



# EMPLOYMENT TRIBUNALS

## Claimant

Dr Christian Mallon

v

## Respondent

Vector Recruitment Limited

**Heard at:** Norwich (by CVP)

**On:** 23, 24, 25 October 2023

**Before:** Employment Judge Postle

**Members:** Mr Terram and Ms M Kidd

## Appearances

**For the Claimants:** In person

**For the Respondent:** Mr Halpin, Solicitor

## JUDGMENT

The Claimant's claim that the Respondents failed to make reasonable adjustments is not well founded.

## REASONS

1. This claim arises out of Applications the Claimant made between November 2007 and April 2022, in which he submitted somewhere in the region of 50+ Job Applications in which the Claimant requested a reasonable adjustment of having an oral Application in response to job adverts rather than making a written Application. The Respondents deny the claim.
2. The Claimant's disability is Autism, Dyspraxia and ADHD and the Respondents do not contest the Claimant's disabilities. The specific issues arising in this case and the PCPs were agreed at a Case Management Hearing before Employment Judge Laidler on 9 February 2023. In particular, the PCPs being:-
  - 2.1. That the Respondent required a written application in response to its advertisements without providing to an applicant a written breakdown identifying the essential criteria for the role; and

- 2.2. Not offering an oral initial discussion with the applicant to discuss essential criteria and whether the applicant met them.
3. The Claimant asserts these put him at a substantial disadvantage compared to someone without the Claimant's disabilities in that he was more able to articulate his abilities orally than in writing and could find it difficult extracting the relevant information, e.g. the essential criteria, when presenting solely in written form to him.
4. The reasonable adjustment that the Claimant asserts would have avoided the disadvantage was providing the Claimant with the essential criteria in writing and conducting an oral interview to discuss the essential criteria with the Claimant and whether he satisfied them.
5. The Tribunal also in the course of this Hearing have to consider a jurisdictional matter, that being whether the claims were presented outside the three month time limit, allowing for Early Conciliation and whether the Tribunal should exercise its discretion to extend time. The Claimant having filed the claim on 17 April 2022, following Early Conciliation from 1 - 12 April 2022. The last Application for a job appears to have been in January 2022 and the rejection by email on 14 March 2022.
6. Therefore the last Application is in time and all the previous Applications are out of time. As they are Applications for positions requiring reasonable adjustments, each must be taken as a separate act, clearly not forming a continuing act.
7. In this Tribunal we have heard from the Claimant through a prepared Witness Statement. We have also heard from Mr Cockle, Chairman of the Respondents, again through a prepared Witness Statement. The Tribunal have had the benefit of two Bundles of documents consisting of 288 pages and 207 pages and further Medical Evidence produced by the Claimant.

## The Law

8. The duty to make reasonable adjustments is in s.20 of the Equality Act 2010. The relevant duty in this case is at sub-section (3),

### **20 Duty to make adjustments**

- (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) ...
- (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.

9. The Claimant's case is that the Respondents discriminated against him by failing to comply with that requirement.
10. It should be noted that the duty requires positive action by employers to avoid substantial disadvantage caused to a disabled person. To that extent it can require an employer to treat a disabled person more favourably than others are treated (see Archibald v Fife Council [2004] ICR 594 ). It should also be noted that the purpose of the legislation is to assist a disabled person in obtaining employment and to integrate them into the workforce, see O'Hanlon v HM Revenue and Customs UKEAT/0109/06.
11. The correct approach to reasonable adjustments complaints was set out by the EAT in The Environment Agency v Rowan [2008] ICR 218,
- a. What is the provision, criterion or practice (PCP) relied upon?
  - b. How does the PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled?
  - c. Can the Respondent show that it did not know and could not reasonably have been expected to have known that the Claimant was likely to be at that disadvantage? and
  - d. Has the Respondent failed in its duty to take such steps as would have been reasonable to have taken to avoid that disadvantage?
12. As to the identification of a PCP, the EHRC Employment Code ("the Code") makes it clear the phrase is to be broadly interpreted. The Code says (paragraph 6.10),
- "It should be construed widely so as to include, for example, any formal or informal Policies, Rules, practice, arrangements or qualifications, including one off decisions and actions."
13. The provision relating to the burden of proof are to be found at s.136 of the Equality Act 2010, which provides in s.136(2),
- 136 Burden of proof**
- (1) ...
  - (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.
14. However, by virtue of s.136(3),
- 136 Burden of proof**
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

15. In reasonable adjustment claims, the burden of proof is on the Claimant to establish the existence of the PCP and to show that it placed them at substantial disadvantage. The burden then remains on the Claimant to identify potential reasonable adjustments. At that point, where the duty to make reasonable adjustments has been engaged and the Claimant has identified one or more reasonable adjustments, the burden of proof is reversed and the Respondents must show, on the balance of probabilities, that the adjustment could not reasonably have been achieved.
16. In Lamb v The Business Academy Bexley UKEAT/0226/15, the Employment Appeal Tribunal confirmed that the term PCP is to be construed broadly, having regard to the statutes purpose of eliminating discrimination against those who suffer disadvantage from a disability.
17. The approach that Tribunals should take to PCPs was considered by HHJ Eady QC in Carreras v United First Partners Research UKEAT/0266/15/RM,

*“As noted by Laing J, when putting this matter through to a full Hearing the Employment Tribunal essentially dismissed the disability discrimination claim because it found that an expectation or assumption that the Claimant should work late was not the pleaded PCP.*

*The identification of the PCP was an important aspect of the Employment Tribunal’s task. The starting point for it is the determination of a claim of disability discrimination by way of a failure to make reasonable adjustments. In approaching the statutory definition in this regard, the protective nature of the legislation means a liberal rather than an overly technical or narrow approach is to be adopted that is consistent with the Code which states that the phrase ‘provision, criterion or practice’ is to be widely construed.*

*It is important to be clear, however, as to how the PCP is to be described in a particular case and there has to be a causative link between the PCP and the disadvantage. It is this that will inform the determination of whether adjustments a Respondent was obliged to make.”*

18. As to substantial disadvantage, s.212 of the Equality Act 2010 defines substantial as more than minor or trivial. It must also be a disadvantage which is linked to the disability.
19. The Tribunal is required to have regard to the Equality and Human Rights Commission Statutory Code of Practice on Employment when considering disability discrimination claims. Paragraph 6.28 of the Code sets out factors which might be taken into account when deciding what is reasonable steps for an employer to have to take:
  - Whether taking any particular steps would be effective in preventing the substantial disadvantage;
  - The practicability of the steps;

- The financial and other costs of making the adjustment and the extent of any disruption caused and the extent of the employers financial or other resources;
  - The availability of the employer or financial or other assistance to help make the adjustment, such as advise through Access to Work; and
  - The size and type of employer.
20. An important consideration is the extent to which a step will prevent the disadvantage. The Tribunal must consider whether a particular adjustment would or could have removed the disadvantage.
21. Accordingly it is unlikely to be reasonable for an employer to have to make an adjustment that involves little or no benefit to the disabled person in terms of ameliorating the disadvantage which he or she has been subjected by the PCP. We have to consider whether on the evidence there would have been a chance of the disadvantage being alleviated.

### **The Facts**

22. The Respondent is a highly specialised recruitment company which operates in the ultra-technology sector. The Respondent's staff are mostly engineers in their own right and their employees have a wide variety degree level qualification, including Electronics, Physics, Computer Science and Mechanical Engineering. The Respondents only work in the high technology market. They do not recruit in respect of general roles outside their sector, or other border fields of engineering such as oil, gas or similar engineering sectors, much of which are part of the Claimant's background (oil and gas) together with noted on his CV not related to Tax and Tax Consultancy. Which the Claimant mentions in his CV. The Respondent's clients are mostly companies which operate wholly or mainly in the high technology sector and are seeking to employ technically gifted individuals with specific experience and qualifications which are tailored to the roles in question. Typically, the Respondent will be informed by their Clients of potential vacancies prior to creating and publishing any advertisements the Respondents will normally have discussions with their Clients as to the specifics of the role and the requirements for any prospective candidates. They will provide detailed job descriptions and copies of those are contained at page 184 – 200 in the Bundle.
23. The Respondents using their experience, knowledge of their Client, verbal discussions regarding the role and the Clients job descriptions, will then formulate an advertisement for the role. The advertisements are put on the Respondent's website and on business social media platforms such as 'LinkedIn' and additional websites including 'CV Library'. They then obtain potential candidates through a combination of advertisements and searching CV databases. The Respondents will then directly approach potentially suitable candidates who may be interested in the role provided they are a clear match for the job advertised. Potential candidates are

asked to send in their CV to determine whether they are suitable for the Client in question and the role advertised.

24. The Respondents would typically reject 90% of Applications received. If the Respondents were satisfied a candidate is potentially suitable for the role from their CV they would then arrange a time to have a verbal conversation with the candidate to discuss the role, skills, experience and salary expectations. Only then, if they are suitable, are they then put forward for an interview with the Respondent's Clients.
25. It is clear that the Claimant has been making extensive efforts to obtain employment since around 2019. The Claimant's preferred method of applying for a job is online via what is known as a 'Once Click Application' process. The Claimant mainly used to make his job Applications, the 'CV Library'. The 'One Click Application' process means that the Claimant could submit his prepared CV and apply for jobs very quickly by just making one click. The Claimant has applied for many jobs using this particular method. The Claimant has estimated that on average he is making as many as 2,000 job Applications per year. It is clear that the Claimant spends very little time checking if he was in fact suitable for the large number of jobs he applied for. Indeed, it is further clear the Claimant was very unselective in the way he applied for jobs. The result is that the Claimant ends up applying for a job which was not realistic in terms of expectation of obtaining them. As is obvious from the number of Applications that the Claimant was making, the Claimant did not make any effort to tailor his Application for each individual role that he was applying for. The Claimant indicated that this was a blanket method of applying for a large number of jobs and suggested even somebody who does not have Dyspraxia might also have difficulty tailoring each individual Application in view of the large volume of Applications made.
26. The Claimant has over a period of a number of years amended, updated and fine tuned his CV. As previously mentioned, the Claimant finds it difficult to express himself clearly in writing but he has a significant amount of support in preparing his various CVs, possibly as many as eight over the year and it is clear from the Claimant's own evidence he has had support from organisations and a professional CV writer in updating, amending and fine tuning his CV.
27. The result was that the CV which the Claimant uses for his 'One Click Applications' was a very professional looking document. It is well structured and clearly set out, containing no errors or at least no obvious errors. It sets out the Claimant's key experience and in particular his key roles going back a very long time, back to when the Claimant was a teenager. The Claimant's key work experience and qualification achievements were set out in a readable, accessible and professional manner.
28. In short, the Claimant's CV was well written and professionally presented. Any reader of it can clearly understand the Claimant's key experiences

and qualifications. The information is accurately and effectively well written and presented. In the view of the Tribunal there is nothing in the writing or presentation of the document that could be held against the Claimant.

29. The CV that the Claimant submitted to the Respondents in respect of the job Application was generic, albeit it was comprehensive. What is clear is the Claimant is capable of amending and updating his CV and the fact that over the years it has been fine tuned many times.
30. In the Claimant's CV the Claimant explains his diagnosis of Dyspraxia and he makes a reasonable adjustment request. Particularly that he should be able to complete an oral Application to talk about his relevant experience. The Claimant also requested essential criteria for the role to be emailed to him so that he could prepare for any oral Application. The Claimant in effect wanted to be judged by what he said and not by what was written in his CV.
31. The information provided by the Claimant in his CV about his disability emphasises his disability causes significant impairment in terms of written communication and his ability to complete Application Forms with structured answers.
32. Given the Claimant's generic scatter gun approach to making Applications, it could be said the Respondent operating in an ultra-high technology sector, with the Respondent staff experienced at various levels in that sector and all having been educated to Degree level, could see from the Claimant's Application that he was fundamentally mismatching himself against the requirements for the job actually advertised. In other words his experience and qualifications came nowhere near the job advertised.
33. In particular, one such job advert made it clear a requirement was for a Medical Degree and medical background and experience in that field, which the Claimant plainly did not have, which the Claimant nevertheless applied for. This appears to have been a pattern following the Claimant's various Applications for job roles with the Respondents being fundamentally mismatched to the job requirements and experience.
34. Therefore, oral Applications would simply make no difference. The process following an Application being normally an automatic reply acknowledging the Application and then if the matter was not to be taken any further, an email rejection in standard form which subsequently was adapted to invite the Claimant to discuss the matter following rejection.
35. The Tribunal noted that during the course of this Hearing, the Claimant did spend some considerable time cross examining the Respondents Witness Mr Cockle, attempting to show that contrary to his view that the Claimant might have been suitable for vacancies they were recruiting for. The Claimant describing in cross examination to Mr Cockle his scientific knowledge and expertise which he believed showed the Respondents

were wrong in rejecting him. Equally, Mr Cockle was able to show and explain why that experience did not match the jobs on offer and that much of the Claimant's experience in the fast moving technology, scientific world was now outdated.

36. What the Claimant did not do, was to show there was any relevant information about his background or experience which could have been given in an oral Application that was not contained in his various CVs. To repeat, his CV was very comprehensive and contains the Claimant's experience, qualifications and background. Therefore the Tribunal are satisfied the Claimant lacked the relevant experience and sometimes basic qualifications for the roles that the Respondents were recruiting for.
37. The Claimant was, on numerous occasions following rejection for a post, clearly offered the opportunity to discuss the matter with Mr Cockle by way of feedback. The Tribunal repeat, it was offered on a number of occasions, albeit after the Claimant had been rejected for a position in an email / emails which the Tribunal have seen. The Claimant chose not to engage with the Respondent asserting that as he had already been rejected for the role there was no point in contacting the Respondents.
38. The Respondents would also say that the job advert would explain the requirements for the job and essential experience required. The Claimant asserts this was not clear in the job adverts. What the Tribunal have seen of the adverts in the Bundle was that there is a breakdown between the requirements being essential and desirable and others state requirements of which it seems clear what background, experience or qualification is required for that particular job. The Claimant's CV would have been seen by the Respondent and they would clearly be able to determine that the Claimant was fundamentally mismatched for the job.
39. The Claimant is clearly an articulate and intelligent man. He should be able to match his abilities, background and experience with what clearly the Respondents are recruiting for in this highly technical and specific area in which the Respondents operate.

## **Conclusions**

40. The first PCP is that the Respondents required a written Application in response to an advertisement without providing to an applicant a written breakdown identifying the essential criteria for the role.
41. The Tribunal were not satisfied such a PCP existed as the job adverts in this highly technical and specific area do set out in the adverts a breakdown of essential requirements and some desirable requirements, to enable any applicant whether disabled or not, to understand what is required and whether they are a potential match for the position by reference to their own experience, qualifications and background. Therefore the Claimant was not put at any substantial disadvantage requiring the Respondents to make such a reasonable adjustment.



42. The second PCP was not offering the Claimant an oral initial discussion to discuss the essential criteria and whether the applicant met them. The Tribunal find the Respondents did have such a PCP.
43. The Respondents generally sifted Applications by reference to the written CV and made their decision based on the detailed CVs submitted by the Claimant and other applicants and there clear and specific knowledge of the job.
44. We then have to consider whether that PCP put the Claimant at a substantial disadvantage compared to somebody without the Claimant's disability. The disadvantage the Claimant asserts is he could not express himself effectively in writing and / or could not adapt his CV to reflect the specific needs for the post. The Claimant's case fails here because the Claimant was not put at a substantial disadvantage as there was nothing in the Application process used by the Respondent which would have put the Claimant at a substantial disadvantage compared to someone without his disability.
45. Although the Tribunal accepts the Claimant had a general difficulty expressing himself in writing, there was not a difficulty in the Respondents being able to see from the Claimant's very detailed and professional CV that the Claimant did not match the requirements of the job. Somebody without the Claimant's disability could not have expressed themselves any better than the Claimant had done in his CV. It merely set out expressly the Claimant's background, experience and qualifications and there is no evidence that the Claimant could have said any more in an oral interview that was not said in his professionally written CVs.
46. The reason the Claimant was unsuccessful in his numerous Applications is he was unselective about the jobs to which he was applying, many which were unrealistic, not meeting basic requirements for the jobs or qualifications. The Claimant could have taken more time to be more selective about the jobs he applied for rather than just applying for hundreds of jobs which were simply never related to his skill set and experience whatever the Claimant might believe.
47. We have therefore concluded, the PCP did not put the Claimant at a substantial disadvantage compared to someone without his disability and therefore the duty to make reasonable adjustments did not arise in respect of the Claimant's numerous Applications and therefore the Claimant's claim fails.

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Employment Judge Postle

Date: 20/11/2023

**Case Number:- 3304952/2022.**

Sent to the parties on: 14/12/2023

N Gotecha

For the Tribunal Office.