EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr V Shone	**v**	**Driver and Vehicle Standards Agency**

RECORD OF AN OPEN ATTENDED PRELIMINARY HEARING

Heard at: **Nottingham** **On: Thursday 29 June 2017**

Before: **Employment Judge Britton (sitting alone)**

Appearances
For the Claimant: **Mr J Searle of Counsel**
For the Respondent: **Ms E Hodgetts of Counsel**

JUDGMENT

1. The claim of disability discrimination is dismissed.

2. As to the remaining claim of unfair dismissal, the Claimant will pay a deposit of £50 by 28 July 2017, the claim having only little reasonable prospect of success. The deposit order notification accompanies.

REASONS

Introduction

The disability claim

1. This case came before Employment Judge Hutchinson on 22 May. As to what he had to say is set out at Bp[1] 25 – 29 in the joint bundle before me. It has to be read in the context of the claim as it had been originally presented to the Tribunal. Essentially the claim was as per the ET1 at Bp 7:

> *"The Claimant is disabled pursuant to Section 6 of the Equality Act 2010. The Claimant suffers from PTSD and fibromyalgia and degenerative arthritis. The Respondent did not consider his disability during the disciplinary process and he was treated less favourably.*

[1] My reference: Bp=bundle page

The Respondent's decision to dismiss was not within the band of reasonable responses."

2. Moving on there was then in due course supplied a statement of case commencing at Bp 14. Amendments thereby to what was originally claimed were not permitted by Employment Judge Hutchinson for the reasons he gives in his decision and thus not going forward was anything other than direct discrimination pursuant to Section 13 of the Equality Act 2010 by reason of the pleaded disabilities and including the dismissal, and unfair dismissal pursuant to s98 of the Employment Rights Act 1996. As to the interface of the disability to the dismissal scenario this is explained in the statement of case at paragraphs 1-11 where it is obvious that the Claimant is pleading that his PTSD was a factor in the behaviour that he does admit to and thus in the context of the dismissal that the Respondent failed to consider that PTSD as a mitigating circumstance; thus paragraph 8, last 5 lines:

"It is contended that an individual suffering from PTSD would be more likely to react in this way given the circumstances in than n individual who did not suffer from the condition. The Claimant contends that his disabilities should have been considered."

3. Against that background Employment Judge Hutchinson ordered the Claimant to provide the particulars as set out at his order 1 at Bp 28. Suffice it to say that the further and better particulars that the Claimant has now supplied commencing at Bp 30 are on a wholly different premise. They deal with treatment of him by reason of his disability, and in particular by one Nigel Robinson, in the period prior to the dismissal and it seems to me that in that respect it cannot but cut off in January 2016 which is when Mr Robinson ceased to manage him. And otherwise the particulars, ie paragraph 12, are about September 2015 as is the reference to comparators; not pleaded to at all and by reference to Section 13 is why discrimination is engaged in the dismissal scenario let alone then providing the particulars as required by Employment Judge Hutchinson. What it means therefore is that the Claimant has not complied with Mr Hutchinson's orders in relation to the dismissal scenario and how Section 13 is engaged. What he is attempting to do is to introduce a wholly new head of claim which on the face of it was at least 11 months out of time as at the presentation of the claim (9 January 2017). Therefore I am with the Respondent's Counsel that there is not a claim made out which passes legal muster, let alone gets into the factual merits which I stress I am not dealing with. There is no time bridge which would bring in the concepts in the dicta of Lord Justice Mummery in **Hendricks against the Commissioner of the Metropolis**[2]. It follows that I therefore dismiss the Section 13 direct discrimination claim as having no reasonable prospect of success.

Strike Out or a Deposit Order as to the remaining claim of unfair dismissal

4. There is an application by the Respondent that I strike out the remaining claim. This would be pursuant to Rule 37(1)(a) of the 2013 Tribunal Rules of Procedure on the basis that the claim has no reasonable prospect of success. In the alternative if I am not persuaded to strike out, I am invited to make a deposit order pursuant to Rule 39(1) on the basis that the remaining claim has only little reasonable prospect of success. Mr Searle has raised arguments before me which contend that I should not take either course of action, I have heard those fully as I have heard the detailed submissions of Ms Hodgetts. Now of course I have got start from the premise that I am not hearing the evidence today, thus with such an application the function of the Judge as per in the past Order 14 strike out applications in the High Court is to assess on the papers before him the strengths and weaknesses of the claim.

[2] (2003) IRLR 96 CA.

5. There are two limbs to the dismissal of the Claimant. The first is that on 11 February 2016 he was involved in an altercation with a Mr A. The Claimant who is a driving test examiner was taking a candidate out on the driving test and had started to put the candidate through the reversing round a corner part of the test, only to find that the passage thereof was, he says, being blocked by Mr A. The Respondent pleads that the Claimant unreasonably impeded the progress of Mr A and thence got out of the test car and confronted Mr A swearing at him. Mr A apparently recorded this incident on his dashboard camera and reported it on the same day to the Respondent and I gather the police. It seems to be obvious from what I have heard today that the Police didn't take any action. The competing version of events in terms of the Claimant is that Mr A has "form" for behaving in this obstructive way to driving test examiners and that the Claimant endeavoured to persuade by way of hand signals Mr A to bring his car round past the examiner car but that Mr A was refusing so to do; and so the Claimant got out of the car and walked over to Mr A to find out why he wouldn't reverse or go round the car: he says that he did not make any threats or swear loudly at Mr A but only on his way away from him muttered under his breath. So there are two competing versions. Ms Hodgetts submits that the evidence simply wasn't there that Mr A had "form" so to speak. The other driving examiners didn't corroborate Mr Shone. But I don't know how they were interviewed. I don't know if statements were taken from them; and therefore it is very difficult to me to assess the fairness in that respect of the dismissal. It requires findings of fact and in that context an examination of the investigatory documentation; the minutes of the disciplinary and of the appeal. None of this is before me. It follows that I am not persuaded the claim of unfair dismissal on this issue case has no reasonable prospect of success or confined **in itself**[3] only little reasonable prospect.

6. However there was a second limb to the reason for dismissing the Claimant by way of gross misconduct and that is that on 15 February 2016 he was seen by his manager Mr Clark, carrying out a driving test and undertook what is known as "short test". In other words instead of the legal minimum of 30 minutes the Claimant stopped the test at 21 minutes. The first explanation that the Claimant gave, which would fit with that he has got a disability accepted to be as such by the Respondent, namely arthritis and fibromyalgia, was that he had stopped the test because:

> *"Needed to take some painkillers that he had not terminated the test, he had passed the candidate". The Claimant apologised and acknowledged that he should have terminated the test and allowed an alternative examiner to carry out a test which complied with the legal minimum of 30 minutes."*

7. Now I don't know whether in fact this candidate was so good that the integrity of the driving test was not undermined by cutting it short. I don't have in that sense the interviews; and I would say that if the Claimant had stopped the test because he was in pain, then that might be significant mitigation. However when the Claimant was interviewed again about this matter by the investigating officer, as pleaded by the Respondent, and I have nothing in the Claimant's particulars that contradicts, the Claimant now (see paragraph 29):

> *"denied that he had conducted a test for less than the minimum time required, sought to allege that it was not his handwriting on the DL25 form".*

8. Fast forward to the actual disciplinary hearing and at paragraph 37 of the response, with regard to the incident of 15 February the Claimant continued to deny knowing that he had short timed a driving test. However he did admit contrary to his statements in

[3] My emphasis.

the investigation meeting that that it was his handwriting on the DL25 test report which stated:

> *"Examiner in bad pain and miss read his watch resulting in a short test of 25 minutes. The Claimant complained he could not remember writing this on the report, nor any of the subsequent conversation with Mr Clark".*

9. So I am with Ms Hodgetts that this somewhat undermines the integrity of the first explanation which might have been sufficiently mitigatory to perhaps mean the Claimant could have been given a final warning. I appreciate that by then he had been given a final warning on 10 June 2016, but that wouldn't stop a second warning because that warning could not really be taken into account as it in fact related to an incident on 8 October 2015. But I can see that the employer might very well be somewhat disbelieving of the Claimant given these competing versions on the events; and the employer was of course dealing with both the Mr A episode and the "short test" for the purposes of finding gross misconduct. Mr Searle argues that they can't be conjoined. He has presented no jurisprudence to that effect. My extensive judicial experience is that they can be and of course findings in relation to one issue may give weight in terms of assessment of credibility as to the other and vice versa.

10. As I am not striking out on the Mr A issue and given the conjoined disciplinary charges, I will not strike out the second limb. But given these competing versions by way of the Claimant's explanation I start with that his claim looks weak. It is, of course fundamental that driving examiners scrupulously apply the test, otherwise of course the credibility of the driving test regime would be fundamentally undermined. And of course the weakness of the second limb claim may have a knock on effect in terms of credibility on the Mr A issue. Therefore I have decided to make a deposit order as I do find that taken together these claims on the face of it have only little reasonable prospect of success.

11. As to the amount of that deposit order the problem I have got, and Mr Searle is not to be blamed, is that Mr Shone despite knowing that on the agenda today there was a deposit application, whether it be his fault or that of his solicitors, has provided no information as to his means at all. What I do know is that he held what is quite a well paid job, particularly in the locale in which he lives, as a driving test examiner. Prior thereto I understand he had service in the armed forces, the police and the prison service. Thus I am with Ms Hodgetts that it is likely that he would therefore have built up some pension entitlement. He is about to start a new job, albeit on a lower salary. Therefore doing my best, and of course I take into account the recent authority of **Hemdan v Ishmael and Another** [2017] IRLR 228 EAT, I have concluded that I will limit the deposit to £50.00. I have no evidence before me that this is an amount that this Claimant could not pay. I am not being told that he is in financial dire straits unlike the case of Mrs Hemdan. I reminded the Claimant of the significance of the making of the deposit order pursuant to Rule 39(5)(a).

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. This case is currently listed for 3 days before a full panel. As the discrimination elements have gone leaving the unfair dismissal claim, it will now be heard over the first **two days**, that is 13 and 14 November 2017 at Nottingham by a **Judge sitting alone** and the following directions apply.

<u>Discovery</u>

2. First stage discovery is that the Respondent will send a chronological, double spaced trial bundle index to the Claimant by **21 July 2017**.

3. The Claimant will reply thereto providing copy documents of anything else he wants in that index and having annotated the same, unless the document is in the custody or control of the Respondent in which case I make that plain.

4. By not later than **1 September 2017**, a single bundle of documents is to be agreed. The Respondent shall have the conduct for the preparation of the bundle for the hearing. The bundle is to be bound, indexed and paginated. The bundle should only include the following documents:

- the Claim Form, the Response Form, any amendments to the grounds of complaint or response and case management orders if relevant;
- documents which will be referred to by a witness;
- documents which will be referred to in cross-examination;
- other documents to which the tribunal's attention will be specifically drawn or which they will be asked to take into consideration.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is material to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle
- the documents in the bundle must follow a logical sequence which should normally either be simple chronological order or chronological order within a number of defined themes e.g. medical reports, grievances etc
- correspondence between the Tribunal and the parties, notices of hearing, location maps for the Tribunal and other documents which do not form part of either parties' case should never be included.

Unless an Employment Judge has ordered otherwise, bundles of documents should <u>not</u> be sent to the tribunal in advance of the hearing.

5. By not later than **29 September 2017**, the parties shall mutually exchange the witness statements of all witnesses on whom they intend to rely on. The witness statements are to be cross-referenced to the bundle and will be the witness's main evidence. The Tribunal will not normally listen to witnesses or evidence not included in the exchanged statements. The Claimant's witness statement must include a statement of the amount of compensation or damages they are claiming, together with an explanation of how it has been calculated and a description of their attempts to find employment. If they have found a new job, they must give the start date and their take home pay.

6. Witness statements should not routinely include a précis of any document which the Tribunal is to be asked to read. Witnesses may of course refer in their witness statements to passages from the documents which are of particular importance, or to the inferences which they drew from those passages, or to the conclusions that they wish the Tribunal to draw from the document as a whole.

NOTES

(i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.

(ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

(iii) The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management': https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20170406-3.2.pdf

(v) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so.*" If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

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Employment Judge P Britton

Date:7 July 2017

Sent to the parties on:

…10/7/17……
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For the Tribunal:
S.Cresswell
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