



EMPLOYMENT TRIBUNALS

Claimant: Mr Justin Griffiths

Respondent: Gloucestershire County Council

Heard at: Bristol (by video)

On: 30 and 31 May and 1 June 2023

Before: Employment Judge C H O'Rourke
Ms S Maidment
Ms D England

Representation:

Claimant: Mrs A Griffiths – Claimant's wife

Respondent: Ms K Legh - counsel

REASONS

(Having been requested subject to Rule 62 of the Tribunal's Rules of Procedure 2013)

Background and Issues

1. The Claimant was an agency worker of the Respondent's, for approximately a month, until the termination of his engagement, with effect 18 March 2022.
2. It is not in dispute that due to his condition of osteoarthritis, he was, at the relevant time, a disabled person, within the meaning of s.6 Equality Act 2010 (EqA).
3. The Claimant brings claims of failure to make reasonable adjustments and victimisation (the latter by way of a successful application to amend his claim). The issues in respect of those claims are as follows:

4. Failure to make Reasonable Adjustments (s.20 EqA)

- a. It is not in dispute that the Respondent applied a PCP of requiring a door to the Claimant's shared office ('the CSO office') to be kept open.
- b. It is not agreed that that PCP put the Claimant at a substantial disadvantage compared to persons who did not share his disability, because, as he states:

'With the door being open, it permitted draughts from the other areas of the building to enter the room and antagonise the osteoarthritis in the Claimant's knees. This caused severe and debilitating pain, preventing him from being able to concentrate on the duties of his job role. None of the other room occupants, who were all not disabled, suffered because of the draughts.'

- c. It is not in dispute that, from 14 March 2022, the Respondent knew or could be expected to know that the Claimant had a disability and was likely to be placed at the claimed substantial disadvantage.
- d. Did the Respondent take reasonable steps to avoid the disadvantage? The Claimant suggests that reasonable adjustments would have been:
 - 1. For the door to the CSO office to remain closed;
 - 2. For the Claimant to be permitted to work from home;
 - 3. For the Claimant to have been relocated to work in a warmer, draught-free area of the business; or
 - 4 For boards to be erected around the Claimant's desk.

5. Victimisation (s.27 EqA).

- a. It is not in dispute that by raising a grievance on 17 March 2022, the Claimant did a protected act.
- b. Was the Claimant's contract terminated because of that protected act?
- c. It is not in dispute that this claim has been brought out of time. Would it, therefore, be just and equitable to extend time, to permit the Tribunal to have jurisdiction to hear it?

6. Summary of Issues. Accordingly, therefore, in summary, the issues this Tribunal needs to determine are as follows:

- a. In respect of the claim of failure to make reasonable adjustments whether:
 - i. The Claimant has shown that the PCP placed him at a substantial disadvantage, when compared to non-disabled colleagues; and, if so
 - ii. Did the Respondent fail to take reasonable steps to avoid such disadvantage?
 - b. In respect of the claim of victimisation, whether:
 - i. It would be just and equitable to extend time, to permit the Tribunal to hear this claim; and, if so
 - ii. The Claimant's contract was terminated because of his protected act?
7. Conduct of the Hearing. The Claimant had informed the Tribunal that due to his condition of Functional Cognitive Disorder he may have difficulty focusing on the hearing and during cross-examination in particular, and also have gaps in memory. There were occasions during his evidence where he could not remember specific events, and also when he became distracted and sometimes agitated, which resulted in several short breaks, to permit him time to focus and to calm down. Overall, however, we considered that the Claimant was able to present his evidence to the Tribunal.

The Law

8. We reminded ourselves of ss. 20 and 27 of the EqA and in respect of limitation, s.123 of the same Act.
9. Ms Legh referred us to the following authorities:
 - a. **Chief Constable of Lincolnshire Police v Weaver [2007] UKEAT/0622/07**, which indicated that a Tribunal should look not only at factors relating to the disabled person concerned, but also should take account of wider implications, such as the effect of the proposed adjustment on the organisation or workforce as a whole.
 - b. **Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48**, which in respect of detriment by way of victimisation, confirmed that the protected act must be '*the real reason, the core reason, the causa causans, the motive*', for the detriment.
10. We noted the guidance in **Efobi v Royal Mail Group Ltd [2021] ICR 1263, SC**, in which the Court held that the enactment of s.136 EqA did not change the requirement on the claimant in a discrimination case to prove, on the balance of probabilities, facts from which, in the absence of any

other explanation, the employment tribunal could infer an unlawful act of discrimination. It therefore remains the case that a claimant is required to establish a prima facie case of discrimination in order to satisfy stage one of the burden of proof provisions.

