



EMPLOYMENT TRIBUNALS

Claimants: Miss T Ghazanfar
Mr S Sudhalman

Respondents: (1) The Governing Body of St John Heron Primary School
(2) London Borough of Newham

Heard at: East London Hearing Centre

On: 23, 24 & 25 November 2016 and
1 & 3 March 2017

Before: Employment Judge B Elgot
Members: Ms L Conwell-Tillotson
Ms H Edwards

Representation

1st Claimant: Ms A Brown (Counsel)
2nd Claimant: Mr D Searle (Counsel)

Respondents: Mr S Bishop (Counsel)

JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

1. In respect of both Claimants the claim of unfair dismissal does not succeed and is dismissed.
2. In relation to the claims of disability discrimination in relation to both Claimants the claims fail and are dismissed.

The reasons for the Tribunal's decision are as follows.

REASONS

1 Written reasons were requested by the Second Claimant on 6 March 2017.

2 The Tribunal is satisfied that the Respondents have shown that the principal reason for the dismissal of both Claimants is that stated in Section 98(1)(b) Employment Rights Act 1996; it was for some other substantial reason of a kind such as to justify the dismissal of employees holding the position which the Claimants held at the St John Heron Primary School (the School). That “some other substantial reason” is that when the 1st Respondent undertook a restructure of the teaching assistants cohort at the School the Claimants were found to lack the basic skills and knowledge necessary to carry out either of the two new teaching assistant roles which were a fundamental part of that re-organisation in the Autumn of 2015.

3 The Claimants both worked as generic teaching assistants on a single pay scale at the School. The School has a group of pupils who study the national curriculum in a class based environment some of whom have learning disabilities and are from the school catchment area. However, the School also takes in and is funded to teach up to 14 children with Profound and Multiple Learning Difficulties (PMLD) and those are usually from outside the catchment area. Each such PMLD child has a complex level of high needs which vary from child to child but certainly may include mobility problems including wheelchair use, severe physical, emotional and mental disability such that they may need feeding through a tube, toileting and/or the administration of medication. This amounts to a very demanding role for the teaching assistants who look after and care for them.

4 Prior to the restructure in the School, in respect of which formal consultation began in October 2015, all the teaching assistants might be called upon to care for any type of child in the School.

5 We heard evidence from the Headmistress Mrs R Karim. With the approval of the governors she proposed to create two new types of teaching assistant post, a classroom-based teaching assistant (CBTA) at Scale 3 and a higher needs teaching assistant (HNTA) at Scale 4. The latter post was the subject of a job evaluation for the higher grade of pay.

6 We find that the fundamental purpose of the restructure was to make the School more efficient in relation to its primary aim which is to give the best possible care and to promote in every way the development of the children who attend the School. Mrs Karim’s written rationale was produced in writing by the Deputy Head, Mr Evan Hollow together with a timetable for the restructure. That document appears at pages 170 – 171 of the bundle. The Tribunal heard evidence from both Mrs Karim and Mr Hollow who were subjected to cross-examination by Counsel for both Claimants. The Tribunal, in accordance with usual practice, read only those documents in the bundle to which its attention was drawn by the parties, their representatives or the witnesses.

7 We find that there were four main aims of the restructure. Aim number 3 at page 171 is an administrative point which we can leave to one side. The other three aims were to recognise and reward the very difficult job of any teaching assistant allocated to a profoundly disabled child. The important objective was to encourage the generic teaching assistants to decide whether to choose the higher needs role (HNTA) with better pay or to remain in the classroom role. The School wished to ensure that any teaching assistant taking on a higher needs child and their care would be highly motivated to undertake that job. Mrs Karim and Mr Hollow stressed in their oral evidence that they wanted applicants for the HNTA post to know exactly what it was they would be taking on. The restructure

rationale makes it clear, and we find that both Claimants knew from their experience of working at the School for five and seven years respectively, that the role of caring for a higher needs child is rigorous emotionally, mentally and physically. Mrs Karim told us that the Respondent wished to ensure that anyone applying for the new HNTA post would be fully aware of the nature of the job from the outset. All of the generic teaching assistants, including the Claimants, saw the job descriptions and the person specification for the CBTA and HNTA jobs. We find that those documents, which are at pages 181 – 183 of the bundle, clearly identify the requirement for HNTA to have not just the physical ability but more importantly the personal qualities, understanding, empathy, skills, abilities and knowledge to work with PMLD children. We find that both the Claimants knew what the job was and they knew how it differed from the class based role as a CBTA.

8 Whilst we do not have expertise in this highly specialised educational field we find that this restructure was a rational and reasonable exercise. We cannot agree that it was, from the beginning, inherently discriminatory on grounds of disability. It was not designed in order to ensure that those members of the teaching assistant cohort who were disabled would find themselves outside the restructure and without a job. The rationale does indeed refer to the need to reduce sickness absences in general. This was clearly a problem at the School as the schedule at page 747 (which was produced for the purposes of these proceedings) demonstrates. The two Respondents decided that it was necessary to have highly-motivated teaching assistants who had actively chosen the HNTA job. The Respondents reasonably anticipated that if that were the case this might reduce absences of all kinds but particularly sickness absence. Statistically it has proven to be the case, following the reorganisation of the teaching assistant structure, that sickness absence has reduced because the class based teaching assistants are not, save in very rare circumstances, required to take on the role of caring for a PMLD child which in the past caused them to take absence and go off sick because they could not cope with the demands of that role.

9 There were 30 generic teaching assistant posts in the School before the restructure. After the restructure it was proposed that there would be extra posts making a total of 34. 18 would be Higher Needs Teaching Assistants and 16 Class Based Teaching Assistants. We accept therefore that, in October 2015, the Respondents did not anticipate losing any teaching assistants because there were, on the face of it, more than enough jobs for the current staff. This fact demonstrates that the Respondents had no pre-determined plan to remove any disabled teaching assistant, including the Claimants, from the School. That situation however changed as the consultation and selection process progressed as we set out below:-

10 We are satisfied that both Claimants knew that the restructure would involve a competitive selection exercise. All generic teaching assistants had to apply for one or both of the new jobs. They had to fill in an application form and undertake an interview for the HNTA post. If applicants for HNTA were unsuccessful they had to take a basic skills test and undertake an interview for the CBTA post. If they did not, for whatever reason, apply for the HNTA job the generic teaching assistants would go straight to take the test and the interview for the CBTA job. Both Claimants however applied for the higher paid HNTA role at the first stage.

11 We heard from Mrs Karim and we accept the Respondents' analysis that, in the light of increasing central government expectations of teaching assistants, a higher level

of skills was required of teaching assistants in the classroom environment than had previously been required. The Respondents therefore reasonably set a basic skills test in numeracy, literacy and information technology for the CBTA post and required a level of attainment at Grade 3. At Grade 3 level the classroom based teaching assistants would be at the same level or slightly above the level of children taking the national curriculum in Year 6 i.e. ten/eleven year olds. The basic skills test is independently devised and administered from an outside source and takes place on-line. The marking is done independently and questions are generated randomly. There was no opportunity for the Respondents to influence the content or results of the test or to unlawfully discriminate in its administration or marking.

12 We have carefully considered whether the Respondents undertook a fair procedure leading up to the Claimants' dismissal including the provision of information, undertaking collective and individual consultation, and fairly selecting the Claimants for the new posts. The restructure, as we have said, had clear and legitimate aims and there is no evidence that it was designed to exclude generic teaching assistants with disabilities or with a high level of disability related sickness absence. It was stated that one factor in the rationale was to reduce sickness absence across the School by motivating staff and focussing on the specific training of the two separate types of teaching assistants going forward. These were structural and organisational aims not directed at the individual past performance of any generic teaching assistant or their individual sickness absence record.

13 We found Mrs Karim and Mr Hollow to be credible and organised witnesses who knew the School and their staff very well and are experts in their field of the specialist education and welfare of profoundly disabled children. The rationale for the restructure was designed to ensure that the generic teaching assistants had the opportunity to make a positive choice to take on the HNTA role working with PMLD children and it was hoped that having made that choice they would be motivated to undertake that difficult work and sickness absence would reduce.

14 Turning first to the consultation, we are satisfied that the Respondent reasonably consulted with the trade unions and with the individual generic teaching assistants. In addition there was the opportunity for further individual consultation between teaching assistants who requested such a meeting and Mr Alexander from Human Resources (who also gave evidence as a witness for the Respondent). At those individual consultation meetings a trade union representative also attended.

15 By the time the First Claimant Ms Ghazanfar had her one to one interview with Mr Alexander her absence record had halved, her sickness absences were considerably reduced and it appears that her back pain and mobility had improved. She nonetheless spontaneously raised her health difficulties as an issue with him and the trade union.

16 The consultation meeting on 22 October 2015 with the School's recognised trade unions, Unison and GMB, is recorded at page 172A. That is a document disclosed by the Second Claimant. It is made clear in that document that Mrs Karim states that she does not "expect" redundancies; there were to be more jobs not less within this new structure. When Mrs Karim asked what would happen to applicants in the recruitment process who were not ultimately successful in applications for either new post she replied they "would have to leave and find a new job" to which the GMB representative replied, as recorded at page 172B, that if she did this it would "cause her a problem" indicating that the trade

union representative fully understood the risk that his individual members may lose their jobs as a result of this process and he was warning the School that there would be resistance to such a result.

17 On 23 October 2015 the Claimants are adamant that at a staff consultation meeting they heard Mrs Karim assure them that there would be no redundancies and that *“no one would lose their jobs”*. This is not what is recorded at page 173 in the contemporaneous notes taken by Mrs Hazel Thornthwaite the Head’s Personal Assistant who also gave credible evidence to the Tribunal. We prefer the evidence of the Respondent’s witnesses in relation to this meeting at which it was made clear that every teaching assistant had to reapply for their job, that there was a selective and competitive process to apply for the new posts and a skills test would be utilised. The wording of what was said is recorded accurately in the notes made by Ms Thornthwaite. Mrs Karim’s answer in response to a question from Mr Sam Leak, who asked *“is there is still a job here for us”* indicates that she did not want to see or indeed expect any redundancies but there may be some employees who might have to leave the school’s employment. We agree with the submission made by Mr Bishop on behalf of the Respondents that it would be incredible that Mrs Karim had said one thing to the trade unions on 22 October and something very different to the staff on 23 October 2015.

18 In any event we observe that, during the course of any meaningful and evolving consultation process with affected staff in a restructure, the situation does sometimes change. Even if we are wrong and Mrs Karim made a firm promise that no one would lose their job then, as the consultation progressed the situation was always liable to change. This is exactly what happened when the Respondents discovered that both Claimants were not properly qualified or equipped for either of the new teaching assistant roles.

19 In relation to the one to one consultations the relevant emails appear at page 174 of the bundle. The email from Mr Alexander to Mrs Karim shows that Mr Alexander had made it clear to the Second Claimant, Mr Sudhalman, that if he wished to carry on with one to one teaching, interaction and care of a PMLD child outside the classroom-based role and if he passed the selection process for the HNTA job the Respondents would make reasonable adjustments for his disability following such an appointment. This is evidence of a fair process. It also supports the Respondents’ case that this restructure was not designed to unlawfully discriminate against the Second Claimant because of his disability or for reasons relating to it.

20 We cannot agree with the submission that Ms Karim’s response at the top of page 174 indicates an intention to obtain a consultant’s report in order to discover medical information which would exclude or otherwise be detrimental to the Second Claimant. That medical information once obtained was, we find, equally likely to inform the Respondents of the detailed scope of any reasonable adjustments required by Mr Sudhalman in future.

