



EMPLOYMENT TRIBUNALS

Claimant

Respondent

X

Home Office

Heard at: London Central

On: 21 - 23 June 2023

Before: Employment Judge Lewis
Ms S Aslett
Mr R Baber

Representation

For the Claimant: Representing himself

For the Respondent: Miss S Cummings, Counsel

JUDGMENT

The unanimous decision of the tribunal is that the claim for direct disability discrimination does not succeed.

SUMMARY AND COMMENT

1. X applied for a job as Immigration Officer - Immigration Enforcement with the Home Office. He did not reach the pass mark of 4 when writing his personal statement, so he did not progress to the interview stage. He had applied through the Home Office's Disability Confident Scheme. He claimed direct disability discrimination because his application form indicated he had applied through that scheme. He believes it was discrimination because he says he has applied for similar grade jobs in the Civil Service / public sector in the past, using essentially a very similar personal statement, and in those cases he did get passed through to the interview stage – the only difference being that he said nothing about being disabled on his application form.

2. We have decided that his mark on this occasion and therefore the failure to interview him was not disability discrimination. Looking at his personal statement, the sifters' guidance, and a sample of other applications, it is clear that his personal statement for this job was correctly marked as 2. If he had not noted anything about disability on his form, he would still have been marked as 2. What happened in other jobs with different duties and different essential criteria, with different employers and different markers, is not comparing like with like.
3. X is very upset and frustrated that he was not given the chance of an interview. He feels he has a lot to offer but cannot get a job in the areas where he wants to work. We have a great deal of sympathy with this. We find it disappointing that the Disability Confident Scheme, which was designed to help disabled people find employment, in practice offered nothing in this case. It guaranteed an interview to disabled people who met the minimum criteria. The minimum criteria were taken to include achieving a pass mark of 4 on the personal statement. However, all candidates who achieved 4 on the personal statement were interviewed anyway.
4. Nevertheless, whether the claimant as a disabled person should receive more assistance in getting a job, was not the legal question in this case. The legal question for a direct disability discrimination claim was whether the Home Office would have rejected the claimant's application at the personal statement stage if he was not disabled, ie if he had not indicated he was disabled on the form. The answer is clearly yes. The claim therefore fails.
5. We wish the claimant every success for the future. We hope that discussing the matter in this hearing has given him some tips for how to complete a personal statement in future job applications, particularly with regard to giving examples to support his general statements.
6. With regard to the Home Office, we hope it will give some further thought as to how to achieve its aim of giving disabled candidates an opportunity to show their skills, talent and abilities at the interview stage if the qualification of meeting the minimum selection criteria includes having the acquired technique of writing a personal statement in a limited number of words, with appropriate examples. It is a skill which is not necessarily related to ability to do the job, and while we do not question it as a general recruitment technique, we wonder whether it is a necessary barrier for guaranteed interview schemes. We can see that in other scenarios, the DCS scheme is very worthwhile, but on the facts of a case like this, it added nothing at all.

REASONS

Claims and issues

1. The claimant (X) brought a claim for direct disability discrimination. His disability was autism. The respondent (the Home Office) accept this amounted to a legal disability at the relevant time.
2. The issues were as follows:
 - 2.1. Did the respondent because of the claimant's disability, treat the claimant less favourably than it treated or would treat others? The alleged less favourable treatment is the respondent's decision, communicated to the claimant on 28 July 2022, to reject his application for the post of 'immigration officer' at the stage of the process at which it rejected it.
 - 2.2. If the claimant succeeds, in whole or in part, the tribunal will deal with remedy. The claimant seeks compensation for injury to feelings and a recommendation that the respondent reconsider his application for the post of 'immigration officer'.

Procedure

3. The tribunal heard evidence from the claimant and, for the respondent, from Kayte Khan. Their statements were contained in a file ('bundle') of witness statements. There was an agreed file of papers ('trial bundle') of 263 pages. After the tribunal had stopped to make its decision in private, the claimant sent an email attaching a link to Home Office diversity statistics and a document titled 'Topic2'. The tribunal copied this to the respondent.
4. The claimant had difficulty getting his camera to work on CVP. He was using a Samsung mobile phone. He did not have any other equipment he could use. Eventually he found a way for it to work. The judge told him he could come into the tribunal and be located somewhere with a laptop and connection. The claimant felt unable to suddenly change his plan and rush into the tribunal on day 1. The judge told him that was fine. We would continue with using his mobile if that was acceptable for everybody. Reception continued to be a big difficulty until about midday and cross-examination had to be abandoned. However, reception did then work for the rest of the hearing. The claimant thought this might be because he switched to Wi-Fi from 4G.

Anonymity and restricted reporting

5. The claimant said on day 1 that he had just found out the previous day that a public decision would be on the register. That made him extremely worried about his future, and for that reason he thought it best that he did not proceed. The tribunal told him that he could make an application to be

anonymised if that would make a difference to his willingness to participate in the hearing. He did this. The respondent opposed the application, simply referring to the principle of open justice and stating that all claimants would prefer to have privacy.

6. That is true, but we considered the present case to be beyond that because of the claimant's disability. He was clearly very agitated and not willing to proceed when there was a risk of publicity. At the point when he stated he was going to withdraw, he did not know there was a possibility of an anonymity order, so his reaction was clearly genuine. It was also consistent with the heightened anxiety over the process and how things worked which appeared to us to be consistent with his autism, albeit recognising that we are not medical experts. We felt it would only be necessary to anonymise the claimant's name and that the respondent could still be named since there were so many vacancies. This meant that the principle of open justice was not severely damaged because a member of the public would understand the entire issue. On the other hand, we felt it would be in breach in particular of art 6 (the right to a fair trial) if the claimant withdrew because he did not have such an order, as he plainly was going to do.

Reasonable adjustments

7. The claimant was offered regular breaks, usually at half hour intervals, and was told to ask for an extra break any time he wanted. In practice, the claimant usually said he did not need a break at the particular point.
8. In general, we explained to the claimant at every stage what was about to happen and what he needed to do.
9. The claimant had only a few questions for Mrs Khan, but the tribunal made sure we discussed with her the issues which the claimant had raised and were causing him concern.

The law

10. Under section 13(1) of the Equality Act 2010 direct discrimination takes place where, because of disability, a person treats the claimant less favourably than that person treats or would treat others. Under section 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case. Under section 23(2), where the protected characteristic is disability, the circumstances relating to a case include a person's abilities.
11. Section 136 of the Equality Act 2010 sets out the burden of proof. The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the

evidence one way or another. (Hewage v Grampian Health Board [2012] IRLR 870, SC.)

Fact findings

Overview of application process

12. The claimant applied for the position of Immigration Officer with the Home Office. It was part of a national recruitment campaign for 330 Immigration Officers (reference number 214800). Mrs Khan was tasked with putting together an advert for the campaign.
13. The Government Recruitment Service (GRS) provides in-house recruitment support. Because of the resources required, the support of its contractor, Capita, was enlisted.
14. The advert opened on 16 June 2022. The job advert, pre-employment checking document and candidate information document was in the candidate pack.
15. The advert was headed 'Borders & Enforcement, Immigration Enforcement – Immigration Officer (national advert). It included a description of the job, person specification and essential criteria.
16. Job applicants first had to provide some basic personal information. They were then invited to complete two on-line tests: Civil Service Verbal Test and Civil Service Judgement Test. If these were successfully completed, applicants were asked to provide a 500 word personal statement. Candidates who scored at least 4 on the personal statement went on to an interview concerned with strength-based and behaviour-based questions. No feedback would be provided to candidates who failed on the personal statement.
17. The claimant successfully completed the on-line tests and was asked to complete the personal statement. He did not pass the minimum score required for the personal statement, so he did not progress to the interview stage.
18. The claimant believes that his mark on the personal statement and therefore failure to pass him on to the interview stage was direct disability discrimination.
19. Candidates were told not to put their name or any identifying features on the application form itself. The markers of the personal statements would not have known who the claimant was. They knew he was disabled because he noted that he came through the Disability Confident Scheme, but they did not know what his disability was.

The Disability Confident Scheme

20. The Home Office operates a Disability Confident Interview Scheme ('DCS'). The claimant applied under the Scheme.
21. Candidates under the scheme are guaranteed an interview if they meet the minimum selection criteria for the job.
22. The Application Form says 'We want to encourage disabled people to apply for jobs and give them an opportunity to show their skills, talent and abilities at the interview stage. The Civil Service runs a Disability Confident Scheme offering an interview to a fair and proportionate number of disabled applicants that meet the minimum selection criteria for the job. To be considered for an interview under this scheme you must have demonstrated in your application and testing stages that you meet the minimum job criteria as set out in the advert or person specification for the post.' The candidate also needed to meet the definition of disability.
23. The Form goes on to ask 'Do you feel that you meet the minimum job criteria and would like to apply under the Disability Confident Scheme (DCS)? The claimant put 'yes'
24. The Form then sets out possible reasonable adjustments with examples and asked whether the candidate would require a reasonable adjustment during the interview or assessment stages. The claimant put 'no'.
25. The tribunal asked Mrs Khan what the 'minimum selection criteria' for this job were. She said it was getting a pass mark of 4 on the personal statement. The tribunal observed that this meant there was no advantage for a disabled candidate under the scheme, since anyone who scored 4 would get an interview anyway. Mrs Khan agreed this was so in relation to this particular campaign. However, on other campaigns, it might be that interviews were generally only offered to those who scored 5 or 6. This might be decided because of a very large number of applicants. In such a case, the pass mark would remain 4, so someone who scored 4 and applied through the DCS scheme would get an interview.
26. The tribunal asked why the 'minimum selection criteria' did not in the present campaign simply mean passing the two on-line tests? Why did there have to be the extra hurdle of writing an adequate personal statement? Indeed, since some recruitment campaigns did not require written statements at all, who decided in this case that the minimum requirements included the personal statement? Mrs Khan was unable to comment on this. She did not know who had made that decision or the reasons for it. She referred to 'policy' but was unable to be any more specific than that.

The personal statement and sift criteria

27. The personal statements were marked ('sifted') on a scale of 1 – 7. 4 was the minimum pass mark for being invited to an interview.

28. The sift was carried out by GRS/Capita sifters. They were given a Sifting Panel Guidance document. The document said that the personal statements should be considered against the essential criteria for the job.
29. There was a standard setting meeting with Home Office and GRS-Capita reps before the sift started to ensure everyone understood what evidence to look for. Also, the sifters were required to have completed mandatory e-learning on Inclusion in the Civil Service (incorporating Equality and Diversity), and Success Profiles: Sifting and Interviewing.
30. The 'essential criteria' were set out in the candidates' application pack and also in the sifters' guidance document. The pack told candidates that no experience was required, but 'in your personal statement you should provide examples which demonstrate the following:
- You will need to be physically fit and will be required to pass a health assessment and annual arrest training refreshers.
 - You must be able to confidently manage potentially difficult and challenging situations with limited supervision, whilst maintaining professionalism and sensitivity.
 - Have sound people and communication skills and thrive when working as part of a team. You must have the ability to establish and maintain effective working relationships with your team, internal & external partners, and the public.
 - The ability to think in an objective and analytical manner with the capability to effectively organise and plan. You must be flexible, adaptable and creative in solving problems, dealing with change and have a strong sense of personal integrity and honesty.'
31. The sifters' guidance stated that 'All of the essential criteria needs to be met to qualify for a score of 4.' It told sifters, 'In assessing a personal statement, you will need to consider:
- Have they specifically addressed all the essential criteria?
 - Have they given convincing evidence? Ie backed up statements with examples
 - Have they related their evidence to the grade and demands?
 - Is the overall spelling and grammar of the personal statement correct? Is the flow of the statement well written and clear regarding points being articulated?

32. The guidance set out a rating scale which it said must be used to assess the candidate's personal statements. The scale was as follows:

Rating	Label definition	
1	Not demonstrated	No positive evidence
2	Minimal demonstration	Limited positive evidence
3	Moderate demonstration	Moderate positive evidence
4	Acceptable demonstration	Adequate positive evidence
5	Good demonstration	Substantial positive evidence
6	Strong demonstration	Substantial positive evidence and includes some evidence of exceeding expectations
7	Outstanding demonstration	Evidence provided wholly exceeds expectations at this level

Moderation

33. To ensure consistency, the respondent reviewed the first 100 sifts and did spot checks on at least 30% of the remainder.

34. They compared marks by Capita and Home Office sifters on the same applications in batches. For example, the first 30 applications which came in had only a 63% match. The target was 80%. When they looked into it, Capita was generally marking more generously than the Home Office. They decided to accept the Capita scores. By 19 July 2022, there was a 74% match on 210 applications. By 26 July 2022, there was a 78% match on 500 applications. Mrs Khan considered this sufficiently close to continue further without moderation, though they continued to do spot checks.

