



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102088/2020

Held remotely by video on 15 January 2020 (V)

**Employment Judge: M Sutherland
Members: R McPherson
J Burnett**

Mr David Odigie

Claimant

Argyll and Bute Council

Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the Claimant's complaint of victimisation is dismissed.

REASONS

Introduction

1. The Claimant presented a complaint of victimisation which was denied by the Respondent.
2. The Claimant appeared on his own behalf. The Respondent was represented by Ms Weaver, Solicitor.

3. It was noted that one of the members in this panel had sat as a member in the prior Tribunal proceedings being relied upon as a protected act. The parties confirmed that this did not give rise to any conflict of interest or concern.
4. At the final hearing the Claimant gave evidence on his own behalf. The Respondent led evidence from Joyce Cameron (Administrator Officer), and Alan Morrison (Regulatory Services Manager).
5. The parties made recourse to witness statements as previously ordered by the Tribunal. The Claimant's witness statement did not address the following issues: the basis upon which he believed that he was subjected to the detriments because he had previously brought Tribunal proceedings and the remedy sought by him. Following discussion it was determined that the Claimant would be allowed to supplement his witness statement by oral evidence in chief in respect of these issues.
6. The parties lodged an agreed set of documents.
7. The parties made oral closing submissions.

List of Issues

8. The parties had agreed the following list of issues at a prior case management preliminary hearing –
 - a. *“Whether the Respondent subjected the Claimant to a detriment and if so what was the detriment?”*
 - b. *Whether the Respondent subjected the Claimant to a detriment because the Claimant had previously brought proceedings under the Equality Act 2010 against the Respondent?”*
9. The Claimant advised of two detriments:

- a. having applied for the position of Environmental Health Officer, being advised on 27 November 2019 that he was not being selected for interview; and
 - b. having applied for the position of Environmental Health Officer/ Regulatory Services Officer/ Graduate Environmental Health Officer, and having advised that his application pertained to the graduate position, being advised on 26 February 2020 that the graduate position was withdrawn.
10. The Respondent accepted that the Claimant had done a protected act by previously bringing Tribunal proceedings under the Equality Act. The Respondent denied that they had subjected the Claimant to a detriment either at all or because he had done a protected act.

Findings in fact

11. In June 2019 the Claimant brought proceedings against the Respondent for race discrimination under the Equality Act 2010 in respect of their failure to appoint him to the position of Regulatory Services Officer ('the prior Tribunal proceedings'). (Judgment was issued in April 2020 dismissing the claim.)
12. On 8 October 2019 the Respondent placed an external advertisement for the permanent position of Environment Health Officer ('EHO') attracting a salary between £34,947 and £38,213. Advertisements for positions were placed by Joyce Cameron ('JC'), Admin Officer.
13. The advertisement stated that "Consideration will be given to newly qualified officers and those working towards REHIS/ EHORB qualification". An EHO is qualified has undertaken an undergraduate degree course and then a graduate Diploma in Environmental Health awarded by REHIS (the Royal Environmental Health Institute of Scotland). REHIS as a third party which is independent of the Respondent.
14. On 29 October 2019 the Claimant submitted an application for the position which stated "I am working towards my REHIS Diploma". The applications were

collated by JC, Admin Officer and passed to the recruitment panel for short-leeting (i.e. short-listing). The recruitment panel compromised Alan Morrison, Regulatory Service Manager ('AM, RSM') and Iain Mackinnon, Environmental Health Manager ('IM, EHM'). AM, RSM is also Chair of the Society of Chief EHOs in Scotland. Following advice the Respondent took steps to ensure that the recruitment panel did not include members who had been members of the interview panel in respect of which prior Tribunal proceedings had been raised. AM, RSM had investigated the Claimant's previous complaint and was aware of the prior Tribunal proceedings.

