



EMPLOYMENT TRIBUNALS

Claimant: Mr M Ferries

Respondent: West Yorkshire Fire and Rescue Authority

Heard at: Leeds **On:** 14 and 15 June 2021

Before: Employment Judge Cox

Members: Mr P Kent
Mr A Senior

Representation:

Claimant: Mr McHugh, counsel

Respondent: Mr Finlay, counsel

JUDGMENT

1. All claims other than a claim of failure to meet the duty to make adjustments are dismissed on withdrawal by the Claimant.
2. The claim of failure to meet the duty to make adjustments fails and is dismissed.
3. The Respondent's application for a Costs Order is refused.

REASONS

1. The Claimant is a Watch Commander based at the Respondent's Hunslet Fire Station. He presented a claim to the Tribunal alleging that the Respondent had discriminated against him because of his disability in its

selection process for the post of Station Manager that was conducted in March to May 2020, contrary to the Equality Act 2010 (the EqA).

2. At a Preliminary Hearing for case management and again during the course of the main Hearing, he clarified his claim. He confirmed that he pursued only a claim that the Respondent had failed to meet its duty to make adjustments to the following practices, which he said put him at a substantial disadvantage:
 - a. The practice of requiring candidates for the post of Station Manager to undertake a command assessment with limited notice.
 - b. The practice of changing the date of the command assessment without first conducting an equality impact assessment of the change.
 - c. The practice of carrying out the command assessment without offering training immediately prior to that assessment.

The law and the issues

3. An employer is under a duty to make adjustments to any practice it adopts that puts a disabled employee at a substantial disadvantage in comparison with people who are not disabled (Section 20 EqA). A substantial disadvantage is one that is more than minor or trivial (Section 212(1) EqA). The employer is not under a duty to make adjustments, however, if it neither knows nor could reasonably be expected to know that the employee is disabled and is likely to be put at that disadvantage (paragraph 20 of Schedule 8 EqA).
4. The employer meets the duty by taking such steps as it is reasonable to have to take to avoid the disadvantage to the disabled person.
5. A failure to meet the duty amounts to discrimination (Section 21 (2) EqA).
6. It is unlawful for an employer to discriminate against a disabled employee in the way it affords the employee access to opportunities for promotion, or by subjecting the employee to any other detriment (Section 39(2)(d) EqA).
7. At the Hearing, the Respondent accepted that the Claimant met the definition of a disabled person in Section 6 EqA at the relevant time, as a result of mixed anxiety and depression and post-traumatic stress disorder. It also accepted that it had knowledge of his disability at the relevant time. The issues for the Tribunal were therefore:

- 7.1 Did the Respondent adopt the practices it was alleged to have adopted?
- 7.2 If it did, did they put the Claimant at a substantial disadvantage in comparison with people who are not disabled?
- 7.3 If they did, did the Respondent know, or could it reasonably have been expected to know, that he was put at that disadvantage?
- 7.4 If it did, did it take the steps that it was reasonable for it to take to avoid that disadvantage?
8. At the Hearing the Tribunal heard oral evidence from the Claimant. On behalf of the Respondent, the Tribunal heard evidence from: Mrs Joanna Hardcastle, Assistant Human Resources Manager, who administered the selection exercise; Mr Adam Greenwood, Group Manager with responsibility for operational training delivery, who was involved in organising the command assessment part of the selection exercise; Mr Chris Lawton, Group Manager, who heard the Claimant's grievance about the selection process; Mr Jim Butters, Area Manager, who heard the Claimant's appeal against the grievance outcome; and Mr Ian Brandwood, Chief Employment Services Officer, who has overall responsibility for the Respondent's human resources function. The Tribunal was also referred to various documents in a file prepared for the Hearing.
9. On the basis of that evidence, the Tribunal made the following findings in relation to the claim.

Background facts

10. The Respondent advertised a vacancy for Station Manager on 31 March 2020. The advertisement gave the timetable for the process: shortlisting would be carried out in the week beginning 20 April; shortlisted candidates would be asked to undergo psychometric assessment and aptitude tests in the week beginning 27 April; applicants would be required to deliver a presentation and undergo an interview on a date between 11 May and 29 May; and candidates who passed the interview stage would attend a Skills for Justice Incident Command Development and Assessment course in either week beginning 15 June or week beginning 13 July.
11. This course was to be provided by a third-party provider. It would run for four days and involve some training to prepare candidates for a command assessment. A command assessment involves a candidate being provided with a practical scenario and then being asked how they would approach management of that scenario. The course would have involved a "dry run" of an assessment and feedback on candidates' performance in it, and then a

- final assessment. If a candidate passed that assessment, he or she would be able to rely upon that in any promotion application nationwide.
12. By 24 April, it became apparent that it was very unlikely that the third-party provider would be able to offer the command development and assessment course because the impact of COVID-19 had affected its ability to provide its services. The Respondent needed to fill the station manager vacancies urgently because of its concerns about the potential impact of COVID-19 on the attendance of staff and its ability to fill the staffing rota. The team responsible for command training and development therefore decided that it should run the command assessment itself. Having identified that the week beginning 4 May was the only week in which the team were available to carry out assessments, they informed Mrs Hardcastle of the need to change the assessment arrangements. On 24 April she emailed the candidates to let them know that the assessment would be carried out internally in the week beginning 5 May. The Claimant read this email on 27 April, his next working day. Also on 27 April Mr Staples, who is involved in station manager training, emailed the Claimant and explained that it was necessary to carry out the assessment internally so that the Respondent could be assured that a candidate was competent to perform the duties of the post and could be placed on the rota before going on the external course, whenever that might run. On 28 April the Claimant was informed that his own assessment would take place at 11.30am to 1pm on 4 May.
13. The Respondent had agreed a Reasonable Adjustment Plan with the Claimant in around March 2020 that identified that he tended to avoid tasks that provoked anxiety, like preparing for exams and interviews, and experienced anxiety when he did not have sufficient time to think. He could on occasion “go blank” when under pressure in interview, exam or assessment scenarios. The Respondent agreed various adjustments for him, including that he would be given additional time in exams and provided with interview questions in advance.

Allegation 1: requiring candidates for the post of Station Manager to undertake a command assessment with limited notice

14. The Respondent accepted that its practice was to require candidates for the Station Manager post to undertake a command assessment with limited notice. For the Claimant, he was alerted to the fact that he would be asked to do the assessment sometime the following week when he read Mrs Hardcastle’s email of 24 April on 27 April. He knew on 28 April that his assessment would be on 4 May.
15. The Tribunal accepts that this short notice of the assessment put the Claimant at a substantial disadvantage in comparison with people who are not disabled. Any candidate would be likely to be stressed by having short

- notice of an assessment. The Claimant's stress level was more likely than not to have been higher to a more than minor or trivial degree because of his underlying condition of anxiety. He had previously assumed that his assessment was several weeks off and now it was imminent.
16. The Tribunal also accepts that the Respondent ought reasonably to have known that this short notice would cause the Claimant more stress than others, because it knew about his disability, including his anxiety condition.
17. The Tribunal does not consider, however, that there were any steps that it would be reasonable for the Respondent to have taken to avoid the disadvantage. Even if it had put the Claimant's assessment back to the Friday, which was the latest possible date that the assessment could have been done, he would still have been facing an assessment at limited notice. Those extra days would not have been any benefit to him in terms of preparing for the assessment. He had already undergone assessment in previous recruitment exercises and so he knew broadly what was involved. There was no question of him receiving advance warning of the particular scenario he would be presented with, given that the assessment was to assess his ability to react under time pressure to unpredictable events. Having sought promotion before, he had already had every opportunity to seek information and guidance from his line manager or others on how to approach the assessment. He was not under any greater disadvantage than non-disabled people would have been because he now had limited time to take up that opportunity.
18. For these reasons, this allegation of failure to meet the duty to make adjustments fails.

Allegation 2: changing the date of the command assessment without first conducting an equality impact assessment of the change

19. The Respondent did not consider what the impact of changing the date of the assessment would be on candidates. The Tribunal accepts that this had the potential to put the Claimant at a substantial disadvantage: as a disabled person, he was more likely than others to have needed adjustments to the process and the Respondent did not consciously consider whether that was the case and, if it was, whether anything could be done to address any disadvantage he might be under.
20. In fact, however, the failure to carry out an equality impact assessment did not put the Claimant under a substantial disadvantage, because such an assessment would not have identified anything the Respondent could have

done to avoid the Claimant's anxiety at now facing an assessment at short notice. For reasons that have already been stated, the assessments had to be done the following week. The Tribunal heard no evidence that changing the date from Monday to Friday would have lessened the impact on the Claimant's anxiety level.

21. For that reason, this allegation of failure to meet the duty to make adjustments fails.

Allegation 3: carrying out the command assessment without offering training immediately prior to that assessment.

22. Whilst the original plan was for candidates to have been provided with training by the third-party provider in the days prior to the assessment, under the revised arrangements candidates underwent the assessment without any prior training. The Tribunal accepts that this put the Claimant at a substantial disadvantage in comparison with people who are not disabled because his performance, even if in a work-based scenario, was likely to be adversely affected when he was being assessed, as a result of his anxiety. That effect would have been mitigated by receiving training in the period running up to the assessment. The Tribunal also accepts that the Respondent could reasonably have been expected to know that the Claimant was at that disadvantage, having already identified in his Reasonable Adjustment Plan that his anxiety affected his ability to perform in interview, exam or assessment scenarios.
23. The Tribunal does not accept, however, that there was any adjustment that the Respondent could reasonably have made to avoid that disadvantage. The third-party provider was not available to provide the training it would normally have provided. It is the Respondent's policy that once a recruitment process has opened the Respondent's own command training and development team cannot provide assistance to any candidate in the process, because of the risk that, amongst other things, they might consciously or sub-consciously give clues as to the scenario on which the assessment is to be based. The Tribunal does not consider that it would be reasonable for the Respondent to have departed from that policy in this case. For self-evidence reasons, the Respondent needed to assure that the successful candidate was competent to fill the role. It was therefore essential for the Respondent to be able to assess the performance of the Claimant, as well as all other candidates, in responding to a scenario of which the candidate had no prior knowledge.
24. For this reason, this allegation of failure to meet the duty to make adjustments fails.

Summary and conclusion

25. The Tribunal concludes that all allegations fail and are dismissed.

Employment Judge Cox
Date: 15 June 2021

Note: Reasons for the decision on the Respondent's costs application having been given orally at the Hearing, the Tribunal will not provide written reasons unless these are requested in writing by either party within 14 days of this written record of the decision being sent to the parties.