EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Jozsef Ferhezli	**v**	Man Commercial Protection Limited

Heard at: Cambridge

On: 19 August 2021
Discussion in Chambers: 20 August 2021

Before: Employment Judge Tynan

Members: Mrs Catherine Smith and Mr Gary Page

Appearances
For the Claimant: In person
For the Respondent: Ms H Groves, HR Advisor for the Respondent

Interpreter: Mr B Sous, Hungarian speaking

RESERVED JUDGMENT

The Claimant's various complaints that he was unlawfully discriminated against by the Respondent are not well founded and do not succeed.

RESERVED REASONS

Background

1. By a claim form presented to the Employment Tribunals on 16 July 2019, following a period of Acas Early Conciliation between 24 May 2019 and 20 June 2019, the Claimant claims that the Respondent unlawfully discriminated against him on the grounds of disability.

2. At a Telephone Case Management Preliminary Hearing on 19 March 2020, at which the Claimant was accompanied by his English and Hungarian speaking 'Litigation Friend', Mr Zoltan Bernath, it was identified

that his claims of discrimination are of direct discrimination contrary to Section 13 of the Equality Act 2010 ("EqA 2010"), discrimination arising from disability contrary to Section 15 EqA 2010, failure to make reasonable adjustments contrary to Sections 20 and 21 EqA 2010 and unlawful harassment contrary to Section 26 EqA 2010.

3. The Respondent accepts that at all relevant times the Claimant was a disabled person within the meaning of Section 6 EqA 2010 because of two ongoing conditions: hypertension and high blood pressure; and a non-healing ulcer on his ankle.

4. At the Telephone Case Management Preliminary Hearing on 19 March 2020, the Claimant stated that his hypertension and high blood pressure caused headaches, fatigue, dizziness and some blurred vision and that his fatigue was more pronounced when he exerted himself physically. In terms of his non-healing ulcer, the Claimant stated that it could be painful to walk on his left leg, that he walks more slowly and that kneeling and bending down can also be an issue.

5. Although he supported the Claimant throughout the proceedings, Mr Bernath was not available to assist the Claimant at the Final Hearing. However, a Hungarian interpreter was present throughout the Hearing. The Tribunal was satisfied that the Claimant was able to participate, including questioning the Respondent's witnesses and making submissions at the conclusion of the parties' evidence.

6. The Claimant gave evidence in support of his claim.

7. For the Respondent we heard evidence from:

   - Melanie Brown, Mobilisation Manager, whose role is to support the Contracts Manager, Mark Walthew – Ms Brown interviewed the Claimant and offered him employment with the Respondent in 2018;
   - Shane Mallon, Assistant Contracts Manager, who also supports Mr Walthew and, amongst other things, who had a discussion with the Claimant on 25 January 2019 after concerns were reported that the Claimant had been asleep whilst at work;
   - Mark Walthew, Contracts Manager, who decided that the Claimant's employment should be terminated during his probation period; and
   - Chris Smith, Quality Director, who chaired the Claimant's Grievance Appeal meeting in April 2019.

8. There was a single agreed Bundle of documents, arranged in three parts, running to 237 numbered pages. The Respondents witnesses had each made a written statement in compliance with the Case Management Orders made on 19 March 2020. The Claimant had not made a written statement in compliance with that Order, but instead filed a statement in response to the Respondent's witness statements. His statement in that

regard was undated though he told the Tribunal that it had been finalised and served on the Respondent a day or two prior to the Final Hearing. The Tribunal considered that it would be in accordance with the overriding objective and in the interests of justice for the Tribunal to admit the statement as the Claimant's evidence. Ms Groves was able to question him about it.

Knowledge of Disability

9. Section 13 EqA 2010 provides,

> 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.

10. Except in obvious cases, the consideration of any complaint of direct discrimination involves some consideration of the mental processes of the alleged discriminator: Nagarajan v London Regional Transport [1999] ICR 877. The complaint of direct discrimination is that the Claimant was dismissed following a review of his probation period. It is not in issue that Mr Walthew took the decision to end the Claimant's employment. Accordingly, it is his mental processes with which the Tribunal is concerned; his knowledge or otherwise of the Claimant's disability is, in our judgment, a material consideration in that regard.

