii) If the claimant himself did not know he had a disability, how could the respondent? At the PH before EJ Gall on 13 December 2019 the claimant said that in December 2017 he did not know that he had a disability, seeking to provide an explanation why he had not raised certain Equality Act claims timeously. He said that he was aware that he had a physical impairment but not a disability;

xiii) Notwithstanding, he states on 15 December 2017 that he is left to ponder whether he was discriminated against due to his disability, using the decision on 12 December 2017 that he was not welcome back due to his attitude, to take the opportunity to manufacture this spurious claim;

xiv) Even if the Tribunal accepts that the claimant did say he had a bad leg and bad back, this does not support a finding that the respondent knew the claimant had a disability. He had not asked for alternative duties before, requested an OH assessment or reasonable adjustments;

xv) Mr Galloway gave convincing evidence about what might have happened if the claimant had told them he had a disability, that he would routinely make adjustments and change duties to comply with the Equality Act;

xvi) That statement is not enough; he may have hurt his back and leg the previous week so that it would be a temporary condition;

xvii) The claimant did not give them the opportunity to investigate further.

52. If the Tribunal is not with him, Dr Gibson asks the Tribunal to find that the reason the claimant was asked not to return was not because of his disability but because of his bad attitude, refusal to carry out a reasonable management instruction and swearing at a manager. In support of that submission, he asked the Tribunal to prefer the respondent's evidence given this is what the claimant is told by Blue Arrow; it was simply not plausible that an agency driver would be asked to do the task if it was contrary to health and safety; had the respondent been told about the bad leg and the bad back they would have immediately wanted to know from Blue Arrow why they had not told them. If any agency worker without a disability had acted in that way, they would have been treated exactly the same as the claimant.

53. In the section 15 claim, the respondent does not concede that what the respondent did was unfavourable treatment. In particular, the respondent saying that they did not want him back is not sufficient to meet the test of unfavourable treatment. The claimant could have continued to work for Blue Arrow if he had wished. Even if it was unfavourable, it did not arise in consequence of disability, but rather the claimant's bad attitude. Even if it did, the treatment was a proportionate means of achieving a legitimate end, namely to have able bodied individuals unload nested yorks at the busiest time of the year. Finding that he could not, with only two weeks of the assignment left, it would have been

proportionate to tell Blue Arrow that they no longer required the claimant's services.

54. With regard to the indirect discrimination claim, Dr Gibson submitted that the PCP did not put persons with the same disability as the claimant at a particular disadvantage, and did not put the claimant at a particular disadvantage. This is because as the evidence progressed it became clear that the claimant was seeking assistance because of red straps which he says caught on the yorks. The untangling of those straps does not appear to be a task which someone with a drop foot whilst wearing a splint would struggle with to any greater extent than someone who did not have a dropped foot whilst wearing a splint.

55. The question whether a PCP puts a claimant at a disadvantage does not require to be assessed as if the claimant were not wearing a splint. This Tribunal has to assess whether the respondent requiring the claimant to empty a trailer of nested yorks without assistance put him at a particular disadvantage. He argued that the Tribunal is entitled to approach that question from the angle of what the claimant can do whilst wearing his splint. He submitted that the evidence shows that the claimant demonstrated for a period of some two months that being required to empty a trailer or nested yorks without assistance did not place him at any disadvantage. He could do it, as others with or without his disability could. He said that he could load the yorks, but his position that the process of unloading was different is not credible. These yorks would have been pushed, pulled and manipulated in all ways when both loading and unloading, but in any event the issue seems to be related to straps, which could have easily been untangled by the claimant himself and then the yorks freed one at a time.

56. In any event, the safe system of work directions clearly show that the PCP was a proportionate means of achieving a legitimate end, namely of getting the work done as economically and safely as possible. An individual would require to move at most three yorks at a time; Mr Galloway said that he had no issue with one being moved at a time. It was the respondent's busiest time; it is not surprising there was no-one to assist him; it was entirely proportionate for the respondent to ask the claimant to do this. The claimant's reference to the safe system of work provisions has only now been referenced in his submissions. The claimant

however did not say at the time that he needed assistance because that was a health and safety requirement.

57. With regard to remedy, the respondent has no contractual relationship with the claimant. In any event the claimant resigned of his own choice from his employer Blue Arrow, but all that occurred was that he was removed from that one assignment. Damages against the respondent would be incompetent as there is no contractual relationship to pay wages (and in any event the claim having been settled against Blue Arrow, would not be just and equitable/represent a windfall). There were no injury to feelings, since the claimant simply moved on to up his hours in another job he was already doing in tandem. There is no evidence that he was affected in any way.

Tribunal's deliberations and decision

Observations on the witnesses and the evidence

58. The Tribunal only heard evidence from two witnesses in this case, the claimant and Mr Galloway, the respondent's transport manager.

59. We found the claimant to be hesitant and evasive when answering questions. We agreed with Dr Gibson that he sought to down-play his impairment when it suited him, or to emphasise it if that suited his ends. Further, we found that he was liable to be obtuse if it suited him. One example of this is his semantic explanation about what he meant when he said that he had not had training. It is however most clearly illustrated by his explanation that he had completed the medical questionnaire honestly, when it was quite clear that he set out to mislead Blue Arrow and in turn the respondent. He tried to suggest that he was answering the questions honestly but that involved him being deliberately obtuse about the import of the question, for example saying that he had no back trouble on that date when it was clear that it was the claimant's medical history which was of note.

60. Indeed, the claimant said in terms in evidence that he did not tell Blue Arrow about his impairment with his leg because he thought that if he did then it would affect his chances of getting a job. He was of the view that he did not need to tell them

about his impairment because it did not prevent him from doing the job which he had been doing for twenty years. He said that he thought it was a "prying question" which they did not have the right to ask. He thought that he had the right to answer in this way because his impairment did not stop him from doing the work; and that if he had told them, then they might not have given them the job. As he could walk without issue (and do the job perfectly well) they had no need to know. He went on to say that he had his limits and he reached them that day.

61. While the claimant may well have believed that to request such information was a breach of his privacy (although that is debatable given the potential impact on others) what he certainly does not have the right to do is to withhold the information and then subsequently seek to rely on it in a claim before this Tribunal. As Dr Gibson put it, he can't have his cake and eat it.

62. The claimant said that he did not consider himself to be a disabled person. He said in evidence to this tribunal that he considered he had an impairment but not that he was a disabled person, which appears also to have been his evidence in a previous preliminary hearing before EJ Gall. However we thought that it was significant to note that as at 15 December 2017 he described himself as disabled.

63. As is clear from the finding in facts, we did not believe the claimant when it came to the dispute about what was said upon leaving at the end of his shift on 11 December. Given that he had gone out of his way not to tell Blue Arrow about his impairment, and indeed the respondent before that date, we thought that it would be surprising to say the least if he were to have told them about his leg on that occasion, given then he had deliberately chosen to keep quiet about it prior to that.

64. His position was that he said that he had a bad leg and a bad back. It did not ring true for us at all that this is what would have been said. We thought that had he done so this would have been followed up by Mr Galloway, not least because as the claimant accepts this would have been the first time he had heard anything about this.

65. We found Mr Galloway to be a well-informed and experienced transport manager. We thought that he would have no reason to lie to the Tribunal. We accepted Dr

Gibson's submissions, when it came to a key disputed passage of evidence that on the day of the incident what the claimant said to Mr Galloway and his other colleagues was to be preferred.

66. We also believed Mr Galloway when he said that he had a confrontation with the claimant shortly prior to this incident. While we accepted that his memory was vague, we thought that it was inevitable that he would not remember the details, or even the date, given that it was a very busy time of year, and that he was dealing with large numbers of staff, including agency staff. He remembered that he had spoken to a number of agency drivers.

67. We thought too that it was clear that the claimant had a grudge against Mr Galloway and that it was more likely than not that was because he had taken him to task about the state of his vehicle. We noted this from the way that he questioned Mr Galloway in this hearing but not least from the claimant's pleadings on page 7 where he described Mr Galloway as "a character lounging…." which we thought was rather telling way to describe him, given this is a formal claim form.

68. We found that the claimant was prepared to lie when he thought this was in his best interests when he was seeking assignments with an agency, and so we find that he is prepared to lie to the Tribunal because that serves his interests.

69. For all these reasons, where there was any dispute between the evidence of the claimant and Mr Galloway we preferred the evidence of the latter.

Disability discrimination

70. Although the claimant had initially pursued claims against both this respondent, and Blue Arrow, his employer, which claims had been combined, he subsequently withdrew the claim against Blue Arrow. However there was no dispute that a valid claim lay against this respondent, in terms of section 41 of the Equality Act 2010.

71. This is a claim only for disability discrimination. As set out in the introduction, the claimant claims direct discrimination because of disability (section 13); discrimination arising from disability (section 15) and indirect discrimination (section 19).

72. It is clear from our findings in fact that we did not believe the claimant's evidence. Therefore, the answers to the legal tests when these facts are applied to them are, perhaps unusually in a disability discrimination case, relatively straightforward.

73. It is appropriate for us to first consider the knowledge question, because any section 15 claim could not proceed unless the respondent had knowledge of the disability; and under any section 13 claim, an action by a respondent will almost certainly not be "because of disability" where a respondent does not know that the claimant is disabled.

74. We had no hesitation in concluding that the respondent was not aware, and could not have been expected to know, that the claimant was a disabled person for the purposes of the Equality Act.

75. This was because the claimant had completed a medical questionnaire without making any reference to his impairment; he deliberately did not tell Blue Arrow about his impairment or medical history; he did not tell the respondent at induction or at any other time while he was engaged with them that he was disabled; even if he had said he had a "bad back and a bad leg" (which we did not believe) this in itself would not have even put the respondent on notice that he had a disability; he did not wait around in any event to give the respondent any opportunity to investigate his assertion; further Blue Arrow made no mention of the respondent having said this to them when they were contacted to terminate the engagement (which would have been what was expected); he had undertaken the job during around 14 shifts in the previous eight weeks; his impairment did not impact on his ability to do the loading and unloading, which he had done on those shifts; the medical report lodged for previous hearings makes it clear that with the auxilliary aid the impairment did not impact on his daily activities; at all times while he was working he worn his splint and by his own evidence it did not impact on his appearance while walking so that his impairment was not visible; given that, the respondent's staff could not have detected his impairment, which was his intention; he claims that he did not know himself that he had a disability until he was made aware of that by the medical report (although he did suggest that his treatment may be due to his disability in the letter of 15 December); he had

previously made no request for adjustments, for an occupational health assessment or alternative duties; and we accepted Mr Galloway's evidence that if he had then steps would have been taken as was common practice.

76. For all these reasons, we did not accept that the respondent knew that the claimant was disabled, or that the respondent had any reason to know or believe the claimant to be disabled. We accepted Dr Gibson's submissions, that although there is no specific provision in section 13 that states that a respondent must know that a claimant is disabled to be liable, if a respondent does not know that a claimant is disabled it is very difficult to see how a respondent could treat him less favourably because of a disability that he does not know about.

77. For these reasons, the claimant's claim under section 13 cannot succeed.

78. Turning to the section 15 claim, we did not accept Dr Gibson's submission that to remove the claimant from the assignment was not unfavourable treatment. While this was just one assignment with Blue Arrow, and there was nothing to prevent him continuing to work for them, this might have been the best assignment or the most lucrative assignment, so that we were of the view that terminating the assignment was in principle a form of unfavourable treatment.

79. We did however accept that the unfavourable treatment was not for a reason arising from his disability. We have found as a matter of fact that the claimant was removed from his assignment because of his bad attitude, his refusal to accept a reasonable instruction, and because he swore at a manager. We do not accept that it was because he could not do his job for reasons which arose as a consequence of his disability. But in any event, as discussed above, section 15 makes it clear that a respondent had to know, or that the circumstances point to the fact the respondent ought to have known that he was disabled, and we did not accept that.

80. The claimant could not therefore succeed in his claim under section 15 of the Act, even if we were to find that there was unfavourable treatment, because the respondent did not know he was disabled, and because in any event any unfavourable treatment did not arise in consequence of his disability.

81. Dr Gibson was alert to the fact that there is no specific or even implicit requirement for knowledge in order for a claimant to succeed under section 19. So that to say that the respondent did not know is not a complete answer to the claim under section 19. We did not agree with Dr Gibson that the fact that if the claimant had difficulties emptying yorks he would have told the respondent about his disability was a relevant factor in determining whether there was a breach of section 19 (although we have no doubt that knowledge it would be a relevant factor in the objective justification question).

