EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**Respondent**
Mr P McWilliams	Fylde Council

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Manchester on 7, 8, 9, 10, 11 January 2019.

EMPLOYMENT JUDGE Warren
Mr D Wilson
Mr P Stowe

Representation
Claimant – Mr Grogan, McKenzie Friend
Respondent- Ms Louise Quigley, Counsel

REASONS

Written reasons have been requested by both parties.

Background and Issues

1. By an ET1 presented to the Tribunal on 16 January 2018,the Claimant brought a claim of unfair dismissal in contravention of Section 98 Employment Rights Act ("ERA") 1996. He further claimed that he was, at the material time, a disabled person and that his employer the respondent failed to make reasonable adjustments in breach of section 20 of the Equality Act 2010 ("EQA"), and that he suffered unfavourable treatment arising in consequence of a disability in contravention of section 15 EQA

The Evidence.

2. We heard evidence from the claimant in his own regard, and from Mr Wilbraham and Mr Wilson on his behalf. For the respondent we heard

evidence from Mr Paul Walker, Director of Central Services, Miss Lisa Foden, Parks and Coastal Service Manager, Mr Geoffrey Willets, Senior Coastal and Conservation Officer, Miss Susan Simister, Employee Relations Advisor and Miss Angela Jacques, Chair of the Appeals panel, Fylde Council.

3. The burden of proof on the issue of disability lay with the claimant, and the initial burden in relation to his discrimination claims also lay with him. The initial burden in relation to the unfair dismissal claim lay with the respondent. The burdens are further dealt with as approproiate. The standard is on the balance of probabilities.

4. We found the claimant to be an unreliable witness. When we compared his own medical notes with his descriptors of his physical health at around the time he made his impact statement (barely able to look after himself without considerable help) but he had obtained a pool lifeguard qualification, there was a direct conflict which he could not resolve. This was supported by the two expert reports. We considered that the claimant's failure to provide copies of scans in his possession, suggested that they may not have supported his case. In all we found his evidence to be exaggerated and inconsistent. We noted that at no time was a doctorable to provide a diagnosis or prognosis in relation to his physical health. With regard to his mental health we had similar reservations. He asserted that he was suffering from anxiety which was severe. However none of the medical practitioners supported his description of his condition, and we again considered that he had deliberately exaggerated his anxiety.

5. By contrast we found the respondent witnesses to be thoughtful and honest. When mistakes were made they were admitted.

6. The claimant has taken civil action in relation to the two accidents referred to in this case. We are aware that the respondent has admitted liability, but the case has not yet dealt with Remedy

<u>The Preliminary Issue</u>:-

7. Was the claimant, at the material time a disabled person?

<u>The Secondary issues</u>

If he was then:-

Was he discriminated against by a failure to make reasonable adjustments and by his dismissal

The respondent denies all of the claims and disputes that the claimant was at the material time, a disabled person.

Was the claimant at the material time a disabled person?

8. The material time was agreed as being September 2016 to the claimant's dismissal in July 2017. What happened before or after that period is irrelevant other than in how it affects any witness credibility, or sets the scene for the claim.

The Law

9. The Equality Act 2010 provides that:

Section 6

(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.

(2) A reference to a disabled person is to a person who has a disability.

(6) Schedule 1 (disability: supplementary provision) has effect.

Schedule 1

Paragraph 2 The effect of an impairment is a long-term effect if –

(a) it has lasted at least 12 months;

(b) the period for which it lasts is likely to be at least 12 months; or

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

Paragraph 5 (1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if –

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) "Measures includes, in particular, medical treatment and the use of prosthesis or other aid.

10. Mr P Aderemi v London & South East Railway Ltd 2012 UKEAT 0316

Sets the principle that the Tribunal should focus on what the claimant cannot do as a result of his physical and mental impairment and then decide if that is substantial i.e more than minor or trivial.

