



EMPLOYMENT TRIBUNALS

Claimant: Mr T Sherbourne

Respondent: N Power Ltd

HELD AT: Leeds

ON: 1 May 2019

BEFORE: Employment Judge Shulman
Mr R Stead
Mr K Smith

REPRESENTATION:

Claimant: Miss N Smith (Claimant's mother)

Respondent: Mr M Winthrop, Solicitor

JUDGMENT

1. The Respondent indirectly discriminated against the Claimant on the ground of his disability.
2. The Respondent failed to make reasonable adjustments for the Claimant.
3. The hearing is adjourned for a Remedy Hearing at 10.00am on 27 June 2019 at Leeds Employment Tribunal.
4. Case Management Orders for the remedy Hearing will follow.

REASONS

Introduction

1. The Claimant is 21 years of age and he commenced employment with N Power Ltd., the Respondent, on 2 October 2017 as a senior analyst. The Claimant complains to this Tribunal that the Respondent indirectly discriminated against him on the grounds of his disability, which disability is autism. The Claimant also

complains that the Respondent failed to make reasonable adjustments. The Respondent accepts that the Claimant has the disability of autism.

Issues

2. These relate to whether or not the Respondent indirectly discriminated against the Claimant on the grounds of disability and further whether or not the Respondent failed to make reasonable adjustments. A further issue is whether or not either or both of the claims are out of time.

Facts

3. The Tribunal having carefully reviewed all the evidence (both oral and documentary) before it finds the following facts (proved on the balance of probabilities:
 - 3.1. In so far as paragraph 1 of these reasons comprises matters of fact then the Tribunal finds those facts as facts.
 - 3.2. The Claimant was working for the Respondent in an open plan setting with a busy walkway behind him and it was not very long before he felt overwhelmed and distracted. Additionally there were building works going on around him. The flexible office environment also caused the Claimant problems and this policy meant that he was not always at his own desk. The Claimant found the method of training confusing.
 - 3.3. His manager was Debra Glancy. At all material times, save for her absence from work between 30 October 2017 and 12 January 2018, she was the operations manager and the Claimant reported directly to her. She gave evidence before us and told us that the Respondent had no autism diversity policy and that she was not aware of the display of materials relating to autism within the business. Neither was she aware of anything specifically relating to autism within the building or the organisation. She told us that colleagues undertook online training relating to diversity and inclusion but she was not aware of strict timelines of one month to complete training. Further in the Respondent's capability procedure (which was implemented in this case), on page 7 of the procedure there is a direct reference under the heading of "sickness absence and the equality act". For the need for managers relating to reasonable adjustments there was guidance on the diversity and inclusion pages of the Respondent's HR portal. There is there a tailored adjustment agreement to support managers and to discuss, agree and record reasonable adjustments. It was clear to the Tribunal when Mrs Glancy was giving her evidence that she was process driven.
 - 3.4. As soon as 3 October 2017 came Mrs Glancy was compelled to have an informal discussion with the Claimant about his disruptive and loud behaviour. She saw nothing unusual in that, but as soon as 10 October 2017 came she was talking to the Claimant about his disruptive behaviour again and there was a rather unusual response by the Claimant when she asked if he understood what diversity and inclusion meant. Mrs Glancy agreed with the Tribunal that the behaviour on 10 October 2019 was not normal on the part of the Claimant. On 12 October 2017 Mrs Glancy took advice from HR about using the capability procedure for the Claimant but she decided to continue with him informally. On 10 October 2017 Mrs Glancy is alleged to have told the Claimant "we're not here to wipe arse".

The Claimant was clear about that evidence. Mrs Glancy said that she did not recall saying it. We find as a fact that she did say it. Our finding is supported by Mrs Glancy's failure to deny that she said it at a capability meeting that took place on 20 June 2018 (see bundle page 122 bottom box). Another meeting took place with the Claimant, this time on 19 October 2017, as a result of which Mrs Glancy was of the view that not only was the Claimant disruptive but he was also argumentative, could become agitated and that his behaviour was unacceptable. At the same meeting Mrs Glancy told the Claimant that she and The Claimant would have weekly catch-up sessions. Neither she (particularly as she went off sick shortly afterwards) nor any other manager in her absence ever did this. On or about this date (that is 19 October 2017) the Claimant alleges that in the team area Mrs Glancy said loudly "give Tom some things to do so that he doesn't look like a lost dog". When asked by the Tribunal whether she said that Mrs Glancy said she did not and that the Claimant in alleging it was lying. The Claimant was by this time having a feeling of isolation and that his manager was unapproachable and treated him differently from others.

- 3.5. By November 2017 the Claimant became distressed with changes in his working environment and different people sitting near him. This caused him to have more frequent toilet breaks and the Claimant was profusely sweating. He further felt he was not getting support or comfort from his colleagues. The Claimant tried to cope alone. With Mrs Glancy off sick the Claimant asked if he could work from home but this was refused. The Claimant also felt subject to distraction and the noise and smells caused him distress.
- 3.6. On 2 February 2018 the Claimant suffered what he called a breakdown at work, having suicidal thoughts. On the other hand Mrs Glancy described this as "a bit of a meltdown". The Claimant went off sick and he sought help and he went to his GP, who diagnosed him with an anxiety disorder.
- 3.7. In March and April 2018 the Claimant underwent counselling and it was agreed that a referral be made for the Claimant to have an autism assessment.
- 3.8. The Claimant was referred to the Respondent's occupational health team on 11 April 2018 and saw a Dr B King. Dr King made four recommendations for the Claimant to return to the workplace. These can be found on page 103 of the bundle. After the consultation the Tribunal finds that what were effectively adjustments were explained by Dr King to Mrs Glancy. Dr King agreed that it was likely that the Claimant would receive an autism diagnosis and almost certainly would be considered disabled under the Equality Act 2010 (EA) and, therefore, that consideration of these types of adjustment would be important. Despite what Dr King said about autism it is clear that it was not until August 2018 that Mrs Glancy made efforts to try and understand what autism meant when HR gave her an internet link. She did tell us that she knew that people with autism had difficulties. Mrs Glancy also told us that Dr King's "suggestions" were not put in place because of inadequate training. Mrs Glancy agreed that the adjustments never happened.
- 3.9. Mrs Glancy proposed a welfare meeting on the very same day as the assessment with Dr King. The Claimant asked for the welfare meeting to take place away from work on another day. Mrs Glancy refused, having

asked the Claimant on the same day to surrender his laptop because it was apparently needed elsewhere. At the welfare meeting Mrs Glancy said that she would await the Claimant's lead and the lead of the GP before he could come back to work. In his evidence the Claimant told us that this is not recorded in the notes of that welfare meeting and that he needed the adjustments (that is those recommended by Dr King) to be put in place. This was confirmed by the Claimant in writing on 17 April 2018 (page 109 in the bundle) but Mrs Glancy maintained her position in writing on 18 April 2018, namely, to await the Claimant's lead and the lead of his GP.

- 3.10. On 2 May 2018 Mrs Glancy invoked the capability process. This was within three weeks of the occupational health assessment which recommended adjustments and not the capability process. This led the Claimant to feel that his manager showed little empathy towards him.
- 3.11. A welfare meeting took place on 20 June 2018 to discuss the Claimant's ability to attend work. We find that Mrs Glancy was more concerned with when the Claimant would come back to work rather than his disability. Generally what was generated about autism at the meeting came only from the Claimant and his mother (who was present). Mrs Glancy even went as far as asking the Claimant if he would like a lower grade job. This was very much to the end of the recommendations which were made by Dr King. Mrs Glancy made it clear at the meeting, according to the Claimant, that she knew nothing about autism.
- 3.12. On 21 June 2018 the Claimant received a letter with a first notification of concern under the capability procedure and a comment of how his absence fell short of the Respondent's requirements and made mention of a possible lower grade job. The letter does mention adjustments but nothing about a programme of implementation. There then followed a job offer (subsequently withdrawn) at approximately £10,000 less than the Claimant was earning in his present job.
- 3.13. In anticipation of another welfare meeting, convened eight days after the previous capability meeting, the Claimant prepared a wish list. The Tribunal asked whether Mrs Glancy had considered a home visit for this meeting and she said that she had not. The meeting took place in fact on 3 August 2018 in which Mrs Glancy substantially accepted and supportively amended the Claimant's list of adjustments, which can be found with her amendments at pages 131A and 131B of the bundle. Mrs Glancy told the Tribunal that everything on the list could be achieved. As we have intimated the lower paid job was no longer available because of a recruitment freeze. At this welfare meeting Mrs Glancy said the Claimant may be invited for a second capability meeting, which could indeed have been a final meeting under the Respondent's capability procedures.
- 3.14. On 21 August 2018, two weeks after the welfare meeting, the Claimant was invited to discuss the end of what appeared to be his fixed term contract, with no mention of either set of adjustments or their implementation. The Claimant did not attend. By various letters in September 2018 the Claimant's employment was terminated with effect from 30 September 2018, without either addressing the adjustments or indeed completing the capability procedure.

