



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr S Lane**

**v**

**Ford Motor Company**

## PRELIMINARY HEARING

**Heard at:** Bury St Edmunds

**on:** 6 July 2018

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

### Appearances

**For the Claimant:** Mr M Sprack

**For the Respondent:** Ms H Bayoumi

## RESERVED JUDGMENT

The claimant was a disabled person as defined by section 6 of the Equality Act 2010 with effect from June 2015.

## RESERVED REASONS

### Introduction

1. The claimant complains of disability discrimination by the respondent alleging that the respondent's actions in invoking and pursuing a disciplinary process, an initial decision to dismiss him and the ultimate disciplinary sanction awarded all constitute disability discrimination against him, whether direct or indirect, discrimination arising from his disability and/or by a failure to make reasonable adjustments.
2. The purpose of today's hearing was to determine whether or not the claimant was, at the material times, a disabled person within the meaning of Section 6 of the Equality Act 2010 (EQA). As set out below, for a person to be suffering from a disability with these purposes requires that he has a "physical or mental impairment". This much was conceded by the respondent and the focus of today's hearing was whether or not any

adverse effect on the claimant's ability to carry out normal day to day activities deriving from this impairment was 'substantial' and 'long term'.

3. In reaching my decision, I heard evidence from the claimant and his wife, Kathy Lane, and for the respondent from Cat Gray who is the HR manager at the respondent's site where the claimant works. All had produced and exchanged witness statements, the claimant having prepared two witness statements. I was also provided with a bundle of documents comprising over 300 pages and I made it clear to the parties that I would only consider those documents to which I was specifically referred, either in evidence or submissions. Both counsel made helpful oral submissions, Ms Bayoumi amplifying a written skeleton argument prepared prior to the preliminary hearing.

### **Facts**

4. There are a number of agreed facts. The claimant had been employed as a senior security officer by the respondent since November 1995 at its Dagenham plant. The respondent's security function reported into the respondent's HR department and Ms Gray was the claimant's line manager. She had been employed in the role of HR manager since November 2010 although she had taken two periods of maternity leave, the second of which was from June 2014 to September 2015. She had therefore not been at work during the period between June 2015 and September 2015. Since her return, she has worked part time effectively job sharing with another HR manager both of whom work two and a half days a week.
5. The relevant period of time is between June 2015 and May 2017. The period between June 2015 and May 2016 is when the alleged misconduct by the claimant occurred and it is common ground that during this period, the claimant made approximately 100 visits to the company gym for an average of 19 minutes per visit. He did this during working hours without authorisation and accepts that in doing so, he was effectively deserting his post. The respondent treated the claimant's actions as misconduct and began an investigation.
6. The investigation into that alleged misconduct started in May 2016 and in September 2016, the claimant was dismissed. He appealed against his dismissal and under the respondent's policy, he remained in employment pending the outcome of that appeal. The appeal was successful at least in part and his dismissal was converted in May 2017 to disciplinary action short of dismissal, which included transferring the claimant to a less senior position of warehouse operative. The claimant had been suspended in May 2016 and did not return to work until May 2017.
7. Prior to the conduct which is the subject of these proceedings, the claimant had a good employment record with no disciplinary or attendance issues to note. He appears to have been seen as a loyal and committed employee.

8. It also does not appear to be a dispute that the claimant had somewhat of a difficult childhood. By the age of nine his siblings, all of whom were older than he, had moved away and he was the only child in the household. His mother suffered from a mental illness which led to erratic and volatile behaviour. His father did not recognise that his wife was suffering from a mental health condition and did not seek help for her, leading to significant conflict within the family.
9. In March 2016, the claimant's father was diagnosed with dementia. For a considerable period of time before then, the claimant's father had been displaying signs of mental health illness and in December 2015, the claimant and his wife had taken him in to live with them at their home, where he remained until moving into residential care in June 2016.

### **Applicable law**

10. Section 6 (1) EQA provides that "a person (P) has a disability if –
  - (a) P has a physical or mental impairment and
  - (b) the impairment has a substantial and long term adverse effect on P's ability to carry out normal day to day activities."

The burden of proving that a person is disabled under section 6 EQA is on the claimant.

11. By section 6 (4) the relevant provisions of the EQA apply to someone who has previously had a disability.
12. In 2010, the Secretary of State issued guidance under section 6 (5) EQA concerning the definition of disability in the EQA. I have had regard to that guidance in formulating my conclusions below.
13. The guidance provides that "a substantial effect is one that is more than a minor or trivial effect". This mirrors the definition in section 212 (1) EQA.
14. Paragraph 2 of Schedule 1 to the EQA provides that:
  - "(1) the effect of an impairment is long term if –
    - (a) It has lasted for at least twelve months,
    - (b) It is likely to last for at least twelve months, or
    - (c) It is likely to last for the rest of the life of the person affected."
15. There is no statutory definition of "normal day to day activities". The guidance states that "in general, day to day activities are things people do on a regular or a daily basis". It goes on to say that "normal day to day activities can include general work-related activities, and study and educational related activities." Examples of such activities are given as interacting with colleagues and preparing written documents.

16. Ms Bayoumi has referred me to several European cases regarding activities in professional life – activities undertaken at work. Insofar as Ms Bayoumi’s argument extends to the proposition that a person cannot be disabled if he is able to go about his work without substantial adverse effects, then I do not accept that proposition. As Mr Sprack pointed out, my focus must be on the wording of the statute. Nevertheless, activities at work may well be relevant, unless they are particularly specialist and therefore not “normal day to day”. In the particular circumstances of this case, I consider there are a number of areas of the claimant’s work which are relevant, including his interaction with colleagues and the time taken to undertake tasks such as composing and typing e-mails.
17. In determining whether the adverse effect on day to day activities is substantial or long term, the tribunal should focus on what a person cannot do (or has difficulty in doing) rather than trying to undertake a balancing act between what he or she can and cannot do.
18. By paragraph 5(1) of schedule 1 to the EQA an impairment will be treated as having a substantial effect on a person’s ability to carry out normal day to day activities if:
  - “(a) measures are being taken to treat it or correct it; and
  - (b) but for that, it would be likely to have that effect.”

Thus a tribunal should assess how an impairment would affect a person’s day to day activities if the medical treatment were stopped.
19. The guidance also provides that account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, in order to prevent or reduce the effect of an impairment on normal day to day activities. It goes on to say that in some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. However, account should also be taken of where a person avoids doing things because of a loss of motivation and the guidance states specifically that “it would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person”.

## **Conclusions**

20. It is the claimant’s case that from the time that his father began to show signs of mental illness and behave erratically, his own mental health was affected such that he went from being passive and quiet at home to being angry and irritable withdrawing into himself and avoiding contact with people whilst at work. He states that from the spring of 2015, his personality changed from being quiet, passive and laid back to angry, aggressive and verbally abusive, often arguing with his wife, viewing her as the “enemy” and feeling controlled and resentful. He says that he did not feel motivated to leave the house or even get dressed in the morning. Whereas he used to love to go outdoors for walks in the park and visit

country fairs in the summer, he had no desire to do any of these things. He became intolerant. He was unable to sleep at night and found it difficult to concentrate or make rational decisions. His memory suffered.

21. The claimant says that when his father came to live with him in 2015, his mental health deteriorated further as he was then experiencing his father's decline 24/7. However, he was in denial about his own mental condition and was only finally persuaded to go to his GP in April 2016.
22. The claimant did not wish to go on medication but was willing to try counselling attending around six to eight sessions of counselling in July 2016 as well as further sessions later. In August 2016, the claimant was given anti-depressive medication, but the claimant says his symptoms did not improve and was therefore placed on a higher dosage and an alternative anti-depressant in September 2016 which he still takes to this day. The claimant's wife supports the claimant's assertions stating that the claimant "became a stranger" to her, was dismissive of her and demeaning towards her, becoming reckless in his own behaviour. In summary, the claimant became very difficult to live with and trying to encourage him to do anything was very difficult often resulting in the claimant lashing out at his wife.
23. The claimant's wife also states that after the claimant's wife came to live with them in December 2015, the claimant's mental state rapidly declined. She describes the process as watching her husband "turning into somebody I never want to meet again".
24. Within the bundle of documents are reports from two consultant psychiatrists. The first was prepared on behalf of the claimant by Dr C Taylor in December 2016 and the second on behalf of the respondent by Dr T G Tennent in March 2017. There is a level of agreement between the two reports and in both psychiatrists confirm that between June 2015 and May 2016, the claimant was suffering from a mental disorder. The disorder is described by Dr Taylor as most likely to be an "Adjustment Disorder". Dr Taylor goes on to say that such disorders are defined as "states of subjective distress and emotional disturbance usually interfering with social functioning, performance arising in the period of adaptation to a significant life change or stressful event." Dr Tennent's conclusions are similar: "in my opinion Mr Lane during this period was suffering from a mental disorder/Adjustment Disorder with depression, anxiety and dissociative behaviours being a part of this".
25. If the evidence of the claimant and his wife and the reports of the two consultant psychiatrists are taken at face value, it would be hard to argue that the claimant was not disabled under section 6 EQA. I have described some of the effects on his behaviour set out in his own evidence as supported by the evidence of his wife. In addition, he refers to incidents at work when he took two days to compile an e-mail and occasions when he simply failed to react to things going on around him. Dr Taylor concludes: "there appears to have been a very significant personality change around

the time of his father's diagnosis" and Dr Tennent concludes that: "his behaviour at home changed so that many of his actions were offensive to his wife and there were frequent arguments".

26. In response, the respondent essentially puts forward two arguments. Firstly, and as set out in paragraph 29 of Ms Bayoumi's skeleton argument, the respondent asserts that: "the claimant has not shown as he is required to do, that his medical condition was such that it had a material impact on his professional life". The argument is effectively that to be disabled, the complainant must show that not only that the impairment suffered by the claimant has a substantial and long-term effect on activities at home, but also on activities at work. As stated above, I do not accept that this is a correct statement of the law. Whilst activities performed at work may constitute "day to day activities" for the purposes of section 6, this does not mean that no claimant who is able to function at work can be disabled under section 6.
27. The other argument raised by the respondent is that I should not take the evidence of the claimant, his wife and the consultant psychiatrists at face value. Firstly, Ms Bayoumi points out that the two consultant psychiatrists were relying purely on accounts given to them by the claimant and his wife. This is correct to some extent, although one would expect a consultant psychiatrist to have the experience and expertise to interpret the accounts provided by the patient. In addition, the claimant undertook two psychiatric assessments at the time of his examination by Dr Tennent and both consultants have the prior medical evidence available to them. I do accept, however, that both doctors essentially had only 'one side of the story' and I agree with Ms Bayoumi that I should not automatically follow the evidence of the experts on matters of fact, particularly where there is challenge to their conclusions.
28. The second element of Ms Bayoumi's entreaty that I should not take the reports and the evidence for the claimant at face value is her assertion that the claimant and his wife have exaggerated his symptoms. She maintains that the portrayal of the claimant's medical condition and its effects is simply not borne out by the respondent's own experiences of the claimant. Furthermore, it is not borne out by the other documentary evidence available to the tribunal, particularly the evidence of the claimant's medical records. The claimant had no time off work and did not seek help at work and I was also taken to emails from the claimant during the relevant period which did not appear to be manifestly different in tone to emails he sent before then. In her cross examination and in her submissions, Ms Bayoumi has skilfully identified the inconsistency between what the claimant says he was experiencing and what he was telling others.
29. However, I had also the benefit of hearing direct evidence from the claimant and his wife, as well as from Ms Gray of the respondent. In considering that evidence, I acknowledge that the claimant himself may be guilty of some 'post event rationalisation' of his actions. For example, he insisted that some of the e-mails he sent to Ms Gray should be seen as

him 'reaching out to a friend for help' which does not appear to be an entirely plausible explanation of those emails. However, the way he gave his evidence regarding the effects of his condition upon him was straight forward. The impression given was that he is a proud man who has struggled very hard with the fact that he is a victim of mental illness and I accept that it was only after he had sought medical help and was prepared to be open about his behaviour at home that he recognised that he was suffering from a mental impairment.

30. I also saw consider from the way in which she gave her evidence that the claimant's wife was an honest and reliable witness. She was clearly deeply affected by her husband's illness and struggled to cope with it herself. There were undoubtedly some inconsistencies in her evidence, particularly in relation to some dates, but it does not follow that she is therefore exaggerating her husband's symptoms.
31. As for the respondent's evidence, the impression given by Ms Gray is that she is a professional and honest HR manager. This does not mean that her evidence was infallible, and indeed she seems to have made an error as to the timing and reason for some flowers having been sent to her by the claimant five years ago. However, I do not believe that she was deliberately intending to distort how she saw the claimant at work and I consider that the account given by her was an honest account of what she had witnessed. Nevertheless, Ms Gray did not see the claimant every day. She was not based in the same office and she tended to see him in by-weekly meetings (when they occurred) or when she had cause to go to the office for other reasons. It is also relevant that the claimant saw work as an escape from the problems at home with his father. The fact that Ms Gray did not recognise any deterioration in the claimant's mental health is neither a reflection on her lack of insight nor does it indicate that there was no such deterioration. As I stated, the claimant appears to have been in denial about his medical condition and it is entirely consistent that he was able to hide that denial, for a large part, at work. It is of course the claimant's case that when reminded at work of the issues with his father at home, he sought refuge in the gym.
32. There is no doubt that both the claimant and his wife were not forthcoming about the problems at home and the claimant's own mental condition when consulting his GP. Not until August 2016 is there any substantive reference to those issues in the GP notes and even in August 2016, the example given by Mrs Lane of her husband's problems was that when he went to the gym he would not warm up properly. Nevertheless, the claimant's failure to be forthcoming in this respect is also consistent with him being in denial and his wife's reluctance is consistent with a desire on her part not to antagonise him.
33. For these reasons, I do consider that the claimant's mental impairment had a substantial adverse effect on his ability to carry out day to day activities. The lack of motivation, dissociative behaviour and social isolation and change in personality narrated by Mrs Lane are all more than

minor or trivial. I also consider these effects to stem from the claimant's mental impairment. As stated by Dr Taylor: "the stressor in this case being his father's diagnosis and their decision to accommodate him in the family home, which triggered painful, traumatic memories from Mr Lane's childhood. Individual pre-dispositional vulnerability plays an important role in the risk of occurrence in this condition and the specific presentation, but it is nevertheless assumed that the condition would not have arisen without the stressor". In summary, I do not consider that the claimant and his wife have exaggerated his symptoms to the extent that the true adverse effect was not substantial, and I consider that inconsistencies between his presentation of his symptoms now and the impression he gave at work and to medical practitioners can be explained by other factors such as his 'denial' of the true effects upon him.

34. As to whether the adverse effect on day to day activities were "long term", I must first consider when the claimant began to suffer from the impairment and on this point, the evidence of Dr Taylor is not entirely clear. He is asked specifically whether the claimant was suffering from a medical condition at the time of his misconduct from May 2015 to May 2016. He answers that question in the affirmative but then goes on say that "there appears to have been a very significant personality change around the time of his father's diagnosis". This is consistent with the section of the report cited above, but Dr Taylor appears to have been under the impression that the claimant's father was diagnosed with dementia in 2014 whereas all the evidence available to me points to him being diagnosed with the condition in March 2016.
35. Dr Tennent is clearer, however, stating: "in my opinion Mr Lane was indeed suffering from a mental disorder at the time of his misconduct from May 2015 to May 2016". Taking both reports into account as well as the evidence I heard and read, I conclude that the claimant was suffering from the impairment when the relevant misconduct began in June 2015.
36. There is also some inconsistency in the evidence regarding when the adverse effects became substantial. There is definite inconsistency in Mrs Lane's evidence and the GP notes record that on the 15 August 2016, Mrs Lane said that she noticed the changes in her husband's behaviour "last xmas", which would be December 2015, although it is of course possible that this was a mistake by the GP or a mis-recollection by Mrs Lane.
37. However, taking into account all of the evidence available to me, I have concluded that the substantial adverse effect also began prior to June 2015 and I accept the evidence of the claimant and his wife in this respect.
38. I turn finally to the question of how long the adverse effects lasted, or alternatively were likely to last. There is evidence that the claimant's symptoms may have resolved somewhat once his father had moved into a residential home in June 2016, although it is also possible that any improvement was due to the medication taken by the claimant from August/September 2016 onwards - Dr Taylor states in his report that: "I understand (the claimant's) mental state has now returned to normal



following the resettlement of his father and the introduction of anti-depressants in therapeutic doses”.

39. Nevertheless, I consider that there is ample evidence from the claimant and his wife that the adverse effects endured for at least a year. Even if I am wrong about this, I consider that it was likely from an early stage that the adverse effect would endure for at least twelve months, because it was the claimant’s father’s deteriorating health and erratic behaviour which was a root cause of the impairment and the adverse effect of that impairment (see, for example, the opinion of Dr Taylor).
40. It may well be that by the time of the hearing of his appeal against dismissal, the claimant was no longer suffering from the adverse effect of his impairment, or even from the impairment at all. In his own pleading, the claimant refers to the fact that at his appeal hearing on 12 May 2017, he tried to explain to the respondent that “there was no likelihood of the situation reoccurring”. Dr Tennent is asked specifically whether the claimant was still suffering from his mental impairment in March 2017, responding that: “Mr Lane’s current condition is more related to the stress he feels under regarding the disciplinary proceeding at work and less to his father’s deteriorating situation” and when asked whether the condition is likely to reoccur in the future, Dr Tennent states: “in my opinion it is unlikely that the circumstances that Mr Lane has found himself which led to his developing adjustment disorder are likely to reoccur”. It may of course be that the primary factor in the apparent return to normal of the claimant’s mental state was the “introduction of anti-depressants in therapeutic doses”, as described by Dr Taylor, but ultimately this is not pertinent to the question I have to decide. Whatever his state of health in March 2017 and thereafter, the claimant had the protection of the EQA by virtue of sections 6 (1) and 6 (4) EQA.

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Employment Judge Finlay

Date: 31 July 2018

Sent to the parties on: 15 August 2018..

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For the Tribunal Office