



EMPLOYMENT TRIBUNALS

Claimant: Craig Pryce

Respondent: New Leaf Initiative CIC

Heard at: West Midlands **On:** 25th-27th October 2023

Before: Employment Judge Steward
Ms Hicks
Ms Bannister

Representation

Claimant: In Person

Respondent: In Person

JUDGMENT

The decision of the Tribunal is:

1. The claim of Direct Disability Discrimination failure to make a reasonable adjustment fails.
2. The claim of harassment on the grounds of disability fails.

REASONS

Introduction

3. The claimant was employed by the respondent, a company providing education services, as a Training Coordinator and Tutor, from 27th February 2022 until 10th October 2022 (though the start date is disputed there is nothing evidentially that turns on this.) Early conciliation started (for the first respondent) on 13th October 2022 and ended on 17th October 2022. Early conciliation started (for the second respondent) on 28th October 2022 and ended on 14th November 2022 the claim form was presented on 16th November 2022.

4. The claim is about allegations of harassment based on disability and disability discrimination, including failure to make a reasonable adjustment. The issues have not been clearly set out in the bundle in our view. In the case management order the issues are described as

53.1 Harassment on the grounds of disability;
53.2 Direct disability discrimination about the following:

53.2.1 Failure to make a reasonable adjustment

53.2.2 Failure to provide an auxiliary aid

Unlawful deduction from wages – PILON.

The case management order goes on to say that the claimant was not provided with agenda for meetings in advance and that meetings took place over a longer period than he was able to concentrate for, and that this amounted to a PCP, and a failure to make a reasonable adjustment. These issues were not pursued during the evidence, and neither was PILON.

5. He also argues that he was prevented access to an auxiliary aid, in the form of speech recognition software, and this amounted to a failure to make a reasonable adjustment. The entire focus of the evidence in this case was harassment on the grounds of disability and a failure to make a reasonable adjustment namely to provide dragon speech software and yellow overlay paper. As can be seen in paragraph 30 of the claimants written submissions.

The Claimant submits that the Respondent should have provided both an auxiliary aid of a speech recognition software, namely Dragon Software, and the use of canary yellow coloured overlay. It is submitted that the Respondent should've provided the above auxiliary aids to the Respondent.

We therefore take the view that the issues to be determined are harassment on the grounds of disability and direct disability discrimination in that the respondents failed to make a reasonable adjustment namely not providing dragon software and yellow overlay paper.

6. The claimant argues that he was subjected to numerous comments regarding his communications, related to his disability which amounted to harassment. The following issues were to be determined.

7.

- a. Between July 2022 and October 2022, Ms O'Brien made comments that the Claimant was "slow" "stupid", "dumb", "weak", and "co-dependant on his wife".

- b. During the Claimant's first probation meeting on 9 June 2022, Ms O'Brien made the comment to the Claimant stating she was "surprised [the Claimant] managed to get a teaching qualification"; and
 - c. During the Claimant's second probation on 2 September 2022, Ms O'Brien made fun of the Claimant's spelling in his emails, telling him it was "pathetic" and that her "son can write better than [the Claimant]."
8. On the 7th of October 2022 the claimant issued a letter of resignation and planned to work his notice period.
9. On the 10th of October 2022 the claimant was dismissed for gross misconduct. This was due to an allegation of fraud. That matter was pursued in the county court. A judgment was issued for the respondent, but we did not have a note of the judgment. An order was made that the claimant should pay the respondent a sum of money. This was the issue over the double accounting which was referred to during the hearing.
10. The matter was heard from the 25th until the 27th October 2023 and during the hearing we heard from the Claimant Mr Pryce and his wife. We also heard from Ms Obrien, Mr Harper, Ms Williams and Ms Harris. We also heard submissions from Ms Obrien and written submissions for the claimant prepared by his solicitors even though they did not represent the claimant during the hearing. The main bundle was 471 pages and a supplemental witness bundle of 47 pages.
11. The claimants' submissions at page 40 make the point that this case will boil down to who the tribunal believes about the harassment. We would go further and believe the credibility of the witnesses and the context of the evidence is central to this case.

The Law

12. Harrassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection

(1)(b), each of the following must be taken into account—

- (a) the perception of B;
 - (b) the other circumstances of the case.
 - (c) whether it is reasonable for the conduct to have that effect.
13. To determine whether the conduct is related to the protected characteristic, it is necessary to consider the mental processes of the alleged harasser (*Henderson v General & Municipal Boilermakers Union [2016] EWCA Civ 1049*). This may be conscious or unconscious: as stated by Underhill LJ in *Unite the Union v Nailard [2018] EWCA Civ 1203*:
- “it will of course be liable if the mental processes of the individual decision-taker(s) are found (with the assistance of section 136 if necessary) to have been significantly influenced, consciously or unconsciously, by the relevant protected characteristic.”*
14. As set out in the Code, “unwanted conduct” can include “a wide range of behaviour” (at paragraph 7.7) and it is not necessary for the employee to expressly state that they object to the conduct (at paragraph 7.8).
15. When looking at the effect of harassment, this involves a subjective and objective test. The subjective test is to assess the effect that the conduct had on the complainant, and the objective test is to assess whether it was reasonable for the conduct to have that effect (*Pemberton v Inwood 2018 ICR 1291, CA*).
16. In relation to the subjective element, different individuals may react differently to certain conduct and that should be taken into account. However, as set out in *Richmond Pharmacology v Dhaliwal 2009 ICR 724* by Mr Justice Underhill (as he was then named):
- “if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question.”*

Reasonable adjustments

17. The relevant sections of the Equality Act 2010 are sections 20 and 21. Section 20 (so far as relevant) states:
- 1. (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
 - 2. (2) The duty comprises the following three requirements.

3. (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
4. (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid. ...

18. Section 21 states:

1. (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
2. (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
3. (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

19. The correct approach to a claim of unlawful discrimination by way of a failure to make reasonable adjustments remains as set out in *Environment Agency v Rowan* 2008 ICR 218 and is as follows:

- (a) Identify the PCP applied by or on behalf of the employer,
- (b) Identify comparators (if necessary),
- (c) Identify the nature and extent of the substantial disadvantage

suffered by the claimant.

20. The identification of the applicable PCP is the first step that the claimant is required to take. If the PCP relates to a procedure, it must apply to others than the claimant. Otherwise, there can be no comparative disadvantage.
21. A substantial disadvantage within the meaning of this part of the Act is one which is more than minor or trivial.
22. Only once the employment tribunal has gone through the steps in *Rowan* will it be in a position to assess whether any adjustment is reasonable in the circumstances of the case, applying the criteria in the EHRC Code of Practice. The test of reasonableness is an objective one. The effectiveness of the proposed adjustments is of crucial importance. Reasonable adjustments are limited to those that prevent the PCP from

placing a disabled person at a substantial disadvantage in comparison with persons who are not disabled. Thus, if the adjustment does not alleviate the disabled person's substantial disadvantage, it is not a reasonable adjustment. (Salford NHS Primary Care Trust v Smith [2011] EqLR 1119) However, the threshold that is required is that the adjustment has 'a prospect' of alleviating the substantial disadvantage. There is no higher requirement. The adjustment does not have to be a complete solution to the disadvantage. There does not have to be a certainty or even a 'good' or 'real' prospect of an adjustment removing a disadvantage in order for that adjustment to be regarded as a reasonable one. Rather, it is sufficient that a tribunal concludes on the evidence that there

would have been a prospect of the disadvantage being alleviated. (Leeds Teaching Hospital NHS Trust v Foster [2011] EqLR 1075.

23. A holistic approach should be adopted when considering the reasonableness of the adjustments, in circumstances where there may be a number of adjustments which are required to work in combination to ameliorate the substantial disadvantage (Burke v College of Law 2012 EWCA Civ 37). The test of reasonableness is an objective one (Smith v Churchills Stairlifts plc 2006 ICR 524.) Where the disruption of a proposed adjustment is in issue, the tribunal has to look at the extent to which the proposed adjustment would be disruptive and the extent to which the employer reasonably believed that such disruption would occur. It is necessary for the tribunal to look at the adjustment from both the point of view of the claimant and of the employer and to make an objective determination as to whether the proposed adjustment is reasonable or not. The tribunal has to focus on the practical result of the proposed adjustments rather than the process by which they are arrived at. The focus of a reasonable adjustments claim is on practical outcomes rather than procedures. (See also Royal Bank of Scotland v Ashton 2011 ICR 632).
24. Factors which may be relevant to the reasonableness of a proposed adjustment are referred to in the EHRC Employment Code. They include the effectiveness of the proposed step and the extent to which it was practicable for the employer to take the step. The financial and other costs incurred by the employer in taking the step and the extent to which it would disrupt any of the employer's activities are also relevant. The extent of the employer's financial and other resources, and the availability of financial or other assistance in respect of taking the step are also apt for consideration. The nature of the employer's activities and the size of its undertaking can also be considered.

Findings of Fact

25. What level of disability did the claimant suffer? It is accepted that the claimant suffers from dyslexia. It is not accepted by the respondents that he suffers any other form of disability. The only evidence before the tribunal was found at Pages 63-83 and the Educational Psychologist Diagnostic Assessment Report. The report suggests that the claimant

suffers with issues of cognitive processing and a degree of dyspraxia. There is no other evidence before the tribunal. We therefore accept the report at paragraph 63.

26. The job description can be found at page 88-89 and the written statement of employment particulars begins at page 166. It shows an employment that requires several skills. One of the key documents can be found at page 104 and is the health questionnaire. In this questionnaire the claimant confirms he has dyslexia and dyspraxia. When asked what adjustments are needed the claimant states;

“No just spelling and sense of direction affected”

There is no request for any other adjustments. There is no request for yellow overlay paper or dragon software. The claimant has clearly worked in several positions, and we found it unlikely that he would essentially assess his requirements while working in the role? That does not seem logical. If the claimant required these adjustments, then we find they would have been requested from the outset. If they had been requested from the outset, we find they would have been provided. There are examples of requests the claimant has made in the bundle for items that have been provided by the respondents. We don't find that the claimant requested dragon software or the overlays at the start of the employment. We do not find that these items were ever requested by the claimant. There is no written evidence of this. Whether they were verbally requested is another matter and this needs to be determined on the reliability and cogency of the witnesses we heard from.

27. Pages 207 and pages 225 in the bundle also shed light on the issue of reasonable adjustments. Page 207 is an email from the respondents to the claimant regarding the probationary period extension. In this document the issues that require improvement are issues of improvement with open and transparent communication.....being more assertive with student behaviour and challenging them.....Further at pages 225 the document dated the 2.9.23 outlines the reasons for the further extension of the probationary period which again states communication and assertiveness as issues. The documentation at both pages is signed by the claimant and according to Mr Harper, who was present for the second probationary meeting, no reasonable adjustments were requested.
28. When Ms Williams gave evidence, she was clear that the respondents had helped her with adjustments for her dyslexia. She was a forthright witness who clearly could speak up for herself. She described the claimant as the 'tech guy' who was effectively 'set up' with technology etc. The respondents denied that the claimant had ever requested adjustments. There is nowhere in the bundle to suggest that the adjustments had ever been requested. We find the claimant would have been able to request adjustments if they were required. We find they were not.
29. In order to evaluate the harassment claim and the issue of reasonable adjustments we must consider the witnesses who gave evidence.

- (i) The Claimant. We did not find the claimant a convincing witness. He has clearly worked in several positions, and we find would be very familiar with his own requirements. We believe he would have made it clear if he needed reasonable adjustments and he would have asked for them out the outset. The claimant suggested that he has raised the issue with the respondents, but the respondent and the witnesses refute this. The view we have is the organisation hired the claimant in a specific role and would have, like Ms Williams, provided the claimant with the items he needed if they had been requested. The claimant's case was that comments the respondent, Ms O'Brien, had made were not heard by other members of staff and could have been said. We did not find this a convincing argument, and this can be further considered in the context of the evidence the respondent and her witnesses gave.
- (ii) Mrs Pryce. We did not find her evidence convincing. The suggestion that she overheard the claimant and the respondent discussing adjustments and heard the respondent speaking to the claimant in a condescending and patronising manner we do not accept. We also found it implausible that she wanted to apply for a role working closely with Ms O'Brien. Mrs Pryce said this was because she thought the claimant was being manipulated and wanted to see for herself. We also found that the claimant was fully aware that Mrs Pryce had applied for the job. At page 212 there is an email from Mr Harper to Ms O'Brien that makes it clear that the claimant had raised with Mr Harper the role with Ms O'Brien. The discussion of this role in emails shows that the claimant and Mrs Pryce were corresponding by a joint email. In our view Mrs Pryce wanted to apply for the role not for any reason to see for herself what was taking place but because she was considering the position as a suitable one for her. This period was also the same period that the claimant and Mrs Pryce looked after the respondent's dog when she was on holiday. This was also in August 2022 when Mrs Pryce was in the process of applying for the job. The text exchange regarding the dog shows a friendly relationship. They show the respondent trying to accommodate the issues the claimant was having looking after the dog. The respondent is on holiday and trying to manage the situation in a cordial manner from Palma. There is no hostility whatsoever from her. It begs the question if the relationship was so bad between the claimant and the respondent why on earth would he be looking after her dog?
- (iii) The Respondent Ms O'Brien. She presented as somebody who is rightly proud of what she has achieved and passionate about the business. It's a business that assist some of the most vulnerable people who have been through the criminal justice system. I believe she is a forthright person. She has been through the system herself and I imagine she does need to be robust especially with the people she seeks to assist. I noted on the last day of the hearing she jumped up to resolve a noise problem in the room next door on two occasions. I imagine she is somebody who is extremely hands on in the business and

drives it forward. I thought she was an impressive witness. I did not have a sense that she misled she was trying to help which sometimes spilled over into comment and sometimes a critic of the claimant. I thought the comment 'weak' had a clear context related to his work and not his disability as can be discussed later.

- (iv) Mr Harper. Was another impressive witness. He did not hear any comments concerning harassment and no reasonable adjustments requested. Mr Harper's own values are important to him, and he would not work for an organisation that displayed the behaviour as alleged by the claimant. Throughout the bundle all the correspondence between the claimant and Mr Harper is positive and it's clear that the claimant was able to approach Mr Harper. There is nothing in the bundle to suggest that the claimant was suffering any harassment from the respondent or anybody else.
- (v) Nadine Williams. Another impressive witness who in our view was forthright and could stand up for herself. She described the Claimant as the 'tech guy' who was 'set up' etc. She is also dyslexic and has been provided with reasonable adjustments when asked. She was never afraid of the respondent.
- (vi) Lynne Harris. She never heard anything bad said by Marie Clare. She didn't know the claimant was dyslexic and never heard dragon software mentioned. Nobody ever heard that request.

30. The respondent has accepted that she called the claimant 'weak'. She deals with this in paragraph 14 of her statement. The context was the were the problems in looking after the respondent's dog. The claimant and his wife could not control the dog and had to eat dinner in the bathroom. This was described as 'weak' in the context of the way the claimant had acted with learners in the academy. The issue of assertiveness and communication had been a persistent theme as noted in both the probationary extension meetings aforesaid. This is the only comment we find the respondent made and we do not find that it was made in the context of harassment. We also do not find that the effect of the comment would have been detrimental to the claimant as it was the only comment and clearly in the context of the dog sitting/issues the claimant has in the workplace. It was not reasonable for this comment to have the effect it did on the claimant.

Conclusion

31. Given the above we do not find that the comments allegedly made by the respondent to the claimant were made other than the comment 'weak' however we do not find that this was made in an attempt to harass the claimant as alleged but in the context of paragraph 30 above.

32. We also do not find there was direct discrimination as a result of failing to make a reasonable adjustment for the reasons set out. We find the claimant never requested the dragon speech software or yellow overlay paper. If he had these would have been provided.
33. In the circumstances the claim fails.

Employment Judge Steward

9.11.23

Date