15. On 19 November 2019 AM, RSM contacted REHIS to ask whether it was necessary to be a student member of REHIS to work towards the Diploma. REHIS replied advising "in order to be considered as 'working towards the Diploma' an individual would require to be registered with the Institute as a student. However that does not mean they require to hold student membership...if you could provide the name of the applicant I can advise you if they are registered with the Institute". AM, RSM replied asking "Can you advise on whether [the Claimant] is registered with the institute and would be considered by REHIS as 'working towards the Diploma'". REHIS replied advising that he was not on the student register. AM, RSM did not consider it to be a breach of data protection for him to contact REHIS about the Claimant and he had done this previously in respect of other applicants.
16. Obtaining the REHIS Diploma entails three stages: registering as a student with REHIS; completing a structured practical training programme of at least 48 weeks (11 months) whilst registered; and then sitting the Diploma exam which is held annually in Autumn. Accordingly depending upon when a student is registered relative to the annual exam diet, it may take between 11 months (48 weeks) and 23 months (48 weeks plus 52 weeks) to obtain the Diploma. The training programme is either completed as part of paid work with an employer or independently with the graduate student undertaking unpaid work with employer (s).

17. AM, RSM did not contact the Claimant to discuss what he had meant when he had said on his application: "I am working towards my REHIS Diploma". The Claimant was not a registered student but was engaged in the process of collating a folder of work which would be relevant for the Diploma.
18. There were 5 applicants for the position of EHO including the Claimant. The Respondent considered that only one applicant met the essential criteria and that applicant was invited to interview. All other applicants including the Claimant were advised that their applications would not be taken further. Specifically, on 27 November 2019 the Claimant was advised by the Respondent that his application would not be taken further. The Claimant was not provided with and he did not seek any further explanation. The Claimant was advised to register for the Respondent's email job alert service to advise him of future vacancies. The applicant invited for interview withdrew their application before the interview took place and no one was appointed to the position of EHO.
19. On 5 November 2019 the Respondent placed an external advertisement for the temporary position of Environment Health Officer ('EHO') / Regulatory Services Officer ('RSO') / Graduate Environmental Health Officer ('Graduate') attracting a salary of between £26,790 and £38,213. There was and remains a national shortage of qualified EHOs. The Respondent considered it necessary to widen the qualifications required (and therefore the type of position available) in order to attract a wider pool of candidates who met the essential criteria. Given workload pressures the Respondent wanted to appoint the most qualified candidate they were able to attract to a position that was commensurate with their qualifications. The Respondent's order of preference was to appoint a qualified EHO, failing which an RSO, failing which a Graduate.
20. In November 2019 the Claimant submitted an application for the position. On 3 December 2019 JC, AO emailed all applicants stating "Can I please ask you to indicate what grade of post you are applying for?" and provided a table listing the three posts with a blank next to each post for completion by the candidate. On 4 December 2019 the Claimant replied advising that he was applying for the

Graduate position. (In any event, AM, RSM was of the view that the Claimant was not qualified for the role of EHO or RSO.)

21. There were 8 applications for the Graduate position only, 1 application for the RSO position, and 1 application for the EHO position and 1 applicant who expressed an interest in all three positions. The applications were collated by JC, Admin Officer and passed to the recruitment panel for short-listing. Following advice the Respondent took steps to ensure that the recruitment panel did not include members who had been members of the interview panel in respect of which prior Tribunal proceedings had been raised. The recruitment panel comprised AM, RSM and IM, EHM.
22. The recruitment panel considered that the applicants for the RSO and the EHO position did not meet the essential criteria and in February 2020 they were advised that their applications would not be taken further.
23. The recruitment panel considered the applications for the graduate position on 29 January 2020. 8 out of the 9 applicants for that position met the essential criteria including the Claimant. Of those 8 applicants, the highest overall short listing score based upon the essential and desirable criteria was 36 and the lowest score was 22 (the Claimant scored 27).
24. The length of the training requirement for each applicant was noted as between 6 to 12 months at its the shortest and 24 to 36 months at the longest (the Claimant's training requirement to obtain the Diploma was noted as between 12 to 18 months). The recruitment panel concluded from this assessment that each of the applicants required considerable training with no ability to assist in undertaking statutory work demands for some time.
25. Throughout this time there were considerable pressures on regulatory services because they had 3 vacant posts out of a total of 15 EHOs, long term sick absence and the risks of EU exit with the potential to create an additional 22,000 export health certificate requests. The recruitment panel was of the view that

given these pressures it would be difficult to identify a mentor amongst the EHOs or to support a structured training programme. The recruitment panel formed the view that they required a qualified EHO and took the decision not to appoint a Graduate EHO.

26. All applicants, including the Claimant on 26 February 2020, were advised by the Respondent that they had decided not to proceed with the graduate position. The Claimant was not provided with and did not seek further explanation. The Respondent's recruitment policy states that applicants will be advised as soon as possible that their application has been unsuccessful to reduce the period of uncertainty. Three months had elapsed between the Claimant's application and intimation of the decision to withdraw the post. The Respondent explained that the delay was caused by pressure of work, the Christmas holidays, the need to take advice on the potential conflict of interest, and the need to assess the ability of the service to accommodate a graduate.
27. The Respondent recruited a qualified EHO in October 2020. The Respondent utilised savings from the unfilled vacancy to appoint a qualified EHO consultant to provide services on a contractor basis for around 2 months.
28. Since his first application for work with the Respondent the Claimant has applied for around 10 jobs a week. The Claimant was in receipt of Universal Credit from May 2019 until January 2021. The Claimant registered as a student with REHIS in November 2020. He is working towards his Diploma with a view to sitting his exam in September 2021. The Claimant eventually secured employment as an EHO with another employer on 15 December 2020 earning a salary of £35,000.

Observations on the evidence

29. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur.

30. RM, ASM gave evidence regarding the decision not to select the Claimant for interview, and the decision to withdraw the graduate position, in a straightforward manner which was entirely consistent with the documentary and other evidence and there was no basis upon which to doubt his credibility or reliability.

Relevant Law

Victimisation

31. Section 27 of the Equality Act 2010 ('EA 2010') provides: "A person (A) victimises another person (B) if A subjects B to a detriment because – (a) B does a protected act, or A believes that B has done, or may do, a protected act."

Protected act

32. The Respondent accepted that the Claimant had done a protected act by bringing the prior Tribunal proceedings against the Respondent.

Detriment

33. A detriment arises "where by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged" (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11). The Equality and Human Rights Commission Code of Practice provides that: "Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards".

Subjected

34. The detriment must be caused by some act or deliberate failure to act on the part of the employer.

The reason why

35. The reason for the treatment need not be the main or sole reason but must have at least a significant (or more than trivial) influence on the treatment to amount to an effective cause of it (*R (E) v Governing Body of JFS* [2010] 2AC 728, SC).
36. Victimisation may be intentional or it may be subconscious (based upon stereotypical assumptions). The Tribunal must consider the mental processes which caused the employer to act. This is not a necessarily a question of motive or purpose and is not restricted to considering 'but for' the protected act would the treatment have occurred (*Shamoon*).
37. The reason why may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).

Standard of Proof

38. Proof of facts is on balance of probabilities. Facts may be proven by direct evidence (primary facts) or by reasonable inference drawn from primary facts (secondary facts).

Burden of Proof

39. Section 136(2) of EA 2010 provides that "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provisions".
40. The burden of proof provisions apply where the facts relevant to determining discrimination are in doubt. The burden of proof provisions are not relevant where the facts are not disputed or the Tribunal is in a position to make positive findings on the evidence (*Hewage v Grampian Health Board* [2012] UKSC 37, SC).
41. The burden of proof is considered in two stages. If the Claimant does not satisfy the burden of Stage 1 their claim will fail. If the Respondent does not satisfy the

burden of Stage 2, if required, the claim will succeed (*Igen v Wong* [2005] ICR 935).

Stage 1 – prima facie case

42. It is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has subjected the Claimant to a detriment because of a protected act ('Stage 1' *prima facie* case).
43. Having taken a protected act and being subjected to a detriment is not sufficient (by analogy with direct discrimination *Madarassy v Nomura International Plc* [2007] ICR 867). The claimant must also prove a Stage 1 *prima facie* case regarding the reason for the treatment by way of "something more".
44. It is unusual to have direct evidence as to the reason for the treatment (victimisation may not be intentional and may be the product of unconscious bias or discriminatory assumptions) (by analogy with direct discrimination *Nagarajan v London Regional Transport* [1999] 4 All ER 65). Evidence of the reason for the treatment will ordinarily be by reasonable inference from primary facts.
45. At Stage 1 proof is of a *prima facie* case and requires relevant facts from which the Tribunal could infer the reason. Relevant facts in appropriate cases may include evasive or equivocal replies to questions or requests for information; failure to comply with a relevant code of practice; the context in which the treatment has occurred including statistical data; the reason for the treatment (*Madarassy*). "In so far as this [information] was in the hands of the employer, the claimant could have identified the information required and requested that it be provided voluntarily or, if that was refused, by obtaining an order from the Tribunal." (*Efobi v Royal Mail Group* [2019] EWCA Civ 19, CA)
46. Assessment of Stage 1 is based upon all the evidence adduced by both the Claimant and the Respondent but excluding the absence of an adequate (i.e. non-discriminatory) explanation for the treatment (which is relevant only to Stage 2) (*Madarassy*). All relevant facts should be considered but not the Respondent's explanation, or the absence of any such explanation (*Laing v Manchester City Council* [2006] ICR 1519, EAT and *Efobi*). (The Respondent's explanation for its

treatment provides the reason why he has done what could be considered a discriminatory act.) “Most cases turn on the accumulation of multiple findings of primary fact, from which the court or Tribunal is invited to draw an inference of a discriminatory explanation of those facts” (Madarrasy). “In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts” (*Igen; Hewage*).

Stage 2 – rebutting inference

47. If the Claimant satisfies Stage 1, it is then for the Respondent to prove that the Respondent has not subjected the Claimant to a detriment because of a protected act (Stage 2).
48. The employer must seek to rebut the inference of victimisation by explaining why he has acted as he has (*Laing*). The treatment must be “in no sense whatsoever” because of the protected act (by analogy with direct discrimination: *Barton v Investec 2003 IRC 1205 EAT*). The explanation must be sufficiently adequate and cogent to discharge the burden and this will depend on the strength of the Stage 1 *prima facie* case (*Network Rail Infrastructure Limited v Griffiths Henry 2006 IRLR 865*).
49. The Tribunal may elect to bypass Stage 1 and proceed straight to Stage 2, if they are satisfied that the reason for the treatment is fully adequate and cogent (*Laing*).

Claimant’s Submissions

50. The Claimant’s submissions were in summary as follows –
 - a. There had been a delay of 13 weeks to consider his application for the second post. The recruitment policy requires them to act as soon as possible.

- b. At the time of submitting his claim for victimisation he believed he had been victimised because he had applied for 2 jobs with the Respondent without success and because they had delayed in responding.
- c. It was a breach of data protection to go to REHIS to check whether he was working towards his diploma – they only went REHIS to avoid speaking to him. Had they contacted him he would have explained how he was working towards his diploma. He was not selected for interview because of the prior Tribunal proceedings.
- d. He understood that he could only select one of the three possible jobs
- e. The Respondent should have addressed the national shortage of qualified EHOs by appointing a graduate EHO.
- f. It was not credible that they could not identify a mentor or support a graduate EHO amongst 12 EHOs.
- g. There was no increase in the pressures of work between the decision to advertise for a graduate EHO and decision to withdraw that advertisement. The EU exit had been ongoing for years. Had a graduate mentor been appointed he would have been qualified by the time the qualified EHO was appointed in October 2020. The graduate position was cancelled because of the prior Tribunal proceedings.
- h. He had a 1 in 8 chance of securing the graduate EHO role had it not been cancelled

Respondent's Submissions

51. The Respondent's submissions were in summary as follows –

- a. Not inviting someone for interview and the cancellation of a job advert do not of themselves amount to a detriment
- b. In respect of his first application, there was no breach of DPA and in any event that was not relevant to his claim. The Respondent had checked with REHIS in respect of other students in past too. The Claimant was

not selected for interview for the EHO position because he did not meet the essential criteria.

- c. There was a good reason for the delay in responding to his second application given the Christmas holidays, the pressures of work, and the need to take advice on the recruiting panel.
- d. The Claimant was not qualified for the other jobs advertised (EHO and RSO)
- e. The Claimant had no insight into the changing pressures of the department and nor could he. Had a graduate mentor been appointed he would not have become qualified until November 2021. The graduate position was withdrawn because of pressures of work and not because of the Claimant's prior Tribunal proceedings.

Discussion and decision

52. The Claimant had raised the prior Tribunal proceedings which amounted to a protected act.
53. The decision not to invite the Claimant to interview for the EHO position put him to the disadvantage of the loss of an opportunity to secure work. The decision to withdraw the advertised graduate position also put the Claimant to the same disadvantage, namely the loss of an opportunity to secure work.
54. The decisions not to invite the Claimant to interview and separately to withdraw the graduate position were taken by a recruitment panel which included AM, RSM. AM, RSM knew of the protected act.
55. The essential criteria for the EHO position was that the applicant was qualified (i.e. had the Diploma) or was working towards the Diploma. The Respondent's criteria for a candidate to be working towards the Diploma was that they required to be registered with REHIS as a student. REHIS as an independent third party had specified that criteria. There was no evidence that the Respondent had previously applied different criteria. The Respondent approached REHIS to ascertain whether or not the Claimant was registered as a student. REHIS advised he was not.

56. There was no basis upon which it could reasonably be inferred that the Claimant was not invited to interview because he had raised prior Tribunal proceedings. There was clear incontrovertible evidence that the Claimant was not invited to interview because he did not meet the essential criteria. The Respondent had approached REHIS directly regarding a candidate in the past and no reasonable inference could be drawn from their decision to do so again. In any event the Respondent provided a fully adequate and cogent explanation of why the Claimant was not invited to interview and the prior Tribunal proceedings had no influence on that decision.
57. Throughout this time regulatory services were under significant pressure of work: they were short staffed - they had 4 unfilled vacancies and long term absence; and they were addressing the risks of EU exit. The first position advertised in October 2019 was for a qualified DHO (or someone already working towards the Diploma) which was not filled. The second position advertised in November 2019 was for a qualified DHO, RSO or a graduate DHO. The Respondent's preference was and remained for the appointment of a qualified DHO. The position which was ultimately filled in October 2020 was that of a qualified DHO.
58. Whilst the Respondent could estimate the length of training required for a graduate EHO at the time of placing the advertisement, the actual length of the training required was unknown until the applications had been received and then assessed at the end of January 2020. In the circumstances it was entirely reasonable for the Respondent to revisit their decision advertise for a graduate EHO once the applications had been received.
59. The recruitment panel took longer than normal to leet (short-list) the applications. The first recruitment process had taken around a month and this process took 3 months. However the recruitment process coincided with the Christmas holidays and entailed 3 different positions. There was no basis upon which it could reasonably be inferred that the Respondent withdrew the Graduate position because of the prior Tribunal proceedings. In any event the Respondent provided a fully adequate and cogent explanation of why they withdrew the position and the prior Tribunal proceedings had no influence on that decision.

60. Accordingly the Respondent did not victimise the Claimant as alleged and this complaint is dismissed.

**M Sutherland
Employment Judge**

**22 January 2021
Date of Judgment**

Date sent to parties

28 January 2021