82. We accepted that the requirement to unload a tailer of nested yorks without assistance was a PCP.

83. We questioned Dr Gibson's submission that unlike the question for determination by the Tribunal to assess whether the claimant is disabled, it is appropriate for us to approach the particular disadvantage question from the angle of what the claimant can do whilst wearing his splint.

84. Dr Gibson provided no authority to support that submission. We were however aware that section 6 must be interpreted with the relevant schedule. We note that the provisions in section 19 make reference to a "relevant protected characteristic". That protected characteristic in this case is disability, and the reference is not to a person's *impairment*, but the pool would contain others who share the same *disability* which we take to be with a dropped foot. We were also aware for the purposes of the reasonable adjustments duty at least, the question whether there is substantial disadvantage is to be determined without taking account of any adjustments including auxiliary aids.

85. We would be prepared to accept that in principle those who shared the same disability as the claimant would be put at a particular disadvantage by the PCP in terms of section 19(2)(b). Whether it would put the claimant at that disadvantage (for section 19(2)(c)) (given his medical aid) is perhaps a different matter, although we are aware that the "reason why" is irrelevant to the question whether there is disparate impact.

86. This is a very interesting question which, if it had been necessary, we would have explored further. However that point in this case, interesting though it is, is academic given our findings in fact.

87. Specifically, while there was some lack of clarity about what exactly the claimant was saying that he could not do, and we noted that even Mr Galloway seemed confused about the reference to "hooks", we came to the view on the basis of the evidence that we heard that the real problem for the claimant was that the straps of the empty yorks had got tangled.

88. In particular, we noted that these events took place at the end of the day, when the claimant was due to come off shift. We have concluded that he was simply not prepared to take the time that was needed to finish the task at hand. But even if he had needed assistance with it, he would have made that clear to the relevant managers when he was handing in his keys, and he would have been much more conciliatory with his managers as regard the need for assistance to complete the task before leaving that day.

89. We noted that the claimant referred us (in submissions) to page 11 of the SSOW protocol (document 177) which states that "nested yorks must be loaded and unloaded over a dock leveller either by a single person (maximum 3) or two people (maximum 5). This may require undoing York straps and moving the containers individually where there is difficulty. Two people should be available to help free nested yorks within the vehicle if required, taking care to avoid trapping fingers between yorks".

90. The claimant said that this was the situation he found himself in. We accepted Dr Gibson's submission that this was the first time this was raised and this is not what the claimant sought to rely on at the time of the incident.

91. In any event, we took it from the evidence that in fact the problem was nothing to do with pushing or pulling in regard to unloading the yorks. We got the very clear impression that his difficulties were caused by the red straps having got tangled during the course of the journey from Perth and that the untangling of the tasks was a "troublesome", time consuming and frustrating task. We did not accept that the task "require[ed] a great deal of leg power and good footing to overcome the

yorks resistance". We did not accept in relation to this specific issue that "there are times where brute force is required and more than one person is required to provide it".

92. We therefore accepted Dr Gibson's submissions that the claimant's impairment did not particularly disadvantage him in regard to the task at hand. We have found as a matter of fact that the claimant had done his job, of driving and loading and unloading yorks, for some eight weeks without incident, and so we concluded that the claimant, and indeed those sharing his disability, would not be particularly disadvantaged by that requirement. The claimant's claim under section 19 cannot therefore succeed.

93. Indeed, we accepted Dr Gibson's submission that the most plausible explanation for the claimant's conduct was not his disability at all but the fact that he did not need the job; he was upset that he had been taken to task about the state of his vehicle; that he was at the end of his shift and the unloading of the yorks was too time consuming when there was no-one available to assist. We thought that the claimant would otherwise have been much clearer with the respondent's managers in explaining why he could not complete the job at that time had it not been for lack of commitment to the engagement.

94. The claimant's complaints under the Equality Act 2010 are not well-founded and therefore the claim is dismissed.

Employment Judge: Muriel Robison

Date of Judgment: 17th February 2021

Entered in Register: 24th February 2021

Copied to parties