35. Looking at the campaign overall, at least 545 statements were sifted by both Capita and the Home Office with an overall outcome match of 79.45%. Mrs Khan's team had sifted over 193 applications (ie one other person and herself), of which she had done the vast majority.

36. We were not entirely able to make sense of how the figures in the bundle supported the percentage totals, but we had no reason not to accept that the percentages as calculated by the recruitment department and given to Mrs Khan were correct.

The claimant's personal statement

37. The claimant was assessed by a Capita sifter. He was marked as 2 'minimal demonstration'. Mrs Khan was not personally involved in the claimant's sift. This was not one of the applications which was moderated.

38. The claimant was informed on 28 July 2022 that the Home Office would not be proceeding with his application.

39. Candidates were allowed a maximum of 500 words for the personal statement. The claimant told the tribunal that he could have written much more and that he found it hard to say everything in only 500 words.
40. The claimant actually only used 376 words. He told the tribunal that when he reduced down his statement, he could only take out whole sentences at a time to try to meet the word count. He said he did not have the technique to take out individual words in order to make full use of the 500 words available.
41. Mrs Khan looked at the claimant's personal statement for the purpose of this hearing. She says she believes that 2 was the correct score. The reasons she gave were:
 - 41.1. The statement seemed to be written for a Border Force Officer role (which it explicitly referred to) whereas the post was for Immigration Enforcement - Immigration Officers, which are no part of Border Force. This suggested to Mrs Khan that the application had been drafted for a different role.
 - 41.2. Although the claimant had referred to some of the essential criteria, he had not given examples or evidence backing up his general statements.
 - 41.3. The claimant only used 376 words, which gave the impression that he did not have enough experience to show he could meet the essential requirements.
42. Of course, this is just Mrs Khan's opinion for the purposes of this case. She was not the marker of the claimant. However, the claimant did understand and accept in the tribunal that he had not given examples to back up his statements.
43. We also looked at the guidance to sifters and the claimant's application, to check whether we felt his marks were surprising. However, we did not think his mark of 2 was surprising on this particular job application. We would have given him the same mark for the same reasons as Mrs Khan.
44. We would have marked the claimant's statement down for his references to Border Force Officer, when this was a different job. That would suggest to us lack of attention to detail, and also that he had simply copied and pasted. We would worry about whether he understood the nature of the role he was applying for.
45. We would have marked the claimant's statement down for the complete lack of examples. Examples are important because otherwise candidates can just repeat back to the Home Office what the Home Office has put in the advert, without showing they really understand, or that they have any relevant experience. It would just be a statement without proving anything. The Application Form clearly said there needed to be examples. So, for example:

- 45.1. On the first essential criterion, the claimant said 'I keep myself very fit and active'. This does at least refer to the first criterion (which would help bring up the score from 1 to 2). But what was missing was an example or evidence such as 'I go to the gym once/week' or 'I cycle to work'.
- 45.2. On the second essential criterion, the claimant said 'I understand you need to be vigilant, resilient, remain calm in difficult situations I believe the skills, attributes and ultimately experience I have gained in life so far would enable me to be an excellent Border Force Officer.' Again, the claimant made an assertion, but gave no example. What experience had he gained in life? For example, he could perhaps stated that he worked at Southern Trains in a safety critical role. It would be even better if he then gave an example of an incident where he had remained calm.
- 45.3. On the third essential criterion, the claimant said he would be a great team worker, but again gave no examples. He could for example have referred to any team he worked with while at Southern Rail or when on the Princes Trust Scheme. On this criterion, he did not even mention public or external partners or say anything about communication skills.
- 45.4. The fourth essential criterion was not addressed at all, let alone with examples.
46. We feel the personal statement was borderline between 1 or 2. The complete lack of examples and using the wrong job title could have led to a score of 1. On balance, we can see the claimant may have been given 2 because, although he gave no examples at all, he did recite back three of the four criteria to some extent; he wrote with a good flow and spelling/grammar overall ; and he demonstrated enthusiasm. Also, looking at the examples of other candidates in the bundle, we can see that the claimant was better than the two candidates marked 1.
47. In the trial bundle, the respondent provided a sample of other personal statements with their scores, to compare with the claimant's marking. For each statement scored 1, 2, 3, 4 and 5, there was an application which had been made through the DCS and an application which had not been through the DCS. There was one final non DCS application which had been marked 6.
48. We looked at these samples, to see whether the claimant's marks looked out of line with the marking of other candidates relevant to their content. We take into account that the applications in the bundle were not randomly selected, but were chosen by the respondent. Having said that, we can see a clear progression in content that essentially matches the marks. In particular, there is a clear difference between the content of those marked 4 and the claimant's application. We also looked at those who scored 1, 2 and 3, and the claimant's statement best fitted with those who scored 2 (whether having entered through the disability scheme or not).

