EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000075/2023

Final Hearing held in Private in Glasgow on 20, 21, 22 and 23 February 2024

Employment Judge M Robison
Tribunal Member P MacColl
Tribunal Member V Alexander

“C”	**Claimant** **In Person**
Brown’s Food Group Limited	**Respondent** **Represented by:** **Mr N MacDougall KC** **Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claims of disability discrimination and victimisation under the Equality Act 2010 are not well-founded and are dismissed.

In relation to these proceedings, and pursuant to rule 50(3)(b) of the Employment Tribunal Rules of Procedure 2013, the identity of the claimant shall not be disclosed to the public in any documents to be entered on the Register or otherwise forming part of the public record, and the claimant shall be known as “C”.

REASONS

1. The claimant lodged a claim in the Employment Tribunal on 24 February 2023 claiming disability discrimination under the provisions of the Equality Act 2010. His claim relates to allegations of discrimination following an interview for the role of despatch administrator with the respondent, for whom he had previously worked.

2. Although the respondent had conceded that the claimant had a disability as defined by section 6 of the Equality Act 2010 in regard to diabetes, following a preliminary hearing which took place on 24 July 2023, Employment Judge Campbell found that the claimant also had a disability by way of anxiety and depression at the material time. Employment Judge Campbell also permitted the claimant to amend his claim by adding additional claims relating to direct discrimination and victimisation.

3. On 17 October 2023, Employment Judge Campbell also issued orders under rule 50 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 that the claimant should be anonymised and that the final hearing should be in private.

4. Notwithstanding, at the final hearing, following discussion, the respondent's HR director, Mr John Boyd, was permitted to remain in the hearing room throughout as a representative of a party to the proceedings.

5. A list of issues which had been agreed by the parties was lodged for the final hearing, and the outstanding issues for determination, being claims of direct discrimination and victimisation, are discussed later in this judgment.

6. The Tribunal was referred during the hearing to a joint file of productions. That included paperwork relating to a subject access request (SAR) which the claimant had requested to be included in the file, but to which the respondent objected on relevancy grounds. We decided that it was appropriate to allow those documents to be referred to during the hearing, under reservation as to their relevance.

7. A further issue considered at the outset was an application by the respondent to hear a recording of the job interview which the claimant had covertly recorded. It transpired that there were three written transcripts of the interview, but that one had been agreed subject to a couple of typing errors. We decided that since that version was agreed it would be referred to and that there would be no need for the Tribunal to hear the recording of the interview.

8. The Tribunal heard evidence from the claimant and for the respondent from Ms G Batt, HR manager; Mr M Grimes, assistant despatch manager backshift;

Mr L Godfrey, managing director; Mr A MacGowan, despatch manager backshift; and Ms C MacCormick, despatch manager.

9. On the morning of the third day of the hearing, the claimant sought to lodge additional documentation. This was refused, on the basis that the issues raised could be addressed in cross examination of remaining witnesses and dealt with in submissions.

10. The Tribunal heard oral submissions on the fourth day and reserved judgment.

Findings in fact

11. On the basis of the evidence heard and the documents referred to, the Tribunal finds the following relevant facts admitted or proved.

12. The respondent operates a meat processing, manufacturing and distribution business from a factory in Kirkconnel. They employ approximately 500 staff there.

13. The claimant commenced employment as a despatch administrator on 18 February 2022. That role involved ensuring that the correct products were loaded onto trucks to fulfill orders to supply several large supermarkets.

14. The claimant's contracted hours were Tuesday to Friday, 12 noon to 8 pm and Saturday 6 am to 2 pm. This was the backshift. He had to travel each day some 30 miles from Dumfries via a windy back road.

15. The claimant's line managers were Mr Matt Grimes, assistant despatch manager backshift and Mr Sandy McGowan, despatch manager backshift.

16. The claimant informed the respondent that he has type 1 diabetes, and arrangements were made for the claimant to store insulin safely at the right temperature.

17. The claimant was open with his managers Mr Grimes and Mr McGowan in discussing aspects of his personal life, including issues arising from his diabetes, mental health issues stemming from the death of his sister in a car crash, and his debts. He also mentioned to them that he had previously pursued a claim in the employment tribunal against a former employer.

18. By e-mail dated 6 September 2022, the claimant advised Ms Kelsie Black, then trainee HR coordinator, that his “mental health issues should now be classed as a disability” and that his mental health was affecting his ability to work every day, but he was able to minimise its impact.

