



# EMPLOYMENT TRIBUNALS

**Claimant:** Dr C Mallon

**Respondent:** BDO Services Ltd

**Heard at:** Midlands West by CVP  
2023

**On:** 20 January

**Before:** Employment Judge Woffenden  
**Members:** Mr D Faulconbridge  
Mr D McIntosh

## **Representation**

Claimant: In Person

Respondent: Miss R Thomas of Counsel

# RESERVED JUDGMENT

- 1 The complaint of direct discrimination because of disability fails and is dismissed.
- 2 The complaint of harassment related to disability fails and is dismissed.

# REASONS

## **Introduction**

1 By a claim form presented on 18 September 2022, following a period of early conciliation from 6 July to 17 August 2021, the claimant( who the respondent has accepted is a disabled person because of autism and dyspraxia) brought a complaint of disability discrimination.

2 At a preliminary hearing before Employment Judge Burns on 10 January 2023 the claimant identified his complaints as direct disability discrimination and/or disability-related harassment in the alternative. The case is essentially about what was said by Ms Salek to the claimant during a telephone call on 15 June 2021.

3 The tribunal asked the claimant if he had any objection to Mr Faulconbridge being a member of the Tribunal since he had been a tribunal member on a final hearing in November 2022 at which the claimant had alleged disability discrimination. He confirmed he did not.

4 The claimant confirmed that the reasonable adjustments for today's hearing were that he be given extra time to read and digest the contents of documents and for the Tribunal to appreciate that his conditions mean that he sometimes gets easily muddled. He also asked that he given extra time to answer questions which should be short and concise and that the tribunal stop him if he rambled.

## **Evidence**

5 There was an agreed bundle of 408 documents ( paginated and indexed).We heard from the claimant who gave evidence on his own behalf and on behalf of the respondent we heard from Samina Salek ( Talent Acquisition Specialist ) and Eyal Hamouieh (Partner -Innovation and Technology Division ) .

6 We read only those documents in the reading list of key documents provided by the respondent at the tribunal's request and in the parties 'witness statements and referred to in cross-examination.

## **Issues**

### **Equality Act 2010, section 26: harassment related to disability: section 40(1)(a)**

7 Did Samina Salek tell the Claimant that he would never be suitable for any jobs with the Respondent (or use words to that effect) during a telephone call with him on or around 15 June 2021?

8 If so, was that conduct unwanted?

9 If so, did it relate to the protected characteristic of disability?

10 Did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

### **Equality Act 2010, section 13, section 39 (1)(a): direct discrimination because of disability**

11 Alternatively, if the treatment at paragraph 2 occurred, was it "less favourable treatment", Le. did the Respondent treat the Claimant less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The Claimant relies on hypothetical comparators.

12 If so, was this because of the Claimant's disability?

## **Fact Finding**

13 The claimant is 48 years old (date of birth 13 November 1974) .He has dyspraxia and autism. He has a BSc in Chemistry and a PHD in Chemical Engineering . Since 2014 he has also gained experience in research and development ('R&D') tax work for a number of employers. He has been out of full time work since May 2019 and has been applying for jobs ( including roles in R & D tax ) without success since then.

14 The respondent is an accountancy and business advisory firm that operates in 17 locations across the UK employing 5500 people.

15 The claimant's evidence was prior to the phone call in question on a date he did not identify that he thought he had applied for a job with the respondent and been rejected. We accept Ms Salek's evidence that on 21 May 2021 the claimant had applied for a job with the respondent as an Associate - R&D Tax - Built Environment and had been rejected.

16 On 11 June 2021 the claimant contacted Matthew Chadwick ( a Partner in the Respondent's Business Restructuring and Corporate Simplification team) on LinkedIn. Mr Chadwick sent an email to Ms Salek forwarding to her the message that he had received from the Claimant which said that he had seen the role of Associate R & D Tax – Mechanical Engineering on the respondent's website and would like to apply for it and attached his CV. The claimant had also mentioned he had autism and dyspraxia and would like to have an oral application.

17 On 11 June 2021 Ms Salek contacted the claimant by email asking him when he would be free to discuss his application. They spoke by telephone on 15 June 2021. Prior to doing so, she searched for his name on the respondent's applicant tracking system to see if he had also applied via the usual channels. She believed at that time he was continuing to pursue an application for the role of Associate - R&D Tax - Built Environment though she now realises his message to Mr Chadwick related to an R&D Tax Mechanical Engineering position. She found the claimant's CV on the applicant tracking system and saw his PhD was in Chemical Engineering and that he did not have a Masters or PhD in either Civil or Structural Engineering necessary for the role of Associate - R&D Tax - Built Environment. She also saw that the Claimant had what she regarded as quite extensive experience, but the role was a junior one, more suitable for someone at graduate level, as reflected by the salary. She deleted the CV that the claimant had sent to the partner in accordance with respondent's practice because of data protection and privacy concerns.

18 The phone call on 15 June 2021 was only 2 minutes long. The claimant asked her for a record of the conversation and she sent him an email that day in which she referred to his lack of relevant qualifications as listed in the job requisition for R&D Tax - Built Environment ('civil or structural engineering or equivalent graduate degrees in the built environment sector' and that they had identified targeting universities for new Masters' /PhD graduates in those fields might be a good place to start. It is clear from the claimant's email to Ms Salek of 15 June 2021 ( timed at 18.10) that he had thought the purpose of the telephone call was an oral application for the R&D Tax Mechanical Engineering position as a reasonable adjustment and he did not understand why her email to him had referred to a different role.

19 The claimant sent another email to Ms Salek on 15 June 2021 (timed at ) in which he said it was not listed in the job description and referred her to material about age discrimination during recruitment processes. He was commenting on what she had said about the Associate - R&D Tax - Built Environment role in her earlier email about new graduates and said she needed to be careful what she write and said and (how) she behaved. In another email that evening timed at 18.44 he said she had told him there were not suitable R&D roles as you were only looking for masters and PhD students finishing that year and not in the past and he had explained that he had a PhD and a Masters' from a few years ago

and lots of R&D tax experience. When on 16 June 2021 Ms Salek emailed the claimant to suggest she conduct an oral interview with him to understand his skills and experience and so that future and current vacancies could be discussed he asked her to get her manager to email him direct.

20 In his email to Mr Whittle (Ms Salek's manager ) dated 18 June 2021 the claimant said his application had been clearly dismissed as well as other R&D roles currently on offer. He sent the respondent a grievance dated 18 June 2021 headed 'treatment of disabled candidate ' in which he said he had been given a phone call told lots of things and told he was unsuitable for all current roles with the respondent and his application had been clearly rejected as he was told he had to graduate with a masters or PhD that year. He complained of a failure to make reasonable adjustments as he had not been given an oral application.

21 We found Ms Salek to be a credible witness. She was clear and straightforward in her evidence about what she did when and why. We did not find the claimant's evidence under cross examination compelling. The claim form (completed by the claimant and presented just over 3 months from the date of the telephone conversation) is sparse and notably does not feature the word 'never' , the telling detail relied on by the claimant . His witness statement ( of 21 paragraphs little of which related to the specifics of this case) addresses the conversation in question in only one paragraph and does not include the word 'never ' either. In his evidence today he said he posited that were 2 phone calls ,not one. We find that he has no clear memory of what was said to him during the telephone call with Ms Salek and as a result has retrospectively tried to construct what was said from the documents in the bundle.

22 We prefer and accept Ms Salek's evidence about what was said in the telephone conversation on 15 June 2021 .It is consistent with the contemporaneous documentation including that from the claimant .She explained to him that they were not able to accept CVs that came in directly from applicants due to GDPR constraints, and so she had searched and found his CV to check the role he was applying for. She told him unfortunately, he did not have the qualifications that they were looking for in relation to the role , and also mentioned that they were looking at recent graduates rather than someone of his level of experience. He had immediately become angry , raised his voice and would not let her explain anything further to him until he had finished talking. He told he that this wasn't in the job description. She started to tell him that she would be happy to get in touch with him if and when a suitable vacancy did arise, but he did not seem to be listening. He told her to put what she had said in writing and hung up quite abruptly.

## **Law**

23 For the purposes of the Equality Act 2010 ("EqA"), disability is a protected characteristic (section 4 Eq A).

24 Under section 13 (2) (a) and (4) EqA 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.

25 Section 23 (1) EqA states that "On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case

26 Under section 26 (1) EqA  
'(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

Under section 26 (4) EqA

' (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect. '

27 Under section 39 (2 ) EqA an employer must not discriminate against an employee by subjecting him/her to any detriment.

28 I remind myself that 'detriment' does not include conduct which amounts to harassment (Section 212 (1) EqA.

29 Section 136 EqA reverses the burden of proof if there is a prima facie case of discrimination. The courts have provided detailed guidance on the circumstances in which the burden reverses but in most cases the issue is not so finely balanced as to turn on whether the burden of proof has reversed. Also, the case law makes it clear that it is not always necessary to adopt a two stage approach and it is permissible for Employment Tribunals to instead identify the reason why an act or omission occurred. The two-stage test reflects the requirements of the Burden of Proof Directive (97/80/EEC). The first stage places a burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If they fail to establish that, the Tribunal must find that there is discrimination.

30 Tribunals are urged to take an over view of the totality of the evidence before making findings in respect of individual allegations made by a claimant. The necessity of setting out chronological findings of fact should not lead to the assumption that they have been made piecemeal. In looking at this case we looked at the totality of the evidence before reaching our findings of fact as set out above and before reaching the conclusions which follow.

31 Tribunals must take into account any part of the Equality and Human Rights Commission Code of Practice on Employment (2011) ("the Code") that appears to them relevant to any questions arising in proceedings. As far as harassment is concerned Chapter 7 addresses harassment and says at paragraph 7.7 that "*unwanted conduct covers a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry,*

*jokes, pranks, acts affecting a person surroundings or other physical behaviour. The word “unwanted” means essentially the same as “unwelcome” or “uninvited”. “Unwanted” does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment (paragraph 7.8).*

32 In **Richmond Pharmacology v Dhaliwal 2009 ICR 724** Mr Justice Underhill said “*not every racially slanted adverse comment or conduct may constitute the violation of a person’s dignity. Dignity is not necessarily violated by the things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended.*’ The claimant must have actually felt or perceived his or her dignity to have been violated or an offensive environment to have been created. The fact that the claimant is slightly upset or mildly offended by the conduct in question may not be enough to bring about a violation of dignity or an offensive environment.

33 Tribunals were reminded in **Chapman v Simon [1994] IRLR 124 CA** that the jurisdiction of the employment tribunal is limited to the complaints which have been made to it. It is not for us to find other acts of which complaints have not been made if the act of which complaint is made is not proven.

### **Submissions**

34 We thank the parties for their oral submissions which we have carefully considered.

### **Conclusions**

35 We can understand the claimant’s disappointment about the telephone conversation with Ms Salek on 15 June 2021 because having been seeking employment unsuccessfully for a long time he was expecting an oral application for the job in Mechanical Engineering and instead he was told he did not have the requisite qualifications and they were looking for recent graduates. In his submissions the claimant described the steps taken by the respondent after the conversation ( in which he said he had been put down and put in his place ) as a cover up but that is an assertion which is not supported by any evidence. He has failed to prove that Ms Salek said what he has alleged and the claim must fail on that basis and is dismissed.

36 If we are wrong in that conclusion there are no facts from which we could conclude or infer that the claimant’s disability had anything whatsoever to do with his treatment .Ms Salek would have treated anyone in the same material circumstances as the claimant in relation to the absence of requisite qualifications and who was not (as she perceived it) a recent graduate and who she (mistakenly ) thought was applying for the Associate - R&D Tax - Built Environment role in the same way. As far as harassment is concerned there are no facts from which we could conclude or infer that the conduct complained of was in some way related to disability.

.

Employment Judge Woffenden

27/01/2023