Case No: 2600119/17

EMPLOYMENT TRIBUNALS

Between:

Mr S Lester	**and**	1. Manpower UK Ltd
Claimant		2. E.ON Energy Solutions Ltd
		Respondents

RECORD OF AN ATTENDED CLOSED PRELIMINARY HEARING

Heard at: Nottingham **On:** Monday 14 August 2017

Before: Employment Judge P Britton (sitting alone)

Representation
For the Claimant: Mr L Bronze of Counsel
For the First Respondent: Mr A Southerland, Solicitor
For the Second Respondent: Ms A Smith, Counsel

JUDGMENT

1. The Claimant is found to be a disabled person pursuant to s6 and schedule 1 of the Equality Act 2010.

2. The Judge is ,however, of a preliminary view only at this stage that this case is one where he should make a deposit order against the Claimant on the basis that the claims prima facie appear to have at best only little reasonable prospect of success. The parties are therefore to inform the tribunal as to their proposal for the way forward in that respect by not later than **21 days from the issue of this judgment**.

REASONS

Introduction: the issue and the law engaged

1. This is a preliminary hearing to determine whether or not the Claimant is a disabled person pursuant to Section 6 and Schedule 1 of the Equality Act 2010 (the EQA). The disability relied upon is Irritable Bowel Syndrome (IBS), which the Claimant describes at paragraph 8 of his impact statement before me as "what is classed as "severe IBS"..."

2. The Respondents do not accept that the Claimant was a disabled person. Essentially they contend that the evidence before me, with the burden of proof upon the Claimant, has failed to establish disability at the material time which is between 30 May and 14 September 2016.

3. Raised at the onset of the matter before me today, and in fact covered in the closing section of her written submissions at paragraph 29, is that Ms Smith is instructed to also put forward that the Second Respondent (E.ON) lacked the required knowledge in any event. That is not an issue that was directed to be heard today. Furthermore, Manpower was not on notice that knowledge would be an issue for this adjudication and thus Mr Southerland had not arranged for a crucial witness in that respect (Miss Ewa Ingram) to be present and she has not been proofed at this preliminary stage. I am therefore not prepared to deal with the issue of knowledge today, although I will at the conclusion of this judgment give some preliminary observations.

4. I am most grateful for the written submissions from Mr Bronze, which set out the law engaged in this matter and which is not challenged as accurate by the Respondents.

5. Thus, I remind everyone of the definition of disability as per Section 6(1) of the Equality Act 2010:

> *"**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."*

6. I do not intend to rehearse the further assistance to be gained from Schedule 1; the parties are well aware of it and as to rehearsing the legal authorities principally engaged in matters such as that before me, they are all set out in the written submissions of Mr Bronze.

7. For my purposes, suffice it to say that I have to decide whether or not the Claimant has a physical impairment which has had a more than minor or trivial impact on his ability to undertake normal day to day activities and was particularly prevalent at the material time; but I need to factor in that a recurring condition which from time to time flares up can nevertheless still be a disability.

8. I have considered for the purposes of this adjudication, the full medical notes of the Claimant (including the consultant's letters and some other documentation which has been referred to in that bundle, such as the Claimant's provision of details when he commenced this engagement and also what he is recorded as saying when he had two return to work meetings following short-term absences and the email trail in particular between him and Chloe Charles and particularly in that respect circa 24 August 2016: Finally, the issue of the GP letter and to which I shall now refer.

9. However, what I do wish to make clear is that I am not adjudicating today upon the merits of the Claimant's claim. However in order to explain the background to this hearing, in his claim (ET1) he sets out how he was employed by Manpower UK Ltd, which of course is a well-known provider of workers to end users. Manpower has an arrangement with E-ON whereby it provides it with workers for inter alia the call centre at which the Claimant was deployed. Within the call centre is a tightly managed environment and I have done many cases involving such operations. So, those tasked, such as the Claimant, with taking calls from such as customers in that call centre must before taking such as a comfort break switch off the call button, so to speak, all of which is recorded. And therefore the amount of downtime from taking calls is electronically monitored and reviewed by management. The permitted breaks in the 8 hour shift are 2 x 15 minutes and 1 x 30.

10. The issue in this case can be put very simply. It is, says the Claimant, that when his engagement was ended at the request of E-ON by Manpower, and because of the frequency of the breaks that he was taking, that in the context thereof he was discriminated against for the purposes of the EQA in that those breaks had been occasioned by his need to go to the toilet more frequently than other employees might have done by reason of his IBS.

11. That is of course the issue that the tribunal panel will have to determine if I find that the Claimant was disabled at the material time. Within the call centre there are toilets and the frequency of the Claimant's breaks as per the data I have got before me and which he has confirmed himself, is that he would need to go to the toilet up to about 3 times more than others during the working day so say about 5 times. From the statistics that are before me, but which does not tell me whether the breaks were for toileting or other purposes, the frequency by and large is of short duration breaks.

12. That is not the issue before me today. It is whether or not the Claimant suffered from a physical impairment described by him as IBS and whether it in the course of normal day to day activities, in other words not necessarily within the call centre, it caused him to suffer on a long-term basis more than minor or trivial problems and in that context with such as the urgent need to go to the toilet.

13. What it means is that much of the evidence that I have actually heard today is strictly speaking irrelevant in that respect as it goes more to knowledge and the merits of the case rather than the issue of whether the Claimant is disabled. But I do factor in that Counsel for the Second Respondent, Ms Smith, supported by Mr Southerland, has raised issues about the Claimant's credibility.

Findings of fact on the disability issue

14. From the medical evidence, it is quite clear that the Claimant has for many years suffered from what I would describe as gastric problems. This has inter alia meant that he underwent surgery in 2006 by which a gastric band was fitted. This was in order to deal with that he had a "sizable internal hernia", I gather in his oesophagus, and that as a consequence he suffered from reflux illness; hence the fitting of this band to alleviate the problem.

15. Also, going back through those medical notes, he has regularly presented with bowel problems and this has challenged the doctors as to what might be the cause thereof. For example, in February 1997 it was thought that this might be due to "ulcerative colitis". From time to time, he was prescribed medication. I do not intend to spend any time dealing with this in detail because it may well have been for the reflux issue, but equally it may also have been in that context of assistance in relation to the bowel problems. Suffice it to say that the Claimant tried various medications over the years, none of which were successful.

16. Certainly, going all the way forward, there having been references to IBS in the medical notes before he went to Jersey (which is 1998) they flagged up again in the period post the his return in May 2003. So there are references again to the same problems.

17. Suffice it to say that as a result of all of that, the Claimant was placed in the hands of specialists, in particular Mr Bowrey, circa May 2011. Inter alia an endoscopy was performed but it seems to me that Mr Bowrey was also looking at the gastric reflux issue again in relation to which he found no signs of abnormality but did, as at 16 November, record that the Claimant was still troubled by IBS. He did not say whether or not the Claimant had IBS as such; and I do not know, because there is no expert report before me one way or the other, as to whether that presented was clinically IBS as opposed to symptomatic of it. Suffice it to say that there was at that stage a further report from a gastroenterologist, Dr J D Caestacker, but that seems to go to the acid reflux issue.

18. Thus at the end of that year, all that can be said is that the doctors were not saying the Claimant did not have any problem, what they could not say is what was causing it because the other tests done, such as bloods did not flag up IBS as such.

19. Having said that, if I shoot forward to the latest GP report before me dated 26 September 2017 (BP 287a), it records:

> "*Based on the medical records Mr Lester has a history of irritable bowel syndrome. This is recorded in the electronic records in April 2011. In 1996 there was a bout of proctocolotis*[1] *which was investigated by the gastroenterologists.*
>
> *He also has a history of gastro-oesophageal reflux disease with oesophagitis which was treated with surgical nissens fundoplication in 2006.*[2] *In the records there are a number of different symptoms including bloating, constipation, diarrhoea, abdominal pain and some reflux symptoms.*
>
> *...*"

20. So to put it at its simplest and which rather accurately encapsulates what I have said so far, a situation where the doctor does not say he has got

[1] This is inflammation of the anal/rectum.
[2] That is the gastric band.

irritable bowel syndrome as such. He does however record a history and he sets out the other symptoms.

21. The way I look at it is simply this. Clearly the Claimant has over the years on a flare up basis suffered from problems with his bowels which are more than minor and trivial and which caused him from time to time incontinence. The reason why I use that description is by reference to the appendix to the Guidance on the Definition of Disability (2011), as to which see Butterworths 2016 edition starting at 4.265. Thus:

> *"... **IT WOULD BE REASONABLE** TO REGARD AS HAVING A SUBSTANTIAL ADVERSE EFFECT ON NORMAL DAY-TO-DAY ACTIVITIES."*
>
> *...*
>
> *Difficult carrying out activities associated with toileting, or caused by frequent minor incontinence...."*

22. In contrast:

> *"... **IT WOULD NOT BE REASONABLE** TO REGARD AS HAVING A SUBSTANTIAL ADVERSE EFFECT ON NORMAL DAY-TO-DAY ACTIVITIES."*
>
> *...*
>
> *Infrequent minor incontinence ...*"

23. If I bore the issue right down, what the Respondent says to me is that the evidence is not there of other than possibly "*Infrequent minor incontinence"*. Why does this matter? It is because in his impact statement and the supplementary thereto and as confirmed under oath, the Claimant, inter alia in dealing with the problem, describes that he can get "caught short" because of what he describes as IBS:

> "*I have had accidents when out in public as I could not find a toilet quick enough. I always have a carrier -bag in my pocket for occasions like this because when I do manage to find a toilet, I clean myself up and dispose of my underpants because I do not want to be walking around in messy underpants*"

24. He then gives a considerable amount of detail on the subject of the inconvenience his condition causes him. The point I get to is this. Unless I disbelieve him, surely the need to carry that carrier bag with him at all times when he goes out in public for the reasons he has given, is a more than minor or trivial impact on day to day activities? Neither Respondents advocates asked him as to the frequency of the same. To turn it around another way neither contradicted him by questioning on this topic as to what he is saying. And the overall statement that he has made is that this is something that is always with him and can also, when he has a "*bad flare up*" (as to which see his paragraph 5) cause him to be in pain, spending extensive time on the

toilet, drained of energy: "*My mood level gets very low. It also gets depressing*".

25. Do I disbelieve him? This is where the Respondents advocates have pointed out issues they say go to his credibility. Summarised they are as follows and with my observations thereto:

25.1 In the Originating Claim (ET1) he said that he had informed the First Respondent, and thus thereby the Second, that he had IBS when applying for this engagement. This is not correct. However, the Claimant conceded that point in his supplemental written submissions. It did not have to be prised out of him in cross examination.

25.2 The Respondents say that he is over stating his condition in saying that "*it is classed as severe IBS*". I agree that this is not opined in the medical notes. There are however references, as Mr Bronze has pointed out, and I have now referred to, in those medical notes, to IBS. And as per the impact statement clearly the Claimant sees it as severe.

25.3 The other issue is that the Claimant has said that he told Chloe Charles (CC) (from whom I heard and who I found to be a credible witness and who ran the team in which he worked for E-ON) that he had IBS within a week or so of taking up the engagement. She says that he did not. But it is not disputed by her that he did tell her circa 25 July when she was informally flagging up as a potential concern the frequency of his breaks. He says he also told Terri (the trainer) that he had IBS and therefore might need to go to the toilet more frequently during the training period, which commenced circa 22 June 2016. CC does not dispute that he might well have done and that Terri might not have told her because it would have been perhaps an embarrassing issue.

25.4 However, the point to me then becomes this insofar as it matters today. The Claimant had an absence for a virus circa 27 June and on his return to work had an interview with Ewa Ingram, the onsite Manpower representative, who recorded the reason and whether he needed any adjustments.

25.5 This goes first of all to the following. When he made application to work for Manpower on 27 April 2016, he disclosed two disabling conditions, namely fibromyalgia and visual impairment. Incidentally, he has a severe visual impairment as was obvious to me today and there is a diagnosis in his medical notes of fibromyalgia.

25.6 What is important is that form was specifically asking for information in order that reasonable adjustments could be made if that became necessary. Visual impairment adjustments were in fact made during the period of the engagement and there is no claim in relation to that matter before me.

25.7 It is now clear that the Claimant did not raise IBS on 27 April and in the context of whether or not he might need reasonable adjustment. When Ewa interviewed him on 28 June and he did

disclose to her his IBS, it was recorded that he was not requiring any reasonable adjustments. The same goes when he was interviewed by her on 6 September after another short term absence for a stomach bug.

25.8 Finally on this topic of credibility, in having to resolve a conflict between the Claimant and CC, I believe the latter as she is not undermined by any shortcomings unlike Mr Lester over for instance the issue of the informing of Manpower at the start of this engagement. Thus she first requested from the Claimant a GP letter on 25 July because that is the first time he told her about his IBS. Although he was not raising it as an explanation for the frequency of his breaks, she did tell him that he should get a GP report confirming his IBS because she could then use that if needed, for instance if there were additional breaks which were occasioned by an urgent need to visit the toilet or extended visits thereto by reason of the IBS, to make what is called a backdated case so as to mean that any such break from the workstation is not used against the employee. The Claimant complained that obtaining the GP report might cost him some money. CC told him that if that was a problem, Manpower would pay for it. As it is the Claimant did not provide her with a GP report despite her repeatedly requesting it of him. As to why, cross referencing to the medical notes, the Claimant was first asking for a GP letter on 8 September but did not like the content of it in that the Doctor was going to use the words "a past history of IBS". Therefore after some negotiation between the Claimant and his GP, the final version was issued only on 26 September 2016 in which the word "past" has been deleted. So on the evidence as I have it today, but it really goes to knowledge by the Respondents, the Claimant did not provide a GP letter until after the engagement had been terminated.

26. However, even so and taking into account these shortcomings (to which I shall return to in terms of a judicial observation), does that mean that on the balance of probabilities, with the burden of proof on the Claimant, I do not believe him when he explains to me as to the issue of whether or not he has a bowel condition (which I will describe by the term IBS as it is in that sense a convenient label) which does mean that he has a frequent need at short notice for a lavatory in circumstances where in the absence of one he can suffer the embarrassment of an accident; and is this in fact sufficiently frequent to constitute a more than minor or trivial impact on his ability to undertake day to day activities?

27. The important bit there is not within the workplace at E-ON where there were of course toilets available close by and thus whether he has suffered accidents at work which does not seem to have been the case. It is whether in terms of normal day to day activities, he was suffering from the bowel problems that he has described in his statement; had done so for a long time; and that it could flare up and when it did causing him the discomfort and embarrassment he has described. I find it inconceivable that the Claimant would make up about needing to have the carrier bag and to me that is very significant indeed. If he carries it on all occasions that he goes out with his wife, for instance to the shops, and I have no evidence to the contrary, then surely that is more than infrequent? The need he has to carry the carry-a-bag, and again I do not want to labour it and cause him embarrassment, is

because he is likely to suffer an accident, hence he carries spare underwear and discards that which is soiled. I believe him.

28. It does not matter that the condition has not been diagnosed as such. Also albeit the Claimant may not have presented during the period post the investigation of Mr Bowrey and his colleague culminating in December 2011 with a presentation of IBS on any regular basis to his GPs thereafter, there is the odd reference, ie 15 July 2013 and 4 February 2016. Plus he does flag up an issue with diarrhoea in May 2016, albeit he seems to have been thought it was more to do with a virus. But the fundamental point is that the Claimant tells me that post being told they could not find a reason for his IBS, if that is what it was, albeit he was continuing so to suffer, he did not see the point of repeat visits to the doctors because there was nothing they could do for him; hence the coping strategies to which I have referred.

29. What it means is that I have concluded that do find that the Claimant was a disabled person at the material time, this being a substantial impairment.

Observations

30. However, as is perhaps obvious from what I have now said, it seems to me that the Claimant at present has some difficulties with this case. It is not so much as to whether or not he disclosed "IBS", he clearly did eventually, but what he did not do which was to never flag up that it was causing him any problem requiring reasonable adjustment at work. A good example is the emails to which I have been referred. He was quite capable of asking for example for time off in lieu. Also on 24 August when asked if there was one thing that he would like to see achieved in relation to himself, he flagged up that there needed to be a completion of the provision of the visual aids as advised by Access to Work. He never raised that he was having problems with toileting at work or that it explained the frequency of his breaks.

31. Thus, he never raised that he needed any reasonable adjustments for his "IBS" disability. Therefore, prima facie how can the Second Respondent in particular be liable for a failure to make reasonable adjustments during the period up to the termination of the engagement if it was not aware of the need to make any? Secondly, in terms of whether or not it should have granted a reprieve so to speak via the efforts of Manpower, the GP report that belatedly was received by Manpower and to which I have now referred, never mentioned anything about a need for toilet breaks. CC never saw it until the discovery process in this case. Manpower having been unsuccessful in seeking to get a reprieve from E-ON, thus then seems to have tried to assist the Claimant to obtain an alternative engagement with it.

32. Therefore, how on the face of it can Manpower be liable in these circumstances?

33. What it means is that, and obviously I will hear further argument if necessary from the parties at a further preliminary hearing if required, I am of a mind at present, but of course I could be dissuaded by the Claimant, that I should be making a deposit order against the Claimant in relation to the continued progression of these claims on the basis that prima facie they only have little reasonable prospect of success. Hence my Order in the headnote.

34. As this was a closed PH confined to determining disability, this decision is not to be published other than to the parties.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

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

(iv) 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 Britton

Date: 11/10/17

Sent to the parties on:

For the Tribunal: