



EMPLOYMENT TRIBUNALS

Claimant
B Miah

v

Respondent
Concentrix CVG IC Limited

Heard at: Watford by CVP
Before: Employment Judge Anderson

On: 15 December 2023

Appearances

For the claimant: In Person

For the respondent: T Russell (solicitor)

JUDGMENT

1. The respondent did not know and could not reasonably have been expected to know that the claimant had a disability, from the time of his recruitment interview to his dismissal.
2. The claimant did not do any Protected Acts as defined in s27(2) Equality Act 2010.
3. The claimant's claims of direct discrimination, failure to make reasonable adjustments, harassment and victimisation have no reasonable prospects of success and are struck out.
4. The claimant's claim of indirect discrimination continues.

REASONS

Background

1. The claimant commenced employment with the respondent on 28 November 2022 as an Advisor 1 Technical Support. His employment was terminated, with effect from 20 December 2022, during his probation, on grounds of poor performance. In order to successfully complete his probation, he was required to pass two tests with a score of 85% or more in each. He failed on two occasions. He was given a right of appeal against his dismissal which he exercised but the decision to dismiss was upheld.
2. The claimant says that he is disabled by way of anxiety and depression, and a learning impairment. His case is that the respondent should have known this from comments the claimant made at various stages about feeling

stressed and having suffered stress following being assaulted outside a shop.

3. It is the respondent's position that it had no knowledge that the claimant may be disabled during his employment with it and the claimant did no protected acts. EJ Bedeau, on 30 August 2023, listed the case for a half day public hearing to determine whether the respondent had knowledge of disability and whether the claimant did any protected acts.

The Hearing

4. The parties filed a joint bundle of 159 pages. The claimant filed a witness statement as did the respondent's two witnesses, Daniel Ritchie and Alex Goatman. All witnesses attended the hearing and gave evidence. I gave a brief judgment orally during the hearing.

Findings of Fact

5. The claimant completed an Offer Confirmation Form on 10 November 2022. In response to the question:

Reasonable Adjustments

Would you require any reasonable adjustments?

This is to ensure that we provide the right support throughout your Concentrix career, if needed.

The claimant answered 'none'.

6. The claimant completed a BT Screening Form around the same date. In response to the question:

Reasonable Adjustments

Would you require any reasonable adjustments at either interview or in the job role should you be successful??

The claimant answered 'none'.

7. During his online training the claimant left training early one evening. He was contacted by the respondent's Daniel Ritchie on 1 December 2022 to ascertain the reason for his early departure. The claimant says that he told Mr Ritchie during the conversation that his part time job was stressful and the people he worked with were causing him stress and anxiety. Mr Ritchie denies this. I find that the claimant did not make these comments to Mr Ritchie. Mr Ritchie's evidence was credible and I find that it is unlikely that the claimant would have made these comments where it was clear that the respondent was unhappy about the claimant having a second job and having left early for that reason.

8. As part of his training the claimant had to pass two online tests with a pass rate of at least 85%. He took the tests twice and failed them, leading to a probation review on 20 December 2022 at which he was dismissed.

9. During the review meeting, conducted by Shantell Armstrong, the claimant's failure to pass the tests was discussed. The claimant said:

I didn't have a very good night's sleep as well to be honest. I wake up at like 2.33AM

And tiredness has a lot to do with it.

10. The claimant appealed his dismissal and an appeal hearing took place on 19 January 2023 chaired by Alex Goatman. Relevant extracts are:

Claimant: I think it is a learning thing for me, I can get a bit confused with questions.

...

A Goatman: What other external factors do we need to take into consideration?

Claimant: I was planning to leave my other position as it was a part time contract, I was under pressure as they didn't have other stuff to cover so it was a lot of pressure on me. I was unwell in November, I still had body aches and pain the first week of November, I had problems with my car and stressed, when I started training it was alone and I was tired as it was so long. I could have done better on the test I suppose, I don't see why.

A Goatman: Do you have anything else to add

Claimant: No

Note taker: is there any external factors we need to consider

Claimant: no

11. The claimant, on his own admission in oral evidence, did not say to the respondent that he had believed he had been discriminated against or raise discrimination or the Equality Act to the respondent during his recruitment or employment.

Decision and reasons

12. In direct discrimination claims (s13 Equality Act 2010 (EQA)) and claims of harassment (s26 EQA), the claim is that the unfavourable treatment is because of the claimant's protected characteristic. In this case disability. If the respondent had no knowledge that the claimant had a protected characteristic then those claims cannot succeed.
13. In a claim of failure to make reasonable adjustments (s20 EQA) , under Paragraph 20(1) of Schedule 8 to the Equality Act 2010 (EqA) a person is not subject to the duty to make reasonable adjustments if he or she does not know, and could not reasonably be expected to know that a disabled person has a disability.
14. In a claim of victimisation (s27 EQA) a person victimises another if , because that person has done a protected act, they are subjected to a detriment. A protected act would be raising discrimination or doing something in connection with Equality Act 2010.
15. Under Schedule 1, Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 the tribunal has the power to strike out all or part of a claim on the ground that it has no reasonable prospects of success.

16. In *Cox v Adecco Group UK & Ireland and ors 2021 ICR 1307*, EAT the EAT gave guidance on approaching strike out applications which I have kept in mind in reaching my decision below.
17. The claimant has agreed that there was no protected act and therefore the claim of victimisation is struck out. There is no prospect that it could succeed where there has been no protected act.
18. On the matter of knowledge, the claimant admitted in oral evidence that he did not clearly state that he had a disability to the respondent either during the selection process or during his employment. This is also apparent from his witness statement.
19. Knowledge can be constructive, so I also need to consider whether the respondent ought to have had knowledge of the claimant's disability. The claimant was asked on two forms if he needed reasonable adjustments and on both forms he said that he did not. The claimant said at a probation review that he was tired, and at an appeal meeting when asked whether there were any matters he wanted to raise that would be relevant to why he had failed the tests he said he had been physically unwell, had problems with his car and the training was long. Asked, if there were other external factors he said no. The claimant relies on a conversation he said he had at his interview about being stressed after having been attacked outside of a store, and with Daniel Ritchie about being stressed due to car troubles. Mr Ritchie denied that such a conversation took place.
20. It is my decision on the evidence before me today that the respondent did not have either explicit or constructive knowledge of the claimant having a disability or claiming to have a disability. There is no evidence that the claimant has pointed to that could lead me to conclude that he had raised issues or acted in a way which should have led to the respondent taking further steps to ascertain whether he had a disability. The period of employment was brief. The claimant said he did not need adjustments, he said he was stressed but gave reasons for that such as his car being in disrepair and that he had previously been attacked. Stress in itself is not a disability and I do not accept that simply using the word stress meant that the respondent should have made further enquires. Furthermore there is evidence that the respondent does take steps to ascertain whether a new employee requires adjustments, and it is clear that the respondent gave the claimant every opportunity to raise such matters at the appeal hearing.
21. As I have decided, having considered all of the available evidence, that the respondent did not have knowledge of the claimant's claimed disability then the claims of direct discrimination, harassment, and failure to make reasonable adjustments have no prospect of success and are struck out.
22. Mr Russell said that the claim of indirect discrimination (s19 EQA) should also be struck out as knowledge is also relevant to such a claim. He relied on *City of York Council v Mr P J Grosset: UKEAT/0015/16/BA* which is a claim of discrimination arising from disability (s15 EQA). I do not agree. A s15 claim is one in which knowledge is relevant; that is specifically spelled

out at s15 (2). There is nothing in s19 EQA which implies or states that knowledge is relevant. In *Bevan v Bridgend County Borough Council ET Case No.1602784/12*, a claim of discrimination arising from disability failed because of a lack of knowledge, but an indirect discrimination claim on the same facts succeeded.

Employment Judge W Anderson

Date: 18 December 2023.....

Sent to the parties on: 12 January 2024

T Cadman.....
For the Tribunal Office