The Facts

11. The facts of the incidents were not in dispute. On two occasions whilst at work the claimant, moved heavy wheelie bins across a beach as part of his work responsibilities. The first occasion was on 27 July 2016, and the second was on 12 September 2016. In July he continued to work and the following day visited his GP, and was prescribed painkillers for back wrist and knee pain. He did not take any time off work. In September he continued to work for 2 days and then visited his GP, who signed him off work with a diagnosis of pulled muscles in his back and abdomen. However, the GP notes also revealed the claimant asserting that he had ongoing increased lower back pain from the earlier accident. He received numerous sickness absence notes – initially weekly.
12. Later anxiety and depression begin to appear on the med3 sick notes.
13. Throughout the period up to dismissal the claimant was a regular visitor and correspondent to his GP and over the period 14 September 2016 to 12 October 2017 was signed from work with different descriptors of pain.
14. The claimant has had MRI scans some months ago but they have not been disclosed to the respondent or the Tribunal. None of the doctor's reports have been able to conclusively give a diagnosis or prognosis as a result.
15. There were no specialist interventions during the material time. The specialist reports on both the claimant's physical and mental condition were prepared for a civil case being brought against the respondent. The

scans were arranged in regard to that. However, the scans have not been released by the claimant.

16. We were provided with an undated physiotherapists report – (page 65) The claimant appears to have started treatment around 31 March 2017. There is reference to reduction in mobility in the lumbar region, a nagging pain in the shoulder, and pain radiating into the right groin, knee and foot. None of these symptoms are referred to in the claimant's contemporaneous GP notes.

17. The claimant was seen by Dr Salem who produced an independent medical report on 4 December 2017(presumably for the benefit of the civil case). The report was provided to the respondent and tribunal on the first date of hearing of this case, even though the report had been with the claimant since June 2018, and he had been ordered to make full disclosure.

18. Mr Salem found severe restriction of the lumbar spine, and stiffness to the left shoulder, with tenderness on the abdominal wall. He noted there had been no investigations into any of the injuries and recommended an MRI scan and and ultrasound scan.

19. The investigations have been done but the claimant has failed to disclose them in these proceedings.

20. The respondent therefore sought their own independent medical opinions

21. Mr McCloughlin, a consultant orthopaedic surgeon prepared a report dated 20 November 2018. He reviewed the medical notes and met with the claimant. The claimant did not mention his pool life saving achievement to Mr McCloughlin, when outlining in great detail his inabilities with regard to day to day living. He told the doctor that he could not pursue hobbies or sporting activities. The consultant however expressed an element of scepticism about the extent of the damage to the claimant and the impact on him, speculating that if the MRI scan results show no significant pathology, then there may be a degree of psychological overlay and Mr McWilliams may not be as physically disabled as he would at first appear. The MRI scans were never supplied by Mr McWilliams to Mr McCoughlin.

22. In a supplemental statement he indicated further that he remained unconvinced that the claimant had sustained a significant physical impairment that would have a substantial effect on his day to day activities. He found it difficult to justify Mr McWilliam's claimed level of disability based on the injuries sustained and his clinical examination

23. Dr Friedman is a consultant psychiatrist. The claimant told him that he used to cycle and swim but did not do so now. He presented using a walking stick as an aid. The doctor raised the issue of the successful life guards' course, which he had seen in the claimant's GP notes. He noted that the claimant was reluctant to discuss it.

24. The claimant accepted in his evidence that at that stage he was not using a walking stick, and told the Tribunal that the course was adjusted for him. He accepted though that it involved vigorous swimming, diving and recovering a heavy object from the pool, and exiting the pool. He presented in Tribunal as having great difficulty walking, and using a stick, as he did at the appointment with Mr Friedmann

25. Dr Friedman noted that the claimant presented as somebody who was significantly physically disabled. Dr Friedmann had significant concerns about how straight forward he was. He had some concerns about whether or not he was significantly psychiatrically unwell at the time he was referred for help in 2016. The doctor accepted that at the time the claimant was distressed but had not developed a depressive disorder, and notes that the claimant was happy to be discharged from the mental health services. There was a clear period of time when he was not psychologically unwell.

26. After his return to work in February 2017 the claimant became significantly distressed, but not at the level of a depressive disorder. He was not significantly psychiatrically unwell and at his dismissal there was no psychological reason that preventing him from working at the time

27. The doctor concluded that the claimant did not suffer a mental impairment which impacted substantially on day to day activities during the material time, and such mental impairment as he suffered after he lost his job could not have lasted more than 12 months. The doctor concluded that he did not suffer a mental disorder such as to make him disabled, during the material time.

