



EMPLOYMENT TRIBUNALS

Claimant: Mr J Aslam

Respondent: London General Transport Services t/a Go Ahead London

Heard at: London South Employment Tribunal

On: 13-14 January 2022

Before: Employment Judge Ferguson

Members: Ms D Mitchell
Mr S Khan

Representation

Claimant: In person

Respondent: Mr I Maccabe (counsel)

JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The Respondent's rejection of the Claimant's job application on 29 March 2019 amounted to direct disability discrimination and victimisation.
2. A remedy hearing will take place on 21-24 June 2022. Notice of the hearing and directions have been sent separately.

REASONS

INTRODUCTION

1. By a claim form presented to the Tribunal on 31 July 2019, following a period of early conciliation from 23 May to 23 June 2019, the Claimant brought complaints of direct disability discrimination and victimisation against the Respondent relating to an unsuccessful job application.
2. This hearing was limited to liability only and the issues were agreed at a preliminary hearing as follows:

Disability

- (i) Was the claimant a disabled person in accordance with the Equality Act 2010 (“EQA”) at all relevant times because of anxiety/depression?

EQA, section 13: direct discrimination because of disability

- (ii) It is not in dispute that the respondent rejected the claimant’s application for employment on 29 March 2019.
- (iii) Was that treatment “less favourable treatment”. is. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others (“comparators”) in not materially different circumstances? The claimant relies on hypothetical comparators.
- (iv) If so, was this because of the claimant’s disability and/or because of a perceived disability (anxiety/depression)?

Equality Act, section 27: victimisation

- (v) Did the claimant do a protected act and/or did the respondent believe that the claimant had done or might do a protected act? The claimant relies upon the complaint of disability discrimination which he brought against Metroline in January 2019.
 - (vi) Did the respondent reject the Claimant’s application for employment because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act?
3. The Respondent has since conceded that the Claimant was a disabled person at all material times due to anxiety/depression.

FACTS

- 4. On 1 March 2019 the Claimant applied for a job with the Respondent as an iBus Controller. It is not in dispute that he was qualified for the position. The Claimant had worked for another bus company, Metroline, for more than 16 years and had been promoted to Senior Operations Supervisor. He was subjected to disciplinary proceedings in 2018 relating to alleged improper viewing of CCTV footage and as a result was demoted to driver and issued with a final written warning. On appeal he was regraded to Operations Support Supervisor, still one step below his substantive position, and the same level as the iBus Controller position he applied for with the Respondent.
- 5. There were around 120 applications for 5 vacancies and there was scope to recruit others to a lower grade role but suitable for the position in the future.
- 6. In the Claimant’s application form, in the section on professional experience, he wrote of his role at Metroline: “Dismissed under medical capability awaiting tribunal hearing”.

7. The recruitment exercise was managed by Sajid Chaudry, Service Manager for Area Delivery, and Takmil Kiani, then Deputy General Manager.
8. Around 45 applicants, including the Claimant, were shortlisted for interview.
9. The Claimant's interview took place on 15 March 2019. It consisted of a 30-minute skills-based assessment and a 30-minute interview.
10. The interview was conducted by Mr Chaudry and Mr Kiani. Mr Chaudry led the interview and Mr Kiani took notes on a laptop. The notes were taken in a pro forma document that lists 10 standard questions. The first question is "What makes you suitable for the role? And why should we give you the position", which Mr Kiani described as an ice-breaker. It had no scoring associated with it, whereas all the other questions had a space to give a score. The notes record only an answer to the first question. They read as follows:

"1. What makes you suitable for the role? And why should we give you the position

Answer:

Dvr with Metroline 2001, experience / knowledge of the industry, controller 2003 (managing route performance). Senior operations supervisor. Managing supervisors, liaising with senior managers, route performance, health & safety.

SC: I worked at First Group and know the garages and some people, what made you leave Metroline?

