



EMPLOYMENT TRIBUNALS

Claimant: Mr S Glasson

Respondent: The Insolvency Service

Heard at: Manchester Employment Tribunal

On: 19, 20 and 21 January 2022

Before: Employment Judge Mark Butler
Tribunal Member Egerton
Tribunal Member Worthington

Representation

Claimant: Self-represented

Respondent: Mr NM Flanagan (Counsel)

JUDGMENT

The claimant's claims for discrimination arising from disability and for a failure by the respondent in the its duty to make reasonable adjustments do not succeed and are dismissed.

REASONS

Introduction

1. The claimant presented his claim form on 16 December 2020. He brought complaints of disability discrimination. The impairment on which he brought his disability discrimination complaints was a stammer. The respondent had conceded this as satisfying the legal test of disability under the Equality Act 2010 in advance of this hearing.
2. The tribunal was assisted in this case with a bundle that ran some 632 pages.
3. The claimant gave evidence and called no further witnesses.
4. The respondent called the following witnesses:
 - a. Ms Joanne Bean
 - b. Ms Catherine Hudson

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5. Although ordinarily the tribunal would hear the claimant's evidence first in a discrimination complaint, Mr Flanagan sought permission to call Ms Bean as the first witness in this case. This was due to Ms Bean having been provided a date for a medical procedure that fell on the second day of this hearing. Mr Glasson considered that this would not cause him any difficulties. And therefore the order of witnesses was altered accordingly.
6. As part of the initial discussion with the parties on the first day of this hearing, the tribunal agreed with the claimant that as the claimant sometimes overlooked details due to concentrating on his speech that we would put in place regular breaks to allow the claimant to reflect on the questions he had asked and assess whether there was anything he had missed. In particular, this was done when the claimant indicated that he thought he had finished his cross-examination of a witness. The tribunal at those points took short breaks, and gave the claimant on returning the opportunity to ask any further questions on matters he had not covered.
7. This also extended to giving the claimant the permission to ask a follow up question of Ms Bean after Mr Flanagan had completed re-examination questions. The tribunal considered it only appropriate that the claimant was given as much room and flexibility as possible to allow him to ask the questions that he wanted to ask, so long as they remained relevant to the issues in the case.
8. The tribunal was grateful for the way that both parties presented their case during this hearing. It enabled the tribunal to hear the evidence that it needed to reach a decision on this dispute.

Issues

9. The issues in this case were considered at the outset of the first day of this hearing. The claimant confirmed that his claim remained as that recorded by Employment Judge McDonald at a Preliminary Hearing on 26 March 2021.
10. The issues in this case were thus:

Discrimination arising from disability

1. Has the Claimant been treated unfavourably contrary s.15(1)(a) EqA 2010 by not being offered a position following a job interview on 1 B August 2020?
2. Was that unfavourable treatment because his assessed score in the interview was lower than two other candidates?
3. Was that lower score something arising from his disability?
4. Can the Respondent show that the alleged treatment described at paragraph 2 was a proportionate means of achieving a legitimate aim under s. 15(1)(b) EqA 2010? The respondent says that the legitimate aim is having a fair and proportionate recruitment process for filling any vacancies

Reasonable Adjustments

5. A "PCP" ¹ is a provision, criterion or practice. Did the respondent have the following PCPs in relation to the recruitment process for the Assistant Official Receiver vacancies:
 - a. PCP 1: Holding interviews by video conferencing
 - b. PCP 2: Emphasising oral answers and performance in interview over written answers and an assessment of technical skills when scoring candidates or selecting them for appointment;
 - c. PCP 3: Having warm-up questions as part of the interview.
6. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability?
7. In relation to each PCP, did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?
8. Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCPs would have been reasonable:
 - a. In relation to PCP1: not requiring the claimant to attend the interview by videoconferencing
 - b. In relation to PCP2: increasing the weight given to written answers and an assessment of technical skills when scoring candidates or selecting them for appointment
 - c. In relation to PCP3: not asking the claimant warm up questions or giving him the option whether to be asked such questions.

Closing Submissions

11. We were provided with skeleton submissions from Counsel on behalf of both the Claimant and the Respondent. And we were also assisted by closing submissions made on behalf of both the Claimant and the Respondent. We do not repeat them here, but considered them carefully in reaching this decision.

Law

12. The extent of the duty placed on a respondent to make reasonable adjustments in the workplace for a person with a disability can be read at sections 20 and 21 of the Equality Act 2010.

20. Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. ...

21. Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

13. The tribunal reminded itself that when considering a claim for a failure in the duty to make reasonable adjustments, that there is need to establish knowledge (actual or constructive) of the substantial disadvantage alleged on the part of the respondent.

14. Protection against discrimination arising from disability is contained at section 15 of the Equality Act 2010.

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.

15. The burden of proof in discrimination cases is expressed at section 136 of the Equality Act 2010:

(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.

16. Mr Flanagan reminded the tribunal of a number of authorities that were relevant to the issues in this case. Each were considered when reaching this decision. We were taken to the following case law:

- a. *T-Systems Ltd v Lewis* (UKEAT/0042/15)
- b. *Pnaiser v NHS England* [2016] IRLR 170 EAT
- c. *R (Elias) v SSD* [2006] 1 WLR 3213
- d. *Hensman v MoD* UKEAT/0067/14/DM
- e. *Newham Sixth form College v Sanders* [2014] EWCA Civ 734
- f. *Lincolnshire Police v Weaver* [2008] All ER 291

Findings of Fact

Any findings of fact we make are based on the balance of probability from the evidence we have read, seen, and heard. Where there is reference to certain aspects of the evidence that have assisted us in making our findings of fact this is not indicative that no other evidence has been considered. Our findings were based on all of the evidence and these are merely indicators of some of the evidence considered in order to try to assist the parties understand why we made the findings that we did.

We do not make findings in relation to all matters in dispute but only on matters that we consider relevant to deciding on the issues currently before us.

(i) Failure by the respondent in its duty to make reasonable adjustments

1. The claimant has worked for the respondent for a number of years.
2. The Respondent was aware that the claimant had a stammer throughout his employment with it. The respondent accepts that this impairment satisfies the legal test for disability in the Equality Act 2010.
3. The claimant's performance with the respondent is to a high level, and has been throughout his employment. There have never been any questions raised concerning the claimant's level of work performance. The claimant was given a temporary promotion in January 2019, and a further temporary promotion for the period 17 Nov 2020-31 May 2021. This all supports the finding that the claimant was working effectively and to a high level during his employment.
4. The claimant was interviewed for a promoted/new role on 07 July 2020. This was by video conference. The claimant did not request any adjustments to the selection process, other than requesting additional time.
5. Following the completion of the selection process, the claimant did not raise as an issue the affect that the selection process was having on him, or the difficulty he was having in that process as a result of his disability.
6. The claimant applied for a permanent role as Deputy Official Receiver.
7. In the claimant's application form he indicated that he would require a reasonable adjustment during the interview process. When providing further detail on his condition, he wrote "I have a stammer and may require longer to answer questions in the interview". Nothing further was requested by the claimant.

8. The claimant was interviewed for the role of Deputy Official Receiver on 18 September 2020.
9. At the interview, the claimant struggled to give full answers to the questions being asked, and entered what he referred to as 'restrictive mode', which is where the claimant limits what he is saying. We have no reason to doubt the claimant's evidence on this, and the claimant's evidence on the fullness of the answers he was giving in interview is consistent with the feedback given by the panel at the time, in that some of the claimant's answers were not fully expressed.
10. The claimant did not explain to the interviewers of the difficulties he was experiencing in expressing himself at the interview. Although the claimant had thoughts of terminating the interview at the time, he continued to provide answers to the questions he was asked as he considered this to be least worse option. When the claimant was asked questions he continued to provide answers, and when he was prompted for further information, he provided responses.
11. The claimant did not tell anybody of the respondent, either before or during the interview process, nor anybody on the panel, about this impact of his stammer, or why he was not able to provide fuller answers. He simply assumed that the interviewers knew. This finding is consistent with the notes of interviews that were prepared as part of grievance process, and the evidence of Ms Hudson, which we accepted as accurate.
12. The claimant scored reasonably well in the process. He was deemed to have passed the interview. However, he was placed third out of all the candidates, on the score that he received. As a result he was placed on a reserve list. The claimant scored one point less than the second successful candidate. The candidates that were placed first and second in the process were offered the two available posts.
13. Consequent to the findings above, in these circumstances, the tribunal concludes that the respondent did not have knowledge, either actual or constructive, of the disadvantage that the selection/interview process was putting the claimant at due to his disability. The claimant was working to a high standard in his role, he had been interviewed through a video conferencing format previously and raised no concerns, he raised no concerns in advance of his interview for Deputy Official Receiver either on his application form or elsewhere, he provided answers in the interview which were reasonably competent, albeit not as detailed as the panel expected. It is in these circumstances that that the tribunal concludes that knowledge on the part of the respondent of the substantial disadvantage has not been established in this case.
14. The claim for a failure by the respondent in its duty to make reasonable adjustments therefore fails, and is dismissed.

(ii) Discrimination arising from disability

15. The respondent conceded that the claimant has a disability pursuant to the Equality Act 2010. That being the impairment of stammering. The respondent had knowledge of this disability during the relevant period.
16. The respondent accepts that receiving lower scores in the interview process could be considered as unfavourable treatment, and this is a finding that the tribunal does make. The first question the tribunal had to address under this claim was whether that unfavorable treatment was for something arising in consequence of the claimant's disability.

17. The claimant employs various mechanisms to help him manage his impairment. This includes avoiding particular words or phrases, trying to avoid blocks and increasing concentration on the words that he is using. These coping strategies make it difficult for the claimant to provide a full and focused answer to any questions being asked of him in his interview for the role of Deputy Official Receiver. The answers he provided led to lower scores being awarded to him during the video interview for the role.
18. The claimant gave clear and consistent evidence of the impact that his stammer has on him, this was both compelling and persuasive evidence. And this evidence is consistent with some of the views given to him following interview, at least in so far as the panel expected the claimant to have been able to provide fuller answers. And this evidence from the claimant is substantially consistent with the Speech and Language Therapy Report (at p.392), the STAMMA Report (at p.394, although we note that this document is not relating specifically to the claimant but his a general report), and the stammering assessment report (starting at p.396, but in particular the comments under the heading of 'Interview and Issues at work' at p.398). Although this supporting evidence is somewhat limited, and the tribunal would have benefitted from more directed evidence on the impact that the claimant's stammer has on him and the effects of it, we conclude that this, on balance, satisfies the burden of proof required to establish a causal connection between the disability and the something arising in consequence of it.
19. The tribunal was satisfied that the claimant had been subject to unfavourable treatment for something arising out of his disability. The tribunal therefore needed to assess whether the approach adopted was objectively justified.
20. The numbers affected by the decision to hold interviews by video from a disability discrimination perspective were small. There were no other complaints, other than from the claimant. And there were no complaints, including by the claimant, in relation to an earlier round of video conference interviewing.
21. The impact on the claimant of holding interviews by video conferencing is quite low, when qualitatively assessed. The claimant was able to engage with the process for the most part, and answered questions asked of him. He scored relatively high in the process. He passed the interview, and only missed out on one of the two available roles by one point. He scored joint highest in at least one category. With all this in mind, the measure adopted had a low discriminatory affect. The tribunal reminded itself that the respondent's justification is to be assessed with proportionality to the seriousness of the discriminatory treatment in mind.
22. This process was held during a pandemic, during which the respondent had put in place a hold on recruitment, and its offices were closed. Face to face interviews were not able to be conducted. However, there were business critical roles that it needed to fill, with the role of Deputy Official Receiver being one such role. It is in this context that the measure adopted must be considered.
23. The respondent put in place a recruitment process to fill the role. The measure adopted was to assess the candidates, including the claimant for the role in question, using a standard interview process but over video conferencing.
24. The tribunal concludes that this measure adopted, that being using video conferencing to conduct interviews for the role of Deputy Official Receiver, was with a view toward achieving the legitimate aim of having a fair and proportionate recruitment process for filling any vacancies. And that it was appropriate to achieve that aim. In effect, it enabled assessment of candidates against the required competencies for the role. Each candidate, including the claimant, was

able to provide answers to questions posed and were assessed against these competencies.

25. No reasonable alternative approach that was capable of achieving the legitimate aim but with a less discriminatory impact has been presented before the tribunal. Nor, could the tribunal identify one. The role itself included oral communication. This was one of the skills needed, and was one of the skills being tested during the process. The approach adopted was appropriate to test the required skills, including oral communication. Any alternative approach would have had to include some oral communication aspect to it, which would inevitably include the claimant having to consider situations and provide some explanation and expansion to the situation presented. And therefore it is difficult to envisage how an alternative approach could have been adopted, given the circumstances of the pandemic and the inability to hold face to face interviews, that would have remained appropriate to achieve the legitimate aim whilst having less of a discriminatory impact. Removing the oral aspect would be one way of reducing the discriminatory impact, however, this would not be deemed appropriate to achieve the legitimate aim, given the need to test oral communication skills.
26. Balancing all of the factors in this case, although we conclude that there has been discrimination arising in consequence of the claimant's disability, we find that the measure adopted was a proportionate means of achieving a legitimate aim.
27. The claimant has not been subjected to unlawful discrimination, and his claim therefore does not succeed.

Employment Judge Mark Butler

Date 25 March 2022

JUDGMENT SENT TO THE PARTIES ON

12 April 2022

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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