



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondent

Mr J Samra

London Borough of Islington

REASONS FOR THE JUDGMENT OF THE EMPLOYMENT TRIBUNAL GIVEN ORALLY ON 17 JULY 2024

Introduction

1 The Claimant, Mr Jugjit Samra, is and was at all relevant times employed by the Respondent as a Community Partnership Officer (Grade PO4). In July 2022, December 2022 and March 2023 he applied for the much higher role of Community Partnerships Locality Lead (Grade PO7). On the first two occasions, he was shortlisted but not ultimately selected. On the third occasion, he was not shortlisted and so did not reach the interview stage.

2 By a claim form presented on 4 August 2023 following Early Conciliation between 4 June and 17 July 2023, the Claimant brought what appeared to be complaints of disability discrimination and victimisation in respect of the three job applications, citing disability in the form of dyslexia as the relevant protected characteristic for the purposes of the former claim.

3 In its response form, the Respondent disputed all claims on their merits and those resting on the first two job applications on the further basis that they had been presented out of time and accordingly fell outside the Tribunal's jurisdiction.

4 The main developments in the course of case management were the following.

- (1) The victimisation claim was withdrawn.
- (2) On 18 December 2023, the Claimant was given permission to amend the claim form to add complaints of failure to make reasonable adjustments and harassment but both were made subject to deposit orders and, since he elected not to pay the deposits, those new claims immediately fell away, being automatically struck out.
- (3) The result was that the Claimant was left with the six complaints of alleged direct disability discrimination identified by Employment Judge Emma Burns at the case management hearing on 6 November 2023 namely:

1. First job application: not being supported;
2. First job application: not being appointed;
3. Second job application: not being supported;
4. Second job application: not being appointed;
5. Third job application: not being supported;
6. Third job application: not being appointed

We will refer to these as Complaints 1, 2 and so on.

- (4) The Respondent admitted that the Claimant was dyslexic, that his condition amounted to a disability and that these facts had been known to it at all material times. But it denied the claims on their merits, contending that its actions had in all respects been free of discrimination. It also maintained its jurisdictional defence in respect of Complaints 1-4.

5 The matter came before us for final hearing on 15 July 2023 with four sitting days allocated. The Claimant represented himself with courtesy and skill, demonstrating an impressive command of the documentary evidence. The Respondent had the advantage of being represented by Mr Christopher Howells, counsel.

6 At the start of the hearing, the Claimant raised a concern about some late disclosure given by the Respondent. Mr Howells expressed regret but pointed out that the documents concerned were very few in number and that they appeared to be material to the dispute. We took the view that it was appropriate to add the new documents to the trial bundle, without prejudice to any issue as to their admissibility or weight. We were mindful that the Claimant would have plenty of time to consider them further while the Tribunal was reading into the case, which occupied the whole of day one. When the hearing began in earnest on day two, it appeared that the Claimant's concerns had been resolved. In any event, the new documents had no bearing whatsoever upon our decision on the claims.

7 Having heard evidence and closing argument over day two and the morning of day three, we gave an oral decision on the afternoon of day three, dismissing all claims.

8 These reasons are given in writing pursuant to a timely written request by the Claimant.

The Statutory Framework

9 Direct discrimination based on specified characteristics, which include disability, is defined by the Equality Act 2010 ('the 2010 Act'), s13 in (so far as material) these terms:

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

By s23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the claimant's case and that of his or her comparator and that (for these purposes) the 'circumstances' include the claimant's and comparator's abilities.

10 In *Nagarajan v London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

If racial grounds ... had a significant influence on the outcome, discrimination is made out.

In line with *Onu v Akwivu* [2014] ICR 571 CA, we proceed on the footing that introduction of the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', etc in the pre-2010 legislation) effected no material change to the law.

11 Discrimination is prohibited in the employment field by s39 which, so far as relevant, states:

- (1) An employer (A) must not discriminate against an employee of A's (B) –**
- (a) in the arrangements A makes for deciding to whom to offer employment;**
- ...**
- (c) by not offering B employment ...**

12 By the 2010 Act, s123(1) it is provided that proceedings may not be brought after the end of the period of three months ending with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable. 'Conduct extending over a period' is to be treated as done at the end of the period (s123(3)(a)). Now, under the Early Conciliation provisions, the limitation period is further extended by the time taken up by the conciliation process. The 'just and equitable' discretion is a power to be used with restraint: its exercise is the exception, not the rule (see *Robertson v Bexley Community Centre* [2003] IRLR 434 CA).

Evidence and Materials

13 We heard oral evidence from the Claimant and, on behalf of the Respondent, Mr Sal Asghar, Assistant Director for Strategy Equality and Communities, and Mr Robert Stonor, Senior Recruitment Lead. All gave evidence by means of written statements.

14 In addition to oral evidence, we read the documents to which we were referred in the two-volume trial bundle.

15 Finally, we had the benefit of the written submissions handed up by Mr Howells.

The Key Facts

First job application

16 In relation to the first job application the only facts in addition to those already noted which it is necessary for us here to record are the following. The allegation of failure to support (Complaint 1) was said to consist of the

Respondent's breach of its own 'Internal First' policy. The Claimant's case was that the policy, which (as its name suggests) requires priority to be given to internal candidates was applicable and was not followed. We find that the Respondent was, as it accepted before us, in error initially in failing to limit the competition to internal candidates. But we also find (as was not disputed) that the error was corrected and applications by external candidates were placed on hold pending consideration of the internal applications. Accordingly, we are satisfied that the initial error caused no disadvantage to the Claimant (or to the other internal candidate). Moreover, even if we had found substance in Complaint 1, it could not have succeeded as an allegation of direct disability discrimination. The policy on which the Claimant relied was designed to protect internal candidates. It had nothing to do with disability. The initial failure to apply the policy, if (contrary to our view) it caused any disadvantage, operated equally to the detriment of the other internal candidate who, as the Claimant agreed, was not disabled. It was (rightly) no part of his case to suggest that the initial error was in any way motivated or influenced by the fact of his disability.

17 As to Complaint 2, the decision of the interviewing panel to offer the vacancy to another candidate rather than to the Claimant was based entirely on the fact that that candidate was scored the highest at interview.

Second job application

18 Complaint 3 was confined to the assertion that the feedback given to the Claimant following the second competition had not been proper or adequate. We find that the Claimant received feedback orally in the first instance and later in writing. We find no legitimate ground of complaint concerning the feedback offered. We find that it was clear and adequate.

19 As to Complaint 4, our findings relating to Complaint 2 are repeated. Quite simply, the Claimant was outscored by the winning candidate and that fact explains why the role was offered to that candidate.

Third job application

20 Here it is convenient to record findings of fact bearing on Complaints 5 and 6 together. The essence of the Claimant's grievance is that he was not shortlisted because of a failure to apply the Respondent's 'Disability Confident' policy. That policy guarantees an interview for any candidate whose application is scored at or above the minimum shortlisting score. Typically, that score is set at 50% but we accept the evidence on behalf of the Respondent that it had a discretion in appropriate cases to set it at a higher percentage. One circumstance in which it may be appropriate to do so is where there is a large field of strong candidates. The third competition attracted such a field. Accordingly, the Respondent adjusted the threshold to 36/60 and later 37/60. This had the twin consequences of reducing the field to 12 and excluding the Claimant. Even at 12, the field was judged too large and the Respondent invited only the top five to interview.

Secondary Findings and Conclusions

First job application - merits

21 Complaint 1 fails. As the parties agree, the Respondent did begin by failing to operate the Internal First policy but the error was corrected and no harm was done. The internal candidates, including the Claimant, were not disadvantaged. That being so, there is no adverse treatment on which to hang a claim.

22 Complaint 2 fails because the Claimant cannot get a claim for unlawful discrimination off the ground. As emerged clearly at the hearing, it was no part of his case to argue that his score at interview was to any extent motivated by discrimination (based on his disability or anything else). And he very fairly accepted that the outcome of the first competition was determined entirely by the scores awarded at interview.

Second job application - merits

23 Complaint 3 rested entirely on the assertion that the feedback given following the second competition had been improper or inadequate. That complaint fails on our primary findings rejecting that assertion. There was no disadvantageous treatment on which to hang a claim. Nor, in any event, is there any evidence on which the Tribunal could conceivably find that any deficiency in the feedback given was related in any way to his disability.

24 Given our primary findings, Complaint 4 necessarily receives, the same result as Complaint 2. The interview scores determined the outcome of the second competition. There is no evidence of any discrimination in the scoring of the interviews and the Claimant in evidence suggested no such discrimination.

Third job application - merits

25 Complaints 5 and 6 also fail. We find that there was no hard and fast rule setting the threshold under the Disability Confident policy at 50% and that, given the size of and quality of the field, the Respondent acted properly and in accordance with the policy in setting the threshold higher. The Claimant's case before us was that that action had the consequence of excluding him from the third competition but it was no part of his case to maintain that it was itself a product of a discriminatory motivation based on his disability.

26 These findings make Complaints 5 and 6 unsustainable but this part of the Claimant's case is logically and legally doomed in any event. Direct discrimination requires a comparison to be drawn between the employer's treatment of the complainant and his/her treatment of a real or hypothetical comparator whose circumstances are the same save for the absence of the relevant protected characteristic (here disability). That comparison is impossible because the Disability Confident policy is, for obvious reasons, a policy which applies only in relation to disabled candidates. The Claimant's logical position has to be that a non-disabled comparator would have had the Disability Confident policy applied in

a manner advantageous to him or her, so as to secure entitlement to an interview. That is self-evidently not the case. The policy would not, and could not, have been applied in the case of a non-disabled candidate.

Overall conclusion on merits

27 For all of these reasons, we are satisfied to a high standard that there is no substance in any of the Claimant's complaints of unlawful discrimination.

First and second job applications - jurisdiction

28 Mr Howells submitted that the claims arising out of the first two job applications were outside the Tribunal's jurisdiction in any event. We agree. They cannot be seen with Complaints 5 and 6 as resting on 'conduct extending over a period' within the meaning of the 2010 Act, s123(3). 'Conduct' in that context self-evidently means conduct which is unlawful under the Act, and we have found no unlawful conduct. Accordingly, Complaints 1-4 are out of time unless the Tribunal exercises its power to substitute a longer limitation period than the 'default' three months (see s123(1)). It would obviously be idle to do so in circumstances where those claims have already been found to be without merit.

Outcome and Postscript

29 For the reasons we have given, the Claimant's claims are dismissed.

30 We would not wish to leave this case without paying tribute to the Claimant and acknowledging that, despite our findings, his claims are entirely sincere. They seem to us to reflect a frustration which he feels in seeking to progress his career. No doubt rightly, he takes an obvious pride in his work. We wish him well.

31 We also observe that the Respondent rightly accepts that there are some lessons to be learned from this dispute. We hope that those lessons will result in concrete action to head off avoidable conflicts in the future.

EMPLOYMENT JUDGE SNELSON

20 September 2024

Reasons entered in the Register and copies sent to the parties on 26 September 2024...

..... for Office of the Tribunals