11. Section 15 EqA 2010 provides:

> 15. Discrimination arising from disability
>
> (1) A person (A) discriminates against a disabled person (B) if-
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

12. An employer's duty to make reasonable adjustments in respect of employees and others who have disabilities, arises by virtue of the operation of Sections 20 and 21 EqA 2010. As with Section 15(2) EqA 2010, the duty to make adjustments is subject to a 'knowledge' requirement. Paragraph 20 of Schedule 8 EqA 2010 provides,

> 20. (1) An employer is not under a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know-
>
> (a) …
> (b) that the individual concerned has a disability and is likely to be placed at a substantial disadvantage by the disability.

Knowledge (actual or constructive) of both the disability and substantial disadvantage is required for the purposes of Sections 20 and 21 EqA 2010. As with Section 15(2) EqA 2010, the burden of proof is on an employer to establish, on the balance of probabilities, any claimed lack of knowledge.

13. Whilst Section 15 EqA 2010 and paragraph 20 of Schedule 8 to EqA 2010 are framed in essentially identical terms, Section 15 is concerned with the acts and omissions of the employer's employees, agents and others who may have treated an individual unfavourably and in respect of whose actions the employer is vicariously liable by virtue of the operation of Section 109 EqA 2010. As such, there is a particular focus on the knowledge and mental processes of the alleged individual discriminator(s) at the time of any treatment about which complaint is made.

14. The duty of adjustment is the employer's and the focus therefore is upon how the organisation, rather than any individual, has responded to a disabled worker's situation and needs. Where, as here, the employer is a corporate entity, its knowledge (actual or constructive) of any disability and any resulting disadvantage is more commonly derived from a number of sources, potentially over a period of time, including from the employee himself, the employee's manager and colleagues, the employer's HR function, Occupational Health specialists and others.

15. By contrast, in order for a Claimant to succeed in a complaint under Section 26 EqA 2010 it is not strictly relevant whether the Respondent knew, or ought reasonably to have known, that the Claimant had a protected characteristic: firstly, a worker may be harassed even if this was not intended; and secondly, the Claimant need not have the protected characteristic to which the unwanted conduct relates in order to bring a claim. When considering complaints under Section 26 EqA 2010, the question for the Tribunal is simply whether any unwanted conduct complained of relates to a relevant protected characteristic.

Findings of Fact

16. The Claimant commenced employment with the Respondent on 6 September 2018. He was employed as a Security Officer. He was deployed to the Respondent's site at Gowerton Road in Northampton. He was interviewed by Ms Brown for the role on 29 August 2018 and was then offered employment with the Respondent.

17. The Tribunal accepts Ms Brown's evidence, which in any event is not disputed by the Claimant, that neither during the recruitment process nor in his subsequent induction and training stages, did the Respondent state or intimate that he had any underlying health conditions. Ms Brown's further undisputed evidence at Tribunal was that the Claimant had not told her of any underlying health conditions at any time during his employment with the Respondent.

18. The Claimant was issued with a written contract of employment dated 6 September 2018. There is a copy of the contract in the Hearing Bundle starting at page 56. The Claimant's duties are set out in clauses 3.4 and 3.5 of the contract, including an undertaking to work 'to the best of his ability' and to 'observe high standards in the performance of his work and conduct'. When questioned by Ms Groves, the Claimant accepted that if a security officer slept on duty they would not be discharging their responsibilities to ensure a safe and secure environment.

19. Clause 4 of the Claimant's contract of employment, contains provisions relating to a six month probationary period. It confirms that performance and suitability for continued employment will be reviewed throughout the probationary period and that employment may be terminated before the end of the probationary period.

20. The Respondent has a comprehensive Employee Handbook. Section 13 of the Handbook sets out the Respondent's Disciplinary Rules and Procedures, including a list of examples of the types of conduct considered by the company to amount to gross misconduct justifying dismissal without notice. The list is stated not to be exhaustive. Sleeping on duty is not within the list of examples (page 104 of the Hearing Bundle). However, as noted already, the Claimant accepted at Tribunal that sleeping on duty would mean that a security officer was not discharging their responsibilities. He further accepted that he would accept an employee to fail their probation period if they slept on duty.

21. When the Claimant joined the Respondent, he was initially required to undertake one full warehouse patrol shortly after 10pm when the warehouse staff left site for the evening. Two or three months later, the number of patrols was increased significantly. By then, the warehouse was operating through the night. A theft issue had been identified at the site that was believed to be more prevalent during the night shift. The Respondent was requested by its client to undertake regular patrols in order to maintain a visible security presence. In discussion with its client, the Respondent had identified that 10 patrols during a 12-hour evening and night-time period would provide the necessary security presence. This was communicated to the Claimant and his security colleagues. It was not suggested by the Claimant that he raised concerns with the Respondent at this time that he had underlying health issues that may impact his ability to undertake that number of patrols.

22. The Claimant was not required to complete a medical questionnaire on joining the Respondent as this was not company policy at the time. Its approach in this regard was informed by concerns as to whether asking questions of employees about their health might be discriminatory. It was not the Claimant's evidence at Tribunal, nor was there any evidence in the Hearing Bundle, that he had volunteered information to anyone at the Respondent regarding his health. One of two reports from his GP surgery at pages 191 to 195 of the Hearing Bundle evidence that the Claimant was first diagnosed with a non-healing ulcer on his ankles on 18 February 2019, just two weeks before he was dismissed. The Report itself is dated 19 February 2020, namely a year later. We find that he did not share this diagnosis with anyone at the Respondent prior to being dismissed. There is a second Report dated 16 March 2020, which confirms that the Claimant was diagnosed in Hungary with hypertension approximately 20 years ago, for which he was treated in Hungary. Again, we find that he did not share this diagnosis with anyone at the Respondent prior to being dismissed. After the Claimant sustained an ankle fracture in 2017, he seems to have consulted his GP in the UK and was prescribed alternative equivalent medication to address his hypertension and high blood pressure. The March 2020 Report records that his blood pressure checks were found to be normal with occasionally high levels.

23. We find that the Claimant had not shared any information or evidence regarding his health situation with the Respondent by 24 January 2019, when he was first observed to be asleep whilst on duty. Ms Groves questioned the Claimant as to the fact that he was able to raise operational issues with the Respondent, specifically IT issues and difficulties operating the CCTV system. However, the Tribunal acknowledges that particularly during their probationary period, employees may be reluctant to raise health or other personal issues. We accept the Claimant's evidence that he was concerned that if he did so this might affect his employment with the Respondent. We stress that there is no evidence before the Tribunal that the Respondent might have acted on such information to his detriment. However, it does mean that he did not share information with the Respondent.

24. The Claimant's various complaints relate to the allegation that he was observed to have been asleep on duty on 24 January 2019 and again on 26 February 2019. Whilst Mr Bernath identified at the Hearing on 19 March 2020 that the Claimant had become fatigued in consequence of being required to undertake 10 security patrols in the course of a shift, these patrols were only required during night shifts. The Claimant was observed to be asleep during two separate day shifts. On the basis that the Claimant worked a rotating shift pattern of four days on and four days off, working nights every alternative shift, he would not have worked a night shift for at least four days prior to the day shift during which he was observed to be asleep.

25. Apart from two incidents when the Claimant was alleged to have been asleep on duty, it was not suggested by the Respondent either during the Claimant's employment or in these proceedings that there were other conduct or capability issues on his part during his employment with the Respondent.

26. On 24 January 2019, Mr Mallon received an email from the Respondent's client contact with a photograph of the Claimant seemingly asleep at the security desk. Mr Mallon was informed that the photograph had been taken by a contractor carrying out works at the Gowerton Road site. We accept his evidence that this is what he was told. He discussed the matter with Mr Walthew who asked him to go to the Gowerton Road site to complete a Record of Discussion with the Claimant and explain the potential seriousness of the situation.

27. The Claimant and Mr Mallon met the following day, 25 January 2019. We accept Mr Mallon's evidence that he spoke with the Claimant prior to the meeting to let him know he would be conducting a Record of Discussion and what the discussion would be about. We further accept his evidence that the discussion itself was friendly, that Mr Mallon reiterated to the Claimant on 25 January 2019 the purpose of the discussion and that a copy of the Record of Discussion would be placed on the Claimant's personnel file. The Record of Discussion itself is at page 125 of the Hearing Bundle.

28. When they met on 25 January 2019, Mr Mallon showed the Claimant the photograph of him apparently asleep at the security desk. The Record of Discussion and Mr Mallon's evidence to the Tribunal was that the Claimant had said that he did not *"realise"* he had been asleep and he was unaware that he had been photographed. In his witness statement and at Tribunal, the Claimant took issue with the use of the word *"realise"* and stressed that his stated position on 25 January 2019, a position which he maintains to date, is that he was not asleep, instead that he had momentarily closed his eyes. We do not accept his explanation but instead find that he was asleep on duty. The photograph does not indicate someone alert but resting their eyes, instead, the Claimant has his arms folded across his body and is leaning forward with his head dropped.

29. We are further supported in this conclusion by the fact that the contractor in question thought the situation sufficiently noteworthy that they took a photograph of the Claimant. It seems unlikely that they would have thought to do so, or been able to do so, had the Claimant simply closed his eyes for a matter of seconds. We also think it likely that the Claimant would have been alerted to the presence of the contractor had he been awake. Instead, he was unaware that his photograph had been taken until Mr Mallon met with him on 25 January 2019.

30. Whilst the Claimant has limited spoken and written English, he signed Mr Mallon's handwritten record of their discussion. We are satisfied that Mr Mallon explained the content of the Record of Discussion to the Claimant

before he signed it and, particularly given the summary nature of the note, we find that the Claimant signed it on the basis that it was an accurate record of their discussion. Other than now challenging the reference to having not realised he was asleep, the Claimant did not otherwise challenge the content of the Record of Discussion at Tribunal.

31. There was no agenda on Mr Mallon's part to discipline or dismiss the Claimant. On the contrary, the Record of Discussion evidences a supportive discussion during which Mr Mallon sought the Claimant's comments and any explanation as to why he might have been asleep on duty. The Claimant told Mr Mallon that he had a low blood sugar issue that made him tired, but that if he had a small snack every couple of hours this would keep his energy levels up and he would not fall asleep.

32. We consider that there was nothing further for Mr Mallon or the Respondent to do following that discussion. It was not discussed or agreed, nor suggested by the Claimant, that any follow up action was required. As described by the Claimant, it was a minor issue, addressed through having regular snacks. The Claimant expressed confidence that he would not fall asleep again.

33. There is a dispute between the parties as to whether or not the Claimant told Mr Mallon on 25 January 2019 that he would follow the matter up with his health advisors in Hungary. We find that he may have said to Mr Mallon that he might get the matter checked in 'Hungary' the next time he was there. But, if so, it was a casual observation on his part rather than indicative that there was an unresolved medical issue requiring further investigation.

34. On 26 February 2019, the Claimant was observed to be asleep again at the security desk, again during a day shift. Mr Walthew was called to a meeting at the Gowerton Road site with the Respondent's client and informed at this meeting that the client wished the Claimant to be removed from their site. In light of this request and on the basis that sleeping on duty was considered gross misconduct, Mr Walthew advised the HR team on 1 March 2019 that the Claimant was to fail his probation period. A letter was issued to him on this basis (pages 127 and 128 of the Hearing Bundle) albeit which referred to him "not being right" for the position. We are satisfied that the only reason he failed his probation period was that he was believed to have been asleep on duty with the result that the client had requested his removal from its site.

35. The Claimant may understandably feel aggrieved that Mr Walthew did not seemingly ask the client on 28 February 2019 for more details as to the circumstances in which the Claimant had been observed to be asleep. Moreover, Mr Walthew failed the Claimant's probation period without first speaking to the Claimant, to seek his comments or explanation. However, as at 1 March 2019, Mr Walthew and the Respondent's knowledge of any health issues affecting the Claimant remained unchanged.

36. We find that Ms Brown, Mr Mallon, Mr Walthew and Mr Smith did not know that the Claimant had a physical impairment that had a long term adverse effect on his ability to undertake normal day to day activities, such as to be disabled within the meaning of Section 6 EqA 2010. The fact that the Claimant was reported to have fallen asleep for a second time did not in our judgment put the Respondent or any of the four individuals referred to on notice of a disability or a potential disability.

37. It is possible that other employers faced with these facts might have made further enquiry, but in our judgement that does not mean that the Respondent failed to make such enquiries as it ought reasonably to have made in the matter. In any event, had Mr Walthew made further enquiries of the Claimant, the Claimant would have told him, as he maintained both in his Grievance and throughout these proceedings, that he had not been asleep on 26 February 2019. This was not a case where the Claimant accepted at the time that he had been asleep, but suggested that it may be as a result of a medical condition. On the contrary, for reasons he felt were in his best interests, the Claimant withheld from the Respondent that he had hypertension and high blood pressure and that these had been treated over many years with anti-hypertensive medication. Likewise he withheld that he had sustained a nasty ankle fracture in 2017. Instead, the information and evidence he put forward and, according to his evidence at Tribunal that he would have continued to put forward during what remained of his probation period, was that he had a potential low blood sugar issue that was easily managed through regular snacking.

38. In our judgment the Respondent did not know and could not reasonably have known that the Claimant was disabled for the purposes of Section 6 EqA 2010. The Respondent has discharged the burden in Section 15(2) and Schedule 8(2) EqA 2010. In the absence of the requisite knowledge, the Claimant's complaints against it under Sections 15, 20 and 21 EqA 2010 fail.

39. We are satisfied that Mr Walthew, as the relevant decision maker, did not know (and ought not reasonably to have known) that the Claimant was disabled when he determined that the Claimant should fail his probation period. In such circumstances it is difficult for us to identify on what basis his thinking and mental processes may have been affected by consideration of the Claimant's disability or disability in general. In any event, we conclude that the Claimant was treated no differently to how someone without a disability would have been treated had they been thought to have been asleep on duty on two separate occasions during their probationary period. We are satisfied, and the Claimant accepted whilst giving his evidence at Tribunal, that any employee in his (disputed) situation would have been dismissed. In these circumstances the Claimant has failed to establish primary facts from which the Tribunal could conclude, in the absence of any explanation being provided by the Respondent, that treatment complained of, namely his dismissal, is because of his disability.

Harassment

40. At the Telephone Case Management Preliminary Hearing on 19 March 2020, the Claimant's complaint under Section 26 EqA 2010 was identified as based on the Respondent's actions in taking a photograph of the Claimant with his eyes closed and his hand resting on his stomach, on 24 January 2019. In fact, the photograph was taken by a contractor at the client's site. Nevertheless, he was shown a copy of the photograph by Mr Mallon on 24 January 2019. The Tribunal proceeds for these purposes on the basis that this was unwanted conduct and that the Claimant was embarrassed to be shown a photograph of himself asleep on duty. However, if so, we are not satisfied that the conduct related to a relevant protected characteristic. It relating to the fact that he was believed to have been sleeping whilst on duty and was shown the photograph in order that he might comment on it.

41. We reiterate that the Claimant's case is that he was not asleep on 24 January 2019. He has not put forward a positive case that he was asleep on that date because he was fatigued as a result of hypertension and high blood pressure and / or as a result of a non-healing ulcer on his ankles. The available medical evidence, whilst supportive of the fact that patients can feel tired easily due to anti-hypertensive medication and if their blood pressure is poorly controlled, does not state in terms that the Claimant experienced tiredness on or around 24 January 2019 as a result of a medical condition or the effects of medication to treat that condition. On the evidence available to the Tribunal, it is simply not possible for the Tribunal to conclude, on the balance of probabilities, that the unwanted conduct complained of by the Claimant was related to a relevant protected characteristic, namely his disability by reason of hypertension, high blood pressure and a non-healing ulcer on his ankles.

42. In these circumstances the Claimant's complaint that he was harassed also fails.

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Employment Judge Tynan

Date:27 August 2021…….

Sent to the parties on: .....

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For the Tribunal Office