



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**  
Mr C George

AND

**Respondent**  
Marks & Spencer Plc

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT** Exeter  
**Partly by Cloud Video Platform**

**ON**

1 March 2021

**EMPLOYMENT JUDGE** N J Roper

**MEMBERS** Ms W Richards-Wood  
Ms R A Clarke

### Representation

**For the Claimant:** In person, assisted by his parents

**For the Respondent:** Mr J Bryan of Counsel

### JUDGMENT

**The unanimous judgment of the tribunal is that the claimant's claims are dismissed.**

### RESERVED REASONS

1. In this case the claimant Mr Charlie George claims that he has been discriminated against because of a protected characteristic, namely his disability. The claim is for direct discrimination, and for discrimination arising from disability. The respondent concedes that the claimant is disabled, but contends that there was no discrimination.
2. This has been a hybrid hearing which was partly in person and partly by Cloud Video Platform, to which the parties have consented. A fully face to face hearing was not held because it was not practicable and all issues could be determined in a hybrid hearing. The documents to which we were referred are in a bundle of 88 pages, the contents of which we have recorded. The order made is described at the end of these reasons.
3. We have heard from the claimant's mother Mrs Jacky George on his behalf. For the respondent we have heard from Ms Louise Hirst.
4. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence and have observed their demeanour in the witness box. We found the

following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

5. The Facts:

6. The respondent is the well-known national retailer. It operates an employability programme which supports people facing barriers to employment into work. It is known as the Marks and Start scheme and it has been running for at least 16 years. It is highly regarded by the Government and media, as well as other businesses. In the course of this scheme the respondent works with a number of programme partners, which includes the Prince's Trust, whose aim is to provide support to young people between the ages of 16 to 25. The scheme is not reserved to candidates who are disabled. The Prince's Trust sources individuals for the Marks and Start scheme from local referral partners, with the aim of them gaining work experience at one of the respondents many stores. The Prince's Trust then provides support to the participants and the relevant store before during and after the work placement takes place. This support includes pre-screening and preparing candidates before they intend a "taster day" at the relevant store.
7. The taster day is an opportunity to assess a young person's suitability for a four-week work placement at one of the respondent's stores, and involves an interview process. The event is led jointly by the Prince's Trust and the relevant store.
8. If a participant is deemed suitable, he or she will be given the opportunity to attend a work placement. Not all participants on the taster day are necessarily offered a work placement. There may be a number of reasons for this, which can include the individual demonstrating a lack of participation; a lack of confidence when communicating and engaging with other participants and/or during an interview; or not showing sufficient interest in the taster day process, the job role, or the respondent generally.
9. If an individual is offered a work placement, then he or she will be assigned a "Buddy" whom they shadow over the four-week period. Once the participant has been coached in the duties of the relevant department he or she will carry on completing those duties independently, although without being permitted to use the tills. The Buddy will give the participant and the relevant section managers weekly feedback on observations made about the participant's work. The purpose of the work placement is for the participants to learn and gain work experience of working in a store.
10. If an individual performs well during the work placement, this might result in an offer of part-time work in the store for up to 16 hours per week. These contracts are offered by the respondent on an altruistic basis rather than because the respondent requires more workers and the respondent has a separate social responsibility budget for these vacancies. However, participation in the taster day does not guarantee progressing to the four-week work placement, and the four-week work placement does not in turn guarantee the offer of a part-time contract.
11. The claimant Mr Charlie George was born in March 1998. He has suffered from autism all of his life, and will continue to do so. This mental impairment has a substantial adverse effect on his ability to carry out his normal day-to-day activities.
12. With the assistance of the Prince's Trust the claimant attended a taster day at the respondent's Torbay store on 21 August 2019. One of the respondent's Commercial Managers at the Torbay store is Ms Louise Hirst, from whom we have heard. She had a number of conversations with Becky from the Prince's Trust to discuss the number of candidates which the respondent would accommodate on that day. In the event 10 candidates attended, including the claimant. Ms Hirst was not informed by Becky or anyone else that the claimant was autistic, and no special requirements or adjustments were requested for the claimant or for any other candidates before their arrival on the taster day.
13. At the start of the taster day the participants were shown a Power Point presentation by Ms Hirst and Becky. The participants then undertook various activities to assess whether they would be suitable to take part in the work placement scheme. These activities included a group discussion, a selling exercise, an interview and a team

