



EMPLOYMENT TRIBUNALS

Claimant: Miss T Stewart

Respondent: The Chief Constable of South Wales Police

Heard at: Cardiff **On:** 6-8 February 2024
(hearing); 5 March 2024 (in chambers)

Before: Employment Judge C Sharp

Members: Ms Y Neves
Mrs L Bishop

Representation:

Claimant: Mx O Davies (Counsel)

Respondent: Ms A Palmer (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that the Claimant's claims of discrimination arising from disability under s15 Equality Act 2010 are not well-founded and are dismissed.

REASONS

Background

1. Due to the sensitive nature of the work undertaken by those involved in this case, these reasons have been prepared on the basis that only what is necessary for the decision is recorded here. This means at points full job titles and/or job descriptions are not given, and the nature of the work is not fully set out.

2. The Claimant, a member of civilian staff presented a claim to the Tribunal on 1 December 2022 complaining of suffering discrimination arising from disability. The Claimant's disability of rheumatoid arthritis and Raynaud's disease arising from the arthritis has been accepted by the Respondent as existing and causing her to be disabled at the relevant time. The Claimant says that the "*something arising*" from her disability is the reasonable adjustment of working from home.
3. The Claimant says that she suffered three acts of unfavourable treatment connected to her working from home:
 - a. That an email from Mike Parry on 4 July 2022 about an expression of interest process for three analyst roles in the tackling organised exploitation programme ("TOEX") was not sent to her personal email address;
 - b. That the Respondent refused to reopen the recruitment process when the Claimant found out about the roles;
 - c. That she was dissuaded from making further enquiries by Mr Parry's email of 4 August 2022 saying she could not undertake the roles as travel was required.
4. The Respondent says that if the Tribunal finds in the Claimant's favour for the questions set out above, it relied on a justification defence in that it had four legitimate aims for which it says its actions were a proportionate means of achieving:
 - a. To recruit staff/officers who meet the requirements of the role;
 - b. To recruit the best person for the role;
 - c. To fill vacancies as quickly as possible whilst being fair and recruiting the best person for the role;
 - d. To ensure roles are carried out efficiently and effectively, to ensure proper delivery of the Respondent's public duties.

Law

5. At the outset of the hearing, following consideration of preliminary matters by the Tribunal, it was agreed to convert the hearing into a liability only hearing due to lack of time and concerns that certain remedy matters could not be adequately addressed. There was no dispute that the Respondent had knowledge of the Claimant's disability at the relevant time. This meant that the legal issues were relatively limited.
6. The Tribunal bore in mind the key case of Pnaiser v NHS England and others UKEAT/0137/15/LA at paragraph 31. It set out in detail the questions that the Tribunal must answer, such as was there unfavourable treatment, and if so, what was the reason for it? The "*something arising*" does not have to be the only or principal reason why the unfavourable treatment occurred; it just has to

be significant. “*Unfavourable treatment*” is something that an employee might reasonably view as to their disadvantage (see as an example the discussion in the Supreme Court decision in Williams v The Trustees of Swansea University Pension and Assurance Scheme [2018] UKSC 65).

7. When considering justification, the role of the Tribunal is to reach its own judgment, based on a critical evaluation, balancing the discriminatory effect of the act with the organisational needs of the Respondent. The burden of proof is on the Respondent to establish justification (MacCulloch v ICI [2008] ICR 1334). The legitimate aim must be identified by the Tribunal (MacCulloch, approved in Lockwood v Department of Work and Pensions [2014] ICR 1257). The Tribunal should engage in an objective assessment, balancing the needs of the employer, as represented by the legitimate aims pursued, against the discriminatory effect of the unfavourable treatment (Department for Work and Pensions v Boyers EAT 0282/19). The treatment must be an appropriate means of achieving a legitimate aim and reasonably necessary in order to do so (Hardys and Hansons plc v Lax [2005] ICR 1565 at paragraphs 32-33 and Homer v Chief Constable of West Yorkshire [2012] ICR 704 at paragraphs 20-25).
8. Whilst the Tribunal should approach matters objectively, in Birtenshaw v Oldfield [2019] IRLR 946, the EAT reminded tribunals when assessing proportionality they should give a substantial degree of respect to the judgment of the employer as to what is reasonably necessary to achieve the legitimate aim.
9. The Tribunal at the outset pointed that the agreed list of issues said that there was a claim under s39 Equality Act 2010 (“EqA”), which it was puzzled by as this provision was a gateway provision enabling the Claimant to bring a s15 claim; Ms Palmer initially submitted that even if the Claimant was successful in her s15 claim, she had to establish detriment under s39(4)(d). The Tribunal was not persuaded as less favourable treatment in its view addressed the detriment point, and in the alternative noted that the claims were centred on promotion so s39(2)(b) addressed the point. Ms Palmer accepted that her argument was moot. The Tribunal focussed on the provisions of s15 as a result.

The hearing

10. The final hearing took place via hybrid means in Cardiff between 6-8 February 2024; the Claimant attended remotely and the panel, representatives and other witnesses attended in person.
11. The Tribunal was provided with a 425-page bundle, counter-schedule of loss, cast list, chronology and agreed list of issues. References in square brackets are to pages of the hearing bundle.

12. The Tribunal heard oral evidence from the Claimant, Gareth Williams, Mike Parry, Sarah Knowles and Nicholas Wilkie.

Findings of fact

13. Factually, there appears to be very little in dispute between the parties. The Claimant was in a grade 5 role SWP25 and was off work with work related stress from 3 February 2022 (though on 30 March 2022, the reason for her absence appears to have then related to her arthritis). She returned to work on a phased return from 31 July 2022 onwards and returned to full-time hours on 8 September 2022.

14. In the meantime, three fixed-term analyst roles in the Threat of Exploitation team became available; these would have been a promotion for the Claimant as they were graded PO1/2 spinal points SWP33-SWP38. Mike Parry emailed researchers in the Claimant's department about the vacancies on 4 July 2022 about how to express an interest and apply for the roles. The Claimant's work email address was sent the email, but it was not sent to her personal email.

15. Previously, Mr Parry had texted and then sent to the Claimant's personal email at her request the information about a different vacancy on 7 April 2022. He then offered to send future vacancies that might be of interest to the Claimant's personal address while she was off sick. It is agreed that Mr Parry explained that he had not sent his email to the Claimant's personal email address on 4 July 2022 [105] due to an oversight; his evidence was that the autoselect function had suggested the Claimant's work email and he had clicked on it without realising his error. Mx Davies on behalf of the Claimant challenged Mr Parry about this during cross-examination, but Mr Parry's evidence remained consistent that he had made an error, not deliberately excluded the Claimant by using her work email.

16. On 20 July 2022, the appointees to the three analyst roles had been decided by the Respondent. On 28 July 2022, the successful candidates were notified by the Respondent's human resources team, and contracts sent to them. On the same day, one successful candidate accepted and signed their contract, while the other two did so on 1 August 2022.

17. On 2 August 2022, the Claimant emailed Mr Parry and asked for the competition to be reopened to allow her to apply for the roles. Lesley Davies from Human Resources confirmed to Mr Parry that the successful candidates had been appointed and the outcome could not now be changed; Mr Parry passed this information onto the Claimant on 4 August 2022. He invited her to apply for an analyst role in a different team, which the Claimant refused to do on 17 August 2022. The successful candidates started in the three-year fixed-term role on 1 September 2022, and the Claimant later raised two grievances.

18. Having considered the evidence and heard the submissions of the parties, what this case is really about in the view of the Tribunal (given the way that Mx Davies has argued the case on the Claimant's behalf) is whether the Claimant suffered unfavourable treatment because her reasonable adjustments included working from home and this was a significant reason for the treatment.
19. The role that the Claimant complains of not being able to apply after the closing date for is one that the Respondent says required travelling, attendance at an in person training course that could not then be attended remotely, and attendance at face-to-face meetings as it was a new nationally-driven role, and attendance in the office to access certain information. Gareth Williams in his witness statement set out in more detail the travel requirements, but it is not set out here for the reasons given in paragraph 1 above. In any event, the claim before the Tribunal at its core was not about whether the TOEX role could be adapted to meet the Claimant's role; it was about the wider issues about how the Claimant was notified of the opportunity, and the responses she received once the deadline to apply had passed.
20. Taking each claim in turn, dealing first with whether the Respondent treated the Claimant unfavourably by Mr Parry not sending his email of 4 July 2022 to her personal email address and whether a significant reason for it was because she had the reasonable adjustment of working from home, the Tribunal finds that it is correct that Mr Parry only sent the email to the Claimant's work address. Ironically, had the Claimant been working from home, she would have seen it; it was because she was on sick leave that she did not. The Tribunal accepted that this was unfavourable treatment in that the Claimant as a result was unable to apply for the role by the closing date, something that a reasonable employee could consider to their detriment.
21. However, her reasonable adjustment of working from home in the judgment of the Tribunal was not a significant reason why Mr Parry sent the email to the Claimant's work email address. This was an email sent to several people within the relevant workforce of the Respondent, and [112] shows two other people were left off the distribution list in error. The reason that the Claimant's email address issue was not identified before it was too late was because she was on the original list, but with her work email address; the others were more obvious to spot as they were not on the original distribution list at all. Mr Parry's evidence about the autoselect function was plausible.
22. In addition, it was Mr Parry who offered to email the Claimant at her personal address about vacancies [80; 85]; this was not the action of someone trying to avoid telling the Claimant about vacancies. The evidence before the Tribunal showed that Mr Parry was caring in his approach to the Claimant and her difficulties. The Tribunal did not consider that there was any evidence at all to support a finding that Mr Parry was influenced by the Claimant's working from

home arrangement in selecting her work email address. Mr Parry made a mistake. This claim was dismissed.

23. The second claim asserted that the Respondent refused to reopen the closed recruitment process and a significant reason for this was the Claimant's working from home arrangement arising from her disability. From the evidence before the Tribunal, it finds that Human Resources made this decision, and it appears more likely than not that Lesley Davies was the individual responsible (see [130] where another member of the team asks Ms Davies to deal with the Claimant's request). Ms Davies did not give evidence to the Tribunal; her absence was unexplained. Mr Parry in his email did mention that the Claimant worked from home, but Ms Davies' response [130] was clear – the competition had closed, the candidates had been notified and signed their contracts. It was, in short, too late.
24. The Claimant sought to compare this to a wholly different situation where in 2015 she had been verbally offered a job but on the same day it was revoked on discovering that a candidate who should have been interviewed had not been. The Claimant accepted that she had not signed a contract. The Tribunal therefore found the comparison of no assistance; once the contracts had been signed, the Respondent was legally liable to the candidates. This was why Ms Davies refused to re-open the competition. There was no basis on which it could find that the refusal of Ms Davies to reopen the closed recruitment exercise was significantly influenced by the Claimant's working from home arrangements, despite the request made by her to Mr Parry that he explained that in any event, the Claimant would have had issues carrying out the role as a result of her inability to travel. This claim is dismissed.
25. The third claim is that Mr Parry in his email to the Claimant of 4 August 2022 [133] had the effect of dissuading the Claimant from making further enquiries and this was due to her working from home arrangements. The first observation that the Tribunal would make is that the Claimant was plainly not dissuaded; she made two grievances and sued the Respondent in these proceedings.
26. However, the Tribunal was unwilling to take a narrow view of this allegation, even though the Claimant had failed to establish that she was dissuaded from making further enquiries. The Tribunal and the parties agreed that Mr Parry sent the email; the real question was whether it was unfavourable treatment due to the Claimant's working from home arrangements.
27. The email did refer to the Claimant's travel issues in two ways – once after explaining why it was not possible to reopen the TOEX analyst competition, and once in connection with a proposal about an alternative role that the Claimant could apply for:

"I have been advised that in relation to that process, because individuals have been advised they have been successful and HR process are being concluded to that effect we would not be able to open that process back up. As part of those discussions we also looked at the requirements of those posts, which will include attendance at residential training courses in September as well as a need to travel to other locations and these needs would not be possible to accommodate with our current understanding of your needs for reasonable adjustment.

With this being taken into consideration, we do have a separate role as an Analyst within the ROCTA Team that could be opened out to an Expression of Interest so that you would have the opportunity to apply. This team have a much lower requirement for travel and so your currently identified reasonable adjustment needs could be better accommodated. This is an additional post that is funded through to March 2024 and so, like the TOEX post, this would mean having to rescind you current established post as a Researcher if you were successful. I highlight this as, like with the TOEX EOI, I understand it is a significant decision for people to make with the current economic climate and I want to ensure people understand the implication."

28. The Tribunal did not consider it to be a reasonable conclusion that this email was trying to dissuade the Claimant from making further enquiries; in its view, the email was explaining to the Claimant that it was too late to reopen the TOEX roles but Mr Parry was supporting the Claimant's ambitions of promotion by highlighting another promotion opportunity which had a lower travel requirement. It is also relevant that some of the contents of the email were included on the instruction of Ms Davies from Human Resources [130], but Mr Parry's earlier email to Human Resources [128] on 3 August 2022 showed that he was aware of the Claimant's difficulties and was trying to help her progress with her career by finding other opportunities.
29. The Tribunal found that the email of 4 August 2022 from Mr Parry to the Claimant was not intended to, and did not, have the effect of dissuading her from making further enquiries. Further, the Tribunal found that the email was not unfavourable treatment. A reasonable employee would not consider this email to be a detriment; it was a supportive constructive email designed to explain to the Claimant what had happened and to encourage her to explore other options. This claim is not well-founded and is dismissed.

Employment Judge C Sharp
Dated: 5 March 2024

JUDGMENT SENT TO THE PARTIES ON 6 March 2024

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche