EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr C Iqbal	**v**	LHR Airports Limited

Held at: Reading **On:** 19 August 2022
Before: Employment Judge Gumbiti-Zimuto

Appearances:
For Claimant: In Person (assisted by Ms P Howell)
For Respondent: Mr G Graham, counsel

JUDGMENT having been sent to the parties on 7 September 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This is a ruling on a preliminary hearing, reasons for judgment provided at the request of the claimant. These reasons were given orally at the hearing on the 19 August 2022.

2. The case was listed for a preliminary hearing to deal with a number of issues. The primary issue initially was whether the claimant was a disabled person. However, since the last hearing the respondent has conceded that the claimant was disabled within the meaning of the Equality Act s.6. Further points to be determined today are the question whether the claimant's case should be struck out on the grounds that it has no reasonable prospect of success; there is also an application to amend the claim; and the respondent also takes issues relating to time limits.

3. The claimant has presented two complaints; the first complaint presented on 27 November 2020 was in respect of an allegation of disability discrimination. The disability that the claimant relies upon is dyslexia. In section 8.2 of his claim form the claimant stated that:

> "When I applied for a position in the organisation I was discriminated based on my disability as I have dyslexia. I requested reasonable adjustments to be made for my assessment. However, I was only provided adjustment for one of three assessments. I passed only the stage where I was provided such support and was failed when my request for adjustment not processed."

4. I stop there to point out that the claimant does not identify the nature of the adjustments that he seeks but he does say that there were adjustments

made in respect of his application. He then continues:

> "On two other subsequent occasions I was failed after being provided such support but I strongly believe that I was failed due to serious concerns I raised for my first application as the same person was again responsible for my subsequent applications who refused to provide me requested support for reasonable adjustments in the first application. None of the assessors were trained to help them in assessing people with hidden disabilities. This also led me to be discriminated against by those who were shown performing well compared to myself."

5. That laconic passage is enigmatic but, unfortunately, not particularly informative as to what the nature of the claimant's complaints.

6. The claimant made a further employment tribunal claim on 22 July 2021. In this claim he was once more claiming that he was discriminated against on the basis of disability. And in section 8.2 of that claim form he stated:

> "I faced discriminatory behaviour and treatment while applying for a position within our company. I requested to be offered a diagnostic assessment which would have given us a valuable insight about the extent of my disability and reasonable adjustments to be offered based on this assessment."

7. In this application the claimant identifies the failure to carry out a diagnostic assessment as being a matter of complaint, he says that it would have given a valuable insight as to the extent of his disability and the reasonable adjustments to be offered based on this assessment. That is an important feature bearing in mind the decision in the case of Tarbuck v Sainsburys Supermarkets Limited (2006) about which I will come to in a moment. The claimant continues:

> "However, my request for such assessment was turned down instead some reasonable adjustments were offered".

So, here the claimant says that he was provided with some adjustments:

> "based on my old record despite myself declaring that dyslexia is a dynamic disability hence can change over a period of time".

8. I stop again to comment that the claimant is there not only saying that there were adjustments made in this case but the problem was that the adjustments related to his old record and he talks about his dyslexia as being dynamic but what he does not do, he does not say the respondent should or shouldn't have done beyond what they did do, he does not appear to complain about what they did, it just says that they did not do more. He continues:

> "I was also assured in the past that assessors the job interview assessment would be trained about how to assess the applicants with hidden disabilities to reduce the chance of such applicants being discriminated due to their disabilities. I strongly believe that my performance and job interview was not assessed fairly and transparently due to prejudice of my previous complaints against the hiring process being discriminatory."

9. In both of the claims the claimant appears to be making some sort of complaint that he was not provided with the necessary support by people

who were carrying out his assessment.

10. The claimant provided further particulars and under the heading of Reasonable Adjustments the claimant said this: "*There was every indication that the claimant had a disability which the respondent had a duty to investigate particularly in the light of the recommendations from the TUC, ACAS, BDA and the EHRC's guidance."* So, again, it appears that the claimant's complaint is about the respondent carrying out investigation which coincides with his complaints about failing to carry out some assessment.

11. The claimant says that the respondent was aware that the claimant had displayed worrying issues such as his inability to get to work on time because of the failure to transcribe numbers accurately which could hardly be considered normal difficulties. Further, the claimant has alerted the respondent to the reasons why he believed he has a disability. The failure of the respondent to carry out necessary investigation amounts to a breach of their duty in terms of s.20 of the Equality Act.

12. There is a clear statement that it is the failure to investigate which constitutes the breach of duty under the Equality Act 2010. This failure led to an inability and/or unwillingness to make reasonable adjustments because the respondent's decision not to investigate the claimant's condition.

13. Furthermore, the respondent cannot justify why it was impossible for them to support an investigation into the claimant's condition. Again, the respondent is accused of failing to carry out an investigation.

14. This is applicable to both claims as the respondent did not make reasonable adjustments because their policy was not to assess the claimant's disability.

15. It seems to me clear that the claimant's complaints about the respondent is that the respondent did not make enquiries, investigations or seek an assessment of the claimant's disability so that they could then go ahead and make better adjustments to the claimant's case in the recruitment process that took place.

16. The respondent says that there is a failure to articulate an adjustment that is capable of succeeding. What the claimant has done is complain about a failure to carry out an assessment and the difficulty for the claimant is that the case of Tarbuck v Sainsburys decided in 2006, makes it clear that the failure to carry out consultation which is, for the purposes of this submission in line with consultation, that failure to make enquiries is not in itself capable of being a failure to make adjustments.

17. In the case of Tarbuck at paragraph 71 of the judgment it says, "The only question is, objectively, whether the employer has complied with his obligations or not". I stop there and say this, in this case whether or not the respondent has failed to carry out an assessment of the claimant's disability, is not to the point because the question is whether having regard to the fact that the claimant had a disability, namely dyslexia, did the respondent fail to comply with its obligations to the claimant or not? Mr Justice Elias (President), continued in para 71 as follows:

> "That seemed to us to be entirely in accordance with the decision of the House of Lords in Archibald v Fife Council". If he does what is required of him, then the fact that he failed to consult about it or did not know that the obligation existed is irrelevant."

18. So, in this case we are concerned with failure to assess the claimant's dyslexia, it seems to me that the same applies, in that if the employer fails to carry out an assessment of the claimant's dyslexia and in failing to do so is not in a position to know what adjustments to make, that is not the relevant question.

19. Mr Justice Elias continues:

> "It may be an entirely fortuitous and unconsidered compliance: but that is enough. Conversely, if he fails to do what is reasonably required, it avails him nothing that he has consulted the employee. In our view, the *McCaull* case would have to be treated as wrongly decided if the *Mid-Staffordshire* case were correct, because inevitably, if the employer is unaware of his obligations under the Act and gives no thought to them, then he will perforce fail to carry out any necessary consultation.
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> 72. Accordingly whilst, as we have emphasised, it will always be good practice for the employer to consult and it will potentially jeopardise the employer's legal position if he does not do so- because the employer cannot use the lack of knowledge that would have resulted from consultation as a shield to defend a complaint that he has not made reasonable adjustments- there is no separate and distinct duty of this kind."

20. It seems to me that the case of Tarbuck is entirely in line with the circumstances that we have in this case. We have an employer who has failed to make an assessment of the claimant's dyslexia as a result of which the claimant says the employer then did not make appropriate adjustments. So far so good for the claimant. The problem that the claimant has in this case is that he then goes on to say that there was a failure to make adjustments because he did not do the assessment. That cannot amount to a failure to make adjustments having regard to the guidance which appears from case of Tarbuck v Sainsburys.

21. What the claimant needs to do is to show objectively whether the employer has failed to comply with his obligations. In doing that it is not sufficient in a case brought under the provisions of s.20 and 21 of the Equality Act 2010, for the claimant simply to say well he applied a PCP, he has to then go on to show not only substantial disadvantage but also that there was a reasonable adjustment that could have been made in his case. In this claimant's case what has been missing throughout is setting out what the reasonable adjustment could or might have been.

22. This case must fail because it is circular. The claimant says there was a failure to carry out an assessment and therefore there was a failure to make a reasonable adjustment, that reasonable adjustment was the failure to carry out the assessment. The case of Tarbuck shows means that such an argument cannot succeed.

23. In the absence of any alternative argument to being put forward in order to make out a claim for failure to make adjustments, it seems to me that the

claimant' case has no realistic prospect of success and it is sufficiently clear, in my view, that this is a case where there is no reasonable prospect of success and, therefore, the claim should be struck out. The claim having been struck out it seems to me that I do not need to go on and deal with the issues of time limits and the claim having been struck out there is nothing to amend, so the application to amend the claim also falls away.

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Employment Judge Gumbiti-Zimuto

Date: 4 May 2023

Judgment sent to the parties on

7.5.2023

GDJ
For the Tribunal office