28. After that report the claimant was again asked for copy mri and scan records. The claimant has ignored the requests and not produced them.

29. The claimant's evidence of the impact of his physical condition was set out in an impact statement made a few weeks after he obtained his life guard certificate. In this regard we are entirely reliant on the claimant's evidence and the weight we can give it. He made an impact statement in May 2018 to assist the Tribunal. He described that at the material time he had become reliant on family and friends to get up and get dressed and undressed, walking sitting standing reading writing providing and

preparing meals, ironing, keeping the house clean, shopping and DIY. Through this time he describes his mental well being as getting worse. His impact statement gives no indication of any improvement at any point, and was written on 19 May 2018.

30. Examination of the claimant's GP notes revealed that on 10 April 2018 the claimant had recently been successful in a life guard qualification. He made no mention of this in his impact statement. However adjusted that course may have been, it still involved the claimant (as he accepted in his evidence) in rigorous assessment and physical activity beyond that which would be credible on his own descriptor of his condition.

31. It is also clear that whilst the claimant may have suffered some anxiety around the time of his dismissal, but he had recovered and been discharged from the mental health services team.

Our conclusions

32. We have examined the claimant's account given in tribunal. He has failed to persuade us on the balance of probabilities that he was, at the material time, a disabled person either because of his physical condition, or his mental health. We have no idea of the diagnosis of his physical condition. We have grave doubts about his credibility. We know that he pulled some muscles in September 2016, but even on a layman's limited knowledge, nothing in his medical notes, or in the accounts of the examining doctors explains firstly his extreme limitations as described by him, and the fact he was able to indulge in the vigorous activity required to obtain a life guard certificate at around the same time.

33. We have then turned to the doctors' examinations to see if they can cast light on the situation. Both the psychiatrist and the consultant surgeon express doubts similar to ours about the veracity of the claimant's accounts. The psychiatrist concludes that at the material time the claimant was not suffering from a mental health condition amounting to a disability, and the consultant surgeon cannot account for the claimant's alleged physical symptoms. In the circumstances we have concluded that the claimant has failed to satisfy us on the balance of probabilities that he was at the material time a disabled person.

Unfair dismissal

The Law and Burden of proof

34. The claimant was dismissed allegedly on capability grounds. It is for the respondent to satisfy us that on the balance of probabilities the reason for dismissal was capability (a potentially fair reason within section 98 ERA 1996) and that they held a genuine belief that the claimant was incapable of working and the burden if they do so then becomes neutral in deciding whether the decision to dismiss was within the range of reasonable responses. in all of the circumstances.

Section 98 Employment Rights Act 1996 provides:-

(1) "In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

a) the reason (or if more than one, the principal reason) for the dismissal; and

b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to

do"

(4) "Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

b) shall be determined in accordance with equity and the substantial merits of the case."

It is for the employer to show the reason for dismissal and that it was a potentially fair one. The burden is on the employer to show that it had a genuine belief in the reason alleged. British Home Stores v Burchell 1978 IRLR 379. The

tribunal must consider whether that belief is based on reasonable grounds after having carried out a reasonable investigation but in answering these two questions the burden of proof is neutral.

The tribunal is assisted by the guidance offered in Iceland Frozen Foods v Jones 1982 IRLR 439 namely:-

a) The starting point should always be the words of section 98(4) themselves.

b) In applying the section the tribunal must consider the reasonableness of the employers conduct, not simply whether they consider the dismissal to be fair.

c) In judging the reasonableness of the dismissal the tribunal must not substitute its decision as to what is the right course to adopt for that of the employer.

d) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, another quite reasonably take another.

e) The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

f) The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances

The Facts

35. The claimant was employed by the respondent as a coast and countryside ranger. One of his tasks was to pull wheelie bins to a trailer and removed them from the beach using a Land Roverrover.

36. In July 2016 the claimant was injured whilst trying to move a full wheelie bin on his own. A subsequent risk assessment gave guidance that the bin should be moved by 2 people if it was too heavy i.e. more than half full.

37. The claimant was the only permanent full time in this post. He worked alternate weekends, and some weekdays driving the Land Rover along the beach and resolving problems as he saw them.

38. After his first accident he returned to work the following day.

39. He had a second accident whilst moving a half full bin on 12 September. He was signed from work with abdominal pain, and later lower back pain.

40. There are civil proceedings on going in relation to the two injuries. The respondent has admitted liability, but remedy is proving problematic.

41. On 14 October the claimant was still off sick and his symptoms were unclear to the respondent. The respondent invoked the managing attendance policy which was the responsibility of 'managers' supported by Human Resources ("HR") and Occupational Health ("OH")

42. The council had a 3 stage process for long and short term absence

43. Stage 1 is an informal stage – instigated by (p.122) a manager or supervisor who is to conduct a meeting in private, to explore underlying medical or work related reasons for absence, and to identify any support, and explain ongoing monitoring.

44. Geoff Willetts arranged a private meeting at the claimant's home to undertake stage 1. The issue is then whether the claimant asked for the meeting to be moved, and he be allowed to bring a union representative, ahead of the respondent then arranging the meeting at an office and including Ms Foden, Mr Willett's manager or if the sequence was the other way around.

45. Looking at the written evidence (p222) of a series of texts in which the claimant purported to cancel the meeting at his home, and to ask to include a union representative in the rearranged meeting, he makes no mention of the proposed presence of Ms Foden. If he was so upset at that idea, as he now purports to be, we would have expected him to complain in that series of texts about the proposal to have Ms Foden in attendance.

46. We therefore find the facts to have been as follows: the claimant cancelled and indicated an intent to bring a union representative whereupon Mr Willetts asked Ms Foden, his manager to help him. There is nothing in the policy to prevent 2 managers taking part but the meeting must be in private, which it was.

47. The claimant makes no further complaint about the stage 1 meeting and could not define any detriment he may have suffered from it. Ms Foden

asked most of the questions, but he does not accuse her of asking the wrong questions or of any malpractice.

48. An OH meeting was arranged for 8th November. OH confirmed that the claimant should be fit to return to work within 4 to 6 weeks. It was agreed that upon his return a stress risk assessment would be completed. He did not return to work in the following 4 to 6 weeks.

49. The respondent then proceeded in due course to Stage 2 on the 13 December. On 23 December the claimant emailed Mr Willetts and made it clear he had new symptoms in his arm. His GP had recommended a further OH referral and this was done on 2 February. It was agreed that he would return to work on a phased basis and only undertake office duties.

50. As planned the claimant returned to work on 22 February on a phased basis doing office duties. The claimant makes no complaint about stage 2, which was a formal sickness review hearing. The stress risk assessment appears to have been overlooked at this stage

51. On his return Ms Foden made it clear that the claimant was not to undertake driving duties. This message was passed to Mr Willets and the agency worker Mr Wilbraham. The claimant was working 20 hours a week – he did not need to work weekends on those hours. He chose to go along with Mr Wilbraham as a passenger in the Land Rover on the first weekend he returned to work. No one asked him to do so or told him to. He believed without question that he was expected to work at weekends as before, but he did not confirm this with Mr Willetts, nor Ms Foden and went out without them being aware.

52. He described that sitting in the passenger seat of a Land Rover being driven over a bumpy beach, irritated his condition

53. Ms Foden wanted to hold a stage 3 meeting to review his progress and duties.

54. On 27 February the claimant was hospitalised with what was diagnosed as an anxiety attack. He returned to work the following day. The phased return to work continued and the stage 3 meeting was held on 21 March 2017

55. There was a discussion about the Land Rover being uncomfortable and it was agreed that Mr Willetts and Ms Foden would enquire of fleet services to see if a sports seat could be fitted.

56. There was a discussion about a temporary move to the Boat House where a role could be created for him taking the money and issuing receipts – the role would have lasted to the end of August. It was agreed that the

claimant would think about it and come back to his managers, but he did not do so until the Stage 3 case review on 20 July at which he was dismissed. By then the role had been filled and it was not going to be a permanent solution as the role came to an end at the beginning of September.

57. It was agreed that the claimant would be given a stress risk assessment form to complete. He complained that it should have been undertaken with his manager. The plan was for him to complete his part, and then the manager would look at the stressors. It was however never returned in any event

58. Discussion took place about the Land Rover – Ms Foden asked for information in writing from the fleet manager, who replied verbally that to change the seat would invalidate the warranty. It was entirely reasonable for them to accept that information and not challenge it further. The fact it was not put in writing makes no difference as it hasn't been suggested that either are not telling the truth about this. In fact the claimant was never fit to return to driving duties in any event The claimant subsequently sought information from Land Rover pretending to be a Land Rover owner but he could not however replicate the council's circumstances as a fleet owner and so his evidence in this regard is immaterial.