11. As to the just and equitable test, for extension of time, we note the guidance in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] ICR D5, CA** which indicates that the best approach for a tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular – as Mr Justice Holland noted in **Keeble** – the length of, and the reasons for, the delay. Other factors should include the balance of prejudice to the parties and anything else relevant.

The Facts

12. We heard evidence from the Claimant. On behalf of the Respondent, we heard evidence from Ms Rachel Muldoon, a Project Manager, effectively sharing the Claimant's line management at the time; from Mr James Reed, a Transport Team manager, also with shared management responsibility and from Ms Patricia Gallagher, the Respondent's Head of Service for Adult Social Care, who, in the place of Ms Muldoon's own line manager being on leave, dealt with requests for advice from her.

13. **Sequence of Events.** We set out the following sequence of events, making findings of fact where necessary:
 - a. The Claimant started work on 14 February 2022 (all dates 2022), in the Respondent's Customer Service Operatives (CSO) Team. It was common ground that this Team had been formed to field telephone calls from members of the public requiring assistance with the provision of medical aids and equipment. They were based together, in one office, and in the next office was the Transport team, whose function was to arrange delivery of those items. The teams were, therefore, expected to liaise with each other.
 - b. To carry out their role, the CSO Team needed the installation of specialist telephone equipment, which was not initially available and therefore, until it was, they were given the task of data inputting, to effectively keep them occupied. This task was unrelated to their planned role and therefore, until 14 March, they carried it out, in their office, without the need to liaise with the Transport Team. There was a door between the two offices, which, apart from when persons were entering or leaving the CSO office, was kept closed.

- c. A largely unrelated issue arose on 24 February, when the Claimant stated to one or other manager that the disabled parking space outside the office was being used by non-blue badge holders and that he needed to park there. The Respondent said that they accepted that request at face value, spoke to staff and sent out a notice [51] directing them not to park there and also highlighted the parking spot, this being done by 27 February. The Claimant asserted that this sequence of events indicated a lack of disability awareness by the Respondent, whereas the Respondent states the opposite. We tend to agree with the Respondent's stance in this respect.
- d. On Monday 14 March, the new telephone system having been installed, it was being tested. Mr Reed, the Transport Team leader said that he informed the CSO Team that testing and training would take place that day and that therefore the two teams would need to work together from hereon and that accordingly the door between the offices would be kept open. Mr Reed said that the Claimant, having slammed the door shut and been told by him that it would need to stay open, said in a loud voice in front of the Team that '*I would have to find him somewhere else to work*'. The Claimant denied 'slamming' the door, but certainly his position throughout this matter was that he required the door to be closed and that he would not work in the office, unless it was. Mr Reed said that at this point the Claimant did not explain why he needed the door to be shut.
- e. Later that day, Mr Reed and Ms Muldoon, the Project Manager (having taken some advice from HR) spoke to the Claimant. He had already been to see her and told her that he needed the door to be kept shut, due to the draught from the doorway exacerbating his osteoarthritis. The Claimant was told that the door would need to stay open, but that the heating in the office would be checked and he would be provided with a portable heater, for his own use. During that meeting, the Claimant referred to Mr Reed as being a 'bully'. He also asked why he had not been consulted with earlier about the decision to open the door, as otherwise he would have worn thicker trousers. Ms Muldoon said that the Claimant's main request was that he be permitted to work from home, which she said was not an option, due to the specialist nature of the telephone equipment, which could not be installed in his home; the need for the Team to train up and work together and for there to be 'face to face' liaison with the Transport Team. The outcome of the meeting, the Respondent said, was that it was agreed that the CSO door would be kept open, the Claimant would be provided with a heater, the door leading from the Transport office to the outer entrance

vestibule would be kept closed and the front door to the building, likewise, in an effort to minimise draughts. There was a dispute between the parties as to whether or not another door (referred to by the parties as the 'grey door'), leading from the Transport office to the rest of building would also be kept shut. The Claimant said it was also agreed that that would be the case, whereas the Respondent said that it was never referred to in the discussion. No notes were kept of this discussion, but we think it likely that the Respondent's version of events is the correct one. The Claimant relied on references in subsequent emails of the Respondent to 'doors' (plural) in the Transport office being kept closed, but there were at least four doors in consideration at the time and indeed even in this Hearing there was some confusion, despite the provision of a plan [103], as to which doors were being referred to. It does seem from a subsequent email [75] that the Respondent may have been referring to both doors in the Transport office and that the Claimant may be correct in that assertion. However, even if that were the case, there's no reason why the Respondent could not subsequently change their mind once they had tested the situation. As can be seen from the plan, the door marked '1' is the door from the vestibule to the Transport office, '2' is the CSO door, '3' is a misnomer and of no relevance and the main front door to the building is marked with a large black arrow. The 'grey door' is shown at '2 o'clock' to door '1'. The Claimant's desk was in the far corner of the CSO office, from Door 2. Doors 1 and 2 are in a direct line and therefore common-sense indicating that they are more likely to lead to draughts (as opposed to the grey door, which is not in a direct line, is partially blocked off by partitions and does not lead to the exterior of the building) and was therefore a reasonable decision for the Respondent to make.

- f. On the same day, the Claimant spoke to his agency about the issue and the agency emailed Ms Muldoon [77]. That email refers to the Claimant mentioning his arthritis and asks '*if there's any way Justin can keep warm*'. It went on to say that '*he understands that working from home is not an option*' and that if there was not some solution to the issue, '*Justin may look at other vacancies within Gloucestershire County Council.*' This sentiment was repeated in a further email the next day, the 15th [76].
- g. On Tuesday 15 March, the Claimant was not at work in the morning, due to having a pre-arranged appointment. When he arrived for work, he closed the CSO door. Again, there is reference to 'slamming', which the Claimant denies. We, at this point, comment on the Claimant's demeanour in this Hearing, drawing inferences as to his likely behaviour in March 2022. In this Hearing,

he was often distracted and detached, but when he was engaged, and in particular during cross-examination, he became quite agitated, on occasion raising his arm in the air, accusing Respondent counsel of being a 'liar' and generally being very adamant and sometimes voluble as to his views and the alleged illegality of the Respondent's treatment of him, in particular. We think it likely, therefore that the Respondent's description of the Claimant's behaviour at the time, as being demanding, combative, uncompromising, and not engaging with the Respondent's proposals, is likely to be accurate.

- h. Both the Claimant, Mr Reed and Ms Muldoon agreed, in evidence that complaints were made by other team members as to the heat levels and stuffiness in the offices. At some point, to alleviate this, the grey door was opened. Mr Reed said that he checked the temperature levels in the offices, using a wall thermometer, after work on Tuesday and that they were 20-23 degrees centigrade in the Transport office and 28 degrees in the CSO office. Ms Muldoon also referred to these temperature levels, stating that she herself had spent some time in the office over those days and had found it *'uncomfortably hot and I could not feel any breeze'*. She stated that *'it was not therefore fair on the rest of the teams to be subjected to such an unpleasantly stifling environment.'* While these witnesses were challenged on this evidence, we had no reason to doubt it.
- i. Ms Muldoon said she spoke to the Claimant that day (she said, in the morning, but stated that that was a mistake on her part, as the Claimant wasn't at work until later). She referred to him being *'upset and confrontational'* the day before and told him that his behaviour was unprofessional and would not be tolerated.
- j. On Wednesday 16 March, Mr Reed was informed that the Claimant had closed both Door 1 and the grey door, stating that that was what had been agreed. Mr Reed said that with both doors to the Transport office closed, the temperature was 28 degrees. He therefore re-opened the grey door and referred to his concerns for the wellbeing of the Team generally and a pregnant employee, in particular, bearing also in mind continuing concerns as to Covid.
- k. Mr Reed and Ms Muldoon met again with the Claimant that afternoon. They referred to the complaints from other staff members and confirmed that the grey door would have to be kept open. The Claimant, in cross-examination, confirmed that he said at the time that the Respondent was *'reneging'* or *'backtracking'* on the earlier agreement and told the managers that they were *'breaking the law'*. The Claimant stated that if the grey door was to

be open, then the CSO door should be kept closed. The meeting concluded without a resolution. Later, the Claimant came to Ms Muldoon in her office, stating that he would not return to the office under these circumstances, and he then went home.

- l. On Thursday 17 March, the Claimant did not come to work and presented a written grievance, stating that the Respondent had '*broken discrimination law*', referring to the EqA [69]. He said that the Respondent had '*continuous(ly) refuse(d) to make any reasonable adjustments*', thus meaning he could not attend work, due to the pain he was experiencing. He also referred to '*aggressive and bullying behaviour*' by Mr Reed.
- m. The grievance was acknowledged the same day [72]. Later that day, the Claimant suggested that he could work from home, carrying out data validation [72]. The Respondent passed the grievance to the agency, as they considered that this was a matter that the agency should respond to.
- n. On Friday 18 March, Ms Muldoon wrote to the agency, setting out in a detailed email her account of events, at the conclusion of which she said, '*Justin will need to be contacted to confirm that his placement has ended today.*' [74-75]. On the same day, the Claimant entered into ACAS Early Conciliation [4].
- o. On Wednesday 23 March, the Claimant's ACAS certificate was issued. On the same day, Ms Gallagher received an email from the agency, informing her that the Claimant had an interview the next day, with another team in the Council. She commented that '*I wonder why he or the agency are considering a placement with a company he is actively trying to pursue action against*' [99]. She said that this was merely an expression of surprise, in the circumstances of him instituting a Tribunal claim and that in any event neither she nor any of the other persons copied into her email had any responsibility for the team that the Claimant was apparently applying to.
- p. The Claimant presented his ET1 on Thursday 24 March, alleging only a failure to make reasonable adjustments [11].
- q. A case management hearing on 14 December also recorded that that was his only claim [40]. On the same day, following that hearing, the Claimant applied to amend his claim, to include a claim of victimisation (therefore nine months after the alleged act of victimisation). That application was considered by Employment

Judge Dawson, on 1 February 2023 and granted, subject to the time limitation issue being considered at this Hearing [42].

14. Decision on the Issues. We turn now to the issues upon which we need to decide.
15. 'Substantial Disadvantage'. We find that the Claimant has failed to show that the PCP of the CSO door being kept open caused him substantial disadvantage, in comparison to colleagues who did not share his disability. Beyond what the Claimant himself asserted, there was no evidence of any draught, as a consequence of the door being open. While at the time, the Respondent managers took at face value the Claimant's assertion that there was a draught, Mr Reed denied that there was any such draught, and the Claimant called no witnesses to support his account. We note also the inherent unlikelihood of the fact of the grey door being open causing such a draught, when it is not in direct line with the CSO door, is an internal door, leading to an internal corridor (albeit it to a warehouse area), is at least partially blocked by two small partitions and was the length of two offices away from the Claimant's desk. In addition, even if there were such a draught, there is no corroborative medical evidence than any such draught would have exacerbated the Claimant's osteoarthritis. The Claimant said that it is 'common-sense' that a draught would have this effect, but we don't consider, in the absence of medical evidence that that is the case. It is not something of the nature that we consider we can simply take judicial notice of. We note, by way of contrast that Mr Reed said that he too has arthritis but is not affected in that way.
16. Reasonable Adjustments. Having found that the Claimant has not established 'substantial disadvantage' we are not, strictly speaking, obliged to consider whether or not the Respondent failed to make reasonable adjustments, but for the sake of completeness, do so. We find that the Respondent did not fail to make reasonable adjustments, for the following reasons:
 - a. Keeping the CSO door closed was not reasonable. All the evidence indicated that the two teams needed to liaise closely and keeping the door closed would discourage that. Indeed, the undisputed evidence of the Respondent witnesses was that the intention was (and still is) to make the two offices open plan, removing the separating wall once funding is available to do so. While the Claimant asserted that liaison could be more effectively maintained by email, Ms Gallagher pointed out that by the nature of the service the Teams provided, some requests from the public were of more urgency than others, thus necessitating the CSO team speaking directly, preferably face to face, with the Transport Team, to

prioritise such requests, rather than simply letting them join a queue of emails. It is not, in the circumstances, for the Claimant to attempt to dictate to an employer how, within reason, it chooses to manage its teams.

- b. For similar reasons, it was also not reasonable for the Claimant to work from home. He accepted that the specialised telephone equipment could not be installed in his home and in any event, this was a new team, trialling a new concept and needed therefore to work both in close cooperation with each other and with the Transport Team, which the Claimant could not do from home. Further, it was made clear to both the agency and to him from the outset that the requirement was for Team members to work in the office and that home working was not an option [emails to that effect in January 2022 - page 88]. We also note the agency recording, as stated above that on 14 March the Claimant told them that he knew he couldn't work from home. The Claimant suggested in his evidence that he could have carried on data entry work from home (as he did on at least one occasion previously), but it was clear from the Respondent's evidence that such work was only a temporary stopgap, pending the Team getting their telephone equipment and that dealing with public enquiries was to be their only task. While such data work continued to be necessary, it was passed over to other staff of the Council to complete.
- c. Again, for similar reasons, it would not have been reasonable to have relocated the Claimant to another office. Such a move would have had similar implications to working from home, resulting in lack of cooperation, training and development within the CSO team and loss of liaison with the Transport Team.
- d. Finally, we consider, on the evidence, that the Claimant had not made the suggestion as to the placing of boards around his desk, prior to the case management hearing and certainly not at the time. We find this for the following reasons:
 - i. Ms Muldoon's lengthy email to the agency, detailing the steps taken by her and the Claimant's demands, did not include such a reference.
 - ii. Nor did the Claimant's grievance mention such a suggestion, while he does mention the closure or opening of doors.
 - iii. Neither does his contemporaneous claim form mention such an adjustment but does include claimed adjustments as to

doors being closed, the provision of a heater and working from home.

