

# EMPLOYMENT TRIBUNALS



**Claimant**  
**Mr. C. Dowdye**

**V**

**Respondent**  
**National Car Parks Limited**

**HELD AT: London Central**

**ON: 28 September 2018**

**BEFORE: Employment Judge Mason**

**Representation**

**For the Claimant: Mr. S. Martins, legal representative, The Employment Law Service.**

**For the Respondent: Ms J. Hale, solicitor.**

## **OPEN PRELIMINARY HEARING (RESERVED JUDGMENT)**

1. The Claimant did not have a disability (within the meaning of section 6 and Schedule 1 of the Equality Act 2010) at the Material Time and all his complaints of unlawful disability discrimination contrary to the Equality Act 2010 are dismissed.
2. His claims for constructive unfair and wrongful dismissal will proceed and be heard at the final hearing listed for 18 to 24 December 2018.

**Note:** The parties are asked to liaise and advise the Tribunal within 7 days:

- (i) if 5 days are still required for the final hearing and if not, how many days are now required; and
- (ii) whether the case management PH on 12 October 2018 is still required.

## **REASONS**

**Background and issues**

1. The Respondent describes itself as “*the UK’s leading provider of off-street parking services*” [ET3]. It employs about 1,200 people. The Claimant was employed as a Cluster Leader from 5 October 2015 until 6 December 2017, when he resigned.

2. The Claimant is pursuing claims of constructive unfair and wrongful dismissal and disability discrimination (direct, failure to make reasonable adjustments, harassment, victimisation and unfavourable treatment arising from disability).
3. A closed Preliminary Hearing (“PH”) (case management) took place on 19 July 2018 before EJ Potter. EJ Potter records in her Orders (25 July 2018) that the Claimant produced to that hearing his medical records and an impact statement (hereafter “the First Impact Statement”). However, she noted:  
*“There was some confusion because the [First Impact Statement] dealt with Depression and the medical records appeared to make limited reference to the disabilities of Bronchitis and Migraine relied on or to the severity of the Claimant’s asthma. The ET1 had referred to mental impairment, Asthma, Bronchitis and Migraine and IBS. The confirmation received from the Claimant was that the only disabilities relied on were Asthma, Bronchitis and Migraine; specifically Depression was not relied on.”*
4. In view of this confusion, EJ Potter gave the Claimant an opportunity to clarify his case and ordered him to produce by 31 August 2018:
  - (i) A new impact statement describing the impact of Asthma, Bronchitis and Migraine;
  - (ii) A statement explaining why leave to substitute this new impact statement for that originally filed was made.
  - (iii) Any medical report from the GP relied on, to say that the Claimant is disabled by reference to Asthma, Bronchitis and Migraine or a statement pulling together the entries in the medical record printout that are relied on to establish disability.
  - (iv) Particulars of to whom, how and when it was notified that the Claimant was a disabled person by reference to each of Asthma, Bronchitis and Migraine.”The Respondent was ordered to advise the Claimant and the Tribunal by 14 September 2018 of its position on whether disability was conceded.
5. EJ Potter also set this case down for a PH (open) to decide the question whether the Claimant was a disabled person within the meaning of the Equality Act 2010 and if so, for what period, and when the Respondent had knowledge of this.
6. The Claimant has since produced:
  - 6.1 A new impact statement (“the Second Impact Statement”);
  - 6.2 An explanation of his reasons for the First Impact statement;
  - 6.3 Two letters from his GP dated 13 June 2018 and 31 August 2018;
  - 6.4 Particulars of to whom, how and when he notified the Respondent of his (asserted) disabilities.
7. The Respondent says (letter to the Tribunal 11 September 2018) that disability is not conceded for the reasons set out in that letter. With regard to the particulars (6.4 above): It is accepted that the Claimant declared at the start of his employment that he had asthma, that he had spoken to his line manager (TA) about it and raised it in his grievances. However the Claimant has not at any time explained why he considered himself to be disabled.
8. The inconsistent manner in which the Claimant has presented his case has led to considerable confusion as to the particular impairments he relies on, to recap:

- 8.1 In his ET1 he referred to asthma, bronchitis and migraine but then stated "*the cumulative effects of my IBS are more than minor or trivial*" [page 17];
- 8.2 In his First Impact Statement [pages 42-47] he referred only to anxiety, stress, and depression. He made no mention of asthma, bronchitis, migraines or IBS.
- 8.3 At the PH before EJ Potter, the Claimant clarified he was relying only on asthma, bronchitis and migraine; depression was not relied on [page 38].
- 8.4 In his Second Impact Statement [pages 53-60] he refers to his asthma, bronchitis and migraines.
- 8.5 At the PH before me, he clarified that he was now relying only on asthma and migraines; bronchitis is not relied on.

### **Evidence and procedure at the Hearing**

9. I was provided with an agreed bundle of documents (pages 1-134). Having established the issues, I retired to read the documents. I then heard from the Claimant who adopted as his evidence-in-chief his Second Impact Statement [pages 53-60] and was cross-examined by Ms. Hale.
10. Both representatives then made verbal submissions and Ms. Hale provided a copy of the EAT decision in **Francis Mutombo-Mpania v Angard Staffing Solutions Ltd** 17 July 2018. At the conclusion of the Hearing, I reserved my decision which I now give with reasons. It was agreed that further case management orders were not required for the final hearing listed for 18 to 24 December 2018 given the case management orders previously made by EJ Potter on 23 July 2018.

### **Findings of Fact**

11. Having considered all the evidence in the round and having reminded myself that the burden of proof is on the Claimant and the standard of proof is the balance of probabilities, I make the following findings of fact relevant to the issues before me.
12. On cross-examination, the Claimant said the first act of discrimination took place in August 2016 when TA shouted at him. However, it is apparent from his ET1 (para. 9 page 18) that it is his case that the Respondent had knowledge of his asthma when he completed a pre-employment questionnaire on 30 October 2015 and failed to make adequate adjustments from that date. In fairness to the Claimant, I find that the material time (i.e. the period when the alleged acts of discrimination took place) was 30 October 2015 to 6 December 2017 (date of the Claimant's resignation without notice) ("the Material Time").
13. Asthma:
  - 13.1 I accept that the Claimant has had asthma for many years including at the Material Time. The Claimant's GP states in the letter dated 13 June 2018 [page 76] that the Claimant has had asthma since 1968. Ms. Hale conceded that the Claimant has had asthma all his life.
  - 13.2 Symptoms and effects:
    - (i) In his ET1 [page 16] the Claimant stated that his "disabilities" (asthma, bronchitis and migraine) have a substantial adverse affect on sleeping; mood; anxiety; heart palpitations; headache tension; concentration; panic attacks.

However, he does not state which of the three conditions he says has an effect on these “activities” or the extent to which they are affected.

- (ii) In his Second Impact Statement he says:
  - a. Stress and aggression are triggers for his asthma.
  - b. Towards the end of 2016, he increased reliance on Ventolin but could still feel tightness in his chest which “*at times made breathing difficult*” [paras. 4 & 21].
  - c. He was unable to sleep at nights [para. 22]; his partner could hear him “*wheezing on the odd nights*” that he fell asleep on the couch but he did not sleep long as he needed to use his inhaler as his asthma kept waking him up [para.18].
- (iii) In a document headed “Incorrect statement” [page 61], he says “*foggy memory*” is a symptom of his asthma which is triggered by stress [page 61].
- (iv) In oral evidence, he said he suffers from memory loss, particularly short-term.
- (v) I asked the Claimant again to explain how, if at all, his day-to-day activities were, or are, affected; he replied that it takes him a lot longer to do basic things such as bathing; preparing meals; his mobility is affected and he lives life “*in the slow lane*”.

#### 13.3 The Claimant’s medical records show:

- (i) His last attack was in December 2013 when he was hospitalised [page 102].
- (ii) He has had no time off work in the last 10 years apart from in 2014 when he was off “*3-10 days*” [page101].
- (iii) Under the heading “Asthma limiting activity”: between 17 April 2007 and 21 August 2018, his asthma has not limited his activities other than in 2014 when it limited his (unspecified) activities once or twice a week [page 104]. On cross-examination the Claimant agreed that this was correct

#### 13.4 Medication and treatment:

- (i) The Claimant has a prescribed preventive Fostair inhaler, a prescribed reliever Ventolin inhaler and Montelukast chewable tablets each night [page 61].
- (ii) His asthma is monitored and reviewed by his GP. His medical records [pages 78-105] show that he had consultations about asthma once in 2004, 2005, 2007 and 2008; three times in 2009; twice in 2011; four times in 2014 and three times in 2017.
- (iii) His medical records show that he attended hospital on two occasions in June 2006 and December 2013 [page 102] and I accept his evidence that this was a result of asthma attacks [page 102].

#### 13.5 Without medication:

- (i) In oral evidence the Claimant said that without his inhaler he would not be able to walk or breathe.
- (ii) His GP says in the letter of 13 June 2018 [page 76] that:  
“*He gets shortness of breath – and this will be exacerbated if he does not take prescribed medications. If he gets short of breath, he will not be able to do his normal duties*”. His GP does not specify the Claimant’s “normal duties”. and there is no mention of the Claimant’s ability to carry out his general day to activities.
- (iii) In the letter from his GP dated 31 August 2018 [page 77] his GP says:  
“*He takes medication for his Asthma, which is well controlled if he is on medication. If medication is not taken symptoms can flare up and he can get shortness of breath and chest tightness which can affect his performance at*

*work*". His GP does not specify how, or the extent to which, his performance at work may be affected and again there is no mention of the Claimant's ability to carry out his general day to activities.

14. Migraines:

- 14.1 I accept that the Claimant has suffered with migraines. He says he has suffered from migraines for over 25 years [page 61] but there is no mention of his migraines in the letter from his GP dated 13 June 2018; whilst in the letter of 31 August 2018 page 77] his GP refers to him suffering from migraines, he does not say how long he has suffered with them and there is no evidence before me regarding how often they recur or the likelihood of them recurring. The medical records only show that he complained to his GP of headaches on 6 August 2018 [page 78]; 7 June 2017 [page 80] and July 2004 [page 85].
- 14.2 I accept the Claimant occasionally takes over the counter painkillers due to the prescription costs [page 61].
- 14.3 In his Second Impact Statement, he says he had painkillers for his headaches but does not mention the frequency or intensity of his headaches or the impact of his headaches on his day-to-day activities. He mentions that his migraines make it difficult for him to relay his thoughts "*as concentration can be hard at times*" [page 61] but I do not accept this as he does not explain how often this occurs the severity or how this affects his day-to-day duties and there is no medical evidence in support.
15. The Claimant has provided "Particulars of to whom and when he notified the Respondent that he was a disabled person" [page 62]. It is not in dispute that in October 2015 he completed a pre-employment questionnaire in which he indicated that he suffered from asthma which was controlled by inhalers. It is also accepted that he mentioned his asthma, migraines and bronchitis to TA on 1 June 2017 and mentioned his asthma, migraines and bronchitis in connection with his grievances in July and August 2017.

**Relevant Law**

16. **Equality Act 2010 ("EqA):**

16.1 The starting point is the definition of disability in **section 6 EqA:**

"6. *Disability:*

(1) *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.*

16.2 This definition is supplemented by provisions in **Schedule 1 EqA** including:

"2. *Long-term effects:*

(1) *The effect of an impairment is long-term if*

(a) *it has lasted for at least 12 months,*

(b) *it is likely to last for at least 12 months, or*

(c) *it is likely to last for the rest of the life of the person affected.*

(2) *If an impairment ceases to have an adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing if that effect is likely to recur".*

17. The Tribunal must take into account any aspect of
- **Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability (2011)** ( “the Guidance”) and
  - **The Equality and Human Rights Commission: Code of Practice on Employment 2011** (“the Code”)
- which appears to be relevant
18. In **Goodwin v Patent Office** [1999] IRLR 4(EAT): a Tribunal considering the question of disability should ensure that each of the following four steps is considered separately and sequentially:
- (i) does the person have a physical or mental impairment?
  - (ii) does that impairment have an adverse effect on their ability to carry out normal day-to-day activities?
  - (iii) is that effect substantial?
  - (iv) is that effect long-term?

### **Submissions**

19. **Respondent’s submissions**

- 19.1 The Respondent accepts that the Claimant’s asthma is long-term. It is also accepted that he has migraines but not that these are long-term; the medical records show that he had a headache in 2004 and in 2017 and there is no reference to treatment in the letter from his GP [page 77] or any indication as to when they started.
- 19.2 The Claimant cannot show that his asthma had a substantial adverse affect on his day to day activities at the Material Time:
- (i) Until January 2017, he had no time off.
  - (ii) He does not explain in either of the two Impact Statements how his asthma would affect his day-to-day activities without medication. His GP says he would suffer “breathlessness” but not the extent or the affects of this.
  - (iii) At the hearing, the Claimant referred to shortness of breath, walking and short-term memory loss but there is nothing to support this in his medical records. He says anxiety and stress are triggers for his asthma but again the medical evidence does not support this.
  - (iv) In the EAT decision in **Francis Mutombo-Mpania v Angard Staffing Solutions Ltd** (17 July 2018) Lady Wise held (para. 16):  
*“In the absence of any medical evidence supporting the claimant’s contention, it was incumbent on him to give evidence to the Tribunal of the activities he claimed he was less able to carry out .... . That there are health risks associated with (untreated) hypertension may be well known, but any impact of that condition on a person’s ability to carry out work of a particular kind or activity ... is not something that any Judge would be aware of in the absence of evidence, not least from the claimant himself.”*
- 19.3 It is accepted that the Claimant notified the Respondent of his asthma when he completed the pre-employment questionnaire in October 2105. There was then no further communication about this until June 2017 and then in July 2017 when he lodged a grievance. However he did not at any stage tell the Respondent how his asthma affected his duties.

20. Claimant's submissions

- 20.1 The Respondent has conceded that the Claimant's asthma is a physical impairment and also accepts that it is long-term. Mr. Martins submits that the provisions of the Equality Act 2010 are met and the Claimant was disabled at the Material Time.
- 20.2 In his Second Impact Statement [page 53] the Claimant describes how [when he was at school] he "*found it hard to run, walk or even speak during a very bad attack*".
- 20.3 The medicine he takes only provides temporary relief. His asthma is triggered by stress and this leads to increased reliance on his Ventolin inhaler.
- 20.4 His GP refers to "*tightness of breath*" and this has an adverse affect on his performance at work. The Claimant has said that his asthma makes it difficult for him when preparing food and bathing and it affects his sleep; Mr. Martins accepts that the letters from the Claimant's GPs do not mention this.
- 20.5 The Claimant mentions in his Second Impact Statement that he was unable to complete athletics training with Cambridge harriers with his young daughter.
- 20.6 The Claimant made the Respondent aware of his asthma from the outset (October 2015) and then in June 2017 and in connection with his grievances in June and July 2017.

**Conclusions:**

21. Applying the relevant law to the findings of fact to determine the issues, I have reached the following conclusions.
22. I accept that the Claimant has a physical impairment, specifically asthma, and that he had that impairment at the Material Time. I also accept that he suffered from occasional migraines and this too was a physical impairment. I accept that both these impairments have lasted more than 12 months and are therefore long-term.
23. Day-to-day activities:
- 23.1 I do not accept that his migraines affect, or at any time in the past have affected, his day-to-day activities; I have not accepted that his migraines make it difficult for him to relay his thoughts and concentration and his Second Impact Statement is silent on the point.
- 23.2 I do not accept Mr. Martins' submission that the Claimant's asthma prevented him from completing athletics training with the Cambridge harriers with his young daughter; the Claimant does not say that this was due to his asthma but due to being "*pre-occupied with thoughts and overwhelming feelings of panic*". In any event, this is not a day-to-day activity.
- 23.3 I accept that the Claimant's asthma has an adverse effect on his ability to carry out other normal day-to-day activities. His GP has verified that without medication, he would be short of breath and on the balance of probabilities I accept his asthma adversely affects the day-to-day activities of walking and sleeping.
- 23.4 However, I do not accept that the Claimant's asthma had a *substantial* adverse affect on these or any other day-to-day activities having reminded myself that a substantial adverse effect is something which is more than minor or trivial and the following:

- (i) His medical records between 17 April 2007 and 21 August 2018, show that his asthma has not limited his activities other than in 2014 when it limited his activities once or twice a week [page 104].
  - (ii) His GP says in the letter of 13 June 2018 [page 76] that:  
*“He gets shortness of breath – and this will be exacerbated if he does not take prescribed medications. If he gets short of breath, he will not be able to do his normal duties”*. I place little weight on this as his GP does not specify the Claimant’s “normal duties” and I have not seen the letter of instruction; there is no mention of the Claimant’s ability to carry out his general day-to-day activities.
  - (iii) In the letter from his GP dated 31 August 2018 [page 77] his GP says:  
*“He takes medication for his Asthma, which is well controlled if he is on medication. If medication is not taken symptoms can flare up and he can get shortness of breath and chest tightness which can affect his performance at work”*. His GP does not specify how, or the extent to which, his performance at work may be affected and again there is no mention of the Claimant’s ability to carry out his general day to activities.
  - (iv) The Claimant has been given several opportunities to explain how and the extent to which his day-to-day activities are, and have been, affected by his asthma (with or without medication) and failed to do so despite legal representation and assistance from the outset.
  - (v) Bearing in mind the burden of proof is on the Claimant and it would be wrong for the Tribunal to make assumptions, I am unable to conclude on the evidence before me that his asthma had a substantial adverse effect on his day-to-day activities at the Material Time.
24. In view of my above conclusion, it is not necessary for me to consider the question of the Respondent’s knowledge. In conclusion the Claimant does not meet the requirements of the Equality Act 2010 as he did not have a disability at the material time.

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**Employment Judge Mason**

**1 October 2018**

Sent to the parties on:

1 October 2018

For the Tribunal: