EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr S Johnson	**v**	**Neil Shacklock Plumbing and Heating Contractors Limited**

RECORD OF A CLOSED TELEPHONE PRELIMINARY HEARING

Heard at: **Nottingham** **On: Thursday 24 May 2018**

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

Appearances
For the Claimant: **Ms B Wood, Solicitor**
For the Respondent: **Ms N Thomson, Solicitor**

JUDGMENT

1. The claim of indirect discrimination pursuant to Section 19 of the Equality Act 2010 is dismissed upon withdrawal.

2. The application to amend to substitute a claim pursuant to Section 15, that is to say unfavourable treatment, is granted.

3. Thus the claims that go forward at this stage are as follows:-

a) Claims of Section 15 unfavourable treatment and Section 20-22, failure to make reasonable adjustment pursuant to the Equality Act 2010 and;

b) A claim for constructive unfair dismissal pursuant to the provisions in the Employment Rights Act 1996.

CASE MANAGEMENT SUMMARY

Introduction

1. The claim (ET1) was submitted to the Tribunal on 31 January 2018. It is fully pleaded. At the heart of the case is that the Claimant now aged 60, but at the time of material events then 59, worked for the Respondent as a plumber. He has a condition known as obstructive sleep apnoea. He has suffered from the condition for many years and indeed as a result cannot drive and thus has not got a driving licence. The condition was actually only formally diagnosed by a specialist on 26 June 2017 and thereafter he told his employer disclosing the specialist's letter.

2. At the heart of his case is that because of his condition from circa the start of his employment back in 1998 he had always been driven to and from places of work including being collected from his home and taken back at the end of the day's work by what as I would describe as a plumber's mate. It seems that for a number of years this had been Gary Marsh. And so he pleads that there was a custom and practice which had been present for many years which is described by his solicitor in the pleading as contractual. What he pleads is that in August of last year one of the managers of the business, Mr Hodgson, told him that from now on he would not be provided with the transportation and that he would have to transport himself and in so doing it is alleged told him that he needed to get himself a driving licence and gave him an 8 week deadline. That latter point cross referencing to the response (ET3) is in conflict. As to the latter it is also pleaded that this wasn't a contractual arrangement; only an informal one between the Claimant and Gary, but that in any event post the going off sick by Gary as the months developed it became clear that the other members of the workforce were not willing to convey the Claimant in the manner I have described. The respondent contends that it made reasonable adjustments, I assume as it is not spelt out by the transportation of his tools and the materials needed to any given place of work so that the Claimant could transport himself and as pleaded use public transport. Further particularisation as to the reasonable adjustments, as I have made some assumptions, is clearly needed as it is crucial. The Claimant's position essentially is that this use of public transport would have been unworkable for reasons clearly pleaded.

3. Suffice to say that the upshot is that the Claimant raised a grievance and being dissatisfied with the outcome and the procedure and in particularly as to the appeal all of which he pleads, that he resigned this employment and thus claims constructive unfair dismissal and disability discrimination. The disability claim had essentially been founded upon Section 19 of the EQA, but I pointed out to Ms Wood the judgment of the Supreme Court in **Essop**[1] and that this was not a Section 19 claim because the pool engaged is only one person adversely affected and more than that is required for the purpose of Section 19. I pointed out that is why Section 20-21 is there solely for the purposes of the disabled and that also that is why there is the provision at Section 15 essentially being that a claim can be brought if the disabled person has been treated unfavourably because of something arising in consequence of the disability. Clearly on the Claimant's pleaded scenario that is the case. Thus, and I am most grateful to Ms Thomson in deciding not to object as this case is in its infancy, I granted the application to withdraw the Claimant's Section 19 claim and substitute one under Section 15. Of course I now give the Respondent leave to amend its response, if it wants to, to plead to the Section 15 issue and because of course it might be able to plead that it was justified in the approach that it took but of course that would also involve interface to considering whether or not reasonable adjustments could have been made.

4. As to the way forward at present the Respondent does not admit the Claimant is by reason of the condition a disabled person pursuant to the provisions of Section 6 and Schedule 1 of the EQA. I observed that prima facie this would be a disability because it clearly would have a more than minor or trivial impact on the ability to undertake normal day to day activities, one of which is the ability to drive a motor car in the modern day and age. It seems to me that the case is more going to resolve itself around the factual scenario in this case. Nevertheless I am going to order disclosure to the Respondent of the medical notes in order that it can further consider its position; the Claimant's solicitor is already in the process of obtaining them. Should she encounter difficulties then I made plain that she can apply to the tribunal for an

[1] Essop and others v Home Office (UK Border Agency) 2017 UKSC 27.

order for production by the GP; as I am today ordering a further Preliminary Hearing that could mean that we would order the GP to attend that hearing if the provision of the medical notes is being delayed. I am also ordering the Claimant prepare and serve an impact statement.

5. Should the Respondent having received the same continue to deny that the Claimant is not a disabled person, then it will need to supply persuasive reasons and in particular if wanting to seek a specialist's report. To me it seems evident that the issue of whether or not the Claimant is disabled could be dealt with at a live Preliminary Hearing by consideration of the medical notes including the specialist report that was obtained and the impact statement of the Claimant and his being cross examined. I only say that because at present the Respondent suggested what I call the **De Keyser** approach, that is to say getting a joint specialist opinion. At present I see no need for that at all.

6. Should the Respondent concede disability, to give further directions for the main Hearing. As it is so far ahead I am staying all current directions. The only matter that really needed to be dealt with at this stage was the provision of schedule of loss but this has now happened. As to the extent of his losses, the Claimant has decided not to continue to work as a plumber and is now in receipt of his old age pension. That of course means that from that date henceforth his losses cut off.

7. Finally I consider this case is highly suitable for Judicial Mediation. Ms Thomson does not disagree but would need to get confirmation from her client's insurers in particular. Ms Wood made plain that her client would agree to Judicial Mediation.

8. Against that background I am going to make the following directions.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

<u>On the medical front</u>.

1. By **28 days** from the date of this case management discussion the Claimant will have obtained and served upon the Respondent a copy of the Claimant's medical notes including prescription records and all specialist reports received. By the same date the Claimant will have served an impact statement setting out how long he has suffered from the condition, even if it wasn't formally diagnosed, and its impact upon his normal day to day activities including of course sleep and the impact of sleeplessness and referencing that he does not have a driving licence and as to why.

2. Having received all of the above the Respondent will reply to the same within **21 days** setting out to the Tribunal as to whether or not it now concedes disability and if it doesn't, why and what orders it might require.

3. At this stage as I hope I have now made plain I would not see the need for any further orders albeit that might change, thus I hereby list an **attended Preliminary Hearing to determine the issue of disability and to be heard on 23 July 2018 at Nottingham, commencing at 10:00 am**.

The way forward if disability is conceded

4. Should the Respondent concede disability, then the attended Preliminary Hearing will be converted to a telephone case management discussion to give further directions. However if the Respondent consents to Judicial Mediation, it will be confined to ordering the Judicial Mediation, including setting out the limited directions in relation to the same, and giving a date for that mediation.

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.

_____

Employment Judge P Britton

Date: 31 May 2018

Sent to the parties on:

2 June 2018

For the Tribunal: