



EMPLOYMENT TRIBUNALS

Claimant: Mr A Coulibaly

Respondent: Menzies Aviation (UK) Limited

RECORD OF A PRELIMINARY HEARING

Heard at: London South

On: 15 October 2021

Before: Employment Judge Cheetham QC

Representation

Claimant: Sabrina Sullivan (solicitor)

Respondent: Anisa Niaz-Dickinson (counsel)

JUDGMENT

1. In respect of claim no 2300747/2020, the Claimant was disabled for the purposes of the Equality Act 2010.
2. In respect of claim no 2303724/2020, the Tribunal does not have jurisdiction to hear the claim, as there was no Acas Early Conciliation Certificate and the claim is therefore dismissed.

REASONS

1. The Claimant was employed by the Respondent, Menzies Aviation (UK) Ltd, as a Customer Services Agent from 6 March 2017 until 4 September 2020. At this hearing, he was assisted by an interpreter (French).

2. His first claim (no. 2300747/2020) was presented on 22 February 2020 and claimed disability discrimination, which allegedly took the form of mimicking the Claimant, because of his stammer. The Respondent in its ET3 denied that the Claimant was disabled for the purposes of the Equality Act 2010 and denied liability generally, stating that the claim had not been properly particularised.
3. The Claimant brought a second ET1 on 29 October 2020 (2303724/2020), which alleged unfair dismissal (but not discrimination). The ET3 contended that he was dismissed by reason of redundancy.
4. At a Case Management Hearing on 6 January 2021 (EJ Hargrove), the Tribunal ordered the two claims to be combined and heard together. At a further hearing on 8 March 2021 (EJ Mason), this Preliminary Hearing was listed to consider the following matters, as set out in that Order.
 - (i) *Whether the Claimant was disabled (as defined in s6 EqA) at the relevant time. If the Employment Judge concludes that the Claimant was not disabled, his First Claim will be dismissed.*
 - (ii) *Whether the Tribunal has jurisdiction to hear the Second Claim given that the Claimant has not provided a fresh Acas Early Conciliation Certificate. The claims do not appear to relate to the same matter for the purposes of the early conciliation requirements in section 18A Employment Tribunals Act 1996. The Second Claim is solely for unfair dismissal and the Claimant's complaint is that it was procedurally unfair specifically lack of consultation; he does not mention disability. The only connection between the First and Second claims appears to be that the parties happen to be the same; the Second claim appears to be based on different and subsequent unconnected events to those rehearsed in the First Claim.*
 - (iii) *Whether the claims have been brought in time and if not, should time be extended.*
 - (iv) *Whether either claim should be struck out or subject to a deposit order on time grounds;*
 - (v) *Whether the First Claim should be struck out for failure to comply with Tribunal orders.*

Disability

5. The Equality Act 2010 defines a person having a disability for the purposes of the Act if he or she has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities.
6. The Claimant had provided an impact statement, as well as a medical assessment report. In his impact statement, he referred to having had a stammer since childhood. He stated: "*This impacts my ability to communicate. It takes me longer to communicate what I need to say. I find talking to strangers very difficult to do. If someone does not have patience to listen to me, it can be*

impossible for me to communicate with them". He described how, as a result, people would make fun of him, which affected his confidence and mental health. As a result, he would feel very low, be unable to sleep and unwilling to socialise.

7. The supporting report from a Senior Specialist Speech and Language Therapist confirmed this self-description. She said: "*I observed Adramane stammering. This took the form of repetitions, restarts, and long pauses, sometimes punctuated by several repetitions of 'er', where it took some time for him to get the word out. These dysfluencies will have a significant effect on verbal communication in day-to-day activities, especially with people who lack patience or good listening skills. The stammer did not prevent Adramane from expressing himself eloquently and clearly*".
8. Unsurprisingly, the Respondent's counsel seized upon this last sentence in her submissions. She also argued that what was described in the report was no more than minor or trivial.
9. The Tribunal took the parties to the "Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011)" and – in particular – section D17, which states: "*Some impairments may have an adverse impact on the ability of a person to carry out normal day-to-day communication activities*". That is then followed by an illustrative example, which could largely have been a description of the Claimant in this case.
10. The issue here was whether the Claimant's stammer had, at the material time, a substantial adverse effect on his ability to carry out day-to-day activities, because there was no issue that he suffered from this impairment and had done since childhood.
11. In the Tribunal's judgment, it would be incorrect to focus upon that one sentence in the report to the exclusion of everything else. It is correct that this sentence does not sit easily with the previous sentences (or the rest of the report), when read in isolation. However, it is clear that while - ultimately - the Claimant may be able to express himself clearly, his communication is marked by his stammer and framed by the reactions of his audience, with the consequent and significant impact upon him and his day-to-day activities.
12. In the Tribunal's view, the Claimant has clearly demonstrated an impact that was much more than trivial, as described in his impact statement. Therefore, the Tribunal concluded that the Claimant was disabled by reasons of his stammer at the material time.

The 2nd claim - jurisdiction

13. The issue here was that the Claimant had not provided a fresh Acas Early Conciliation Certificate. On a straightforward reading, the claims do not appear to relate to the same matter for the purposes of the early conciliation requirements, as set out in the Employment Tribunals Act 1996 s.18A.
14. S.18A reads

(1) Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter. This is subject to subsection (7).

15. The Respondent's counsel submitted that the second ET1 was solely for unfair dismissal, the Claimant's complaint being that it was procedurally unfair. He does not mention disability, nor can it be inferred. The only connection between the two claims was that the parties were the same.
16. Counsel relied upon ***Akhigbe v St Edwards Homes Ltd*** UKEAT/0110/18, in which Kerr J said, in terms, that it is a question of fact and degree in each case, where successive claims are brought by the same claimant against the same respondent, whether the second claim is a claim relating to the same "matter" as the first claim. He referred to the guidance provided by Simler J to that effect in ***Compass Group UK & Ireland Ltd v. Morgan*** [2017] ICR 73.
17. The Claimant's solicitor argued that, although it may not be obvious that the two claims were linked, that is what the Claimant intended and he could provide further particulars to show that. She also said that he had completed the form and particulars himself.
18. The Tribunal found that, on a careful reading of the second claim, it made no reference to discrimination and it was not possible to read into his complaint that discrimination played any part in the redundancy. It does not help the Claimant to argue that he wrote it himself, because he wrote it very clearly. In the Tribunal's judgment, there was no connection between the matters in the first and second claims. As a consequence, the absence of a further EC Certificate meant that the Tribunal did not have jurisdiction to hear this second claim.
19. There were no further applications and the consequent case management directions are set out in the separate Case Management Order.

Employment Judge Cheetham QC

Date: 4 November 2021