



EMPLOYMENT TRIBUNALS

Claimant: Miss A Robinson
Respondent: Solihull Metropolitan Borough Council
Heard at: Birmingham
On: 19 and 20 May 2022
Before: Employment Judge Meichen, Mr E Stanley, Mrs N Chavda

Appearances

For the claimant: in person

For the respondent: Mr C Ilangaratne, barrister

JUDGMENT was sent to the parties dated 26 May 2022. The claimant's claim of direct disability discrimination failed and was dismissed. Written reasons were requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013. The following reasons are provided. Oral reasons were given at the end of hearing and so these written reasons are based on the transcript of the reasons given orally.

REASONS

Introduction

1. The tribunal was provided with a bundle running to 342 pages.
2. The claimant gave evidence and was cross examined.
3. The respondent called two witnesses who were also cross examined.

The issues

4. The issues in the case were agreed at the start of the hearing. It was agreed that there was one claim for us to determine which was a claim of direct disability discrimination.
5. The two allegations of direct disability discrimination were recorded at paragraph 2.1 of the case management order made on 27 May 2021.
6. They were firstly that the respondent did not extend the claimant's contract of employment beyond 30 April 2020 and secondly that the respondent did not offer the claimant the role of adult health commissioning administrator.

7. The respondent conceded at an earlier stage that the claimant was disabled at all material times by reason of post-natal depression, anxiety attacks and separation issues.
8. The main condition relied upon by the claimant was post-natal depression. It was not in dispute, and we accept, that the claimant experienced severe post-natal depression in May 2017 following the birth of her daughter and that this led to her leaving her previous employment in February 2019
9. The respondent disputed that they had any knowledge of the claimant's disability.
10. The issues for the tribunal to determine in the claimant's direct disability discrimination claim were therefore as follows:
 - a. Did the respondent do the following things:
 - i. Not extend the claimant's contract of employment beyond 30 April 2020.
 - ii. Not offer the claimant the role of adult health commissioning administrator

- b. Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

- c. If so, was it because of disability?

The law

11. Section 13 Equality Act 2010 provides that: *"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"*.
12. Section 136 Equality Act 2010 sets out the applicable burden of proof provisions. Section 136(2) states: *"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"*. Section 136(3) then states: *"but subsection (2) does not apply if A shows that A did not contravene the provision"*.
13. These provisions enable the employment tribunal to go through a two-stage process in respect of the evidence. The first stage requires the claimant to

prove facts from which the tribunal could conclude that the respondent has committed an unlawful act of discrimination.

14. The second stage, which only comes into effect if the claimant has proved those facts, requires the respondent to prove that he did not commit the unlawful act. That approach has been settled since the case of Igen Ltd v Wong [2005] IRLR 258 and it was reaffirmed in Efobi v Royal Mail Group Limited [2019] IRLR 352
15. It is well established that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those facts only indicate the possibility of discrimination. They are not, without something more, sufficient material from which the tribunal could conclude that the respondent had committed an unlawful act of discrimination. This principle is most clearly expressed in the case of Madarassy v Nomura International plc 2007 [IRLR] 246.
16. The Supreme Court has emphasised that it is for the Claimant to prove the prima facie case. In Hewage v Grampian Health Board [2012] IRLR 87 Lord Hope summarised the first stage as follows: "The complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the complainant which is unlawful. So the prima facie case must be *proved*, and it is for the claimant to discharge that burden". The claimant must prove facts from which it could be decided not simply that discrimination is a possibility but that it has in fact occurred (see South Wales Police Authority v Johnson [2014] EWCA Civ 73 at paragraph 23).
17. Before the burden can shift there must be something to suggest that the treatment was discriminatory (see B and C v A [2010] IRLR 400). Mere proof that an employer has behaved unreasonably or unfairly would not by itself trigger the transfer of the burden of proof, let alone prove discrimination (see in particular Bahl v The Law Society and others [2004] IRLR 799). Therefore inadequately explained unreasonable conduct and/or a difference in treatment and a difference in status and/or incompetence is not sufficient to infer unlawful discrimination (Quereshi v London Borough of Newham [1991] IRLR 264; Glasgow City Council v Zafar [1998] ICR 120 HL; Igen, Madarassy).
18. In Chief Constable of Kent Constabulary v Bowler EAT 0214/16 it was held that an employment tribunal had impermissibly inferred direct race discrimination solely from evidence of procedural failings in dealing with the claimant's grievances and internal appeal against the rejection of those grievances. The EAT memorably observed: 'Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.'
19. We set out in our findings below the shortcomings in the respondent's treatment of her which the claimant relied upon. We also looked at the whole picture when considering whether the burden of proof could shift to the respondent.

20. We should make clear however that the statutory burden of proof provisions only have a role to play where there is doubt as to the facts necessary to establish discrimination. Where the tribunal is in a position to make positive findings on the evidence one way or another as to whether the claimant was discriminated against they have no relevance. This was confirmed by Lord Hope in Hewage and is consistent with the views expressed in Laing v Manchester City Council and anor 2006 ICR 1519, EAT.

Findings of fact

21. The claimant commenced her employment with the respondent on 18 June 2019.

22. The claimant was employed in the role of business support officer within the respondent's children, young people and family division.

23. The claimant worked 16 hours per week.

24. The claimant was employed under a fixed term contract which all parties understood from the outset was due to terminate on 30 April 2020.

25. The claimant was also aware from the outset that the reason why she was employed under a fixed term contract was that she was employed to cover the hours of another employee who was taking some time off in order to care for their mother who was very ill.

26. We have to deal with a dispute on the evidence over whether the claimant informed the respondent about her post-natal depression at the start of her employment. The claimant's case was that she explained about that during the interview process. The notes of the interview which might have resolved this issue one way or the other were destroyed.

27. The tribunal has decided that we accept the claimant's evidence on this point. The claimant explained to us that she is an open and honest person who had no reason to hide the post-natal depression which she had been through. We accept the claimant's description of herself as open and honest as being accurate. We think it is more likely than not that she would have informed the respondent from the start of her employment about her post-natal depression. The claimant had clearly been through a very difficult few years following the birth of her daughter, she was coming back into the world of work and we think she would have communicated this significant information to the respondent from the start.

28. The fact that the claimant disclosed her post-natal depression did not discourage the respondent from employing her. Furthermore, the claimant's fixed term employment appears to have gone well and the impression that we formed was that the claimant was a very good employee who was well regarded by the respondent.

29. We consider that it was obvious that the respondent wished the claimant to remain employed beyond her fixed term contract if that was possible. In particular, on 29 January 2020 the claimant was invited to a meeting with her line manager Hayley Wood to discuss the prospective termination of her employment and any alternative options. There were no guarantees made to the claimant that her employment would continue but Hayley Wood communicated to the claimant that she would look into options which would mean that the claimant's employment could continue.
30. Immediately following the meeting the claimant was placed on the respondent's first consideration register which was a portal to hopefully enable the claimant to secure redeployment elsewhere within the council before her termination date.
31. We are satisfied that the evidence shows that the respondent was actively seeking opportunities to enable the claimant to remain employed. They were willing and indeed keen to extend the claimant's employment if it was possible to do so – they did this despite having known about her disability from the start.
32. In February 2020 the claimant was offered the opportunity to take an administration role in the respondent's public health directorate. The claimant turned that opportunity down because the role involved a minimum of 20 hours per week which for personal reasons the claimant could not do.
33. In March 2020 the claimant was invited to an assessment centre in respect of a customer service advisor role and was also invited to an interview for an administrative support role. However these possibilities were not progressed because of the covid pandemic. The respondent was forced to stop some of its recruitment activities.
34. On 7 April 2020 Hayley Wood emailed the claimant to inform her of a temporary redeployment opportunity that had arisen. This was the role of adult health commissioning administrator. That role involved liaising by telephone with care providers to support the discharge of people from hospital. The claimant was given limited information about the nature of the role and the person specification. We understand that in fact no formal job description or person specification was ever drawn up for this role. It was a temporary role which was introduced to deal with issues arising in the pandemic. It was a role within the respondent's adults division.
35. The claimant expressed some interest in this role and Hayley Wood agreed to make further enquiries on the claimant's behalf.
36. On 14 April 2020 the claimant sent a sick note to the respondent. The sick note signed the claimant off with anxiety for a period of one week.
37. The claimant had annual leave booked for the last two weeks of her employment and therefore she did not return to work after her sick note expired.

38. At the same time as sending in her sick note the claimant also sent an email to Hayley Wood in which she explained that her GP had advised that it was not uncommon for previous mental health issues to resurface in times like these – i.e. the difficult time of the pandemic and lockdown. The pandemic had seemingly caused a relapse in the claimant’s mental health and in particular a resurfacing of her post-natal depression.
39. The claimant had initially had some doubts about whether to go for the adult health commissioning administrator role as she had enjoyed working in the children’s department. However she decided to go for it following advice from her trade union representative that she should carry on working for the council in whatever role that she could if possible.
40. On 15 April the claimant emailed Hayley Wood to confirm her interest in the adult health commissioning administrator role. She asked Hayley Wood to pass on her details to the adults team so that they could contact her to discuss the role in more detail.
41. Hayley Wood did as the claimant requested. On 16 April she emailed the adult services team with the claimant’s details. She said that the claimant was interested in the role and she asked the team to contact the claimant.
42. Therefore Hayley Wood was happy to progress the claimant’s application for the adult health commissioning administrator role even following receipt of the claimant’s letter of 14 April explaining the deterioration in her mental health.
43. There is no evidence that anybody in the adults team was aware of the deterioration in the claimant’s mental health or that the claimant had been signed off sick or of her disability more generally. There is no evidence or suggestion that Hayley Wood passed on any information of that nature.
44. Hayley Wood did not receive any response to her email forwarding the claimant’s details to the adults team and nobody in the adults team contacted the claimant.
45. On 27 April the claimant emailed HR complaining, among other matters, about the fact that nobody had contacted her in relation to the role in adults.
46. HR then emailed the adults team on 29 April asking if the position was still available and asking them to contact the claimant in order to discuss the opportunity further.
47. A response to that email was sent by Karen Murphy from the adults team. She said that Julia Phillips from the adults team had considered the possibility of employing the claimant but their understanding was that the claimant had limited understanding and experience of adult work which would make it difficult to train her up. They commented that others who had been successfully redeployed into this role had more knowledge of adults or worked in the field previously. Therefore the adults team had concluded that the role was not suitable for the claimant.

48. The position of the adults team was communicated to the claimant later on 29 April.
49. We should note that the claimant accepts that she did not have previous experience or knowledge of adult work. Also, the claimant did not suggest that previous experience was not a genuine requirement for the role in adults. However she makes the point that it had not been made clear to her previously that that was a prerequisite for the role.
50. The claimant sent an email on 29 April in which she set out a number of concerns in respect of the process used to recruit into the adult health commissioning administrator role. This was treated by the respondent as a grievance and a grievance outcome was sent to the claimant on 14 May 2020.
51. The claimant has identified some serious procedural flaws in the respondent's handling of her grievance.
52. Firstly, the claimant was not invited to a meeting to discuss her grievance as she should have been. The respondent's explanation for that was that this was during the pandemic. We were not impressed with that explanation. A telephone or remote meeting could, and we think should, have been arranged.
53. Secondly, the outcome letter enclosed a copy of the grievance procedure and indicated that the claimant could use that if she was dissatisfied with the outcome. The word appeal was not actually mentioned but it was clear that the claimant was being informed that she had a right of appeal. However when the claimant did appeal she was informed by HR that her appeal could not be heard because she was no longer an employee. Again we were not impressed with that explanation. The respondent's grievance procedure does not state that an employee will lose their right of appeal if their employment comes to an end following the submission of the grievance.
54. The person whose hours the claimant was covering returned to work. There was no need for the claimant's job in the children's team to continue. The children's team did not have the funding for the claimant's role to continue beyond the expiry of her fixed term contract. The claimant's employment with the respondent therefore terminated on 30 April 2020.

Conclusions

55. There is no dispute as to the essential facts. The respondent did not extend the claimant's contract beyond 30 April and they did not offer the claimant a role as adult health commissioning administrator.
56. We deal firstly with the decision not to extend the claimant's contract beyond 30 April 2020.
57. This was an allegation where we were able to make clear positive findings. We found that the reasons why the contract was not extended were obvious:

- (i) It was agreed from the outset of the claimant's employment that she was employed on a fixed term contract up until 30 April.
- (ii) The claimant was employed to cover the hours of another employee who needed to take time off for family reasons.
- (iii) That other employee returned to work as had been intended.
- (iv) The funding for the claimant's role ceased when that employee returned to work.
- (v) The claimant did not obtain another position with the respondent.

58. These were the reasons why the claimant's contract did not continue past 30 April. They had nothing whatsoever to do with disability. A person without the claimant's disability in the same circumstances would also not have had their contract extended.

59. In any event, the claimant had not proved any facts from which we could conclude that the reason why her contract was not extended was because of disability.

60. We deal next with the decision not to offer the claimant the role as adults health commissioning administrator.

61. In relation to this issue the claimant has successfully shown that the process which the respondent adopted to recruit into this role lacked transparency. In particular the respondent did not formulate a proper job description or person specification and it did not communicate to the claimant before she expressed an interest that an essential requirement of the role was experience in adults.

62. We also note the communication with the claimant was not as good as it should have been. In particular it is unexplained why the adult team did not contact the claimant following Hayley Wood's communication with them on 16 April.

63. We found that these deficiencies in the process were instances of at most unreasonable treatment; they are not facts from which we could conclude that the reason for the claimant's treatment was disability.

64. We took into account the respondent's failure to call a witness from the adults team. However on its own this was not a matter from which we could conclude that the reason for the claimant's treatment was disability. Ultimately the initial burden to prove her case was on the claimant and she had failed to discharge it.

65. We therefore concluded that the claimant had not proved any facts from which we could conclude that the reason why she was not offered the adult health commissioning administrator role was disability. There was nothing to link that decision with the claimant's disability.

66. In any event we were entirely satisfied on the evidence that the reason why the claimant was not offered the role had nothing whatsoever to do with disability.

We concluded that the claimant's lack of relevant experience was the reason why she was not offered the role.

67. We had to take account of the fact that the role was created because of the extraordinary circumstances brought about by the pandemic and the respondent was obviously trying to act quickly in difficult circumstances where most people were unexpectedly working from home with very limited resources. This explained why the recruitment had not been as transparent and the communication with the claimant not as clear as one would expect.
68. Furthermore, the respondent had known about the claimant's disability from the outset of employment. The claimant's disability had not discouraged them from employing her in the first place or from seeking to extend her fixed term contract, including by way of the firm job offer which was made in February 2020. Even after the claimant's email of 14 April in which she referred to the recent deterioration in her mental health the respondent through Hayley Wood still attempted to progress the claimant's application with the adults team.
69. It was the adults team's decision that the claimant lacked the necessary experience for the role which led to her application not being progressed. There is no evidence that the adults team were aware of the claimant's absence, the deterioration in her mental health in April or of her disability generally. There is no evidence that they took their decision for any other reason than that they stated at the time; because the claimant lacked the necessary experience. It was not disputed by the claimant that relevant experience was a genuine requirement for the role and she accepted that she did not have it.
70. Plainly it would have been better if the respondent had made the requirements of the role clearer from the outset. However, it was understandable why this was not done in the circumstances in which the role was created. Ultimately somebody without the claimant's disability with the same lack of experience would also not have been offered the role.
71. We should finally note that we considered the undoubted flaws in the respondent's grievance process. However, these post-dated the termination of the claimant's employment and the acts of discrimination she complained about. They were serious procedural flaws but not facts from which we could conclude that the reason for the claimant's treatment in respect of the two specific allegations was disability.
72. It follows that the claimant's claim of direct disability discrimination must fail and be dismissed.

Employment Judge Meichen

12 August 2022