19. Ms Black forwarded that e-mail to Ms Gillian Batt, HR manager, who arranged a welfare meeting which took place on 9 September 2022. The claimant advised Ms Batt that there had been two instances when he could not attend work because of his mental health. He advised that he had tried to take his own life on two separate occasions, when he took an insulin overdose, but the last time was 2015 (although that was incorrect). He mentioned that his sister had died in a car crash some 20 years previously which had triggered mental health issues for him. A review meeting was scheduled for six weeks’ time.

20. That review meeting took place on 25 October 2022 with Ms Batt and Mr McGowan. An abbreviated record was made on the respondent’s HR system which referenced issues raised relating to the claimant’s diabetes but also that he had “No issues at work. Mental health better as got engaged. Tribunal settled at £1,700”.

21. In e-mail exchanges on 28 October 2022, the claimant advised that due to the fact that his car was still in for repair and personal issues, he would not be in that day, but that he intended to be in the next day (which was a Saturday), by bus, train or taxi.

22. Due to a miscommunication, Ms McCormick understood that the claimant would not be able to commence at 6 am that next morning 29 October 2022, because he had to get the train. She was aware that the first train would get into Sanquhar (the nearest station) at 7 am. She had arranged for him to be collected at the station and she had arranged cover for him between 6 am and 9 am.

23. When he arrived at work at 6 am she was confused and bewildered after making those arrangements and questioned him about why he was in after all.

24. At 06.56 that morning the claimant e-mailed Ms Batt to advise that he believed that Ms McCormick was very upset with him, and that this had upset him. He

confirmed that he would finish his Saturday shift although he was “in tears” and “did not feel safe” because of how upset Ms McCormick was with him, although he said that she could not know how complex his mental health issues were.

25. By e-mail dated 4 November 2022, sent at 22.39, the claimant advised Ms McCormick, Mr McGowan and Ms Batt that he was unable to come into work the next day (a Saturday) “due to immediate need for intervention due to my mental health” and that he was “struggling to stop thinking about suicide”. He said that he intended to be in work the following Wednesday.

26. On 9 November 2022 the claimant attended a welfare meeting with Amanda Huston, HR; and on 10 November the claimant e-mailed Ms Huston to advise that he was feeling better but he was worried that he would not get through all the work on his Saturday shift which he found stressful.

27. Around this time, the claimant started to look for a new job.

28. On 22 November 2022 the claimant e-mailed HR to advise that he had just received a text about a hospital appointment which he required to attend that Thursday and that he would need to take Friday off as well to recover. He said that he would need to take annual leave (because he could not afford to take unpaid leave), and that he had put in a request to Mr McGowan.

29. On 23 November 2022, Mr McGowan emailed Ms Huston and Ms Batt, copying in Ms Black, to make them aware that the claimant had been told that because he did not provide evidence of his hospital appointment his request for holidays had been declined due to short staffing and too short notice. He was told that he could take these days as authorised absences without pay but if he produced the letter from the NHS, he would be granted holidays retroactively and then paid for those two days.

30. In or around week beginning 24 November 2024, a member of staff engaged in the logistics division forwarded e-mails, headed “done some digging”, enclosing a link to a previous employment tribunal decision relating to a claim pursued by the claimant, and a copy of a newspaper article when the claimant had been interviewed in regard to suicide prevention.

31. On 24 November 2022, Mr McGowan sent an email to Ms MacCormick, Ms Huston and Ms Batt asking for a further welfare meeting to be set up with the claimant "as soon as he was back at work because this will be another Saturday that he is going to be missing".

5 32. The claimant then decided to take up new employment, having been offered two jobs. The claimant's last shift was on 22 November 2022.

33. On 25 November 2022, the claimant sent the following e-mail to members of staff including Mr Grimes and Ms Black to state, "Unfortunately Wednesday was my last day working for Browns. I start my new role…next week. I have 10 enjoyed my time with Browns and the people I have worked with since February. I wish you all the best in the future".

34. The claimant did not send a letter or email of resignation to HR. However, Ms Black forwarded the claimant's e-mail to Ms Batt, who wrote to the claimant by letter dated 28 November 2022 as follows:

15 "With reference to your email to Kelsie I am writing to confirm you have taken the decision to terminate your employment with immediate effect. I am disappointed that you have felt unable to work your notice period. As you have not returned your tensor card and fleece £25.00 will be deducted from your final wage. All final monies will be paid into your account on Friday 2 December 20 2022 and your P45 forwarded to you. Please note that on leaving the company you have accrued 18 days however have taken 25 days. Please make arrangements to repay the 7 days exceeded entitlement. May I take this opportunity of thanking you for all you have contributed towards the success of Brown Brothers during your employment".

25 35. On 1 December 2022 the claimant sent an email to Ms Black headed "FAO Gillian Batt" stating his reasons for leaving, explaining that following the e-mail he had sent five weeks previously, regarding Ms McCormick being upset with him, he had no response although he expected one, given he had been open about his mental health issues. He said that had he received a response at the 30 time he would not have felt he had to apply for other positions. He concluded,

"I am not upset with anyone at Browns and I wanted to stay there but I couldn't put myself in that position again".

36. On 13 December 2022, the respondent advertised for two despatch administrators, one backshift (which did not include Saturdays) and one day shift, to replace the claimant and another colleague who had left shortly after him.

37. On 13 December 2022, the claimant emailed Ms Batt and Ms Black apologising because he felt he had no other option but to leave due to mental health issues. Although he had started a new job three weeks prior it was not working out and he asked if his position was still available.

38. On 14 December 2022, Ms Batt forwarded this e-mail to Mr Grimes with the one word question, "Thoughts". Mr Grimes replied that day by e-mail, copying in Ms MacCormick, stating "we could get him in for a chat".

39. Ms MacCormick replied by e-mail that day stating, "He has said he left due to mental health issues. Where will we be when he starts taking time off due to the pressure of the despatch office work. But it is not my shift he will be working in so I would say that it is up to Matt [Grimes]".

40. By e-mail dated 15 December 2022 Ms Black invited the claimant to attend an "interview/chat" with Mr Grimes, Mr McGowan and a representative from HR.

41. On 9 January 2023, the claimant attended an interview for the post of despatch administrator. He made a recording of the interview although he did not advise the interviewers.

42. At the outset of the interview, Ms Batt stated that it was intended that they would go through standard questions for the role and then have a general chat about "the issues when you were here".

43. Mr McGowan asked the claimant why he had reapplied for the despatch administrator role, to which the claimant replied that he had made a mistake and he had problems in the last months with his mental health which "got in the way".

44. After the standard questions had been asked, Ms Batt stated that Mr Grimes and Mr McGowan had "some other questions for you just with you being a previous employee of the business". Then Mr McGowan said that the claimant had mentioned mental health and Mr Grimes asked "what was the things that were playing on that, obviously you said money was one of them and the travelling and all that". The claimant replied saying that he had been honest about his mental health and that it went back to the death of his sister.

45. Mr Grimes replied saying that he was not asking about that, but rather about what was triggering his mental health concerns at work. The claimant replied that it was the travel, which Mr McGowan said was not going to change since he still lived in Dumfries. He queried whether there was any guarantee that was not going to happen again.

46. Ms Batt asked him about relations with Ms McCormick and suggested that he would need to work with her and that she was not going to change. The claimant said that he did not have a problem with Ms McCormick.

47. The claimant said that he knew he still had mental health issues and that should not be a barrier to working somewhere, to which Mr Grimes replied "No, no. We're not saying that".

48. Ms Batt went on to ask the claimant's views about working on the factory floor if he were unsuccessful. The claimant said he could work anywhere in the factory and that it did not have to be as despatch administrator. He made it clear that he could not work in the departments where meat was cut, but he said he could "work the line". Mr Grimes and Ms Batt confirmed that the alternative role would be in despatch.

49. Mr Grimes subsequently raised an incident when he had been concerned about the claimant taking an overdose of insulin and had sat and helped him with his work for a couple of hours to monitor him. He said that they would need to put things in place to try and help him if they took him back on.

50. Following that interview, Mr Grimes confirmed to Ms Batt and Mr McGowan that he was happy for the claimant to return to work for the respondent in despatch administration, or in any other role. He was satisfied that the

concerns he had, relating to travel, debts and working Saturdays, had been appropriately addressed.

51. Ms Batt, Mr McGowan and Ms McCormick interviewed three other candidates for the despatch administrator role. There were two preferred candidates, one of whom had worked for the respondent for a number of years and had been assisting in the despatch administrator role and another who had run her own business. The claimant was their third choice. He was accordingly unsuccessful in his application for the despatch administrator role. He was however to be offered a role as food operative in despatch, where there were also vacancies.

52. By e-mail dated 19 January 2023, Ms Black contacted the claimant stating as follows "I tried to call you and have left a voicemail. To give you an update following your recent interview, unfortunately you have not been successful for the despatch administrator positions. However they would like to offer you a backshift food operative position instead".

53. The claimant e-mailed back with a one word reply "no". He followed that up with an e-mail around 20 minutes later, which Ms Black forwarded to Ms Batt and Ms Huston. In that email he advised that three weeks before he left he had tried to take his own life with an overdose of insulin, but made sure he was in on the Saturday because of difficulty with cover. Doing this put him in harms way, and he believed that Ms McCormick "did everything she could to push me over the edge". He said that he had made it clear he did not feel safe, but heard nothing further from Ms McCormick or HR. He said he reapplied to work there because he had no choice but believed that he was "very much not welcome in area of the factory that the bullying took place. If you believe that I would be achieving potential in role offered then I have to accept that I am an absolute gimp and being punished…".

54. The claimant commenced new employment on 11 April 2023. After seven days his employment was terminated.

Deliberations and decision

55. The final list of issues for determination by this Tribunal had been agreed between the parties, and the outstanding issues for determination related to claims for direct discrimination and victimisation only. The list of issues set out the specific alleged acts and omissions said to constitute direct discrimination and victimisation.

Direct discrimination

56. The claimant claims direct discrimination in breach of s.13 of the Equality Act 2010 (EqA). Section 13 states that an employer must not discriminate against an employee by treating them less favourably than others in the same or similar circumstances because of a protected characteristic.

57. Thus, in order to establish direct discrimination, the Tribunal must find less favourable treatment by reference to an appropriate comparator in the same or similar circumstances, and that any less favourable treatment is because of the protected characteristic. There must be a causative link between the protected characteristic and any less favourable treatment. While this is a two stage test, it is often appropriate to focus on the reason why the employer acted as they did.

58. Mr MacDougall stressed in submissions that the test is an objective one, and submitted that the fact that the claimant believes that he had been less favourably treated does not of itself establish less favourable treatment.

Comments in e-mails

59. The claimant argued that he had been less favourably treated on 14 December 2022 by one or more of the respondent's employees providing access to and/or commenting on the claimant's employment tribunal claim against a previous employer with a view to negatively influencing the decision taken about whether to offer the claimant a role as a despatch administrator.

60. This related to e-mails which came to the attention of the respondent through a SAR. These were emails in which a member of staff in a different department had shared with some colleagues a link to the decision of a previous

employment tribunal pursued by the claimant and a press article in which the claimant had spoken about his mental health.

61. We have found as a matter of fact that the claimant had spoken openly about previous employment tribunal claims he had pursued. Mr Grimes, Mr McGowan and Ms McCormick all said in evidence that the claimant had mentioned such claims within two or three months of commencing employment. We noted too that the claimant mentioned that he had settled a tribunal claim at the follow up welfare meeting in October 2022, which related to an improvement in his mental health because he had used the settlement to pay off his debts.

62. Further, we noted in evidence that Ms McCormick was not aware of the e-mail exchanges between colleagues who were employed in a different section of the business from the claimant, and indeed she considered them to be inappropriate, as did Mr McGowan. Further, we have found that the claimant had discussed his mental health concerns with Mr Grimes and Mr McGowan.

63. Given that background, we find that the claimant was not less favourably treated by reference to these emails. We accept that these could not be said to have negatively influenced the respondent. That was not least because he was in fact offered a job albeit not as a despatch administrator, but also because all of the decision makers were aware that the claimant had previously pursued claims in the employment tribunal, and his managers were aware of his mental health concerns, and that had not influenced how he was treated prior to the interview.

64. The claimant also argued that he had been less favourably treated on 14 December 2022, because Ms MacCormick had responded to the claimant's application for his old role with the following comment: "he has said he left due to mental health issues. Where will we be when he starts taking time off to the pressure of the despatch office work. But it is not my shift and we will be working in for I would say it is up to Matt".

65. Ms McCormick's evidence was that she only became aware of the claimant's mental health issues when she was sent the e-mail on 4 November 2022. Ms

McCormick then subsequently became aware that the claimant had advised that his reasons for leaving were due to his mental health issues when she was copied into e-mails he sent on 13 December 2022.

66. We agreed with Mr McDougall that, viewed objectively, Ms McCormick had a legitimate concern that returning to the same position in the same conditions may well result in the claimant finding himself with similar issues. In any event it was a comment made not to the claimant but to colleagues. We concluded that this was Ms McCormick's opinion and to that extent could not per se amount to less favourable treatment. In any event, we agreed it had not been established as a causal factor in his treatment at the interview because we know that the claimant was offered employment and her concerns would apply equally to the role of food operative.

Comments at interview

67. The claimant also argued that the respondent had treated him less favourably by making certain comments during the interview on 9 January 2023. The Tribunal had the benefit of an agreed transcript of that interview based on the claimant's covert recording.

68. Again, it is appropriate to consider whether the comments were capable of being categorised as "less favourable treatment", given that it would be usual to focus on whether these comments or observations influenced and ultimately caused the outcome in regard to the offer of employment.

69. The claimant had insisted throughout evidence that it was a breach of the Equality Act to ask questions about mental health. Mr MacDougall said that having researched the matter he could not find any authority to support that proposition. The claimant appeared to concede that in submissions, having also researched the point, to the extent at least that he accepted questions could be asked to establish a need for reasonable adjustments, but not if it affects the fairness of the interview.

70. We were of the view that it could not be said that to raise the matter of mental health or indeed to ask questions about mental health would be classified per se as a breach of the Equality Act. There are parallels with interviews where

women are asked about their childcare arrangements. So long as the information given is not used to discriminate against a candidate, then questions such as these, which might relate directly or indirectly to protected characteristics, are not prohibited.

71. Given the claimant said that he left the respondent's employment because of his mental health, we were of the view that it was entirely legitimate in any event for the respondent to ask questions, which might indirectly or even directly relate to his mental health.

72. We agreed with the claimant that any answers to such questions should not affect the fairness of the interview. He submitted that the decision not to give him the job was influenced by what was said at interview, which he argued was discriminatory in itself. We accordingly considered the significance of the comments identified in the list of issues which the claimant asserted related to his mental health and amounted to less favourable treatment.

73. The claimant relied on the following comments during the interview to support his arguments:

- "obviously you mentioned your mental health and that. So that's what you were saying when you left…what was the things that were playing on that, obviously you said money was one of them and the travelling and all that" (Matt Grimes)
- "How was the work affecting that?" (Matt Grimes)
- "I'm not asking about that…I'm asking about what you are saying is triggering it in here, what was putting you on the back foot?" (Matt Grimes)
- "You said yourself you were alright for the first few months and then it just started to get worse as you were travelling down the road. Is there any guarantee that it won't happen again" (Sandy MacGowan)
- "Because what our concern is…to be upfront and honest with you, the issues that you had prior to going off with the likes of Christine can be….it's going to happen again. So folks personalities aren't going to change so that's people that you would potentially have… you know, there will be things like that so…that's my only concern because you know the way you left was not ideal because…. (Gillian Batt)

- “Leopards don’t change their spots. People are who they are and they get stressed” (Gillian Batt)
- “I just think that all the issues are still here, every issue. I think a lot of the time things were said and they weren’t said in a bad way…but for some reason you have taken them from a different perception” (Matt Grimes)
- “It’s not going to change, it’s still 30 miles” (Sandy McGowan)
- “No, no. We’re not saying it’s that” (Sandy MacGowan and Matt Grimes)
- “We need to put things in here in place to try and help you if we take you back on” (Matt Grimes).

74. We came to the view that, seen in their proper context, these comments cannot be classified as less favourable treatment or even as leading to an outcome that amounted to less favourable treatment, for the following reasons.

75. Although the claimant sought to suggest that Ms Batt intended that mental health issues would be brought up in her opening comments, we did not accept that her reference to “issues when you were here” had anything to do with his mental health, but rather related to other issues which the respondent was aware of regarding the claimant’s concerns about working for them.

76. A number of these comments do pick up on the claimant’s references to his mental health, but the matter was first raised by the claimant in an exchange with Mr McGowan when he was asked why he re-applied for his position. Significantly, Mr McGowan did not ask why the claimant left, but rather he asked why the claimant had reapplied. This was ostensibly not even an indirect question about mental health.

77. The claimant understood or chose to understand one question in particular to be about his mental health but we noted Mr Grimes clear response that he was not asking about his mental health history but rather about the triggers at work.

78. Mr Grimes was quite clear in his evidence, which we had no hesitation in accepting, that going into the interview he wanted to satisfy himself about three things in particular. The first was related to the travelling, which the claimant had expressed concern about, given that the claimant would still have to travel 60 miles each day. This was a concern for Mr McGowan too. However, Mr

Grimes was aware that the roadworks which had impeded the journey had now finished. There was also a concern about the claimant working Saturdays, but the contract for the new role of despatch administrator no longer included Saturday working. The other concern related to the claimant's debt but he had become aware that he had taken steps to consolidate his debt to make it easier to repay. Mr Grimes said that he was satisfied in relation to these issues, and therefore happy for the claimant to be offered either the despatch administrator role or another role.

79. There was also the concerns that the respondent had relating to the claimant's relationship with Ms McCormick whom he would require to work given that her hours overlapped with the backshift. Mr Grimes and Mr MacGowan were aware of these issues. They stressed that he would require to work with Ms McCormick and Ms Batt sought to emphasise that people are not going to change, which was obviously a reference to Ms McCormick, not the claimant.

80. The claimant had subsequently accused Ms McCormick of bullying in regard to the incident in October 2022, although that term was not used at the time and no grievance was lodged. Mr MacDougall submitted that although the claimant asserted after the fact that Ms McCormick was a bully, her evidence about the incident was unchallenged, and this was a significant omission. Further, the claimant denied in the interview that he had any issues with Ms McCormick and indeed spoke very positively about her.

81. Mr MacDougall submitted that "Matt Grimes hit the nail on the head" when he suggested that claimant had a tendency to take things the wrong way. That he said has been demonstrated in these proceedings where the claimant has sought to present as less favourable treatment comments which viewed objectively were actually attempts to help and support him.

82. We agreed with this observation. We noted that the claimant was liable to anticipate the worst and to read into and misinterpret events and comments in a negative way. One example of that which became clear is that the claimant had wrongly understood that he had been dismissed following his resignation, when the letter refers to the claimant himself terminating his employment with immediate effect.

83. We agreed with Mr McDougall that the comments in the interview can all be viewed as reasonable expressions of concern. We agreed that objectively speaking they should be understood as efforts by the respondent to help the claimant to find ways to overcome previous difficulties so that he could return to work for them and that the respondent could be satisfied that these same issues would not have a similar outcome.

84. There was no evidence that he had been badly treated while employed, and indeed we found the opposite to be the case. We acknowledged the candid evidence of Mr Grimes and Mr McGowan which showed just how supportive they had been to the claimant. Indeed, it would be surprising if the claimant asked for his job back if he had been badly treated.

85. We considered that it was significant that while the claimant was recording the interview, the interviewers were not aware of that. Our conclusions were fortified by the example of Mr Grimes' response to the claimant's statement, "I know I've still got mental health issues and that should not be a barrier to working somewhere", namely "no, no. We're not saying it's that". This was a clear statement that mental health was not a barrier to working for the respondent. Given that, we accepted that the comment about "putting things in place" was related to reasonable adjustments which could be put in place on his return.

86. We therefore conclude that neither the e-mails which circulated nor the comments made by Ms McCormick nor the comments made in the interview could be said to amount to less favourable treatment per se.

Failure to secure role of despatch administrator

87. However, the nub of this case is the claimant's argument that he was less favourably treated by being advised on 19 January 2023 of the respondent's decision not to offer him one of two despatch administrator roles.

88. While the claimant's fundamental complaint is about "not being successful" at interview, Mr MacDougall emphasised that the issue in this case is not about the claimant not getting employment, rather the issue is about him not getting the employment he wanted; the claimant has to establish that he was not

offered that particular role because of his mental health, because he was in fact offered another role.

89. An issue which arose during the course of the hearing was that the claimant had misunderstood the alternative role that he was being offered. This would seem to be yet another example of the claimant misinterpreting circumstances in a negative way. He claimed that there was no such job available, and seemed to suggest that the offer was a way of countering any claim of discrimination.

90. During the course of the interview, the claimant was asked if he was interested in a job “on the line”. He appeared to understand that might be in food production and he made it clear in the interview that he could not work in a department where he was required to cut meat.

91. It is perhaps unfortunate that Ms Black used the terminology she did in the offer. However we were completely satisfied having heard evidence from several of the respondent’s witnesses on the point, including Mr Godfrey, that those working in despatch “on the production line” dealing with wrapped food products, labelling and boxing and palleting were also called “food operatives”. Further the claimant in response to the alternative food operative role offer issued a flat “no” and made no effort to seek clarification or even confirmation of what the role entailed. This was despite the fact that those attending the interview could not have been clearer that any alternative role offered would be in despatch.

92. Further and in any event, we accepted the evidence of Mr McGowan and Ms McCormick regarding their reasons for not offering the claimant one of the roles as entirely credible and reliable. We heard credible evidence from Mr McGowan that their preferred first candidates were different, but that they both agreed on the two who should be offered the role. We accepted that they were better candidates, and the clear reasoning advanced. Both said unhesitatingly in evidence that the claimant was third out of the four interviewed.

93. Further and in any event, for reasons which became clear to us during the course of evidence, and which we accepted as credible, Ms McCormick was

not on the interview panel for the claimant's interview. While at first blush this may appear anomalous, we heard evidence that it had been decided that Mr Grimes as the claimant's immediate line manager on backshift should be on the interview panel for the claimant's interview to question the claimant about why he wanted to return, given his previous concerns. Mr Grimes was satisfied with the answers and confirmed that he would be happy for the claimant to be engaged either on the despatch administrator role or any other role he might be offered.

94. We heard candid evidence from Mr Grimes about his own personal circumstances and about his efforts to help the claimant while he was employed, and his genuine concerns for his wellbeing. The claimant had described him and Mr McGowan as "friends" with whom he enjoyed a good relationship. Mr Grimes said he genuinely liked the claimant and would have him back "in a heartbeat". Given that, we accepted Mr McDougall's submission that he was the clear and obvious candidate to ensure a fair interview. Given the claimant's issues with Ms McCormick and her e-mail expressing concerns he might have suggested that he was less likely to get a fair interview had she been on the panel.

95. We found no evidence to support the claimant's argument that he was not offered the despatch administrator role because of his mental health. He was offered the role of food operative in despatch notwithstanding what the respondent knew about his mental health. The particular difficulty for the claimant is that his mental health issues would have affected both roles equally. We were of the view that there were no factors relating to the claimant's mental health which might pertain to one role and not the other.

The reference issue

96. The claimant also argued that he was less favourably treated by the respondent on or around 18 or 19 April 2022 when his new employer asked for a reference from the respondent which led to the claimant's new employment being terminated.

97. The evidence which we heard from the claimant to support his belief was that he had overheard the director at his new employment receive a call from Mr Lee Godfrey, managing director of the respondent, but he stated he could not take the call (because he was standing beside the claimant). In so far as the claimant may have believed this, we consider that this may have been yet another example of the claimant reading into events a relevance to him which has no substance, and misinterpreting situations negatively.

98. We heard evidence from Mr Godfrey that no such call had taken place, and that he did not know the claimant's new employer. Indeed, Mr Godfrey said that he did not know the claimant, and that is a credible position given the claimant was one of around 500 staff and had only worked for the respondent for a short time. We consider if the director at the claimant's new employer had contacted him, then he would not have been able to give a verbal reference, and would have referred him to HR which we heard was the correct procedure.

Knowledge of disability

99. Regarding the general questions posed at section 2.2 to 2.4 of the list of issues, these related to knowledge and establishing less favourable treatment by reference to a comparator.

100. The respondent argued that they did not know or could not reasonably be expected to know that the claimant was a disabled person. There is no dispute that the respondent knew about the claimant's diabetes and made reasonable adjustments to accommodate that. With regard to the mental health disability of anxiety and depression, he did not have a formal diagnosis, but it was the claimant himself who advised that his mental health issues now "meet the definition of disability".

101. Mr MacDougall argued that was different to the respondent having reasonable knowledge that the claimant was a disabled person as a result of having mental health issues; there was evidence that there were a good number of individuals employed by the respondent who have mental health issues, but they are not necessarily disabled as a result. He submitted that it is a matter of fact and degree, and the question was whether the "line was crossed" such that the

respondent could be said to have known that he was disabled by reason of anxiety and depression.

102. It is not necessary that a respondent is aware that the claimant might fall within the definition of a disabled person for the purposes of the Equality Act, and no formal diagnosis is necessary. It is not necessary that there should have been any referral to occupational health. The claimant had revealed details about his history including attempts to take his own life in welfare meetings organised by HR, and subsequently in e-mails. He had spoken openly to Mr Grimes and Mr McGowan about his mental health challenges. It is apparent therefore that Ms Batt, Mr Grimes and Mr MacGowan were aware of a history of mental health issues.

103. We take the view that the respondent treated the claimant the way that it did because of an awareness that he may have been disabled by reason of his mental health issues. We consider this in any event to be best practice. This is evidenced by welfare meetings and discussions about reasonable adjustments. While we agreed that this was not a clear cut matter, on balance we have concluded that the respondent knew or ought to have known that the claimant was a disabled person by reason of his mental health.

Comparators

104. To establish less favourable treatment, the claimant sought to rely on a hypothetical comparator, namely an ex-employee who had resigned through illness and had sought re-employment or requested a reference. Mr McDougall argued that a hypothetical comparator would necessarily include a comparator who left the job without serving their notice. He submitted that there was no evidence which would allow the tribunal to infer that such an individual would be hired back in the same role.

105. While we accept that a comparison is required to establish less favourable treatment, assuming it could be said that the claimant was less favourably treated (at least in not being offered the despatch administrator’s job) and accepting that the decision makers knew he was disabled (or ought to have known, the key question is whether there was any causal link between any

less favourable treatment and disability. The question is whether any less favourable treatment was because of disability.

106. We accordingly asked the “reason why” the claimant was treated as he was. We concluded that there was no evidence to support an inference that the reason why he did not get the despatch administrator job was because of his disability. Rather the reason why was because there were better qualified candidates. The reason why we could say it had nothing to do with mental health was because he was offered an alternative job, and any issues arising in relation to mental health would have applied equally to that job.

107. We find therefore that the respondent did not discriminate against the claimant contrary to s.13 in regard to his anxiety and depression (or his diabetes).

Victimisation

108. Section 27 EqA, headed up victimisation, states that “A person (A) victimises another person (B) if A subjects B to a detriment because (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act”. Protected acts include “Bringing proceedings under this Act” and “doing any other thing for the purposes of or in connection with this Act”.

109. On the question of whether the claimant had done a protected act, there was no dispute that the claimant had previously brought proceedings under the EqA against a previous employer. Mr MacDougall accepted that bringing proceedings against other employers who were not the respondent was a protected act, so that element of the test was conceded.

110. The next question is whether the claimant could be said to have suffered a detriment. He relies on the e-mails circulated by members of staff relating to previous claims; and he alleges that his new job was terminated following a reference from the respondent.

111. For the reasons discussed above, the fact of e-mails being circulated would not in and of itself amount to a detriment, unless they were acted upon. Further we have confirmed above that the evidence does not support the conclusion that any reference was given by the respondent.

112. Even if we were to have identified detriment, the key question is whether any detriment was because the claimant had done the protected act, that is, there must be a causal link between any detriment and the claimant having raised proceedings previously under the EqA against another employer.

5 113. We did not accept that the circulation of the e-mails could have negatively influenced the decision-makers. The witnesses were asked if they were motivated by previous claims and given that we have accepted their evidence as credible and we accepted that was not the case. This was not least because they did not apparently know about the e-mails, but they did know 10 about previous employment tribunal claims because the claimant had told them, and this preceded the claimant being offered an interview and being offered employment as a food operative.

114. As discussed above, there is no evidence to support any causal link between the termination of the claimant's new employment and the respondent.

15 115. For these reasons the claimant's claim of victimisation must also fail. This claim must therefore be dismissed.

Consideration of orders under rule 50

116. During oral submissions, parties were invited to make submissions in regard to whether the rule 50 order should be made permanent. It was agreed that 20 parties would reflect on their position and revert with written submissions.

117. In those written submissions, the respondent argued that the rule 50 order issued by Judge Campbell did not order that the final judgment should be anonymised, rather the judgment relating to the preliminary hearing and any other documents relating to the case should afford the claimant anonymity, and 25 that the full hearing should be in private. The respondent therefore argued that the final judgment should be made publicly available in accordance with the principle of open justice. The claimant's evidence was that he had publicly discussed his personal circumstances and previous tribunal claims.

118. The respondent submits that it is neither necessary, nor in the interests of 30 justice, for a further rule 50 order to be granted. The claimant's reasoning that

he may struggle to find alternative employment is insufficient to warrant an order being granted, but in any event there is already a publicly available decision against another employer.

119. Further, they point out that the claimant did not make the application for anonymity, this was done on the initiative of the Employment Judge. They submit that if the claimant's line of reasoning is accepted, this may set a precedent for other claimants to use rule 50 orders as a shield against a negative judgment. The claimant chose to bring a claim in what he knew to be a public forum.

120. The claimant confirmed that he would accept any decision made by the panel. He relied however on his belief that some of the respondent’s staff had used or intended to use the previous judgment to negatively influence possible employment. He believes that any decision will be searched for and used in any employment application processes. He believed that there would not be as much information about his mental health in this judgment as in the one relating to disability status. He concluded, “however I am proud of what I have achieved and how I presented my evidence with no legal training. I therefore have no firm response either way.”

121. Rule 50 permits the Tribunal to make an order with a view to preventing or restricting the public disclosure of any aspect of the proceedings so far as it considers it necessary in the interests of judice or to protect Convention Rights.

122. The EAT in *Ameyaw v Pricewaterhousecoopers Services* UKEAT/0291/19 set down guidance on rule 50 and stated that the starting point required that judgments will be publicly available in fulfilment of Conventions rights to a fair trial under Article 6 and to freedom of expression under Article 10. These however are qualified rights which can be outweighed by other rights, including the right to privacy under Article 8. In this case the hearing was in private, so we accept that the claimant’s right to privacy is engaged.

123. While we accept that the claimant’s concerns about future employment prospects are not sufficient, the claimant may not have appreciated that details about his mental health history would require to be included in this written

judgment. We consider that ultimately the claim turned on these issues and therefore that we had to include some detail in this judgment about the claimant's mental health.

124. Further, we take account of the fact that the claimant has suffered from mental health issues over a good number of years and we consider that it is appropriate for us as a Tribunal to take that into account when deciding whether these matters should be included in a public judgment. We therefore conclude that on balance the claimant's right to privacy outweighs other concerns.

125. However, we came to the view that while there is a public interest in this judgment being published, there is no specific public interest in knowledge about the claimant's mental health history. Accordingly we consider that the claimant's right to privacy will be sufficiently respected by his name not being published and therefore by this judgment being published in an anonymised form.

126. An order under rule 50(3)(b) is therefore granted preventing the disclosure of the identity of the claimant by anonymisation.

M Robison

Employment Judge

15 March 2024

Date

Date sent to parties **22 March 2024**