building exercise. The assessment of the participants was based on observations throughout the day which were undertaken by Ms Hirst and a number of her colleagues from the respondent who were involved in conducting interviews. Tasks were assigned to the participants to assess their ability at selling, communication, engagement, ability to work as a team, ability to use their own knowledge, and skills required for working in a customer assistant role. The respondent was also looking for participants who demonstrated enthusiasm, commitment, and motivation for the work placement.

14. Ms Hirst observed all of the participants during the day, and did not feel that the claimant had engaged with the other individuals during the tasks which they had been set, and felt that other participants on the taster day had performed more strongly across all of the tasks. The selling exercise involved thinking about the features and benefits of a particular product, and then working in pairs to take turns selling the item to each other. The claimant performed well during this task which surprised Ms Hirst because she had not seen a similar level of engagement from the claimant on any of the other tasks. She also noted that the standard of all of the participants on the taster day was high on this particular task. Each of the participants also took part in an interview lasting approximately 10 minutes which primarily consisted of motivational based questions to assess the participant's enthusiasm towards the work placement.
15. Ms Hirst considered the claimant's performance across the various tasks which he had performed, and sought feedback from her colleague who had conducted the claimant's interview. This feedback was that the claimant had struggled to answer questions even with further exploration and encouragement from the interviewer. Both Ms Hirst and the interviewer had concerns about the claimant's ability to deal with one-on-one situations with customers bearing in mind that those participants who progressed to the work placement would spend the majority of their time on the sales floor and were not allowed to use the tills. They felt that this would leave the claimant vulnerable and not afford him the best opportunity to experience the work placement as it should be. Ms Hirst reached the conclusion that the claimant was not suitable for the work placement scheme at that time.
16. One particular concern of Ms Hirst was that the respondent did not have the resources to guarantee that a Buddy would be available at all times to accompany the claimant because Buddies would normally be required to fulfil their day-to-day jobs as well, and Ms Hirst felt that it was unfair to risk leaving the claimant in situations where he would have to deal with customer issues by himself because he would be unable to solve any difficulties arising on his own, and this would potentially leave him vulnerable.
17. At the end of the taster day Ms Hirst and the colleague who had conducted the claimant's interview provided feedback to Ashley and Becky from the Prince's Trust and informed them that the claimant was not currently suitable for a place on the work placement. They proposed further work which the Prince's Trust could do with the claimant which Ms Hirst agreed would provide extra support for the claimant if he wished to be considered for another taster day, and which might prepare him for a future work experience placement elsewhere.
18. Ashley and Becky from the Prince's Trust were disappointed at Ms Hirst's decision not to offer the claimant a place and tried to persuade her to change her mind. Ms Hirst did not do so because she felt the claimant had demonstrated that he was not ready for the work placement.
19. Out of the 10 participants who attended the taster day, the claimant and three others were not offered a place on the work placement scheme. Of these three other candidates, one was unsuccessful for similar reasons as the claimant, namely a lack of confidence and engagement with other participants, whereas the other two unsuccessful participants were not offered a place because of their poor attitude on the taster day. A number of the successful participants recorded on a health questionnaire that they suffered from disabilities, but this did not prevent them from being invited to proceed to the work placement scheme. At least two of the six successful candidates also suffered from mental health disabilities/impairments.

20. The claimant and his parents were disappointed at the respondent's decision, and the claimant's parents wrote to the respondent on 26 August 2019 by way of a formal grievance. The gist of the complaint was that they had been informed by Ashley of the Prince's Trust that the claimant had fulfilled all of the tasks that were given to him "and was one of if not the best candidate ref selling an item. However due to the fact that he has a disability, he will not be taken on, because Marks and Spencer do not have the resources for a one-to-one support if they employed him." They alleged that the respondent had directly discriminated against the claimant because he had disabilities and was treated less favourably than an able-bodied person was or would have been.
21. Ms Hirst responded by letter dated 12 September 2019 to the claimant. She stated: "... During the taster day, it was felt that you needed further development in your confidence to engage with other individuals. Engaging with customers is an essential function of the job role and therefore, the decision was made for you to work with the Prince's Trust to develop your confidence so that you could be considered at a future taster day. M&S and the Prince's Trust work in partnership to deliver the Marks and Start programme, a training and mentoring scheme to give young people the skills they need to find a job. As such we have been in touch with our contacts at the Prince's Trust team following your correspondence, and they are committed to supporting you to find a suitable opportunity. As we understand it you are in touch with the Prince's Trust team about another program and we wish you the very best."
22. The claimant then commenced the Early Conciliation process with ACAS on 16 November 2019, and the Certificate was issued on 19 November 2019. The claimant presented these proceedings on 25 November 2019. At a Case Management preliminary hearing on 1 May 2020 it was confirmed that the claimant brings claims of direct discrimination on the grounds of his disability and for discrimination arising from his disability.
23. Having established the above facts, we now apply the law.
24. The Law:
25. This is a claim alleging discrimination because of the claimant's disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct disability discrimination, and discrimination arising from a disability.
26. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
27. Under sections 55 and 56 EqA an employment service provider has an obligation not to discriminate in the provision of work experience, or as to the terms upon which work experience might be offered.
28. As for the claim for direct disability discrimination, under section 13(1) of the EqA 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.
29. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Under section 15(2), this 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.
30. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

31. We have considered the cases of Igen v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Pnaiser v NHS England [2016] IRLR 170 EAT; McCullough v ICI Plc [2008] IRLR 846. We take these cases as guidance, and not in substitution for the provisions of the relevant statutes.
32. Disability:
33. The claimant suffers from autism. This is a mental impairment which has a substantial adverse effect on the claimant's ability to carry out his normal day-to-day activities. The claimant will continue to suffer from autism for the rest of his life. The respondent concedes that the claimant is a disabled person for the purposes of the EqA by reason of this impairment. We agree and we so find.
34. Knowledge:
35. We accept Ms Hirst's evidence that she was unaware of the exact nature of the claimant's disability. However, the respondent has conceded that as an organisation it had knowledge of the claimant's disability at all material times, and we so find.
36. Direct Discrimination s13 EqA:
37. With regard to the claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of his disability than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have been treated in the same (less favourable) way. In Madarassy v Nomura International Plc Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in both Ayodele v Citylink Ltd [2018] ICR 748 and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.
38. We find that the respondent has given clear evidence as to its reasons for rejecting the claimant after the taster day. The claimant did not perform well at the taster day, except for the module on selling, and the respondent did not wish to expose the claimant to an environment with customers where he might be alone and/or vulnerable, and it could not justify a full-time Buddy who might have to neglect other duties too often in supervising the claimant. Given that the respondent invited disabled applicants on the scheme, and at least two of the six successful applicants were disabled with mental impairments, we cannot agree that the claimant was refused the placement on the grounds of his disability, or otherwise simply because he was disabled.
39. In this case the claimant has not proven any facts upon which the tribunal could conclude, in the absence of an adequate explanation from the respondent, that an act of discrimination has occurred. In these circumstances the claimant's claim of direct discrimination fails, and is hereby dismissed.
40. Discrimination Arising s15 EqA:
41. The proper approach to section 15 claims was considered by Simler P in the case of Pnaiser v NHS England at paragraph 31: (a) Having identified the unfavourable treatment by A, the ET must determine what caused it, i.e. what the "something" was. The focus is on the reason in the mind of A; it involves an examination of the conscious or unconscious thought processes of A. It does not have to be the sole or main cause of the unfavourable treatment but it must have a significant influence on it. (b) The ET must then consider whether it was something "arising in consequence of B's disability". The question is one of objective fact to be robustly assessed by the ET in each case. Furthermore: (c) It does not matter in precisely what order the two questions are addressed but, it is clear, each of the two questions must be addressed, (d) the

expression "arising in consequence of" could describe a range of causal links ... the causal link between the something that causes unfavourable treatment and the disability may include more than one link, and (e) the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

42. The unfavourable treatment of which the claimant complains is the respondent's rejection of him at the end of the taster day, and not letting him proceed to the four-week placement. The respondent concedes that this was unfavourable treatment.
43. The next question to address is whether this rejection was something arising in consequence of his disability. The respondent has reminded us that the burden of proof is on the claimant in this respect. The respondent asserts that the claimant has not discharged that burden. He has adduced no evidence to show that the reasons why the respondent rejected him are said to have arisen in consequence of his autism.
44. Whereas we have some sympathy with this argument, and it is true that the claimant did not adduce any evidence to this effect, we nonetheless adopt a common-sense approach and conclude as follows. The reasons why the respondent did not agree to select the claimant for the placement were a failure to engage well with others, a failure to interview successfully, and the need to be supervised constantly by a Buddy and not left alone and exposed to customers and potentially vulnerable. These are all concerns and criticisms which one would ordinarily expect to have arisen from someone suffering with autism. The reasons for the claimant's rejection are entirely consistent with the normal symptoms for his impairment. For this reason, we are prepared to extend to the claimant the benefit of doubt with regard to the burden of proof, and conclude on the balance of probabilities that the respondent's decision not to allow the claimant to proceed to the placement was a decision which arose in consequence of his disability.
45. The next question for us to address is the extent to which the respondent's actions were justified. The respondent clearly has a legitimate aim of ensuring that it protects its business reputation which includes customer satisfaction. In assessing the justification and legitimate aim defence, the tribunal must consider fully whether (i) there is a legitimate aim which the respondent is acting in pursuance of, and (ii) whether the treatment in question amounts to a proportionate means of achieving that aim (McCullough v ICI Plc).
46. In the first place we find that the respondent was acting in pursuance of this legitimate aim when it declined to allow the claimant to proceed to the placement. The final question to be addressed therefore is the extent to which this treatment amounts to a proportionate means of achieving that legitimate aim.
47. The respondent did not wish to have to commit another member of staff to be a full-time Buddy with the claimant, at the expense of that member of staff's other duties to both the business and general customer satisfaction. Had the claimant progressed to the placement there inevitably would have been occasions when the claimant would have been left alone with customers. In the likely event that he was unable to cope on his own this could have caused customer dissatisfaction and put the claimant in a potentially vulnerable position. The respondent was entitled to protect its business reputation and to avoid this possibility. Nonetheless the respondent did not merely reject the claimant. At the same time it made an offer to the claimant to assist the Prince's Trust to help the claimant develop in the areas which needed improvement, and to encourage him to reapply on another occasion in the hope that such improvements would enable him to progress. Against this background we find that the respondent's actions were a proportionate means of achieving its legitimate aim.
48. We therefore conclude that the unfavourable treatment suffered by the claimant arising in consequence of his disability was nonetheless justified by the respondent because it amounted to a proportional means of achieving a legitimate aim.
49. Accordingly, we also dismiss the claimant's claim under section 15 EqA.
50. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made

in relation to those issues are at paragraphs 5 to 22; a concise identification of the relevant law is at paragraphs 24 to 31; how that law has been applied to those findings in order to decide the issues is at paragraphs 32 to 49.

Employment Judge N J Roper

Date: 01 March 2021

Judgment sent to the parties: 08 March 2021

FOR THE TRIBUNAL OFFICE