



EMPLOYMENT TRIBUNALS

Claimant: Mr B Miller

Respondent: Euro Car Parts Limited

Heard at: Birmingham

On: 6 August 2019

Before: Employment Judge Butler

Members: Mrs I Fox, Mr P Simpson

Representation

Claimant: Mrs A Miller, Claimant's mother

Respondent: Mr J England, Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is that the claims of disability discrimination, harassment and victimization are not well founded and are dismissed.

REASONS

The Claims

1. By a claim form submitted on 30 November 2019, after a period of early conciliation from 1 October to 1 November 2019, the Claimant brought claims of discrimination arising from disability, harassment and victimisation. The protected characteristic relied upon in each case is disability following a severe crush injury sustained to his dominant right hand which occurred in June 2018 just before his employment with the Respondent commenced. This was found to be a disability by Employment Judge Wynne-Evans at a Preliminary Hearing on 27 June 2019. The Claimant alleges his disability meant he was unable to write clearly, legibly and at a reasonable speed and this led to harassment and, after he raised a grievance, victimisation. The Respondent denies any discrimination, harassment or victimisation.

The Issues

2. In relation to the claim under s.15 of the Equality Act 2010 ("EQA") of discrimination arising from disability, the Claimant alleges that the "something"

complained of was his inability to write clearly, legibly and at reasonable speed and that this arose in consequence of his disability. He claims that this led to the following unfavourable treatment by the Respondent:

(i) Offensive comments by Mr James Sherwin to the effect that the Claimant's handwriting offended his "OCD" and he did not want to "see this shit again" before throwing his notebook across the desk at the Claimant;

(ii) The refusal by Mr Max Christmas to postpone a grievance hearing on 3 September 2018 when the person from the Respondent's HR team who was due to attend was unable to do so leaving the Claimant with no means of taking notes of the meeting or being allowed to record the meeting.

3. The Claimant's case is that this was unfavourable treatment by the Respondent which was not a proportionate means of achieving a legitimate aim.

4. In terms of the harassment claim under s.26 EQA, the Claimant relies on the alleged conduct of Mr Sherwin as set out above together with comments by Mr Christmas to the Claimant on 4 September 2018 that he could either resign and receive a possible payment of one month's pay or drop his grievance, return to his desk and take his chances in the knowledge that the Respondent could "sack" him at any time.

5. The claim under s.27 EQA of victimisation is based on the Claimant's alleged protected act of raising a grievance on 2 September 2018 and he claims he suffered the detriments of Mr Christmas' comments made in paragraph 4 above and not postponing the grievance hearing or arranging for another note-taker or recording of the hearing.

6. The Respondent denies all of the allegations of discrimination and hence the first issue to be decided is whether the events as described by the Claimant actually occurred.

The Law

7. S.15 EQA provides:

(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.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

8. S.26 EQA provides:

(1) A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of-

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

9. S.27 EQA provides:

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

- (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)
- (b)
- (c)

(d) making an allegation (whether express or implied) that A or another person has contravened this Act.

The Evidence

10. There was an agreed bundle of documents extending to 146 pages and references to page numbers in this judgment are to page numbers in the bundle. The Tribunal also heard evidence from the Claimant and his mother, Mrs Angela Miller, and for the Respondent from Mr James Sherwin, Head of Support for Workshop Solutions, Mr Robert Bell, Regional Manager of South and South East, and Mr Max Christmas who held the Claimant's grievance hearing.

The Factual Background

11. The Claimant's claim form provided details of his claims in the form of his grievance submitted to the Respondent (page 64) and his appeal against the failure to uphold his grievance. The grievance raises 8 points of concern. Only point 1 of the grievance raises the issue of his disability. It states, "Being called into the meeting room specifically to be informed by James (Sherwin) that my handwriting in my personal notepad "offends his OCD", despite James being aware that I am right handed and almost lost my right hand and had major surgery to save it, a day before my interview. Indeed, I turned up to the interview in a massive purple sling and cast (could not miss it) and am still undergoing intense physiotherapy".

12. The remaining complaints do not mention the Claimant's disability at all. They refer to two colleagues laughing at him in the canteen, a refusal to provide him with training, his poor relationship with Helen Ford, a confrontation with Josie Charlton about his difficulties with Ms Ford, being told by "several" colleagues that his face did not fit and Mr Sherwin and Ms Ford moving his personal belongings from his desk. He does not say what those personal belongings were.

13. When the Claimant's grievance was not upheld, he appealed. His appeal document does not make reference to the EQA which he states provides that it is unlawful to directly discriminate against an employee by treating them less favourably because of their protected characteristic which in his case is the injury to his hand. He then goes on to record that Mr Sherwin not only remarked that the Claimant's handwriting offended his OCD, but also said he did not "want to see this "s*it again" before "flinging the notepad at me". The Claimant then states his belief that Mr Sherwin's comments and conduct amounted to harassment.

14. The remainder of the appeal document is taken up with a repetition of the incidents referred to in his grievance and procedural issues surrounding Mr Christmas' handling of the grievance hearing, both procedurally and in terms of the matters he had not addressed in the outcome letter.

15. The Tribunal noted that, throughout the grievance process, the only reference made by the Claimant about his disability was to comments allegedly made about his handwriting. The only references to harassment were in respect of the alleged comments of Mr Sherwin about his handwriting and the conduct of Mr Christmas in the grievance hearing and thereafter when he allegedly attempted to persuade the Claimant to resign or be dismissed.

16. In his oral evidence, the Claimant said his mother typed his witness statement and he had "input" into it. When referred to the medical questionnaire at page 44, he confirmed he completed it in his own handwriting. The Tribunal notes that, when asked in this medical questionnaire if he had a disability, the Claimant said he did not, only that he was having ongoing treatment for a broken hand. He also confirmed that he completed page 46 in his own handwriting which is perfectly legible. When asked when his accident happened during his evidence, he could not remember, nor could he remember when his cast was removed.

17. The Claimant could not remember exactly when the alleged book-throwing incident happened with Mr Sherwin but he accepted he did not complain about him until he submitted his grievance on 2 September 2018 (page 64). The Claimant could not remember in what order the events referred to at points 1-5 of his grievance happened nor could he remember if he had help writing the grievance but remembered writing the appeal with his mother (page 81). He accepted that the appeal was the first time he accused Mr Sherwin of using the word "shit". He then said he was not sure whether he mentioned it in the grievance hearing and in his next sentence said he did mention that Mr Sherwin swore at him. He accepted this was not recorded in the grievance hearing notes. He further accepted he did not raise the issue of Mr Sherwin flinging the Claimant's notebook at him in his grievance but he did mention it in the grievance hearing.

18. In response to questions from the Tribunal, the Claimant said he could not remember what training he undertook on-line nor could he remember what training he specifically asked for. Regarding the grievance hearing with Mr Christmas, he said he was expecting another member of staff to be there and he did not understand the difference between a note-taker and a companion. He then explained that he did not want to take another member of staff in to the hearing with him. With respect to the Claimant, the Respondent's Grievance Policy (page 71) makes perfectly clear who may attend as a companion and what they may and may not do. Further, whilst the Claimant complains that he was not permitted to record the hearing, the Policy makes clear (page 72) that this is not permitted. We noted also that the email from Lisa Goodley inviting the Claimant to the grievance hearing clearly differentiates between the roles of note-taker and companion.

19. The main thrust of the Claimant's arguments are that he was not supported, in particular by Helen Ford, in his requests for training. His allegations of disability discrimination are limited to the alleged comments of Mr Sherwin about his handwriting and his allegations of harassment and victimisation arising

from the alleged comments by Mr Sherwin again about his handwriting and Mr Christmas to persuade him, inter alia, to resign after he submitted his grievance. Consequently, this is a matter of evidence for the Tribunal to determine the facts. However, we found the Claimant's evidence, as set out above, to be uncertain,

contradictory and unsupported by the documentary evidence before us. Accordingly, we found it to be unreliable.

20. Mrs A Miller, the Claimant's mother, said her statement had not been exaggerated.

21. The Respondent's witnesses were far more consistent in their evidence, both written and oral. It is accepted Ms Ford did not give the impression that she was supporting the Claimant with training. It is stated that she apologised to him for sometimes being abrupt and this was not disputed by the Claimant.

22. Mr Sherwin said the Claimant had never complained about his difficulty in writing notes or that he used his notepad for handwriting therapy. He said that over the first 8 weeks of the Claimant's employment he progressed at a rate Mr Sherwin would have expected. He denied the comments and actions attributed to him by the Claimant.

23. Mr Christmas gave evidence about his investigation into the Claimant's grievance and said that some of the witnesses mentioned by the Claimant refused to speak to him as they did not want to get involved. In the grievance hearing he said the Claimant did not ask for a companion and did not request an adjournment or postponement. The Claimant was asked if he was happy to proceed without a notetaker. Mr Christmas denied trying to persuade the Claimant to resign or that he would not be believed over the Respondent's staff. He was critical of the fact that the Claimant seemed to spend long periods of time on his mobile phone.

24. Mr Bell, who heard the Claimant's grievance appeal was not cross-examined.

25. For the above reasons, where there was a conflict in the evidence, we preferred the evidence of the Respondent's witnesses.

26. In relation to the issues, we find that:

(i) At no time during his employment did the Claimant express that he was having difficulty with his handwriting;

(ii) Mr Sherwin did not criticise the Claimant's handwriting, say that it or his notepad offended his OCD. He did not fling or otherwise throw the notepad at the Claimant;

(iii) Mr Christmas did not try to persuade the Claimant to resign from his employment;

(iv) The Claimant did not object to the grievance hearing going ahead without a note-taker or companion and did not ask to record it.

Submissions

27. For the Respondent, Mr England submitted the Claimant's evidence was unreliable due to differences in the matters he relied upon in his grievance and appeal and pointed to the number of times when asked questions he said he

could not remember, was not sure or gave vague responses. This contrasted with the Respondent's witnesses who were all consistent. He reminded the Tribunal that the only claims to be decided were under ss.15, 26 and 27 EQA and there were no reasonable adjustments or indirect discrimination claims.

28. In relation to the burden of proof, Mr England submitted it was initially for the Claimant to raise a prima facie case following which the burden would pass to the Claimant. In this case, he said the Claimant had failed to reach the point at which the burden passed. Regarding the s.15 claim, the "something arising" was the Claimant's inability to write clearly and legibly but the only evidence of his handwriting was at pp 44-47 where the handwriting was clear and legible. If the Tribunal did not accept the Claimant requested permission to record the grievance hearing, there was no unfavourable treatment of him.

29. Similarly, the claim of harassment could not succeed if the Tribunal did not accept the Claimant's account of Mr Christmas giving him an ultimatum that he should resign with pay in lieu of notice or be dismissed.

30. For the victimisation claim, the Claimant's protected act was raising his grievance and, taken at its highest, the Claimant was unable to establish that the alleged comments of Mr Christmas arose because of his disability and the claim must fail.

31. For the Claimant, Mrs Miller submitted it was clear that his grievance was related to his disability and it was reasonable for him to have the perception that his treatment was disability related. The Respondent could not make assertions as to what happened but it was clear that something significant happened.

32. She then relied on her written submissions. We have not taken into account the submissions based on a failure to make reasonable adjustments or indirect discrimination because those claims are not before us.

33. Mrs Miller asserted that the Respondent accepted Mr Sherwin had a heated argument with the Claimant, admitted that training was withheld from him as a result of him raising a grievance and that his disability meant he could not write clearly, legibly or at a reasonable speed. The Respondent created an intimidating, hostile, degrading, humiliating and offensive environment for the Claimant. The evidence of Mr Christmas was inconsistent. Mr Sherwin admitted speaking to the Claimant about his handwriting. The Respondent had been uncooperative in relation to the bundle in not including all of the text messages between the Claimant and Inderpal Chana and had attempted to pervert the course of justice.

Conclusions

34. We first consider the burden of proof. S.136 EQA provides:

(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.

35. Two Court of Appeal judgments consider the burden of proof in greater detail. In **Igen v Wong [2005] EWCA Civ 142**, the Court held it is for the complainant to prove the facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination. This principle was further considered in **Madarassy v Nomura International plc [2007] EWCA Civ 33** where the court said that the correct approach was to consider whether, from all the evidence before it, there was enough for a reasonable tribunal to properly conclude the relevant provision had been contravened.

36. As our findings of fact make clear, we do not accept the Claimant's account of his conversations with Mr Sherwin or Mr Christmas. In these circumstances, we cannot find that he was treated less favourably because of something arising from his disability, nor that he was harassed or victimised because of that disability.

37. We have considered Mrs Miller's long written submissions as far as they relate to the claims before us. We have also considered them in relation to her own evidence which she said was not exaggerated. Referring to paragraph 33 above, it is simply not true on the facts that training was withheld from the Claimant after he raised his grievance. It was investigated promptly and a grievance meeting arranged. The day after the hearing the Claimant went on sickness absence and did not return to work before resigning. It was not possible in these circumstances to withhold training from him. The reference to the evidence of Mr Christmas being inconsistent in that he referred to the Claimant being constantly on his phone following the grievance meeting despite Mr Christmas going for a coffee immediately afterwards is not what Mr Christmas said at all. He actually said he had observed the Claimant spending a lot of time on his phone but this did not relate to the period after the hearing. Mr Sherwin did not admit to speaking to the Claimant about his handwriting nor did he admit to having a heated argument with him.

38. Mrs Miller said in her evidence that it took the Claimant more than 6 months after his surgery for him to be able to write more than a few words at a time in a readable fashion. As previously discussed, the only evidence produced of the Claimant's handwriting in this period showed it to be clear and legible.

39. She also submitted that it was reasonable for the Claimant to have the perception he was being discriminated against due to his disability and links this to the failure to have a note-taker at the grievance hearing. We do not accept the Claimant's evidence in this regard so do not accept this submission. Mrs Miller also says it is clear that "something significant had happened resulting in (the Claimant becoming suicidal)" but does not express what that "something" was.

40. In fact, we conclude that the evidence before us was more in relation to what Mrs Miller thought or would have us believe had happened rather than that

of the Claimant whose evidence was uncertain, inconsistent and some times vague.

41. This is not to say that the Respondent got everything right. The grievance hearing should have had a note-taker present but there is no evidence before us

that this is in any way related to the Claimant's disability. Further, it is clear that Ms Ford seems to have failed to support the Claimant in his training but, again, there is no evidence before us that this was related to his disability, rather that Ms Ford is difficult to get on with generally.

42. In all the circumstances, therefore, we find there is no evidence before us upon which we can reasonably conclude the Claimant was discriminated against because of his disability. We are supported in this conclusion by the Claimant's own evidence and that of Mr Sherwin that he raised the lack of training on a number of occasions. Yet on not one of those occasions did he give evidence that this lack of support had anything to do with his disability. As for the claims of harassment and victimisation, we have found the Claimant's account to be unreliable and those claims fail.

Employment Judge Butler

Date 10 June 2020