JA: Right, I'm going to be very honest and tell you exactly what happened. I was a senior operations supervisor around 2017. I got my self-involved with a female driver. So basically I was dating her. There was an incident and I viewed the CCTV. I saw that she was on the phone. I reported her and because of that, she put in a grievance against me. They investigated and I was done for not following the company's procedure. I was demoted back to controlling. I appealed this but lost. I was a very good worker and always honest. They didn't treat me right. I put in grievances. I was moved to a different garage. I was mistreated there as well where I put further grievances. I was not one for putting in grievances but all this was getting too much. I started getting anxiety and depression for which I was getting counseling. I was off work for over four months. After departing from Metroline in 2019, the case is still ongoing against Metroline which is with IT. I am still getting treatment. I've been in a dark place and have isolated myself. I finally decided to get myself back on track and that's why I've applied for this job."

11. Broadly speaking both parties accept that that is an accurate, although not verbatim, record of what the Claimant said. However, both agree that the Claimant described the relationship with the female driver as "toxic", or at least said they were not on good terms.

12. There are a few minor disputes about precisely what was said:

- 12.1. The Claimant says that he explained he had been demoted to driver, not to "controlling". He accepts, however, that the notes reflect accurately what

had actually happened in the end, i.e. after his appeal. In those circumstances we consider it likely that he explained during the interview that he was regraded to controller on appeal.

12.2. The Claimant's account of the interview in his witness statement is that he said he was disciplined unfairly, i.e. he did not accept he breached the procedures relating to CCTV or the GDPR. Mr Chaudry and Mr Kiani say the Claimant "effectively accepted" in the interview that he had committed a serious breach of company procedure. In fact there may not be any factual dispute here. Given that it is accepted that the Claimant said he appealed, he must have explained that he contested the disciplinary charges. He also said "they didn't treat me right". He also, however, accepted his appeal was unsuccessful. We consider this is not so much a dispute about what was said, as about what inferences were drawn. Mr Chaudry and Mr Kiani formed the impression, given the eventual outcome of the disciplinary proceedings, which still involved a demotion, and having heard the Claimant's description of the background, that there was likely to have been a serious breach of procedures relating to data protection.

12.3. The Claimant also says that he made Mr Chaudry and Mr Kiani aware that his mental health condition met the definition of a disability under the EQA. The Respondent denies that. There is no mention of disability in the notes and the Claimant accepts he did not ask for any adjustments for the interview. We find on the balance of probabilities the Claimant did not *expressly* say his mental health condition was a disability under EQA. Again, however, there is a distinction to be drawn between what was said and what conclusions or inferences were drawn from what was said. It is not disputed that, as recorded in the notes, that the Claimant said he developed anxiety and depression following mistreatment by his previous employer after he was moved to a different garage, that he was off work for more than four months and that after leaving he was still getting treatment and was "in a dark place". Both Mr Chaudry and Mr Kiani said in their witness statements that they had attended recruitment and interview training and a diversity and inclusion course. Mr Kiani had also attended equality and discrimination training at the Respondent's solicitors. We find that both managers must have recognised that the Claimant may well *consider himself* a disabled person under EQA because of his mental health issues.

12.4. There is also a dispute about whether the Claimant said the Tribunal proceedings against Metroline included discrimination. There is a judgment of Watford Employment Tribunal in the bundle which suggests that the Claimant had in fact brought a claim of disability discrimination against Metroline on 25 January 2019. As to what was said during the interview, Mr Chaudry and Mr Kiani say that the Claimant did not say his claim was one of discrimination and they understood the proceedings to be for unfair dismissal. Given there is no mention of discrimination in the notes, we are not satisfied that the Claimant said that the claim included discrimination. Nor is there any basis to find that Mr Chaudry and/or Mr Kiani must have realised it was a claim for discrimination. Even though they would have recognised that the Claimant might consider himself a disabled person, it does not necessarily follow that any claim against Metroline was likely to be for disability discrimination. The Claimant had only mentioned the fact

of his dismissal on medical grounds and the fact of the Tribunal proceedings. That is not a sufficient basis to establish that Mr Chaudry or Mr Kiani knew that the Claimant had done a protected act.

12.5. The Claimant says that Mr Chaudry said after he had finished his explanation: "you sound like a troublemaker". This is denied by the Respondent. We return to this issue below.

12.6. There is also a dispute about whether Mr Kiani asked the Claimant about his marital status, but that is not relevant to the issues we are deciding.

13. There is also a minor dispute about how long the Claimant was talking. He says around 15 minutes, 20 maximum. Mr Chaudry said it was almost the whole time allocated for the interview, i.e. 25-30 mins. Mr Kiani said it was more than the time allocated for the interview. Again, we do not consider it necessary to resolve this. The Respondent's witness accepted that regardless of how much time was left, the interview was effectively abandoned after the Claimant's explanation because they were "gobsmacked" and had decided they were not going to offer him the job.

14. On 29 March 2019 the Claimant was informed his application was unsuccessful.

15. A spreadsheet completed for internal purposes records the Claimant's application as unsuccessful and the reason given is "poor references". Mr Kiani said in response to questions from the Tribunal that he had completed that entry and said it was meant to be an aide-memoire for what the Claimant had said in his interview. He accepted that that was not what would normally be meant by poor references. He confirmed no references had been requested in respect of the Claimant.

16. The Claimant requested feedback on his interview. This was provided, in consultation with Mr Chaudry and Mr Kiani, on 5 April 2019 as follows:

"Although Jamshid has experience working in iBus overall his interview and test did not meet the standards that would be expected.

Successful candidates had outstanding attendance, better understanding of Go-Ahead's policies and procedures and knowledge of our network."

17. On 10 June 2019 a solicitor instructed by the Claimant requested a copy of the interview notes. This was forwarded to Mr Chaudry, who in turn forwarded it to Mr Kiani. On 13 June 2019 Mr Kiani emailed the head of HR, with a copy to Mr Chaudry, as follows:

"Hi Des,

Please see the attached. After the initial question, the interview was terminated. Jamshids' account caused us grave concern. Due to his attendance, ongoing health issues, conduct and grievances, we could not take the risk of employing some one with that background. When Jamshid asked for feedback, he was informed that he had not been

successful due to poor references. These references were his own admission of his breach of procedure, poor attendance and the ongoing grievances.

Regards”

18. Mr Kiani’s evidence was that he discussed and agreed the contents of the email, although not word for word, with Mr Chaudry before sending it. Mr Chaudry did not disagree at the time with the account given in the email or provide his own account of the reasons for the decision. In his evidence to the Tribunal he said he did not disagree with the email, but it could have been clearer because the decision was in fact “purely” because of the Claimant’s admission that he had breached the procedures and GDPR in relation to viewing CCTV and had been demoted as a result.
19. Mr Kiani in his oral evidence accepted that the health issues, attendance and grievances were “areas of concern” but he said they were not the ultimate deciding factor. When asked by Tribunal what he meant by the risk of employing someone with that background, he said he was referring to the grievances the Claimant had submitted, which he described as “fine”, but said they raised a concern. He said then to go off sick as a result of those grievances and how the company was dealing with the case “raised alarm bells”.
20. Returning to the troublemaker comment, we note that in both Mr Chaudry and Mr Kiani’s witness statements they do not expressly deny that Mr Chaudry made the comment; they say they do not recall it. The Claimant’s account was not challenged during cross-examination. Although Mr Chaudry in his oral evidence did deny making the comment, on balance we consider it more likely than not that Mr Chaudry said words to that effect, and that he used the word troublemaker. The Claimant’s account has been consistent throughout and contrary to the Respondent’s submissions, we consider it entirely plausible that Mr Chaudry would respond to the Claimant’s revelations in that way. Indeed it is consistent with the email of 13 June 2019, which refers repeatedly to the grievances the Claimant had raised and says they could not take the risk of employing someone with that background. It is also consistent with Mr Chaudry’s evidence that he was gobsmacked by what the Claimant had said.

THE LAW

21. The EQA provides, so far as relevant:

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.
- (2) If the protected characteristic is age, A does not discriminate against B if A can show A’s treatment of B to be a proportionate means of achieving a legitimate aim.

...

27 Victimisation

- (1) A person (A) victimises another person (B) if A subjects B to a detriment because-

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- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.
- (2) Each of the following is a protected act--
 - (a) bringing proceedings under this Act;
 - (b) giving evidence or information in connection with proceedings under this Act;
 - (c) doing any other thing for the purposes of or in connection with this Act;
 - (d) making an allegation (whether or not express) that A or another person has contravened this Act.

...

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.

22. It is well established that the protected characteristic need not be the only reason for the treatment in order for direct discrimination to be made out, as long as it was an “effective cause”, or had a “significant influence” on the outcome (Nagarajan v London Regional Transport 1999 ICR 877). The same applies to the protected act in victimisation complaints.

CONCLUSIONS

Direct disability discrimination

23. The Respondent accepts that the Claimant had a disability, namely anxiety and depression, at the time of his interview and the decision not to offer him the role. The only issue for us is whether the Claimant’s disability was an effective cause, or had a significant influence, on the decision not to offer him the position.

24. We consider the email of 13 June 2019 is compelling evidence of the reasons for Mr Chaudry and Mr Kiani deciding not to employ the Claimant. Both Respondent witnesses sought to distance themselves from the references to “attendance”, “ongoing health issues” and “grievances” in the email, and instead focused on the reference to “conduct”. Mr Kiani was more candid in his oral evidence, however, accepting that the grievances and the sickness absence, which appeared to be related to those grievances, were also a concern and were factors in their decision.

25. We do not accept Mr Chaudry’s evidence that the decision was made “purely” because of the prior disciplinary issue. If that had been the case Mr Kiani would have said so in his email of 13 June, or Mr Chaudry would have corrected the impression given by Mr Kiani’s email at the time. It is not for us to decide at this hearing, which is limited to liability only, whether the disciplinary issue would have precluded the Claimant being offered the position in any event. The question at this stage is whether his disability was “an effective cause” of the treatment. It is not disputed that the “ongoing health issues” in the email

referred to the Claimant's disclosure that he had developed anxiety and depression, or that the "poor attendance" referred to the absence of more than four months that the Claimant said was due to his anxiety and depression. On a natural reading of the email, those matters were significant factors in the decision not to offer the Claimant the role. We also take into account that the Respondent has not given a consistent explanation for rejecting the Claimant's application. The reason recorded internally was "poor references" and Mr Kiani's explanation for recording that as the reason was not wholly satisfactory. The feedback given to the Claimant on 5 April 2019 gave different reasons again. We consider the 13 June email gave the true reasons. Mr Kiani was giving an honest account to the head of HR, not expecting that the email would be seen more widely, and the Respondent is now seeking to resile from the natural meaning of it.

26. We are satisfied that the Claimant's health issues, which the Respondent concedes amounted to a disability, were an effective cause of the Respondent's decision not to offer him the role. The complaint of direct disability discrimination therefore succeeds.

Victimisation

27. We have found that neither Mr Chaudry or Mr Kiani knew that the Claimant's Tribunal claim was one of discrimination, so they cannot have rejected his application because of his protected act in bringing that claim.
28. We must also consider whether they rejected his application because they believed he might do a protected act in the future.
29. We consider the key evidence here is the comment in the email of 13 June 2019 that they could not "take the risk of employing someone with that background", having referred to the Claimant's health issues and multiple grievances as part of the background. We have already found that Mr Chaudry and Mr Kiani must have known that the Claimant may well consider himself a disabled person under the EQA. We have also found that Mr Chaudry made a comment along the lines that the Claimant sounded like a troublemaker. It is also not disputed that Mr Chaudry and Mr Kiani knew that the Claimant had brought Tribunal proceedings against his former employer. In those circumstances we consider that the "risk" referred to in the email included the risk of the Claimant doing a protected act in the future, either by making a complaint of discrimination against the Respondent or bringing proceedings under the EQA. This is also supported by Mr Kiani's oral evidence, in which he said that the grievances were a matter of concern and raised "alarm bells".
30. The complaint of victimisation also therefore succeeds.

Employment Judge Ferguson

Date: 24 January 2022