Other applications made by the claimant

49. The main reason why the claimant believes he was discriminated against is because he has used the same personal statement for similar jobs at a similar level elsewhere in the public sector and with the civil service and has been accepted for interview.
50. We were not shown the adverts, job specifications or the claimant's personal statements for any of these other posts. His evidence was rather vague and general on this point.
51. The claimant did refer specifically to an application he had made to the National Statistics Office, because that was an entry level role like this one. The claimant accepted that the NSO job was not like for like and may not have had the same essential criteria, but he felt it was comparable because it was at the same grade (entry level). He had not kept copies of the documents and had been unable to get them. He also mentioned an unspecified job with the Home Office for which he said he has an interview this month.
52. The claimant cannot have used an identical statement on his NSO application because much of the content of his personal statement for the current job would be unlikely to apply. However, we assume the claimant is saying that he wrote a statement in the same style.

Conclusions

53. As we have said, the question is whether the claimant was not progressed to the interview stage because he is disabled. There is no doubt that the pass mark applied to personal statements for getting to interview was 4. So the question is whether the claimant was scored below 4 because he was disabled.
54. Since anonymous forms were passed on to the sifters, the only way the marker could have known the claimant was disabled was that he noted on his form that he came through the Disability Confident Scheme. So a good way to think about it is, if the claimant had not referred to the DCS on his form and had not said anything about being disabled, would the sifter have scored him below 4?
55. The claimant finds it difficult to accept that scoring a personal statement is subjective. We would say that some subjectivity is inevitable on this kind of test. However, it is not entirely subjective. The respondent had written guidance for sifters. It set out written essential criteria. It set out what sifters should look for. And it set out what the marks of 1 – 7 should represent. It did extensive checking of how GRS and Capita markers compared, and arrived at a consistency just short of 80%. Where there was inconsistency, it was resolved in favour of the Capita scores.
56. We see no evidence at all that the claimant received a lower mark because the marker knew he was disabled. The key thing is to look at the

personal statement which the claimant provided. There was nothing at all to make us suspicious about the mark. There are these very important points:

- 56.1. The claimant agrees he put in no examples.
 - 56.2. Mrs Khan, who was one of the main sifters on the recruitment exercise, says she would also have marked the statement as a 2. We do not just accept her statement. But she gives reasons and her reasons make sense.
 - 56.3. We looked carefully at the statement, the essential criteria and the guidance to sifters. We would also have marked the statement as a 2. It was nowhere near 3, let alone 4.
 - 56.4. We looked at the samples of other applications in the trial bundle, both those who had applied through the DCS and those who had not. The markings of the DCS candidates seemed consistent with the non DCS candidates on each score. Overall, the marks seemed consistent with the guidance. And in particular, the claimant's statement was similar to those scored 2 (including a non DCS candidate) and fell well short of those scored 3 and above.
57. We thought carefully about the claimant's point that he has passed the personal statement stage using the same style on other jobs where he has not mentioned that he is disabled on his form. We do not believe this indicates discrimination for these reasons:
- 57.1. We did not see any of the documents in question. All we know is that one job was with the National Statistics Office and a recent one was with the Home Office. We do not know anything about the essential criteria or job content or what the claimant actually wrote.
 - 57.2. The claimant himself said, at least with reference to the NSO job, that he accepted it was not comparing like with like.
 - 57.3. Even if the jobs were very similar, it would not mean anything. That is because it is almost certain that the person doing the scoring would have been someone else. They might have been a stricter marker or a less strict marker of every candidate they dealt with. For all we know, had the person who marked the claimant's statement for this job, marked his statement for the other jobs (without the indication of disability), that marker might have failed him on that other job too.

Employment Judge Lewis

Dated: 23/06/2023

Judgment and Reasons sent to the parties on:

23/06/2023.