



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4122829/2018**

5

**Held in Glasgow on 4 and 5 September 2019**

10

**Employment Judge L Doherty  
Members I. A. Poad  
W. Muir**

**Miss E Gavito**

**Claimant  
In Person**

15

**The Scottish Ministers**

**Respondent  
Represented by:  
Ms I Moretti -  
Solicitor**

20

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

25

The judgment of the Tribunal is that the claimant was not discriminated contrary to Section 13 of the Equality Act 2010, and the claim is dismissed.

**REASONS**

30

1. The claimant, whose date of birth is 20 October 1987, presented a claim of disability discrimination arising from the respondent's decision on 25 July 2018 not to progress her application for employment with them as a prison officer. The claim was presented to the employment tribunal on 15 November 2018.

35

2. It is accepted by the respondents that the claimant is disabled in terms of the Equality Act 2010 (EqA) on the basis of her condition of multiple sclerosis (MS).

**E.T. Z4 (WR)**

3. The claim is one of direct discrimination under section 13 of the Equality Act 2010 (the EqA). The discrimination claimed is the respondent's decision at the end of July 2018, not to progress with the claimant's application for employment.
- 5 4. The issue for the tribunal in considering the claim under section 13 of the EqA is to consider whether the respondents treated the claimant less favourably than they would have treated a relevant comparator. There is no named comparator, and the tribunal understands that the claimant is relying on a hypothetical comparator. The issue for the tribunal therefore is to
- 10 consider whether in making the decision not to progress the claimant's application for employment, the respondents treated her less favourably than they would have treated a relevant comparator, whose circumstances were materially the same as the claimants, but who did not have the claimant's disability.
- 15 5. The claimant gave evidence on her own behalf. For the respondent's evidence was given by Louise McLean, a senior resourcing manager with the respondents, who considered the claimant's appeal against the decision not to progress her job application.
6. Both sides lodged documentary productions.

20 **Findings in Fact**

7. The tribunal made the following findings in fact.
8. The respondents are the Scottish Ministers, acting via the agency of the Scottish Prison Service.
9. The Scottish Prison Service (SPS) has responsibility for the prison services
- 25 across Scotland. The respondents have a number of employees across Scotland.
10. From time to time, the respondents engage in recruitment exercises to recruit for the role of prison officers. There are eight stages in SPS' recruitment exercise to the role of prison officers. These are as follows:

- 5 (i) An application is submitted. The candidate is required to complete a standard application form which is submitted to the respondents. If the candidate satisfies the respondent's screening of candidate in terms of minimum qualifications, against the job specification, then the candidate goes onto the second stage of the process.
- (ii) Stage 2 process is 'Testing and Awareness Session'. The candidate undertakes a test which can be performed online, or in writing. If the candidate passes at this stage, they move to stage 3 of the recruitment process.
- 10 (iii) Stage 3 of the recruitment process is 'application form review/written submission'. The candidate is required to provide written information which is then marked by a panel. If the candidate passes at this stage, they progress to stage 4.
- 15 (iv) Stage 4 - 'Assessment Centre - interview and fitness test'. At this stage, the candidate is asked to attend for a panel interview, and a fitness test. The fitness test involves a push pull test, and the demonstration of a level of overall fitness. If the candidate passes at this stage of the recruitment process, they are given a conditional offer of employment. The offer of employment is conditional at that stage on the candidate passing pre-employment checks.
- 20 (v) Stage 5 is 'Pre employment checks'. Pre-employment checks are carried out by obtaining a report from Disclosure Scotland, verifying references, and carrying out a pre-employment medical to assess a candidate's fitness to undertake the role. The respondents consider it necessary to ensure that a candidate is fit for the role, so that they do not present a risk to themselves or anyone else. A prison officer is required to undertake control and restraint training, and from time to time to exercise control and restraint in the conduct of their duties, and therefore the respondents require to be satisfied as to their ability to perform control and restraint techniques.
- 25
- 30

The respondents have a contract with an external occupational health provider, 'Optima\*. Optima provide the respondents with Occupational Health services. As part of the service Optima provides to the respondents, they carry out medical assessments on candidates in the respondent's recruitment process for the role of Prison Officer, in line with guidelines developed between Optima and the respondents.

The respondents do not receive any medical information about the candidate from Optima but at the conclusion of the fitness assessment Optima send the respondents a proforma form, an example of which is produced in the respondent's bundle at document 11. Section 3 of Optima's form provides for four options; *fit with restrictions given; referred for further opinion; fit for specific work category; unfit*.

In the event that a candidate is deemed unfit after assessment by Optima, then the respondents do not progress the candidate further through the recruitment process. Candidates have the right to appeal against the assessment made by Optima.

(vi) Stage 6 of the recruitment process is 'banked' which means the candidate's name is put on a list, and 'banked', until such time as the candidate can be placed into the business, taking into account the businesses' needs, and where and when vacancies arise. This can sometimes take several months.

(vii) Stage 7 is 'assignment process/formal offer', where the candidate is assigned a particular post, and a formal offer of employment is made.

(viii) Stage 8 of the recruitment process is when the candidate commences employment.

11. The claimant, whose date of birth is 20 October 1987, applied for the role of prison officer on 18 April 2018. A copy of the claimant's application form is produced at document 9.

12. One of the questions on the application form was *'do you consider yourself to have a disability?'* to which the claimant responded 'yes'.
13. The application form also asked *'would you like your application to be considered in line with the disability confident scheme?'* to which the claimant answered 'yes'.
14. The claimant's application met the minimum eligibility criteria, and she progressed to stage 2 in the selection process. The claimant passed stage 2, and therefore she progressed to stage 3 of the process. She passed the testing stage, and attended the awareness session in May 2018, during which she was given information about the stages in the recruitment process. This included information about the conditional offer which would be made if a candidate reached stage 5 of the selection process. As part of the information given about the recruitment process, candidates were told that if they failed the pre-employment checks then the conditional offer of employment would be withdrawn and they would not progress further in the recruitment process.
15. The claimant passed the written submission stage and was invited to attend for an interview and a fitness test. During the course of the fitness test, the claimant undertook aerobic exercises, a push-pull and a grip test. The claimant passed the fitness test and therefore she had progressed to stage 5 of the SPS' selection process.
16. At this stage, the claimant received a conditional offer of employment, that offer being subject to satisfactory completion of the pre-employment checks. The pre-employment checks involved the respondents obtaining references, a Disclosure Scotland report, and pre-employment medical assessment from Optima to assess physical and mental fitness for the role of prison officer.
17. Optima, as the respondent's OH health providers, were instructed to carry out the employment medical assessment. They did so in accordance with guidelines developed with the respondents. The claimant attended at Optima on 18 June 2018, where she saw a nurse practitioner. Various medical checks were carried out, and the claimant gave Optima documentation

regarding her medical condition, which she had been asked to bring with her to the assessment. The claimant disclosed to Optima that she had MS.

18. The nurse practitioner who examined the claimant, said she wished to get in touch with the claimant's GP. The claimant suggested to her that it would be better if she contacted her specialist, but the nurse indicated she would prefer to write to the claimant's GP. The claimant was concerned that her GP did not have any particular knowledge about the disability, but she gave her consent for an approach to her GP to be made.
19. On 18 June 2018, Optima sent the respondents a proforma fitness for work assessment form in relation to the claimant (document 10), in which they had indicated that she was referred for further opinion. The comments box on the proforma formally stated; *7 have gained consent to write to her GP for further medical evidence. I will advise you further in receipt of GP's report.'*
20. On 20 July, the claimant was contacted by the practitioner nurse from Optima who told her that she was going to be rejected for the position because of her M S condition. The claimant was very upset and disappointed to hear this, and she asked the nurse for the reasons why she had not been passed as fit for the post. The nurse gave her number of reasons which made reference to the claimant's condition. The claimant asked for the decision to be given to her in writing and the nurse said she was happy to tell the claimant the position over the phone but she would not send her a letter. The nurse said that she was speaking on behalf of Optima.
21. On 25 July, the respondents received Optima's proforma fitness for work assessment (document 11) which indicated that the claimant was unfit for work. The comment on the form was; *'following discussion with OHP, unfit for proposed role'*. The respondents did not receive any other medical information about the claimant from Optima
22. The claimant received notification via the respondents' on line portal to the effect that they would not progress further her application for the post of prison officer.

23. The claimant telephoned Anne Johnson of the respondents following her discussion with Optima. She was told by Ms Johnson that she could appeal against Optima's assessment. The claimant emailed Ms Johnson on 30 July (document 12) stating that she wished to appeal on the grounds that  
5 Optima's assessment of the claimant's health and potential needs, were greatly removed from the reality of her situation. The claimant also recorded her frustrations with Optima.
24. Ms Johnson responded to the claimant the following day confirming that she had contacted Optima and asked them to refer her with regards to an appeal  
10 of the decision made regarding the claimant's fitness for the role of prison officer.
25. The claimant attended Optima for a further assessment and following upon that, Optima produced a further report dated 4<sup>th</sup> October which was seen by the claimant and sent to the respondents in November.
- 15 26. The claimant's appeal was considered by Ms McLean. Ms McLean wrote to the claimant on 8 March 2019 to advise that having reviewed her circumstances, and the medical information contained in the report produced by Optima dated 4<sup>th</sup> October, her appeal had been successful, and the claimant's application would be returned to the pre-appointment process for  
20 the necessary checks to be concluded prior to confirming any offer of employment.
27. Ms Johnson also advised the claimant that as it had been nine months since the original pre-employment checks were initiated, the respondents required to re-do some of the checks, which included obtaining an up to date enhanced  
25 disclosure certificate, obtaining any additional references from new employers within the time period, as well as re-referring her for a medical assessment. (Document 15). This was in line with the respondent's practice which was to initiate new pre-employment checks, where the time scale between pre-employment checks being undertaken and the point of considering a  
30 candidate for assignment exceeded six months

28. The claimant decided not to pursue her application for the post of prison officer further with the respondents, and she confirmed this to Ms McLean. She was concerned about having to reattend for a medical with Optima.
29. The claimant was very distressed and upset about the fact that she had not been passed as fit for the role of prison officer. She felt that she had been judged on her condition. This had a considerable impact on her mental state, and in particular, she felt that her confidence was dented. The claimant feels hesitant about applying for other types of work which require medical checks of this nature.
30. The claimant has applied for a post at Scottish Ambulance Service. She felt she has been able to do this, as a requirement of the post is that she obtains an enhanced driving licence from DVLA, and if she obtains this, she considers this will give her more confidence in connection with the Scottish Ambulance recruitment process.
31. At the point the claimant made her application for employment with the respondents, she was working at Holland & Barret on a part time basis, 15 hours per week. Her rate of pay was £7.83 per hour gross during that employment.
32. The claimant then obtained employment with the Royal Mail, working on a part time basis of 28.5 hours per week, with a gross rate of pay £10.25.
33. The claimant incurred travelling expenses in travelling to and from medical assessments of £32.40, and £28.40. The claimant has also lost earnings of £58.48 from Royal Mail Group, in order to attend a medical appointment.
34. Had the claimant obtained employment as a prison officer, she would have received a gross annual salary of £18, 871 per annum. She would also have enjoyed a pension from that employment in line with the civil service pension schemes, whereby the respondents would have made contributions of 20% of her salary for the first three months, and 26.6% of her salary for the following 7 months (to date of the hearing).



35. The claimant has enjoyed a pension with Royal Mail, in the autoenrollment, and the value of her pension pot to date is £2298.41 .

### Note on evidence

5 36. The tribunal heard from the claimant, and Ms McLean. It found both witnesses to be entirely credible and believable. There was no material conflicts in their evidence which the tribunal had to resolve.

### Submissions

#### *Claimant's submissions*

10 37. The claimant submitted that initially she considered that she may have been indirectly discriminated against, however due to the fact that she had been told by Optima that she was rejected because she had MS that she was told by them that she would not be able to cope with the physical and demanding elements of the job of prison officer, and she decided that she would raise a claim of direct discrimination. The claimant submitted it was unlawful to have  
15 an offer of employment withdrawn because she disclosed that she had a disability.

38. The claimant referred to the medical reports produced in her bundle, which confirmed that for the majority of the time, she enjoyed the same level of fitness as someone who did not have her condition.

20 39. The claimant referred to an example (again produced in the documents) given by the Equality Human Rights Commission which dealt with a job candidate who did have MS. The example made clear that it was unlawful to deny that candidate employment on the grounds of their disability.

25 40. The claimant submitted that she did not raise the claim against Optima, because she was seeking employment from the respondents. Optima however were working for the respondents, and the claimant submitted that they should be regarded as employees of the respondents, and therefore the respondents are liable for their actions which were discriminatory towards her, and on this basis the claim should succeed.

*Respondent's submissions*

41. Ms Moretti for the respondents produced written submissions, which she supplemented with oral submissions. She took the tribunal to the law, and in particular, to the terms of section 13 of the EqA, on which this claim is based.
- 5 42. Ms Moretti referred to the chronology of events and made submissions as to the findings in fact which the tribunal should make. She submitted that the burden of proof is on the claimant.
43. Ms Moretti submitted that the claimant had failed to establish that she had been treated less favourably than her hypothetical comparator. She referred  
10 to Section (23) of the Equality Act, and the evidence which the tribunal must take into account in constructing a comparator. In this regard, Ms Moretti referred to the case *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285. No real comparator has been identified, and the appropriate comparator would be an applicant for the prison officer role  
15 who had passed the physical tests at the assessment centre but did not suffer from a disability, and who was also deemed unfit by occupational health.
44. Ms Moretti submitted that there were adequate non-discriminatory explanations for the actions taken and decisions made. The question for the tribunal was why the respondents treated the claimant in the way which it did?  
20 The tribunal should not apply a 'but for' test but rather the 'reason why. The correct test is therefore '*what was A's conscious or subconscious reason for treating B less favourably?*') (*Nagarajan v London Regional Transport & others* 1999 IRLR 572) (HL).
45. The documentary which the respondents had sight of was Optima's standard  
25 form. The respondents did not have the evidence which the claimant supplied to Optima in relation to her health, or her fitness. Ms Moretti submitted that the claimant's disability was not a factor in their decision to withdraw the offer of employment.
46. In relation to remedy, in the event the claimant is successful, Ms Moretti  
30 submitted that the claimant has failed to mitigate her loss. The claimant's

injury to feelings award was excessive, and the award would fall into the lower band, which was identified in the case of **Vento v Chief Constable of West Yorkshire Police [No.2] 2003 IRLR 102 Court of Appeal**. In determining the level of an award for injury to feelings, the tribunal will focus on the effect of the discriminatory act on the particular claimant. The tribunal must be concerned with the effects on the claimant and not the gravity of the act of the respondent (**The Cadogan Hotel Partners Ltd v Mr Ozog UKEAT/0-001/14**). The claimant has continued to be in employment through the withdrawal of the offer of employment, and she has applied for posts with the Ambulance Service, notwithstanding her indication that she was hesitant of applying for other roles requiring an OH health appointment.

### Consideration

47. It is accepted in this case that the claimant is disabled in terms of section 6 of the EqA.

48. This claim is one of direct discrimination under section 13 of the EqA, and the act of discrimination identified in the ET1, and confirmed in further information provided by the claimant, is the decision not to progress further with the claimant's application to the post of prison officer in July 2018, after the claimant attended her medical assessment with Optima. That therefore is the ambit of the claim of which the tribunal considered.

49. Section 13 (1) provides:

*"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."*

50. Section 23 (1) of the EqA provides:

*"(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.*

*(2) The circumstances relating to a case include a person's abilities if—*

(a) on a comparison for the purposes of section 13, the protected characteristic is disability;

51. In bringing a complaint of discrimination, the burden of proof rests in the first instance with the claimant.
- 5 52. In considering the claim under section 13 of the EqA, the tribunal therefore has to consider whether in deciding not to progress the claimants application for the post of prison officer further in July 2018, the respondents treated her less favourably than they would have treated a relevant comparator.
- 10 53. Section 23 (1) provides that on a comparison for the purposes of establishing direct discrimination, there must be '*no material difference between the circumstances relating to each case*'.
- 15 54. In order to make a relevant comparison, the circumstances which are relevant to the claimant's treatment must be the same or materially the same for the claimant and the comparator, other than the comparator does not have the claimant's protected characteristic (disability). This was made clear in the case of **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** referred to above, in which it was stated that 'circumstances' relevant for a comparison include those that they alleged discrimination took into account when deciding to treat the claimant as it did.
- 20 55. On the basis of the evidence before it, the tribunal was satisfied that the relevant comparator was a candidate who had applied for the post of prison officer with the respondents, who did not have the claimant's disability, and who had been successful in the application process up to stage 5; who had received a conditional offer of employment, conditional, amongst other things, on passing a medical assessment; and who had attended for such an assessment with the respondents Occupational Health providers, Optima, and who had been deemed unfit for the role of prison officer by Optima as a result of that medical assessment.
- 25 56. In reaching its conclusion as to the identity of such a hypothetical comparator, the tribunal took into account that there was no dispute as to the stages which
- 30

the respondents undertook in their recruitment process, and information given to the candidates, including the claimant, about the recruitment process. It was not in dispute that the respondent's process involved them making a conditional offer of employment, and that one of the conditions attached to the offer was that a candidate had to pass a medical assessment in order to assess their fitness for the role.

57. The tribunal had no difficulty in accepting Ms McLean's evidence that any candidate who was certified by Optima as unfit for the role, would not have progressed further in the respondent's recruitment process.
58. The tribunal was satisfied that the reason why the respondents decided that the claimant should not progress further in recruitment process, was because after carrying out a medical assessment, Optima reported to the respondents that the claimant was not fit for the role of prison officer and she failed the fitness assessment.
59. The claimant both in her evidence, and submissions, made reference to statements which were made to her by Optima, which she considered to be discriminatory. She submitted that Optima were working within guidelines which had been supplied by the respondents, and they were to be regarded as employees of Optima.
60. Albeit Ms Johnson could not give evidence as to the guidelines, which were not within the remit of the department in which she worked, she accepted that the respondents and Optima had worked together in the production of guidelines. There was no evidence however to support the conclusion that Optima were employees or could be regarded as employees of the respondents. The tribunal accepted that Ms Johnson's evidence that they were an external third party provider who were engaged by the respondents to provide them with a service, which was an Occupational Health service.
61. There was no evidence to support the conclusion that the respondents had not progressed the claimant's application because she disclosed that she had a disability. The claimant disclosed that she had a disability in her application form; after this disclosure her application progressed to stage 5 of the

recruitment process. The fact that this was the case supported the conclusion that it was the assessment by Optima indicating that the claimant was unfit for the role, which caused the respondents to take the decision which they did. The tribunal was satisfied that the respondents would have taken such a  
5 decision about any candidate whom Optima deemed as not being fit for the role after medical assessment.

62. The tribunal was not satisfied that it had been established that the respondents' decision not to progress with the claimant's recruitment further after 25 July amounted to an act of direct discrimination under section 13 of  
io the EqA and therefore the claim is dismissed.

Employment Judge: Laura Doherty  
Date of Judgment: 10 September 2019  
Entered in register: 12 September 2019  
and copied to parties

15

20