59. The day after the stage 3 meeting the claimant was signed off work sick – this time with the same muscular skeletal issues and also anxiety. It was in this meeting that he had noted Mr Willetts appeared to think he had been present at the 2nd accident, and also that he had been included in a risk assessment as part of the team, when in fact Mr Willetts had been away from work. He believed Mr Willetts, with whom he had had a very good working relationship had lied about these things. Mr Willetts gave evidence that he believed he had input from the claimant about the risk assessment, but when it was redone, he knew the claimant did not take part in the review, and so the claimant's name was removed on the re-dated copy. We found this to be a credible and innocent explanation. He also said that he realised after the stage 3 meeting that he had not been present at the accident, rectified the situation and apologised – in fact he was on leave at the time.

60. In May 2017 a further OH report was sought. The report now suggested that the claimant had pain all over his body, had no diagnosis as to what the cause was and was advised to return to the GP for further investigation. The report indicated he would be able to return to work in 8 weeks time and noted that the CBT had finished although private physiotherapy was ongoing

61. There followed a case review hearing on 20 July 2017. The decision was taken by Mr Walker that realistically the claimant could not return to his old job and he was dismissed on notice on capability grounds. There was still no diagnosis and no prognosis.

62. The claimant appealed his dismissal. The appeal was heard on 15 November 2017 and it upheld the dismissal. The claimant made no complaint about the appeal process.

63. The claimant was given 12 weeks notice and invited to consider redeployment. The claimant needed to complete a skills form and return it but he failed to do so for 8 weeks. He was offered assistance over and again, and did not take the help offered. He claimed he ran out of data. He agreed in his evidence he could have gone the library or told Ms Simister, who explained that had she known she would have given him access to a computer and printer. The claimant seemed fixated on obtaining details of his own qualifications from the respondent, who simply didn't have them on file. By the time he had returned the form there were no suitable vacancies for which to offer him an interview.

Our conclusions

64. When examining the attendance management policy, stage 2 appears to have been followed to the letter, the stage 3 meeting also followed the guidelines and we noted that the claimant was represented by his union. The case review in July was handled by a more senior manager as required.

65. The case review was to establish whether there were any further actions the authority could take to assist the employee in continuing their employment or whether employment should be terminated due to the incapacity to undertake their duties effectively because of ill health. That is what it did. The chief officer had to consider the impact on other employees and the service provided, the claimant's absence record and medical advice received, financial implications, the claimant's representations and any actions taken to keep the claimant in work

66. The claimant's absence level was high, and if he could not do the job he needed to be replaced. The medical situation was vague and ever changing. It was clear the claimant could not return to a role in the foreseeable future which at some point would have to include physical work.

67. The whole process was fundamentally fair. It may not have been perfect, but the minor glitches which occurred such as having Ms Foden in the stage 1 interview did not disadvantage the claimant at all. Because we have found he was not a disabled person, the council were not under a duty to consider reasonable adjustments. They found that his high levels of absence were impacting on the service they could provide to the public. They could see no way of him undertaking those duties in the foreseeable future, and they had no idea whether he would recover in the short or long term. In the light of his extensive absences, it was unlikely to be in the short term. It was therefore within the range of reasonable responses to make the decision to dismiss on the grounds of the claimant's inability to undertake his job as a coast and countryside ranger. The respondent undertook a considered 3 stage process, with appropriate referrals to OH

68. We are satisfied that the respondent has shown on the balance of probabilities that they dismissed the claimant for capability, and that they did so following a 3 stage process in which the claimant was given every opportunity both to put his case, and to attempt to return to work and consider redeployment. However that proved impossible. The respondent held a genuine belief that the claimant could not return to his role, and that he did not appear to want to cooperate with them over finding alternative deployment and we therefore find this to have been a fair dismissal.

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Employment Judge Warren

Signed on 18 June 2019

Reasons sent to Parties on

18 July 2019