- e. We don't consider, therefore, in that context that this is an adjustment that can possibly have been in the Respondent's mind at the time, or that it would have been reasonable for them to have contemplated, unless prompted to do so by the Claimant. In any event, there can be no evidence that any such adjustment, if contemplated and then applied would have made any difference to the Claimant's claimed substantial disadvantage. The evidence of the Respondent's handling of both the parking issue and also the events of the 14th to 16th March indicates to us that had that issue been raised, it would have been given due consideration.

17. For these reasons, therefore, the claim of failure to make reasonable adjustments is dismissed.

18. Time Limitation in respect of the Victimisation claim. We find that it would not be just and equitable to extend time to permit jurisdiction to hear this claim, for the following reasons:

- a. The length of delay is egregious – nine months.
- b. The longer the delay, the more cogent the reason needed to justify it. In this respect, the Claimant has belatedly, in closing submissions, provided two reasons: his overall medical condition and the assertion that he needed to await the outcome of a SAR to the Respondent, before deciding whether or not he had grounds to bring such a claim. We don't accept these reasons as excusing the delay, for the following reasons:
 - i. While we don't doubt his stated medical conditions, to include Functional Cognitive Disorder, he was, nonetheless, despite these conditions, able to promptly bring a grievance, based on allegations of breach of the Equality Act in relation to disability and then subsequently a claim. He was also able to prepare for and attend a case management hearing. If he was able to carry out these functions, therefore, we see no reason why that could not have included a claim of victimisation, which is, in itself, particularly in the context of him having brought a formal grievance alleging breach of the Act, a relatively more straightforward claim than one of failure to make reasonable adjustments – effectively was the termination of his contract because he had brought a grievance?

- ii. There was no evidence that the SAR was related to the claim of victimisation and his belated raising of this issue prevented the Respondent from dealing with it more comprehensively. In any event, what further information did the Claimant need? He knew he had brought a grievance that would qualify as a protected act, and he knew that his contract had been terminated – that is all the information he needed to make the allegation.
 - iii. We note that the Claimant is a litigant in person, but from his evidence he is clearly well-versed in the law relating to disability, making wide reference to the EHRC and ACAS guidance on the subject. He referred to himself, at one point, as a ‘disability rights advocate’. He also agreed, in cross-examination that he has previously brought a disability discrimination claim. He is not, therefore, the average litigant in person.
- c. Another factor that is relevant to this decision is the balance of prejudice to the parties in deciding against an extension of time on a late application of this nature. In this case, we consider that the balance falls in the Respondent’s favour, as the Claimant nonetheless was able to proceed with a claim of failure to make reasonable adjustments and therefore was not left without recourse, whereas the Respondent was obliged to consider a new claim at late notice, with a previous final hearing date having to be adjourned, with no doubt consequences for legal expenses and management time.
- d. Finally, we note that an extension of time is the exception rather than the rule and we see no reason to conclude that this is an exceptional case.

19. Termination of Contract due to Protected Act. Having found that the Tribunal does not have jurisdiction to consider this claim, we nonetheless, for completeness, comment briefly on this issue as follows:

- a. The Claimant’s contract was not terminated because he brought a grievance. It was in fact terminated for the following reasons:
 - i. He made it crystal-clear that he had no intention of returning to the CSO office, unless his demands were met, which the Respondent was unwilling to do.
 - ii. His behaviour in making these demands, his manner generally and the effect the adjustments that were made had

on the rest of the staff, rendered his continued employment impossible.

- iii. He himself made it clear that he didn't want to work in the CSO office and was actively looking for work elsewhere in the Council.
- iv. The Respondent was, relatively speaking, unconcerned by the grievance, considering it a matter for the agency to deal with.

Conclusion

- 20. For these reasons, therefore, the Claimant's claims of failure to make reasonable adjustments and of victimisation fail and are dismissed.

Employment Judge O'Rourke
Dated: 17 July 2023

Reasons sent to the Parties on 31 July 2023

For the Tribunal Office