21 Both Claimants applied for the HNTA role. The interview panel was Mrs Karim and Mr Hollow. All interviewees were asked the same five questions. The Second Claimant was candidate 28, the First Claimant was candidate 29, and the interview notes are at pages 188 – 199 and 197 – 200 in the bundle. Mr Hollow described the consistent approach taken by him and Mrs Karim. He said that question 1 was a “warm up” question, as often appears in interview scenarios, designed to ask the candidate something about

how they are currently working and to give them the opportunity to “*talk a bit about themselves*” and their work, and to describe an activity which they currently enjoyed. Questions 2, 3 4 and 5 are more testing questions; question 5 is a whistleblowing/child protection and safeguarding question exploring the candidate’s technical knowledge of that crucial area. Questions 2, 3 and 4 check the candidate’s understanding (but not necessarily their personal experience) of the role of a higher needs teaching assistant. The panel wished to explore how much the individual candidates knew and understood about the needs of a child with profound and complex needs and the difference between the HNTA job and a classroom based role.

22 Mr Hollow described the selection process by telling us that after all 19 interviews (there were 19 applications and 18 posts) he and Mrs Karim made two piles. The “good” answers were placed in a pile for offers to be made and then there was a pile of ‘maybes’. For the ‘maybe pile’ they pooled the results of their interview notes, they discussed the candidates again to see if they could agree who was appointable and who was not. We accept that the interviewers had no sickness absence or medical records in front of them to which they referred during this selection process. Mrs Karim credibly told us that the aim of the interviews was to test motivation, commitment and what she called an “intellectual” appreciation of the needs of each type of child including PMLD and the nature of the HNTA job. There was, we find, no part of the selection process which assessed the candidates’ physical ability to do the more physically rigorous parts of the HNTA role. There were no tests with the intention of excluding disabled employees or those with high sickness absence. Any candidate demonstrating the intellectual understanding as Ms Karim described it was appointable. After appointment that was the time at which reasonable adjustments could be made in cases where physical difficulties in carrying out parts of the HNTA role were apparent. We emphasise that this type of adjustment had already occurred for both Claimants in their generic teaching assistant jobs, as they both acknowledge.

23 The interview process was not flawless, there was no marking scheme, no model answers and no benchmarking. However we are satisfied that two senior teachers in their specialist field had made no pre-determined decisions before interview. They applied a consistent selection method, asked uniform questions, recorded the answers in the same format, pooled their written material and compared notes. They looked at all 19 applications and the results of 19 interviews and assessed them consistently. This process is not unfair in the judgment of the Tribunal.

24 We have, at the request of counsel for both Claimants looked carefully at the interview notes of some of the other candidates particularly those to whom counsel for the Claimants specifically referred us. We self evidently lack the professional expertise of the interviewers but we have explored the possibility that there are any obvious and significant errors in selection by comparing the two Claimants’ unsuccessful interview answers to those of successful candidates. On balance we find no flaw, discrepancy or glaring error which is evidence from which we could conclude that there has been disability discrimination or unfair dismissal. There is no evidence that the Claimants were marked down compared to other candidates because of their disability or in relation to disability related matters. It does not appear, for example, that any of their answers were as good as or better than the successful candidates.

25 Both Claimants made their own notes of the conduct of their interviews for the HNTA post. The First Claimant alleges that the interview panel brought up the issue of her health at the beginning of the interview and queried whether the job was suitable for her. Ms Ghazanfar said that this initial query unnerved her to such an extent that her mind went blank during the rest of the interview and she became incapable of answering the remaining questions to the best of her ability and potential. This is a crucial evidential point for the Tribunal because if these remarks about her previous health problems were made it might be evidence that her perceived lack of physical ability to care for profoundly disabled children with mobility problems might prevent her from being appointed as a HNTA and might indicate disability discrimination.

26 Ms Ghazanfar's notes appear at page 200C of the bundle. The metadata relating to those notes shows that she created the document on 3 December 2015, some two weeks after her interview on 18 November 2015. She spent 82 minutes editing two and a half pages. Two thirds of the first page of those notes is a very detailed account of Mrs Karim's remarks querying why the First Claimant has applied for the HNTA role and records Mrs Karim giving the opinion that she considers that the First Claimant perhaps should not have applied for that HNTA role saying, "*with your back condition do you think it is wise*". Mrs Karim and Mr Hollow entirely deny that these remarks were made or that the discussion of the First Claimant's health was initiated by either of them. Mr Hollow's notes at page 199 and Mrs Karim's notes at page 197 corroborate their account. Each set of notes has slightly different wording but each show that it was the Claimant who raised her health as an issue stating that she felt that she was currently doing well with a mobile child "A" who had special educational needs but was not in a wheelchair. The subsequent questions then go on to require the Claimant to intellectually demonstrate that she knew about children who had quite different needs to those of child A with whom she was then working. In the view of the interview panel she failed to do this and was not appointable.

27 We find on the balance of probabilities that the statements attributed to Mrs Karim were not made. The Claimant raised her health of her own violation in the same way as she did in the one to one consultation with Mr Alexander and the trade union representative. This was somewhat surprising because, as stated above, her health and her attendance were improving. We are satisfied, as Mr Hollow points out, that Mrs Karim would not have been so unwise as to raise the issue of the Claimant's disability at the interview stage exposing the Respondents to discrimination claims particularly when both past and future adjustments were possible.

28 Mr Sudhalman, the Second Respondent, also made notes after his interview which appear at page 192. He alleges that Mrs Karim expressed 'surprise' that he had applied for the HNTA role when he was insufficiently fit to carry it out physically. We find that the Second Claimant's notes are not an accurate or credible account of what took place at his HNTA interview. The metadata shows that 4½ pages in large print took 136 minutes to type out from the handwritten notes which Mr Sudhalman allegedly wrote at the time but has not retained. Of the 4½ pages one page records the outcome and feedback information he received after the interview.

29 Mr Sudhalman's typed notes are not reliable because the questions are stated in the wrong order, the questions are not accurately summarised and some of the answers he has written underneath specific questions do not relate to the questions in the text above. We do not find those notes to be an accurate and contemporaneous record of

what occurred in his interview. We are certain that Mrs Karim and Mr Hollow did not raise the Second Claimant's health or query his physical ability to do the HNTA job.

30 Once both Claimants were not appointable to the HNTA role because they were unsuccessful at interview and thereafter both had decisively failed the basic skills test for the CBTA role it became apparent that they could not continue in the employment of the School. The results of the tests begin at page 228 of the bundle. Mr Sudhalman had an overall aggregated result of grade 1 and was described as having *'performed badly and displayed little or no skill in many areas'*. Ms Ghazanfar had an aggregated result of grade 2 and the comment is *'struggles with exhibiting skills...has not performed well'*. The Claimants were dismissed for some other substantial reason because they were unqualified and unsuitable for either new role. They were dismissed following a fair procedure.

31 We find, with reference to Section 98(4) Employment Rights Act 1996, that in all the circumstances of this case the Respondents acted reasonably in treating the Claimants' lack of suitability for either role in the restructure and their inability to demonstrate appointability after HNTA interview and CBTA basic skills test as a sufficient reason for dismissing both Claimants.

32 The Claimants have failed to discharge their burden of proof in respect of their claims of direct and/or indirect disability discrimination. Neither has shown facts from which we could conclude that either or both has been treated less favourably than others because of their respective disabilities or because of something arising in consequence of those disabilities. The Claimant have shown no evidence of a discriminatory provision criterion or practice (PCP) which was applied to them in the circumstances of the restructure of the School's teaching assistant cohort and the selection exercise for the two new and separate roles. There is thus no PCP which has placed the Claimants or either of them at a substantial disadvantage as compared to persons who are not disabled. As a result no duty has arisen for the Respondents to make reasonable adjustments in relation to either Claimant in the context of the restructure or the selection exercise. Neither Claimant has pleaded or argued that their respective disability had any effect upon their ability to take the basic skills test.

33 The First Claimant did not suffer harassment related to her disability because we find that Mrs Karim did not make the alleged remarks about her health and disability at the HNTA interview.

34 In all the circumstances of this case all the claims of both Claimants do not succeed and are dismissed.

Employment Judge Elgot

Date: 27 April 2017

