



EMPLOYMENT TRIBUNALS

Claimant: Mr G Westwell

Respondent: South East Coast Ambulance Service NHS Foundation

Heard at: London South, by CVP

On: 11, 12 October 2023

Before: EJ Rice-Birchall;

Ms Bharadia

Mr Cann

Representation

Claimant: In person

Respondent: Mr Tomison, counsel

REASONS

Background

1. This claim arises from the Claimant's job application to the Respondent in February 2022.
2. The Claimant made an application to the Respondent for a call handler position on 5 February 2022. On 8 February 2022 the Claimant received an email from the Respondent's HR department. The Claimant says, and the respondent admits, that he was told his application had been withdrawn and that he should not reapply for any future roles with the Respondent.
3. This claim was brought on 28 February 2022 after a period of ACAS Early conciliation between 9 and 28 February 2022.

4. Disability

5. As regards the claimant's disability, the respondent conceded that the claimant is disabled by way of Autism Spectrum Disorder (ASD) and also conceded, under the umbrella of ASD only and as symptoms of ASD, that the claimant had Generalised Anxiety Disorder; severe social phobia and severe depression. The respondent did not concede that those conditions were separate conditions to ASD. The respondent also denied that it had

any knowledge of these additional conditions or any knowledge that the other conditions were symptoms of ASD at all material times.

6. The Tribunal explained this to the claimant at the outset of the hearing and the claimant confirmed that he did not seek to rely on each of those additional alleged disabilities in their own right, but under the umbrella of ASD.
7. The Tribunal asked the claimant if there were any adjustments it could make to assist him to fully participate in the hearing. He said he may need more time to locate papers and so on. During the hearing, the Tribunal ensured that there were regular breaks and that the claimant had plenty of time. For example, the claimant was given a break overnight before he made his submissions, having heard, and read, the respondent's closing submissions.

The Issues

8. The Claimant confirmed repeatedly at the preliminary hearing for case management that he brings a claim of direct disability discrimination. He does not bring a claim under any of the other provisions contained within The Equality Act 2010.
9. At the outset of the final merits hearing the Tribunal gave the claimant a further opportunity to consider his claim. Again, the claimant was very clear that the claim he was bringing was a claim of direct discrimination and that he was not claiming that his treatment had been because of something arising from his disability, for example. As the claimant saw it, if the reason his applications were not progressed was not his criminal conviction, then it must be his disability which was the reason for those applications not being progressed, hence the direct discrimination.
10. That the claimant had some understanding about the different strands of discrimination was evident from his letter of complaint to the respondent in which he set out allegations that he had been discriminated against because of something arising from his disability and because of the respondent's failure to make reasonable adjustments. It was also evident that the claimant was taking some form of advice as he referenced seeking advice throughout the course of the hearing.

Direct Disability Discrimination (Section 13 Equality Act 2010)

11. Given that this is a direct disability discrimination claim, the issues for the Tribunal to decide are as follows:
 - a. Did the respondent do the following things:
 - i. Fail to progress the claimant's job application made on 5 February 2022;
 - ii. Inform the claimant that, because of his repeated job applications to the respondent, he should not make any further applications and should not contact the respondent again.

- b. Was that less favourable treatment? The Tribunal will decidewhether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The claimant has not named anyone in particular who he says was treated better than he was.
- c. If so, was it because of the disability?

Evidence

- 12. The Tribunal had the benefit of a bundle of documents running to 396 pages; the claimant's witness statement; and three witness statements from the respondent from Gareth Knowles, Safeguarding Lead; Peter Mitchell, Recruitment team leader and Ali Mohammed, Executive Director of HR and Organisation Development.
- 13. The claimant didn't appear to have the bundle of documents as a bundlebut rather as a series of loose pages. This caused some difficulty when referring to documents during cross examination. Where necessary additional time was given for the claimant to locate documents.
- 14. An additional document was disclosed during the hearing which wasreferred to as self-disclosure. The claimant admitted that this had not been shown or given to the respondent at any point. It explained the steps the claimant had taken to move forward after his conviction and how he had taken ownership for his conduct. He explained that he had not had the opportunity to provide it to the respondent.
- 15. The Tribunal also explained the purpose of cross examination to theclaimant at the outset of the hearing, and again during the course of the hearing, and in particular explained the importance of challenging any evidence in the respondent's witness statements with which he did not agree. In the event, the claimant asked very few questions in cross examination.

Facts

- 16. The respondent is a publicly funded NHS organisation which providesemergency response to 999 calls from the public, urgent calls from health care professionals and NHS 111 services across the region.
- 17. The respondent is a Disability Confident Committed employer whocommits to all disabled candidates who meet the minimum criteria detailed in the job specification will automatically be shortlisted and invited for an interview or to the first stage of the recruitment process.
- 18. The respondent's recruitment and selection policy and procedure goes onto state that the respondent "will accept at face value a candidate's statement that they are disabled within the terms of the Equality Act 2010.

19. The claimant had an unspent conviction on his record following the Claimant's guilty plea to the offence of stalking under the section 2A of the Protection from Harassment Act 1997. A sentencing hearing took place on 10 March 2021.
20. On 3 February 2021, the claimant wrote to the respondent who confirmed that, with regard to his criminal record, this would be taken to the respondent's DBS panel and a decision would be made as to whether or not an offer of employment would be made.

The claimant's applications

21. Between May 2021 and March 2022, the claimant applied to the respondent on seven occasions for various job roles, including as a 111 call handler and a 999 call handler. This was despite the Trust informing him that their policy required a six month gap after an unsuccessful application to allow time for improvements to be made and to take into account any feedback given.
22. The claimant applied for a role as a 999 call handler on 8 May 2021. His application was unsuccessful as he had provided limited supporting evidence as to his relevant experience and there had been 63 applications for 12 vacancies. The advert contained the wording: "If you have previously applied for this role and were deemed not appointable at any stage of the recruitment process, you cannot normally apply for the same or similar role for a minimum of six months from the date of application. This is to allow time for the candidate to receive feedback and undergo the appropriate development."
23. Later in May 2021 the claimant contacted the respondent prior to submitting an application form for the role of 111 Call Handler to inform them of his unspent conviction and asked if he was likely to be turned down because of it. He explained that the offence was stalking without fear, alarm or violence and that he had received a community order and a fine along with a restraining order. He said that the "offence 'apparently' took place in 2018/19 over an eight month period." The claimant explained that he did "not see [his] re-offending re occurring" and that he believed that it was because he suffered from autism, which meant that he struggled to read signs of what others are thinking. He finally confirmed that he struggled "to communicate with females on a personal level."
24. The respondent replied to confirm that a conviction would not be something which would be taken into account at the shortlisting stage.
25. The claimant made an application on 17 May 2021 and disclosed his conviction. The claimant also disclosed that he had a mental health condition and a long-standing illness. The claimant also revealed that he may be on the autistic spectrum but at this stage he had not been diagnosed as such.
26. The claimant's comment that he "struggled to communicate with females on a personal level" caused the respondent some concern as the

claimant would be required to build rapport quickly and communicate effectively with all callers, including females, as well as work alongside females in

the control room. The claimant's application was unsuccessful. Again the advert was clear that if unsuccessful, there should be no further application for six months.

27. The claimant applied again for the 999 call handler role on 30 May 2021. The claimant was provided with feedback over the telephone when it was explained to him that he lacked relevant experience. During the call the claimant said he had been rejected because of his criminal conviction but was assured that this had no bearing and was given feedback as to what needed to be improved if he was to apply again after six months.
28. The claimant applied again for the 999 call handler role on 6 June 2021 and 11 June 2021 and his applications were rejected as he hadn't waited six months.
29. On 22 July 2021, the claimant emailed the respondent's recruitment HR email address to raise concerns that he felt he was being discriminated against because he had declared his criminal conviction. The claimant said: "I DO NOT pose a risk to society only to the one individual that lied throughout the police statements to me that tells me she (the claimant is mentally unstable) and was believed purely on the basis of being blonde". He also said that "working within the control room it would be incredibly safe where no staff are at risk as it's a controlled environment".
30. On 23 July 2021, the claimant was provided with a detailed response by email. It was explained again that his criminal conviction itself was not a factor in his application being unsuccessful but that the respondent was concerned about the claimant's admission that he struggles to communicate with females on a personal level. The respondent explained that, as a Call Handler working within both 111 and 999, he would be speaking to people of all genders and that communication is a key aspect of the role. It was further explained that although the claimant's role as a bus driver was customer service experience, the job description and person specification clearly stated that you need the ability to communicate with a variety of different people and build rapport. This was essential criteria for the role. As a result the claimant's application was not shortlisted and was rejected. The respondent advised that if the claimant could work on and feel more confident in communication with people from all walks of life, it would welcome future applications but that he would need to wait six months before reapplying to allow for self-development.
31. The claimant then contacted the respondent again, twice by email and once by phone. It was then confirmed to him by email on 4 August 2021 that his application had been unsuccessful as he had not met all of the essential criteria for the role. The respondent only progresses those applications, including those under the Guaranteed Interview Scheme, where applicants meet all essential criteria.

32. The claimant applied for the 999 Dispatcher role on 3 October 2021. His application for this role was unsuccessful because he did not meet the essential criteria for the role.
33. The claimant applied for a 999 Call Handler role on 5 February 2022. On 5 February 2022, the claimant emailed the Recruitment Team to confirm that he had submitted this application. As the application met the basic essential criteria required for the role, his application was progressed to the next stage under the Guaranteed Interview Scheme. The claimant was told this verbally over the phone before any details had been confirmed.
34. Around this time, given the concerns the respondent had regarding the claimant's persistent communications with both the respondent's HR team and Legal team regarding unsuccessful applications, that the claimant admitted to struggling to communicate with females, and the tone of the claimant's emails regarding his self-declared criminal conviction, the respondent's recruitment team leader asked Mr Knowles, the respondent's Safeguarding Lead, to review the relevant documentation. It felt this was appropriate and necessary because as both a publicly funded NHS Trust and more generally, as an employer, it has a responsibility to ensure that all patients and employees are safe at all times.
35. Further, as a Call Handler, the claimant would be performing a regulated activity and so the respondent wanted to ensure that it would be appropriate for the claimant to proceed to the interview stage.
36. Mr Knowles reviewed the claimant's previous communications with the Trust and was particularly concerned that his emails, particularly that sent on 22 July 2021, suggested that he lacked any insight into his offending and the fact that he had been convicted of a serious offence.
37. In particular, he considered that the claimant appeared to admit that he did indeed pose a risk to the victim of his criminal offence but failed to recognise that this also posed a wider risk. The Safeguarding Lead considered that this behaviour was not compatible with the core values of the respondent.
38. He also considered that the claimant had been persistent in contacting both the respondent's HR team and Legal team, and seemingly trying to contact different individuals to obtain a different response when he was not happy with that given. The Safeguarding Lead considered that the manner of these communications was not always appropriate and had left employees feeling uncomfortable about the exchanges they had.
39. As a result, the respondent did not consider that the claimant would be suitable for employment. Whilst Mr Knowles knew that the claimant had ASD, he was not aware that the claimant had generalised Anxiety Disorder, severe social phobia and severe depression.
40. Mr Knowles contacted Mr Mohammed, the respondent's Executive Director of HR and Organisation Development, with an email dated 8 February 2022 setting out his assessment of the situation regarding the

claimant and his recommendation that he would not recommend or support the claimant to apply for or work in regulated activity with the respondent.

41. Having considered the recommendations, Mr Mohammed agreed and asked Mr Mitchell to write to the claimant accordingly.
42. On February 8 2022, Peter Mitchell wrote to the claimant as follows:
“Having reviewed your application we have decided to withdraw your application for the role of 999 call handler...in addition we will withdraw all subsequent applications that you have made to the Trust. Please refrain from contacting the Trust and from making further applications for both permanent/ fixed term and voluntary posts”.
43. The claimant complained about the handling of his application. Shortly before he had received the communication from Peter Mitchell telling him that his application was withdrawn, he had spoken to the respondent and had been told that he would be invited to an assessment shortly.
44. The claimant said in his complaint: “The door was slammed in my face and I know it is because of my medical “communication disorder”.”
45. The claimant received a detailed response on 2 March 2022, from Mr Mohammed, setting out the history to the matter and explaining the reasons why the respondent had taken the action he took.

The law

Burden of proof

46. Section 136 Equality Act 2010 (EqA) deals with the burden of proof:
 - (1) This section applies to any proceedings relating to a contravention of this Act.
 - (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.
 - (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.
47. The Court of Appeal in **Igen Ltd v Wong** [2005] EWCA Civ 142; [2005] ICR 931 in an annex to the judgment set out guidance on the application of the burden of proof under the antecedent legislation, which applies equally to s136. The guidance will not be repeated here.

Direct discrimination

48. Section 13(1) of the EqA states:

- (1) 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 ...

49. Section 23 EqA states:

- (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case ...

50. Section 39 EqA states, as far as relevant:

- (2) An employer (A) must not discriminate against an employee of A's (B)— ... (d) by subjecting B to any other detriment.

51. Although the two-stage analysis of whether there was less favourable treatment followed by the reason for the treatment can be helpful, as Lord Nicholls explained in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] UKHL 11; [2003] ICR 337 at [8], there is essentially a single question: “did the claimant, on the proscribed ground, receive less favourable treatment than others?”.

52. The claimant does not have to show that the protected characteristic was the sole reason for the decision; “if racial grounds or protected acts had a significant influence on the outcome, discrimination is made out”: **Nagarajan v London Regional Transport** [2000] 1 AC 501 at pp512-513.

53. The discriminator may have acted consciously or subconsciously: **Nagarajan**. A “significant” influence is an influence which is more than trivial: **Igen** at [37].

54. The comparator, whether actual or hypothetical, has been explained by Lord Scott in **Shamoon**: In summary, the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class. But the comparators that can be of evidential value, sometimes determinative of the case, are not so circumscribed. Their evidential value will, however, be variable and will inevitably be weakened by material differences between the circumstances relating to them and the circumstances of the victim.

55. The Tribunal is required, therefore, to consider how a hypothetical comparator would have been treated.

Conclusions

56. The respondent did fail to progress the claimant’s job application made on 5 February 2022.

57. Further the respondent did inform the claimant that, because of his repeated job applications to the respondent, he should not make any further applications and should not contact the respondent again.

Was that less favourable treatment?

58. The Tribunal must decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The claimant has not named anyone in particular who he says was treated better than he was, and so relies on a hypothetical comparator.
59. In this case, the hypothetical comparator is a person who was not disabled but who:
- a. Had a criminal conviction for stalking and appeared from communications to lack insight into that conviction;
 - b. Appeared from his communications to have communication issues with women (whether professionally or personally); and
 - c. Engaged in repeated applications and communications.
60. The Tribunal concludes that such a person would have been treated in the same way as the claimant was treated. That is not to say the respondent could not have done better at its communications with the claimant but it did not treat the claimant any differently to how it would have treated a person who was the same as the claimant but without his disability in those circumstances.
61. Those responsible for the alleged acts of discrimination: Mr Mitchell; Mr Knowles and Mr Mohammed, knew of the claimant's autism but not of the other related conditions which came under the umbrella of ASD.
62. The Tribunal is further satisfied that the respondent's concerns about the claimant's attitude towards his conviction, and his communications and the content thereof was the reason for its treatment of him, rather than his disability.
63. It was the claimant's conclusion, however, having been told that his conviction wouldn't bar him from reaching the first stage of the recruitment process, that the reason he did not reach that stage was because of his disability. The fact that very shortly after he had been told he had reached the next stage of the recruitment process, he was told that his application was rejected and that he should make no further applications would obviously have been shocking and a huge disappointment. It would have been difficult for the claimant to understand the turnaround in such a short space of time particularly as no reason or explanation was given at the time.
64. However, despite this the Tribunal is satisfied that it wasn't the conviction itself that caused the respondent to reject the claimant's application and to tell him to no longer apply. The conviction itself would stand to be considered at a later stage of the recruitment process, ordinarily. In this case alarm bells had sounded.

65. The respondent considered that the claimant had shown a lack of insight into offending, his communications suggesting that he did not believe that he had done anything wrong. He wrote that the offence “apparently” took place in 2018/2019, suggesting that he did not accept that the conduct even took place. He then wrote that “I do not see my offending re occurring, but I believe at the time it was down to my health condition which is autism”. This lack of certainty about re-offending caused concern.
66. The claimant also wrote that he “regularly attend[s] probation against my will” and that he had been told by one of the probation officers that “I DO NOT pose a risk to society only to the individual that lied throughout the police statements to me that tells me she (the claimant is mentally unstable) and was believed purely on the basis of being blonde”. He then commented on “how corrupt this court case has been”. He was disputing the basis of the conviction and suggesting that he remained a risk to the victim.
67. Further, the claimant admitted to having communications issues with females, even if it was restricted only to “one to one personal facing situations” (as written in his email on 2 August 2021 to HR [159]), given the nature of the role it remained a legitimate concern.
68. The claimant’s volume of applications and contact with the respondent were also of concern for the respondent. The email correspondence within the bundle revealed. In the opinion of the respondent, a pattern of communications and calls from Mr Westwell which concerned it. For example, on 10 August 2021 he is reported to have called up “very upset” and on 13 January 2022 he called up “quite angry”. Mr Knowles’s email records that Mr Westwell had declared to one member of staff that he “cries when he sees an ambulance” because he is so keen to work for the Respondent.
69. The claimant’s communications also gave rise, in the view of the respondent, to concerns about the risk posed by him to the office. In his email on 22 July 2021 to HR, the Claimant wrote that working within the control room “would be incredibly safe where no staff are at risk as it’s a controlled environment”: Rather than being reassuring, this statement legitimately gave rise to concerns about his potential conduct (particularly when coupled with his other communications).
70. Finally, the Tribunal accepts the respondent’s submission that the fact that the claimant had produced a statement subsequently for a later job application with a different employer does not matter. This claim requires an examination of the thought processes of the decision-maker at the time, and this information was not available to the Respondent.
71. For these reasons the claimant’s claim of direct disability discrimination fails and is dismissed. The burden of proof has not shifted onto the respondent.

Employment Judge Rice-Birchall

Date: 1 November 2023

JUDGMENT & REASONS SENT TO THE PARTIES

ON

13 November 2023

FOR THE TRIBUNAL OFFICE