CASE NUMBER: 1402609/2022

EMPLOYMENT TRIBUNALS

Claimant: Dr Christian Mallon

Respondent: (1) Top Spark Recruitment (Dissolved)

(2) Mr Timothy Wadhams

Heard: by CVP in Birmingham On: 3rd & 4th of December 2024

Before: Employment Judge Codd
Members: Mr K Palmer & Mrs D Rance

Appearances

For the Claimant: Dr Christian Mallon
For the Respondent: Mr Timothy Wadhams

JUDGMENT

1. The claims against the First Respondent are dismissed as the Tribunal has no Jurisdiction to hear them.

2. The claims against the Second Respondent of discrimination arising out of disability and failure to make a reasonable adjustment are totally without merit and are dismissed.

A Codd

Employment Judge Codd

04.12.2024

Sent to the parties on

REASONS

Background

1. The Claimant brings claims for discrimination arising out of disability (S15 Equality Act 2010) and a failure to make reasonable adjustments under (S20 & 201 of the Equality Act 2010).

2. The First Respondent is a recruitment agency (now dissolved). The Second Respondent is the owner and manager of the recruitment agency. The claim is about an application the Claimant made for a position advertised by the First Respondent.

3. The Claimant applied to the First Respondent (by submitting his CV) for a job advert on the 9th of August 2022. He provided his generic CV. The job application was for £35,000 gross annual flexible salary. The employment sector was said to be R & D Tax, which the Claimant had previously worked in (although not for approximately 4 years, prior to the application).

4. The Claimant has identified disabilities and he has highlighted reasonable adjustments that would be required in an application and interview process. Emails were exchanged between the 9th and 12th of August 2022 and two phone calls took place on the 12th of August 2022. As a consequence the Claimant argues that he was discriminated against in breach of the above Equality Act provisions.

5. The Claimant initiated early conciliation on the 12th to the 16th of August 2022 and issued his ET1 claim on the 18th of August 2022.

6. The Respondent was granted a just and equitable extension to respond to the claim after Employment Judge Dawson declined to issue a Rule 21 Judgment. The Respondent subsequently submitted a comprehensive response. The case came before myself (Employment Judge Codd) for case management on the 14th of August 2023 where I set case management directions and a list of issues. There has been no objection to that order. The Respondent was unsuccessful in applying

for a deposit order on the 7th of May 2024 as Employment Judge Steward concluded that the issues needed a full evidential hearing to resolve.

Issues

7. The issues were set out in the case management order dated the 14th of August 2023. We will need to determine these issues. Namely:

8. Discrimination arising from disability (Equality Act 2010 section 15)

8.1 Did the respondent treat the claimant unfavourably by:

8.1.1 Failing to accept or progress the job application submitted on the 9th August 2022.

8.1.2 Sending email and electronic communication between the 9th August 2022 and the 16th of August 2022, which rejected the job application, and the candidacy for other roles.

8.2 Did the following things arise in consequence of the claimant's disability:

8.2.1 Failure to progress the claimant to the interview sift stage, following his application on the 9th August 2022.

8.2.2 Rejecting the job application, and the candidacy for other roles.

8.3 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

8.3.1 To ensure only candidates with relevant experience were put forward for the role at the respondent's client.

8.3.2 To ensure candidates were put forward who upheld the respondent's values of professionalism and integrity.

8.4 The Tribunal will decide in particular:

8.5 was the treatment an appropriate and reasonably necessary way to achieve those aims;

8.6 could something less discriminatory have been done instead;

8.7 how should the needs of the claimant and the respondent be balanced?

8.8 Did the respondent know or could it reasonably have been expected to
8.9 know that the claimant had the disability? From what date?

9. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

9.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

9.2 A “PCP” is a provision, criterion or practice. Did the respondent have the following PCPs:

9.2.1 To judge applicants solely on a CV rather than an alternative applications process – namely an oral application.

9.2.2 Sending a generic request for written information on the 9th of August 2022, which the claimant was unable to comply with.

9.2.3 Failing to send the claimant a list of essential criteria prior to the telephone call on 12 August 2022.

9.3 Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant’s disability, in that he compares himself with a hypothetical comparator of a similar experience, without the claimant’s characteristic of Autism and Dyspraxia and who was able to produce a bespoke written CV for job applications?

9.4 What steps could have been taken to avoid the disadvantage? The claimant suggests:

9.4.1 A written list of the essential criteria to be provided prior to an oral application, being undertaken by the respondent, (based on the essential criteria).

9.4.2 For the Respondent to take notes from an oral application and at this stage to put the claimant forward to interview sift, alongside the respondent’s interview notes.

9.5 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

9.6 Was it reasonable for the respondent to have to take those steps and when?

9.7 Did the respondent fail to take those steps?

10. In respect of remedy it is not necessary to repeat those here as this is a liability only Judgment.

<u>Preliminary matters</u>

11. It is no secret in these proceedings that the Claimant is a serial litigant. He has numerous proceedings ongoing and has had articles written about him in various national publications, which have been brought to our attention. We have not seen those articles and have not considered them. We have reminded the parties that whilst the Claimant's history may be easily searchable, we Judge these proceedings on the basis of the facts before us and take no account of the wider canvas, where it extends beyond the relationship between the Claimant and the Respondents.

12. In January 2024 the First Respondent was dissolved. Therefore there is no remaining legal entity to respond to the claim. We dismiss that application accordingly for lack of Jurisdiction. That is not resisted by any party.

<u>Legal Principles</u>

13. The relevant legal principles are set out in the Equality Act 2010.

14. Disability is defined by S6 of the Equality Act 2010. In this case there is no dispute the Claimant meets the definition. S4 of the Equality Act provides for protection against discrimination for protected characteristics.

15. S39 of the Equality Act applies to discrimination against employees and applicants. In relation to this case there is no dispute that the protections of the Equality Act apply to a prospective job applicant, as was the case for the claimant. It protects against subjecting an applicant to a detriment in the way that access is afforded, to relevant opportunities.

16. S15 deals with discrimination arising from disability. It provides that:

(1)A person (A) discriminates against a disabled person (B) if—

(a)A treats B unfavourably because of something arising in consequence of B's disability, and

(b)A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2)Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

17. S20 of the Equality Act deals with a duty to make reasonable adjustments. The relevant provision to this matter is:

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule ap ply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(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 dis abled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

18. Section 136 of the Equality Act 2010 provides that:

“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”.

19. This provision reverses the burden of proof if there is a prima facie case of direct discrimination. This issue is subject to a factual analysis of the circumstances in the first instance.

20. The standard of proof we have applied to all matters is the balance of probabilities, throughout our findings.

21. We have considered the skeleton argument submitted by the Claimant and have considered all relevant provisions even where it is not expressly referred to.

Evidence

22. We have heard oral evidence from the Claimant and the Respondent. We have heard submissions from both parties. We are satisfied that both parties have had an ample and fair opportunity to present their case.

Findings and Analysis

23. The instigation of the relationship between the parties was an application for an R & D Tax role, being advertised by the First Respondent.

24. It is not disputed that the Claimant has; Dyspraxia ADHD and Autism. We find that the Claimant has these disabilities and they are protected characteristics for the purpose of the Equality Act 2010. It is also not disputed that the Claimant would require reasonable adjustments at some point within the application process to provide what he terms a verbal application, specific to any role. It is a matter of fact as to when, and if, that adjustment would need to be applied.

25. Turning to the events of August 2022. On the 9th August 2022 the Claimant emailed the Respondent to apply for the role advertised. The Claimant submitted his CV to the Respondent. His CV was not specific to any role. It includes a reference to the Claimant's disabilities.

26. On the 9th of August 2022 at 18.50pm the Respondent sent an email to the Claimant with a list of 16 generic questions which is said to be sent to all candidates. We accept that to be the case. That list of questions is basic, generic and uncontroversial. The only question which requires any bespoke input is question 16: A short paragraph as to why this position is good for you? We find that this email's purpose was a fact sheet designed as a basic suitability check. For example checking rights to work, driving licence, availability, salary requirements and recent experience are basic questions which can be responded to in the main by very short answers.

27. In his statement the Respondent noted that having sent this email he then noted the reasonable adjustments in the CV and that the claimant required a phone call.

We find this to be the case. For the avoidance of doubt, we consider the initial request was sent without proper knowledge of the reasonable adjustment.

28. Within his CV the following text appears.

"*By way of reasonable adjustment under the Equalities Act 2010/Autism Act 2009, I request that you share the Essential Criteria for this role by email reply with me so that, if appropriate, I can make a bespoke verbal telephone application that addresses how I meet them. Gentle reminder: companies are under a legal duty to be positive and proactive towards reasonable adjustments requests. Many thanks for considering my request. "*

29. It is central to the Claimant's case that he required a verbal application process. The paragraph in his CV is clear, as was his oral evidence, that a verbal application process is not always necessary. It was contingent on whether the essential criteria was suitable. It is clear that he also sought the essential criteria by email (not verbal) according to his CV. During the course of the proceedings there seems to have been an elevation as to what was required and what constituted a verbal application process and at what point this was necessary. In his oral evidence the claimant acknowledged that; "in 2022 it was not as clear as it is now in his 2024 CV, what an oral application meant". He also conceded that an oral application was only needed about 50 per cent of the time. This is significant in our finding and shows that an oral application was not determinative at this stage, prior to the claimant understanding more about the essential criteria (which he did not have at any point in the process).

30. It is not clear to us if there was any interaction between the parties on the 10th and 11th of August 2022. We find there was little if any communication and no evidence has been presented to us. We have not been shown evidence prior to the 12th of August of a further request for an oral application, and we find that there was no request. In any event it would have been contingent on the job specification and screening by the Respondent.

31. We accept that it was the Respondent who initiated the call to the Claimant having noted the need for a phone call in the CV as set out in the Respondent's statement. This call took place around 13.30 (approximately) on the 12th of August 2022. Both sides agree that it lasted one minute and that the Claimant ended the call by hanging up. Both sides agree that this was a negative or hostile call, but attribute blame to the other.

32. At 13.40 the Claimant sent a text message to the Respondent. Outlining the 15 questions which the Respondent wanted to discuss. The Claimant says that he explained the basis of the Equality Act 2010 in the call and his reasonable adjustment. Neither party was able to recall the contents of the call. We accept this as it was brief and a long time ago. However, we favour the Respondent's evidence and find on balance that it was the Claimant who was hostile regarding the need for an oral application. This is supported by the contemporaneous written material at the time. We accept the Respondents' evidence that normally an initial call would last 20 minutes to scope out the issues and that the Respondent was able and willing to discuss the 15 points in that telephone discussion, if the Claimant had explained a reason why this could not have been emailed. However, the Claimant had terminated the call before the opportunity arose.

33. In relation to 13 of the 15 questions, we have seen no evidence as to why the Claimant could not have emailed a response. Particularly given he has been able to produce complex documents and emails for the Tribunal. The basic level of information required was within the Claimant's knowledge and ability to provide, and he was under no time pressure to do so. He can both type and use software to send emails. The questions are simple and had been simplified further for the Claimant.

34. At 13.46 the Respondent text the Claimant to say he had emailed him and would not be working with him. This referenced an email that was also sent.

35. At 13.51 the Respondent sent the Claimant an email explaining he would not be working with him. It highlights that the claimant was aggressive from the moment they spoke and we find that to be the case. The email is drafted in indelicate terms by the Respondent, but in and of itself its content is not discriminatory.

36. The Claimant responded at 13.56. He states:

"I will not get others involved and let the judge decide here. The law is clear and you have a legal duty to be both positive and proactive towards reasonable adjustments requests. Who is your manager as I wish to lodge a formal complaint. So please copy in your manager. I will phone ACAS today as I cannot help my disability. Screen shots attached of our text messages so get legal advise asap."

37. That email had 8 attachments all related to discrimination and the law. We have not been provided with those attachments by the parties. However, we find that there was a clear intention from the Claimant to initiate complaints and proceedings, without waiting to pursue any alternative complaints procedure. This email occurring some 5 to 10 minutes after the initial issues, demonstrates the pre-prepared nature of an anticipated complaint.

38. At 14.29 The Respondent replies and states:

Christian,

Unfortunately there is no one above me, I own the company. To explain so you are aware before speaking to ACAS: All I have said is that because of your aggrieve telephone conversation with me, I will not put you forward to my client, as if you were aggressive to them as you were with me, it is a bad reflection on me & my company and could affect future business with them. Being aggressive is not part of your disability it's just the way you are/were at the time we spoke, I am not prepared to potentially risk my good relationship with a client I have placed people with before. I couldn't even get a word in edgeways as from the moment you picked up the phone you were explaining the law to me, so didn't even give the chance to talk to you?

I am aware of your disability and took this all into account and would not discriminate against you and I was more than happy to put you forward to the client and this is why I sent you the job spec and 15 easy questions (as I do with all candidates, with all positions I am recruiting for around 40 currently so you can see why I do this, as I receive a lot of CVs every day, I do this to speed up the process for everyone and give every candidate a fair chance) and merely wanted to just have a chat with you to explain the process the client goes through in considering candidates just so you would be fully aware (just like I wanted to tell you how the interview process works and to find out if this would affect you? And also to tell you that the Manager who reviews the CVs is away on holiday until next Wednesday so there might be a slight delay on my feedback for you)

I am sure any court in the country would agree with the above and can't say I have done anything wrong. As a gesture of good will and to keep the peace: If you want to answer the questions on the email I will consider speaking with you again and putting you forward to the client. If you cant use a computer to do this because of your disability then the job would not be right for you anyway as this is a pre-requisite of the role, this is not a discrimination, if you can't use a computer the job can't be done. If you do want to do this then please do and treat me with the same respect as I would treat you in a telephone call.

I hope this clarifies my position.

Tim"

39. At this point we find that the Respondent was attempting to re-set matters and was able and willing to speak to the Claimant again, but it also highlighted clearly the need for IT skills to fulfil the role. The Claimant never engaged with the specifics of this offer in the email.

40. The Claimant responded at 14.32 and stated: "*I asked for an oral application and you refused. The law is with me and I have won this before so explain to the judge."*

41. This was responded to at 14.51 by the Respondent. At 14.52 the Claimant replied with: *"Please save your emails for the Judge. "*

42. At 15.03 the Claimant responded further: *" Acas and court paperwork will go to your home address. Learn about your legal duties to be BOTH positive and proactive towards reasonable adjustsments it's your legal duty. For 12 years you have not been BOTH positive and proactive towards reasonable adjustments and I have spend years and years in r&d tax. Accept what the judge will decide"*

43. At some point on the 12th of August ACAS were notified by the Claimant but the time is not clear. However from page 91 of the bundle it occurred some point prior to 15.43pm.

44. Later that day the Respondent tried to telephone the Claimant again to discuss matters. Neither party can remember the details of the call save to say that it was brief and did not resolve the issues. This took place at 7.18PM. The Claimant then re-forwarded earlier emails to the Respondent.

45. At 19.43 the Respondent then sends a conciliatory email at 19.43 offering to put the CV forward and to have a further conversation. There was no further communication that day.

46. On the 13th of August 2022 at 06.21am the Claimant emailed the Respondent and stated: *"find slides attached and the judge will make a decision here all text messages and emails will be shared stop emailing me as your upsetting me over and over again."*

47. Despite this comment, the Claimant emails the Respondent again at 07.12am sending case law and other documents, and 07.14am stating: "*slides to educate and yes a common problem in my life but it will not be a common problem in my sons life.*"

48. Looking at the material and the chronology, we find that the Claimant was not genuinely interested in the job advertised. It is clear that he was well resourced for complaints and litigation. He refused the reasonable opportunity for the Respondent to speak to him to resolve the application process. The Claimant also did not utilise the opportunity for early conciliation via ACAS which would have offered a further opportunity to discuss and resolve the issues.

49. Looking at the process the issue of an oral application was a premature request as the screening and GDPR client information process was not complete. Only after initial review would an oral application have been relevant as a reasonable adjustment. The Claimant rejected verbal conversations and sabotaged his own opportunities, by twice ending the calls.

50. We find that the motivation for the Claimant was to conduct litigation and that he was not a genuine job seeker. We reject his evidence that he wanted the role. His experience was dated over 4 years ago. All of the factors point to a desire to litigate rather than work with the Respondent and in this regard we find the bringing of proceedings to have been unreasonable an vexatious.

51. We turn to consider our analysis of the facts compared to the list of issues.

Discrimination arising out of disability

52. We do not find there to have been any unfavourable treatment at all. Including any unfavourable treatment related to or arising from disability. We have found that the Claimant is not motivated to progress a genuine application. The Claimant's own conduct is the reason it did not progress. Had he conducted himself differently, his application may have been progressed, if he had responded to the basic information (orally or in writing), and allowed the Respondent reasonable opportunity to discuss matters with him on the 12th of August 2022 and thereafter. The fact that the Claimant did not progress to interview or an oral application was related to the above.

53. In any event the Respondent had a proportionate and legitimate role in screening candidates for each role. This process did not get off the ground because of the Claimant's conduct. It was reasonable for the Respondent to decline to progress or work with the Claimant, due to his conduct.

Reasonable Adjustments

54. We accept that the disability was known to the Respondent on or around the 9th of August 2022, after the initial email communication was sent by the Respondent (when he later realised a call was required, which he then made on the 12th of August 2022).

PCPs

1. To judge applicants solely on a CV rather than an alternative applications process – namely an oral application.

55. *We do not find that the Respondent operated this PCP. The recruitment process was clear that screening was required in addition to the CV and we find that this occurred.*

2. *Sending a generic request for written information on the 9th of August 2022, which the Claimant was unable to comply with.*

56. We find the Claimant was able to comply with 13 of the information requests in writing as this was basic information. The Claimant was able to comply with this and chose not to. The more bespoke information could have been provided when the Respondent telephoned the Claimant on the 12th of August. The Claimant ended the call. We do not find this PCP to have operated.

3. *Failing to send the Claimant a list of essential criteria prior to the telephone call on 12 August 2022.*

57. It is not disputed that there was no essential criteria sent by the Respondent in a single format. We have not seen evidence that the Claimant requested the essential criteria prior to the phone call on the 12th of August 2022. The purpose of the call on the 12th of August was an initial contact. This could have been discussed at this point. The job advert had basic 'must have' information in it. Whilst factually the 'essential criteria' was not sent, we do not find that this was an embedded PCP. It was not unreasonable for the Respondent to have delayed sending the criteria until after the conversation on the 12th of August 2022.

58. We find that the above did not constitute PCP's. Even if they did, we find they did not put the Claimant to a substantial disadvantage. Whilst the Claimant compares himself to a hypothetical comparator, he was capable of emailing the Respondent, to request a phone call, which he failed to do. He was capable of sending basic responses. He failed to engage in the call on the 12th of August 2022 which could have set a pathway to making an application.

59. The Claimant is fixated on the requirement of an "oral application". We find that he has not properly understood when such a process would be appropriate. His own definition of this is not clear, and he has wielded this as a weapon to base this litigation upon. His whole approach has been orchestrated to litigate an issue. That is an issue of his own design and construction. He could have mitigated matters and engaged in a meaningful recruitment process, but we find he had set his mind against this from the outset. This is evidenced by his immediate phone call to ACAS to start the litigation. The Respondent had initiated the phone contact on 12.08.22 , and we found that was in good faith. The emails immediately thereafter from the Claimant (within minutes of the call) threatened litigation.

<u>Application of the law to the facts</u>

60. Based upon our findings, we conclude that the Claimant has; failed to evidence that there was any contravention of the Equality Act 2010, or that the Claimant was discriminated against regarding an issues arising from disability (S15 Equality Act 2010), or a failure to make a reasonable adjustment (S20 and 21 of the Equality Act 2010). The Respondent acted reasonably and proportionately in their conduct, in seeking further information from the Claimant, before agreeing to submit him for the role and was willing to make adjustments which they did in telephoning the Claimant. The Claimant was not subjected to a substantial disadvantage. In this regard the Claimant's claims must fail and are dismissed.

61. Further we find that the proceedings were initiated in a vexatious and unreasonable manner by the Claimant. The claim and the basis for why it was issued was totally without merit.

62. This is our unanimous decision.

Employment Judge Codd

04.12.2024