



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr A Habowski

**v Luton & Dunstable Hospital NHS
Trust**

Heard at: Watford

On: 25, 26 & 27 November 2020

Before: Employment Judge Manley
Mr I Bone
Mr M Bhatti

Appearances:

For the Claimant: In person

For the Respondent: Mr D Brown, Counsel

JUDGMENT having been sent to the parties on 1 February 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction and issues

1. The claimant presented his claim on 31 December 2018 having followed early conciliation with ACAS on 7 December 2018. In summary, the claimant's complaints are that he applied for four posts with the respondent between June and September 2018 and he was not shortlisted for any of them. He claims that that was either because he was a person with a disability and/or on the grounds of race, namely his national origin of being Polish.
2. At a previous preliminary hearing in January 2020 part of the claimant's claim for disability discrimination relating to the Sterile Services Technician Role, which application had been made on 27 July, was struck out. No list of issues was drawn up at that preliminary hearing but we agreed at the start of the substantive hearing that such a list would be useful and one was drafted by the respondent. Some minor changes need to be made to that list of issues in light of what the claimant said during the hearing. The list of issues (excluding those relevant to remedy) is as follows:-

"Time limits

- 1 *Were the claims concerning applications for the positions of Ward Inventory Controller (submitted on 21/06/18) and Sterile Services Technician (submitted on 27/07/18) made in time?*
- 2 *Did they amount to conduct extending over a period?*
- 3 *If not, is it just and equitable to extend time to allow those claims to proceed?*

Direct discrimination

- 4 *The treatment relied upon by the claimant is not interviewing him, pursuant to the following job applications;*
 - a) *Ward Inventory Controller (21/06/18);*
 - b) *Sterile Services Technician (27/07/18);*
 - c) *Porter (19/09/18)*
 - d) *Bank Sterile Services Technician (19/09/18)*
- 5 *Did the respondent, by failing to interview the claimant in respect of the above applications, treat the claimant less favourably than it treated, or would have treated, others?*

The claimant relies on comparators (see paragraph 3 below)

- 6 *If less favourable treatment is established, was it because of the claimant's national origin?*
 - 7 *Further or alternatively, in respect of the job applications listed above in paragraphs 4 a), c) or d), was the treatment because the claimant was disabled?"*
3. Part way through the hearing the claimant identified comparators for each of the above roles (for the record they appear in the judge's notes at page 30). In summary the claimant identified two comparators for the Ward Inventory Control position, three for the Sterile Services Technician position, five for the Porter position and two for the Bank Sterile Services Technician posts. For reasons we come to later we have only considered the five for the Porter position.

The hearing

4. On the first day of our hearing the respondent made an application to strike out the claim because of the scandalous manner in which the claimant had been conducting the proceedings. We were taken to many instances of inappropriate language used by the claimant in a number of written documents, emails, statements and so on, in the course of these proceedings which amount to general abuse, racist, sexist and otherwise offensive and abusive language. A great majority of that was directed towards one of the solicitors for the respondent, some was directed towards employment tribunal judges and more generally towards the justice system.
5. We will not provide details of the application now, nor repeat the offensive

language, save to say that we considered it; the claimant responded in writing and in person before us. In essence, the claimant sought to explain his use of that language by reference to his mental health. He told us he had had a diagnosis of emotional unstable personality disorder in 2019 and how angry he felt when he read some of the respondent's case. The claimant readily accepted that his behaviour was scandalous but he assured the tribunal that it would not be repeated and he apologised. In the light of these assurances and making some adjustments to the hearing, the tribunal declined to strike out the claims.

6. We therefore started the substantive hearing rather later than was expected, using the afternoon of the first day for reading and beginning to hear from the witnesses on the second day. We had a bundle of documents of almost 600 pages and witness statements from the claimant. For the respondent we had witness statements and heard evidence from Ms Taylor who is head of recruitment and temporary staffing; Ms Cook, who shortlisted for the Ward Inventory Controller post; Mr Keane who shortlisted for the Sterile Services Technician posts and Mr Ralph who shortlisted for the Porter position. We were able to read written submissions, hear short oral replies, deliberate and give oral judgment on the third day.

The facts

7. The tribunal find the following relevant facts. The respondent is, as its title suggests, a large employer. The respondent provided a breakdown of the workforce by national origin. Just over 63% of new starters between January 2017 and January 2018 were recorded as British, almost 1% were Polish, with a variety of nationalities between 1 and 7% of new starters.
8. The respondent carries out a large number of recruitment exercises over the course of any year. There are, of course, a number of different departments. The way in which the recruitment exercises work, as far as the tribunal can determine, is that there is an online system where applicants fill in an application form online and it is then scored by two recruitment managers who have agreed a scoring system by reference to the criteria agreed for the post.
9. The claimant has not worked for some years because of his ill health but in 2018 he was looking to return to employment. It is accepted that he was a disabled person at the material time. The claimant's national origin is Polish.
10. On 21 June 2018 he applied for the Ward Inventory Controller post. He indicated on the monitoring form that he was disabled. It is worth saying at this point that the evidence we have is that the monitoring forms which appear on the first and last page of the application forms (containing names and other personal details), is not information which the recruiting managers see when they carry out their scoring.
11. On 27 July 2018 the claimant applied for a Sterile Services Technician post. As far as we can tell he received no information from the respondent about either of those posts. On that application form the claimant did not tick the bit on the monitoring information which said that he was disabled and it is for that reason that that part of the tribunal claim was struck out. The

claimant used the same or similar information to apply for a job at Lister Hospital in Stevenage and on 18 September 2018 he was offered an interview with that hospital.

12. On 19 September 2018 he applied for a Porter post with the respondent. He indicated that he was disabled. The body of the application says that he attended a Polish university and in his supporting information he makes direct reference to having suffered from depression. Mr Ralph was one of the recruiting managers who was responsible for scoring the application forms and for determining who should be shortlisted. Mr Ralph told us, and we accept, that he and other managers were very busy people. He is a manager with many other responsibilities apart from recruitment and we have seen and accept that he had a very high volume of recruitment of around 100 applications every three to four months.
13. Mr Ralph told us that for this particular round of recruitment, there were about 105 applications; about 50 people were shortlisted and 10 were appointed. Contained in the bundle of documents was some information on the ethnic origin of those candidates. As far as the claimant is concerned, he would fit into the category of "*white-any other white background*". We can see from that information that around half of the people who applied were shortlisted. We were told that three declared a disability and one of those was invited for interview but did not attend. Of those who applied but were not shortlisted the proportions are similar to those who were shortlisted. By way of example of white British applicants, 24 were not shortlisted whereas 22 were. For the category "*white-any other white background*", 7 were not shortlisted whereas 3 were. When one looks at the other ethnic origins of which there are about 6 categorisations there would appear to be no particular advantage or disadvantage for any particular ethnic group.
14. The claimant identified those he wished to compare his treatment to in the Porter post by reference to their initials. These were five individuals who were not already working for the respondent and whose applications we had copies of. They were invited for interview. We could not be sure of their nationalities nor whether they had disabilities. The tribunal looked at their application forms which varied in the amount of detail and what was said about experience and skills or abilities. We saw how they had been scored against the criteria. There was nothing that seemed to the tribunal to suggest any one of those people was not qualified for the post.
15. On the same day, 19 September 2018, the claimant applied for the Bank Sterile Services Application and we heard from Mr Keane with respect to that application. The claimant did meet the essential criteria in that he scored 10 out of 20 under both headings. We heard from Mr Keane that in order to get the numbers that they wished to shortlist and then interview, the applicant needed a score of 26 and the claimant scored only 20.
16. On 28 September 2018 the claimant was informed that he was not to be shortlisted for the Porter post. He replied on the same day saying this:

"Amazing, VERY AMAZING how you are discriminating me!"

This is the second application I have made for a different position at Luton & Dunstable Hospital and the second that I wasn't shortlisted for the interview. Interestingly when I post both of them, I was automatically shortlisted under a guaranteed interview scheme.

Keep discriminating me and I will cost L&D Hospital money."

17. When the claimant was asked about this in the tribunal hearing he denied that that meant that he intended or was considering Employment Tribunal proceedings. The tribunal finds there is really no other explanation for that phraseology. In any event, the claimant's interview at Lister Hospital in Stevenage was on 18 October 2018. We were told by the claimant that he attended the interview but then decided to withdraw his application which he did two days later, primarily because of the difficulties with travel.
18. On 12 November 2018 the claimant presented a complaint to the respondent about the process. He wrote:

"I want to request full clarification to lack interviews invitation concerning the applications I have posted for a various position at Luton Hospital. I would like to know as well how is look the recruitment process and who's responsible for choosing candidates whether is the manager of the relevant department or someone from the HR team"
19. He then set out the three posts that he wished to complain about which were the Bank Sterile Services Technician; the Porter and the Ward Inventory Controller. For reasons we do not entirely understand he did not raise any issue there with the Sterile Services Technician post. In any event Ms Taylor was the person to whom this was referred and she sent a holding letter on 20 November 2018 saying that she would investigate.
20. On 29 November 2018 the claimant was invited to interview for the Bank Sterile Services Technician post. The interview was to be on 17 December 2018. This is apparently because when Ms Taylor met with Mr Keane it was realised that the claimant had put on what is called "the two ticks" which indicate disability under the respondent's processes. The respondent's arrangements are that where somebody does tick that box, they are invited for interview if they meet the essential criteria and this is what had happened in this case. That was the reason for the invitation and this was confirmed to the claimant in a letter from Ms Taylor of 3 December 2018.
21. In the same letter, she also mentioned the other two posts - the Porter and the Ward Inventory Controller. She said that the responsibility for shortlisting was that of individual recruiting managers, that there was national re-grading of the Porter post and that he should have received an automatic response to the Ward Inventory Controller post.
22. As indicated the claimant was invited for interview for the Bank Sterile Services Technician post but he did not attend. When he was asked why he did not attend, he told the tribunal that he was concerned that, as he had complained, he did not believe he would be successful. That would, of course, indicate to the tribunal that the claimant did not genuinely want the

job.

23. The claimant then commenced early conciliation through ACAS on 7 December 2018 and the ACAS early conciliation certificate was dated 20 December 2018 and on 31 December 2018 the claimant presented this claim to the tribunal.

Law and Submissions

24. The law to be applied is that contained within the Equality Act 2010 (EQA). In particular we are concerned with s.13, the relevant part of which reads:-

13 Direct discrimination

- (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.

26. S.123 EQA provides for the three-month time limit, except where the tribunal finds it is just and equitable to extend time. The relevant parts read as follows:-

123 Time limits

- (1) Proceedings on a complaint within section 120 may not be brought after the end of—
- (a) the period of 3 months starting with the date of the act to which the complaint relates, or
 - (b) such other period as the employment tribunal thinks just and equitable.
- (2) -
- (3) For the purposes of this section—
- (a) conduct extending over a period is to be treated as done at the end of the period;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.

27. S.136 EQA sets out the provisions in relation to the burden of proof and reads:-

136 Burden of proof

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) 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.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
- (4) -
- (5) -
- (6) A reference to the court includes a reference to—

- (a) an employment tribunal;
28. There are a number of historical cases which assist us with the time limitation point. In British Coal Corporation v Keeble 1997 IRLR 336 it was said that the just and equitable discretion is as wide as that given to the civil courts by section 33 of the Limitation Act 1980. The court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension and to have regard to all the other circumstances, in particular the length of and reasons for the delay, the extent to which the cogency of evidence is likely to be affected by delay, the extent to which the party sued has cooperated with any requests for information, the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action. However, it is also said that there is no legal requirement on a tribunal to go through such a list in every case provided of course that no significant factor has been left out of account by the tribunal or judge in exercising its discretion. Robertson v Bexley Community Centre 2003 IRLR 434 reminds tribunals that the discretion to extend time should be exercised as an exception rather than the rule. Another relevant case is Robinson v Post Office 2000 IRLR 804 where the claimant was following an internal process and it says that such a factor can be taken into account when deciding whether it is just and equitable to extend time.
29. In relation to the direct discrimination claim, taken with the burden of proof provisions, we look first to see whether the claimant has shown primary facts from which we could conclude discrimination on either of the grounds pleaded have arisen. If the burden of proof does shift to the respondent we look to it for an explanation of any difference in treatment.
30. The tribunal is mindful that it is unusual for there to be clear, overt evidence of discrimination and that it should consider matters in accordance with S136 EQA. In addition, the tribunal accepts the guidance in Igen v Wong [2005] IRLR 258. The task of looking at the evidence for discrimination may be considered through a staged process. We first have to make findings of primary fact and to determine whether those show less favourable treatment and a difference in nationality or disability. The case of Madarassy v Nomura International plc 2007 EWCA Civ 33 makes it clear that the claimant must show more than a difference in the protected characteristic and difference in treatment. In essence, the claimant must show more than the mere possibility of discrimination before the burden shifts. The test is: are we satisfied, on the balance of probabilities, that this respondent treated this claimant less favourably than he treated or would have treated an applicant without one or more of his protected characteristics. When establishing whether there has been less favourable treatment, comparisons between two people must be such that the relevant circumstances are the same or not materially different. The tribunal must be astute in determining what factors are so relevant to the treatment of the complainant that they must also be present in the real or hypothetical comparator in order that the comparison which is to be made will be a fair and proper comparison.

31. If we are satisfied that the primary facts prove a difference in protected characteristics and less favourable treatment, we proceed to the second stage. We direct ourselves in accordance with s136 EQA and ask whether there are facts from which the tribunal could decide, in the absence of any other explanation, that the provision has been contravened. There may be facts from which inferences can be drawn and the EHRC Code of Practice in Employment may assist. If the answer here is that we could so conclude, the burden shifts to the employer. The employer's explanation will often be considered at the first and second stage as the tribunal considers all evidence presented.
32. Both parties made oral and written submissions but there are no disputes on the legal tests as set out above so they are not repeated here. The respondent reminded the tribunal of the scandalous conduct of the claimant referred to above when we were considering the just and equitable extension. It was also suggested that the claimant's evidence lacked credibility, taking into account the email above at paragraph 16. The respondent cautioned against a minute examination of application forms which had been considered some time ago, and at some speed, by the witnesses. The claimant remained of the view that there had been discrimination and did not accept the respondent's explanations.

Conclusions

33. First we must consider the out of time point (issues 1-3). This is a jurisdictional point for the employment tribunal. We cannot hear claims that are made out of time unless we decide to extend time on a just and equitable basis under s123 EQA. The first point that the claimant raised in his submissions, although he did not raise it before, was that he believed there could be conduct extending over a period. The tribunal accepts that it is right for us to consider that argument and it was added to the list of issues.
34. The tribunal does not accept that that argument can succeed in the circumstances of this case. These were separate applications for jobs in different departments largely marked by different recruitment managers. There is no connection at all between the Ward Inventory Controller post, the Porter post and the Sterile Services Technician posts. It is true that Mr Keane did score both the permanent Sterile Services Technician and the Bank Sterile Services Technician post with another person but there is no evidence that they realised at the time that the claimant had applied for both those positions. The claimant simply cannot show sufficient connection between the posts applied for so as to make that amount to conduct extending over a period.
35. That means that complaints about the applications for Ward Inventory Controller and the Sterile Services Technician roles are out of time so we have to consider whether it is just and equitable to extend time. The tribunal has found that it is not just and equitable to extend time. There are a number of reasons for this. The default position is that claims should be made in time. It is only exceptional cases where the tribunal can consider extending time on just and equitable grounds. We have to consider the claimant's explanation. The claimant said to us that he did not want to bring

a claim after one failure to shortlist but that he wanted to see whether there would be other such failures. The tribunal does not accept that reason as being one which would lead us to extend the time limit on just and equitable grounds. There were three failures by the time the claimant expressed his concern about discrimination which he did on 28 September. It is quite clear to the tribunal that, by that date, not only was the claimant aware of what he considered to be discrimination, but he was also aware that there was a way in which he could try and remedy that situation. That is contained within the email referred to at paragraph 16 above. The claimant has simply failed to give any reason for any delay after that date, 28 September, for progressing the matter by complaining first to ACAS which of course he is required to do and then to the Employment Tribunal. He has not given an adequate reason for the delay which is well over two months.

36. The claimant reminds the tribunal that he was also invited to interview with Lister Hospital on the same information as he gave to the respondent. Again, he was aware of that in mid to late September and there were many weeks after that before the claimant took his concerns to ACAS. When we consider the balance of prejudice, it is clear to the tribunal that the respondent would be most prejudiced by allowing a claim to proceed after the time has expired, especially where there have been inadequate reasons given for the late presentation of the claim. In all the circumstances of the case, it is not just and equitable to extend time and we will not be considering any complaint about the failure to be invited for interview for those two posts – Ward Inventory Controller and Sterile Services Technician. We add, for completeness, that we saw no evidence that there was any discrimination in the decision about who was invited for interview and the breakdown of the respondent's workforce indicates no such discrimination. The claimant would not have been able to shift the burden of proof in relation to those two posts in any event. Issues 4 a) and b) do not proceed.
37. That means that we are only considering the two later applications (issues 4 c) and d)). The first one that we want to consider is the Bank Sterile Services Technician post. We can deal with this relatively quickly. The claimant did meet, as stated, the essential criteria for this post but he did not meet the minimum score required to be invited for interview. The tribunal accepts Mr Keane's evidence that it was an error when he overlooked the two ticks for disability and it was at that point that the claimant was invited for interview and did not attend. The claimant's explanation, as stated, was that he thought he would not be successful because he had complained. This is simply not an adequate explanation. It means in effect that the claimant cannot show that he was subjected to any less favourable treatment than anyone because he was invited for interview. That being the case, he does not get past the first base of a direct discrimination claim on that post because he has not shown less favourable treatment. The tribunal note that, in relation to that post, a Polish person was appointed so it would be highly unlikely that there would be any discrimination in any event because of the claimant's national origin in that post. For all these reasons that claim for disability or nationality discrimination in relation to that post can go no further and is dismissed.
38. The application for the Porter post (issue 4c) gave us more pause for

thought. Here there were 10 successful applicants and the claimant has asked us to consider five of those ignoring, for these purposes at least, the five who already had experience in the hospital. The difficulty for the claimant here is that it is difficult for him to show that those comparators do not share his protected characteristics. We do not know as a matter of fact, for instance, whether they share his national origin or his disability. However, we accept that if one or more of them had shared one of his protected characteristics, the respondent might have been in a position to inform us, so we consider matters on the assumption that it is likely that those five people did not share those characteristics.

39. We do accept, when looking at the five applications of these comparators, that two or three of them raise questions about why they scored enough points to be shortlisted when the claimant did not. These are not all necessarily explained by what Mr Ralph said to us. But they were the scores given at the time and it is not surprising that Mr Ralph cannot provide more details having scored over 100 application forms over two years ago. There is nothing to suggest any preference, either for non-disabled people or those of a different nationality. When we consider the details of the successful and unsuccessful candidates for that post we accept, there is nothing there to indicate any favourable treatment for any nationality. We also know that one person who had indicated that they had a disability was invited for interview. The statistics there simply do not suggest a pattern of discrimination. When considering the difference in treatment of being invited to interview, these applicants were not comparable, in that they were invited because they scored more than the claimant. Their circumstances were materially different to the claimant's.
40. When we take all that into account, we are not satisfied that the claimant has shown facts from which we could conclude that discrimination because of disability or national origin occurred. However, in the circumstances of the claimant being a litigant in person we think we should also consider, if the burden had shifted, the respondent's explanation.
41. Recruitment at this stage is not a precise art. At the shortlisting stage, with a high volume of applications and busy managers, it is possible that some things might be overlooked. It is also possible that some degree of subjectivity might creep in where the manager knows what skills and qualifications are needed. On the balance of probabilities, we accept the respondent's explanation that the failure to shortlist the claimant was not because of his national origin or because he had a disability. The explanation is that the comparators scored more on a sifting process which was based on agreed criteria.
42. Any discriminatory motive was denied by Mr Ralph and he was not cross-examined on it. He told us, and we accept, that he had experience of working with people from Poland. We find that the explanation provided by the respondent shows that there was no discrimination on the grounds put forward by the claimant. The claimant does not succeed in any of his claims for direct discrimination arising from his applications for these posts.
43. The claimant's claims all fail and are dismissed.

Employment Judge Manley

Date: 25 May 2021.....

Judgment sent to the parties on

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For the Tribunal office