



EMPLOYMENT TRIBUNALS

Claimant

Mr D Bushell

Respondent

v Chief Constable of Northamptonshire
Police

Heard at: Bury St Edmunds Employment Tribunal **On:** 1 and 2 August 2023

Before: Employment Judge K J Palmer

Members: David Snashall

Appearances

For the Claimants: Miss D Askew (non qualified) friend

For the Respondent: Mr N Smith (Counsel)

JUDGMENT

1. It is the unanimous Judgement of this Tribunal that the Claimant's claims in disability discrimination under sections 13 and 15 of the Equality Act 2010 fail and are dismissed.

REASONS

2. This matter came before us on 1 August and we immediately faced a difficulty in that one of the Tribunal Members was not available to sit on the case which was originally scheduled for a full day hearing in December of 2022 and relisted for a three day hearing on 1 August 2023. Accordingly, the Tribunal sought the consent of both parties to proceed with the Employment Judge and one Member and both parties consented and it was on that basis that we have heard the case.
3. We had before us a bundle running to some 125 pages and Witness Statements from a number of witnesses. We heard evidence from the Claimant, we also heard evidence from Alison Roberts, H R Business Partner at the Respondents. We also had Witness Statements before us from the Respondents, Sheila Gardner and Paula Baker, neither of whom attended to give direct evidence and to be tested on their Witness Statements. We made it clear to the parties that whilst we would read the Witness Statements of those who did those who did not attend, we would give such weigh as was

appropriate in the circumstances in light of their not being here to be tested on that evidence.

Findings of fact

4. The Claimant was employed by the Respondents from 4 September 2017 to 30 November 2017 as a Probationary Force Control Room Operative. He resigned from that employment. He pursues claims in direct disability discrimination and under section 15 of the Equality Act 2010 for discrimination arising from a disability pursuant to a reference that the Respondent's provided to a prospective employer, Barclays Bank, who had offered the Claimant provisional employment within its Fraud Team subject to checks. Pursuant to that reference the bank withdrew the offer. The claim before us is narrowly framed and involves only the reference given by the Respondent, signed on their behalf by Annette Foy, on 17 May 2019.

5. The key information included in the reference was as follows:

"The FCR environment is a very stressful one with call handlers having to manage multiple systems simultaneously. They regularly have to take calls from very distressed individuals and it is far from an easy role. There are always people on every intake that realise its not for them when they find out the reality of the role. Due to Daniel's autism, he found it very difficult to deal with those calls and so chose to leave. Daniel was not dismissed but because he was in his probationary period when he left, it was documented as 'failed probationary' rather than 'resigned'. In no way does this reflect on Daniels ability or work ethic".

And it is on the basis of that reference that these claims are pursued. In his ET1 the Claimant refers rather narrowly to the middle sentence which reads, "due to Daniel's autism he found it very difficult to deal with those calls and so chose to leave and it is that aspect which forms the meat of his claim.

6. It is common ground between the parties that the Claimant found the role challenging. It was ultimately clear, during the probationary period to both the Claimant and the Respondent, that the role was not for him and that he was not suited to it. He accepted this in evidence. The role involved frontline services for the respondents and taking and dealing with 999 calls. It is common ground that the role is very stressful and very difficult and challenging and that it involves dealing with callers who are calling in extreme circumstances, often life-threatening ones and became obvious very early on in his employment that the Claimant was having difficulty in dealing with the challenging nature of the role. A number of shortcomings were identified, including a difficulty in engaging with the caller, a monotone delivery, an apparent lack of empathy and certain issues concerning data capture of the contents of the calls. The Claimant was placed on an improvement action plan to assist him in overcoming those difficulties. He revealed to the Respondent that he had Asperger's and he did this on 17 October 2017. He confirmed in evidence that he had been re-diagnosed with autism at a later

date. He provided a letter to his employers from Northants Hospital, confirming the diagnosis from when he was a child. The Respondents then reacted in a way which the Tribunal considers to be responsible in that with respect of the development of the revelation of his disability, those initiatives were undertaken to assist the Claimant and to seek alternative roles for him when it became clear that he was not suited for the FCR role. The Claimant resigned in November of 2017. It was clear, at that time, that he would not have successfully passed the probation in the FCR role and he was informed of that.

7. Much of the Claimant's evidence before this Tribunal concerned his time at the Respondents when he was in employment but it is critical and crucial for us to record that this case doesn't involve around issues or claims concerning his time there. Only the provision of the reference on 17 May 2019, some 18 months after his employment ceased. In his evidence the Claimant stated that his concern was that the reference to autism and not Asperger's was a significant issue for him in that reference. As a matter of fact we do not regard this as material to the issues in this case. It is well known that people with Asperger's are often referred to as having autism and it is also well known that Asperger's forms part of Autism Spectrum Disorder and falls under that umbrella, a fact which the Claimant accepted in his evidence. We find that there is no evidence before us to suggest that had the reference contained the word 'Asperger's' instead of the word 'autism', that the bank would have reacted any differently.
8. The Claimant was provisionally offered the job by Barclays in January 2019. Barclays sought a short reference which, we understand, was provided, although this was not before us which led Barclays to believe that the Claimant might have been dismissed. It was as a result of this that they then sought a more detailed reference and this was then provided and is the subject of this claim in May 2019. It is only that reference which is the subject of this claim. Indeed, it is on the basis of that May 2019 reference that the Bank withdrew the offer. There is no claim before us concerning the earlier reference and indeed it was not even before us in the bundle. We are bound to say that there would have appeared to be some considerable logic for the Claimant in joining in Barclays Bank as a party to these proceedings as it was they who effected the withdrawal on the basis of the reference.
9. The Claimant gave evidence that he chose not to do that because he had ambitions to work for a bank and in fact does now work for a bank and that, of course, is a matter for him.

The Claim

10. The Claimant argues that the reference constituted an act of direct discrimination and discrimination arising from his disability. At an earlier hearing the Respondents accepted that at all material time, the Claimant was disabled under section 6 of the Equality Act 2010 by reason of his Asperger's/autism.

The Law

11. Section 13 of the Equality Act 2010 deals with direct discrimination
Section 13(1) tells us 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.”

It is important to realise that the use of the word ‘less favourably’ involves a comparator when looking at claims in direct discrimination”.

12. Section 15 is a claim for discrimination arising from disability.
Section 15(1) tells us that :

- (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.

With respect to the section 15 claim, it is accepted by both parties that the something arising in this case was the Claimant’s difficulty in managing the role.

The Claimant, in his evidence, accepted that many of the difficulties he experienced in the role were as a result of, or exacerbated by, his disability. The Respondents accept that the test in 15(1)(a) is met, namely, that the Claimant was treated unfavourably because of something arising in consequence of his disability. They rely on the justification test in 15(1)(b), namely, that the treatment is a proportionate means of achieving a legitimate aim.

13. This is a reference case and reference cases are unusual and relatively uncommon in the Employment Tribunal. We must stress that much of the Claimant’s unhappiness with the Respondents centres around them disclosing his disability to Barclays without his informed consent. He had, perhaps, unwisely, given a general blanket consent to the Respondents to respond to Barclays’ more detailed request for the reasons for his leaving. However, that is not a part of what this Tribunal has to consider. That may be a data protection issue or a confidentiality issue but it is not within the jurisdiction of this forum and not part of this claim.
14. We heard excellent submissions from both Mr Smith of Counsel on behalf of the Respondent and from Miss Askew, who is a lay Representative. We do not propose to repeat those here but we are very grateful for those.

15. We were referred to a number of Authorities by Mr Smith with respect to the duty on a former employer to provide a reference when requested. He also referred to a useful extract from Harvey which adequately summarised the position.
16. In our deliberations we have carefully considered those Authorities, including the cases of Spring v Guardian Assurance Plc 1994 IRLR 460, Bartholomew v London Borough of Hackney 1999 IRLR 246, TSB Bank Plc v Harris 2000 IRLR 157 and others.
17. We accept entirely the proposition that the employer or former employer has a duty both to the former employee in respect of whom a reference is given and is about, and to the recipient of the reference to provide a reference which, in substance, is true, accurate and fair and that it's a difficult balancing act for an employer in such circumstances.
18. We have also taken due cognisance with the Authorities we have been referred to in respect of the justification defence under section 15 that the Respondent's rely upon. Most particularly, Burtenshaw v Oldfield 2019, IRLR 946. The Respondents argue that the legitimate aim here is the aim to provide a true, accurate and fair reference. The question is, whether it was, that writing of the reference in the terms it was written, amounted to a proportionate means of achieving that legitimate aim. To be proportionate, the conduct in question has to be both an appropriate and reasonably necessary means of achieving that legitimate aim. It is therefore appropriate to consider whether any lesser conduct might have served that aim equally as well. So it is an objective test. In this case, the reference was essentially written by Miss Gardner and cut and pasted by Miss Foy and sent out on the Respondent's behalf. We have to consider whether Miss Gardner acted rationally and responsibly and we must give her a reasonable degree of respect in her judgment.

Conclusions

19. Section 13 Direct Discrimination Claim.

The Tribunal finds that there is nothing in the letter of 17 May 2019 which can amount to direct discrimination because of the Claimant's disability. Applying a hypothetical comparator test on the evidence before us, and on the balance of probability, the reference given for a non-disabled person experiencing the same difficulties in the role as the Claimant would, in our view, have been the same.

20. Moreover and perhaps more fundamentally, it is clear from the evidence before us that the efforts to assist the Claimant once they knew of his condition, that there was no intention to scupper his employment with any future employee on the basis of his disability. There was therefore clearly no intention on their part to do so.

21. Of course, such discrimination does not have to be conscious or deliberate but it is clear from the wording of the letter that the statement deals with the effect of his disability and not the fact of it.
22. For those reasons we do agree with the Respondent's that the Claimant's claiming direct discrimination is misconceived and must fail.

Section 15 Claim.

23. Turning to this claim the Respondents accept that there was unfavourable treatment because of the 'something arising', but argue that it was justified on the basis that it was a proportionate means of achieving a legitimate aim, that the legitimate aim being to provide an accurate, true and fair reference. Applying the test set out above, we do agree with the Respondents. The aim was to provide a true accurate and fair reference. That was a legitimate aim based on the duty of an employer to both the employee and the recipient.
24. We find that Miss Gardner did act rationally and responsibly and that her conduct was an appropriate and reasonably necessary means of achieving that legitimate aim. It was therefore proportionate. For those reasons the Respondents conduct was justified under section 15 and the section 15 claim must also fail and is dismissed.

Employment Judge K J Palmer

Date: 11 September 2023

Sent to the parties on: .4 October 2023.

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For the Tribunal Office.