- 3.15. The Claimant appealed his dismissal and a hearing took place on 13 November 2018 but it was refused.

The law

4. The Tribunal has to have regard to the following provisions of the EA: Section 19 indirect discrimination; Section 20 duty to make adjustments; Section 123(2)(b) and (3)(a).

Determination of the issues

5. (After listening to the factual and legal submissions made by or on behalf of the respective parties the Tribunal reaches the following conclusions):

- 5.1. Indirect discrimination

- 5.1.1. The detrimental action the Tribunal finds was continuous management failure, as set out in the facts above, including, but without prejudice to the generality of the foregoing, failure by the Respondent to take reasonable steps to understand the Claimant's disability, failure to implement two sets of adjustments, one of which came from the Respondent's own in-house doctor and the other which was agreed by management, a mixing up of welfare and capability procedures and use of the Claimant's contractual position, which was the termination of the fixed term contract, before any of the foregoing were exhausted.
- 5.1.2. As we have said it is not in dispute that the Claimant has a disability within the meaning of the EA.
- 5.1.3. The Respondent applied a provision criteria or practice (PCP), as far as the Claimant was concerned, by failing to implement reasonable adjustments, by inappropriate use of the capability procedure and by using dismissal as a tool to rid themselves of a disabled employee.
- 5.1.4. There is no evidence that the Respondent would apply the PCP to others not sharing the same protected characteristics as the Claimant.
- 5.1.5. The PCP would put others with autism generally at a particular disadvantage compared with those whom the Claimant does not share the same characteristics.
- 5.1.6. The PCP would put the Claimant at that disadvantage.
- 5.1.7. The Respondent has not shown that the PCP is a proportionate means of achieving a legitimate aim.
- 5.1.8. In all the circumstances the Tribunal finds that the Claimant was indirectly discriminated against because of his disability.

- 5.2. Failure to make reasonable adjustments

- 5.2.1. As to detrimental action see 5.1.1 above.
- 5.2.2. The Respondent has failed to comply with its duty to make reasonable adjustments.
- 5.2.3. The Respondent has applied the PCP referred to at paragraph 5.1.3 above which put the Claimant at a substantial disadvantage in comparison with non-disabled persons and did not take reasonable steps to avoid the disadvantage.

5.2.4. The Respondent knew that the Claimant had a disability and that that was likely to place him at the disadvantage referred to.

5.2.5. In the circumstances the Tribunal finds that the Respondent failed to make reasonable adjustments.

5.3. Time

5.3.1. The Respondent's conduct was continuous and supplemented at each and every turn up to the dismissal and therefore both claims are in time, either because they occurred at the time of dismissal or because they were continuous.

5.3.2. If we are wrong about that then having regard to the Respondent's conduct for the period 11 April 2018 until 30 September 2018, if necessary, the Tribunal extends time to make the claims in time on the grounds that it is just and equitable to do so.

Remedy

6. This claim is adjourned until 27 June at 10am at Leeds Employment Tribunal to consider the question of remedy. The Tribunal has listed the same for one full day but if it can be achieved in lesser time then so be it.

Employment Judge Shulman

Date__10 May 2019_____

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

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