



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr L Stevenson

**Respondent:** Department for Work and Pensions

**Heard at:** Manchester

**On:** 21 February 2020

**Before:** Employment Judge Barker  
Mr I Frame (Observing only)

## REPRESENTATION:

**Claimant:** Mrs Kehoe, Trade Union Representative

**Respondent:** Ms K Knowles, Counsel

# JUDGMENT

The judgment of the Tribunal is that:

1. The claimant is a disabled person within the definition set down in section 6 of the Equality Act 2010 in relation to the physical impairment affecting his leg. The claimant's claims for disability discrimination as a result of this impairment may proceed.
2. The claimant's claim that he is a disabled person by reason of type 2 diabetes and anxiety and depression do not meet the tests set down in section 6 of the Equality Act 2010 and such claims hereby fail and are dismissed.
3. The matter is set down for a further preliminary hearing with an estimated length of hearing of two hours at the Manchester Employment Tribunal, Alexandra House, 14 – 22 The Parsonage, Manchester, M3 2JA on Monday 6 July 2020 at a time to be notified to the parties by the Tribunal administration in due course.

# REASONS

## Introduction

1. The claimant was employed as a work coach at the respondent's Didsbury Job Centre until his dismissal on 5 April 2019 by reason of gross misconduct.
2. It is the respondent's case that this dismissal was fair for the potentially fair reason of misconduct because the claimant, contrary to the respondent's policies, established an inappropriate platonic relationship with a service user.
3. The claimant will say that his dismissal was unfair and furthermore, that he had been discriminated against by reason of three physical and mental impairments or conditions. These are:-
  - a. "type 2" diabetes;
  - b. anxiety and depression; and
  - c. neuropathy and nerve damage affecting the claimant's leg.

## Issues for the Tribunal to decide

4. At a Case Management Hearing before Employment Judge Dunlop on 15 November 2019, the matter was set down for this hearing. The issues to be determined were:-
  - a. is the claimant a disabled person within the meaning of the Equality Act 2010;
  - b. what are the substantive issues in the case? This is to include whether any amendments are required to the claim, and whether the service of an amended response would be required;
  - c. the respondent's application for a strike out or deposit order; and
  - d. whether the matter was one appropriate to refer for judicial mediation.
5. At the outset of this hearing, the respondent's counsel indicated that issues c) and d) would require further instructions from the respondent dependent upon the outcome of issues a) and b). In the respondent's view, it would therefore not be possible to determine issues c) and d) at this hearing. The claimant did not object to this view.
6. Employment Judge Barker noted that there was a considerable amount of complex medical evidence to be considered during the course of the hearing and indicated that it may not be possible for issue b) to be considered during the course of the hearing either. It was agreed that the Tribunal would hear evidence on issue a) alone in the first instance and consider issue b) should there be sufficient time remaining during this hearing.
7. The claimant had prepared a disability impact statement and had also provided further evidence as to his complaints of disability discrimination. His representative Mrs Kehoe is not legally qualified and it was therefore appropriate

for the Tribunal to take time to consider how the claimant would formulate his claims. This would assist the respondent in knowing the case that it had to meet.

### **The Claimant's Claims of Disability Discrimination**

8. Following a discussion, the claimant confirmed that the document dated 31 December 2019 contained four complaints of disability discrimination which were:-

(i) *A failure to make reasonable adjustments to accommodate the claimant's problems with mobility and pain as a result of his leg condition.*

- a. The claimant will say that there were insufficient adjustments made to his workplace in that he did not, for example, receive an appropriate chair;
- b. There was no lift for a period of time at the Didsbury Job Centre, and insufficient efforts were made to accommodate him on the ground floor;
- c. As of 28 October 2017, he was in the first group of Work Coaches to start delivering the new style of Universal Credit full service to a mixed group of claimants which required a great deal more administration work necessitating frequent trips to the photocopier, printer and laminator and that his limited mobility meant he was in considerable pain as a result of this extra movement;
- d. His limited mobility meant it took him much longer to perform tasks but he had no reduction in work activities to address this balance;
- e. He will say that his manager failed to consider reasonable adjustments in spite of an occupational health report of April 2017 recommending such adjustments; and
- f. The claimant will say he acquired the largest case load of any Work Coach in the Job Centre which necessitated significant administrative work and increased movement.

(ii) *The claimant will say that there was a lack of reasonable adjustments by the respondent to accommodate his anxiety and mental health issues.*

- a. As of 28 October 2017, the new claimant group on Universal Credit Full Service presented with significant health conditions and disadvantages such as being homeless and the claimant was not trained to deal with this claimant group and became unable to cope due to his long-term history of depression;
- b. He will say that the respondent failed to consider reasonable adjustments of a less intensive workload and that this continued until the date of his dismissal as he was appointed the most complex claimants which put huge stress on him and exacerbated his mental health issues.

(iii) *Discrimination arising in consequence of his disability*

- a. The claimant will say his increased physical pain and, at times, very strong medication such as morphine, and the stress of his demanding case load resulted in him making an unwise decision when he decided to help the claimant and subsequently had a platonic relationship with her that the respondent considered inappropriate.
- b. The claimant will say that a failure to take his disabilities into account in the decision to dismiss and in the sanctions applied to him was discrimination arising in consequence of his disability contrary to Section 15 of the Equality Act 2010.

(iv) Failure to make reasonable adjustments in relation to the lack of a lift at Didsbury Job Centre as of 21 February 2019.

- a. The claimant will say that when the lift broke down at Didsbury Job Centre as of 21 February 2019 he became unable as a result of his physical condition to access canteen facilities and private meeting rooms.
  - b. The claimant will say that the respondent did not take all reasonable steps to avoid the disadvantage to him in that, for example, he was unable to attend training or case conferences held on a weekly basis upstairs;
  - c. When his own disciplinary process was conducted at Didsbury Job Centre ongoing investigation and disciplinary meetings had to take place in very public meeting rooms in the Job Centre on the ground floor; and
  - d. Because of his inability to access private meeting rooms on upper floors, he was dismissed on 5 April 2019 in what he will say was the very public arena of the Finance Office due to the lift still being unavailable.
9. The claimant will say that the respondent knew that he was a disabled person because of occupational health reports which at the time to which these proceedings relate and for a considerable period before, advised the respondent that the claimant was likely to be considered disabled for the purposes of the Equality Act 2010
10. The claimant's representative Mrs Kehoe confirmed that the first paragraph of the claimant's further particulars dated 31 December 2019 relating to a lack of consideration of a "disabled persons trigger point" in the respondent's attendance management procedure was included for background information only and did not form the basis of a specific complaint that the claimant wished the Tribunal to decide.

**The evidence before the Tribunal**

11. The claimant gave evidence to the Tribunal as to the issue of his disabilities and answered questions from the respondent's Counsel and the Judge on his

disability impact witness statement which dealt with each of his three conditions in turn.

12. Both the claimant and his representative told the Tribunal that Mr Stevenson had encountered significant difficulties from his GP's surgery in obtaining a full set of his medical records. The Tribunal file notes that the claimant had notified the Tribunal of these difficulties some time before the hearing and had required an extension of time. The extension of time notwithstanding, the claimant had still not received a full set of his medical records at the date of this hearing.
13. Nevertheless, the Tribunal notes that the medical records in the hearing bundle were extensive and date from December 2006. The claimant's complaints of disability discrimination only cover a time period from 2017 onwards. Therefore, although consideration has been given to the claimant's earlier medical records for the purposes of background and context, these have not been given the same weight as those which cover the material time to which the claimant's complaints relate.
14. Furthermore, the claimant's medical records record a significant downturn in the claimant's mental health as a result of his dismissal. The Judge told the parties that this would not be taken into account in determining whether the claimant was a disabled person at the time to which the complaints relate.
15. Having heard the evidence and submissions from both representatives, the Tribunal retired to deliberate. It was apparent that only the first issue, which is that of whether the claimant was a disabled person within the meaning of section 6 or not, would be able to be determined during the time allocated for this hearing. Both parties requested that a contemporaneous decision be given that day if at all possible. Due to the limited time available, and the claimant's need to leave the Tribunal at approximately 4pm, the Tribunal told the parties that a summary decision would be given at the end of the hearing with written reasons including findings of fact and application of the law to the facts found to be provided in due course.

## **Findings of Fact**

### Condition One: Anxiety and Mental Health Issues

16. The claimant gave evidence to the Tribunal that he had a longstanding history of difficulties with his mental health, including anxiety and depression. His statement indicated that such issues had been ongoing for decades, since his late teens. The claimant told the Tribunal that his issues with his leg had begun in the early 2000's and as a result of this he became quite agoraphobic. It was clear from the claimant's medical records that he has received a course of cognitive behavioural therapy through the NHS.
17. The claimant's evidence under cross examination was that he had been taking this medication since 2006 at the same dose of one tablet every morning and that some time ago at an unspecified date had attempted to stop taking Citalopram but that this had caused a significant relapse in his mental health. The claimant was not able to indicate to the Tribunal when this was but suggested that it was after 2006. The claimant's medical records for his diabetic clinic

attendances record what medication he was taking approximately every six months. It was the respondent's case that there were gaps in the records for Citalopram that suggested that the claimant had not taken this continuously for the period that he suggested. The claimant disputed this. It was also noted that the claimant's GP consultation records which were available from March 2017 until December 2019 did not record him as ever having visited his GP by reason of his mental health issues.

18. Having taken time to consider the evidence the Tribunal concludes on the balance of probabilities that it accepts the claimant's evidence that he has taken Citalopram continuously at the same dosage from 2009 to at least the date of his dismissal in 2019. The Tribunal carefully reviewed the medical records in the bundle and noted that on occasion, the diabetes clinic would omit mention of Citalopram but other contemporaneous evidence would note, from the same time period, that the claimant was taking Citalopram. For example, his diabetes clinic records from March 2016 do not refer to Citalopram but a letter from January 2016 from a Neurology Clinic record that he was currently taking Citalopram. On the balance of probabilities, the claimant's diabetes clinic records are not a completely reliable record of the full extent of the claimant's medication.
19. The claimant told the Tribunal that in terms of the effect of his anxiety on his day to day activities, that he coped in work and then came home and found it very difficult to do much other than stay at home. Witness statements had been provided in the bundle and were referred to by the claimant's representative in the form of character references. Having taken time to briefly consider those, and according references the weight appropriate for witness statements that had not been tested in cross examination, the Tribunal notes that none of these make reference to the claimant suffering substantial adverse effects in work because of his mental health issues. Two make reference to the claimant's struggles with mental health but all record that the claimant in work was efficient, effective, popular and conscientious. Furthermore, there was some evidence before the Tribunal from the claimant's medical records of two or three episodes of much worsening mental health which involved collapses. The claimant collapsed at work in December 2010, collapsed again in May 2011 and attended Accident and Emergency at his local hospital in October 2015 having also suffered a collapse. However, none of these episodes relate to the material period covered by these claims.
20. The "*Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability 2011*" indicates that the effects of medication should be discounted where a condition was being controlled by medication and be decided by reference to what the effects of the condition would be if the individual was not taking that medication. However, the Tribunal had no evidence before it, either by way of the claimant's testimony or medical records, as to what the effects on the claimant would have been had he not been taking his medication at the material time. The burden of proof is on the claimant to demonstrate that he is a disabled person. In relation to his mental health issues he has not discharged the burden to show that without taking Citalopram his mental health issues would have had a substantial and adverse effect on his ability to carry out normal day to day activities.

21. From the medical evidence in the hearing bundle, the Tribunal accepts that the claimant was diagnosed with “type 2” diabetes in January 2009 and has been subject to continual review and has continually taken medication for that condition since that time. There was very little evidence before the Tribunal as to whether the claimant’s Type 2 Diabetes had a substantial and adverse effect on his ability to carry out normal day to day activities. It is accepted by the Tribunal that the claimant’s condition is long term. It is accepted that without medication the claimant would suffer some adverse effects of his condition. The claimant referred to it being “*likely*” that he would feel severe fatigue and nausea without the medication. He also told the Tribunal that he was quite sluggish in the morning and could be surly whilst his medication took effect. The claimant also indicated that some of his collapses might have been linked to his diabetes but as set out above, these did not occur at the time to which the complaints relate.
22. Furthermore, the claimant’s medical evidence indicated that at times the claimant was not following some recommendations made that the respondent submitted it would have been reasonable for him to do. In particular this related to his consumption of fizzy drinks. The claimant acknowledged that he had not always followed the recommendations as regards consumption of fizzy drinks. The Tribunal accepts that it would have been reasonable to expect him to do so and that a failure to do so would have caused an exacerbation in his condition. The 2011 Guidance at paragraph 7 notes that account should be taken of how far a person can reasonably be expected to modify his behaviour to prevent or reduce the effects of an impairment on normal day to day activities. The Tribunal accepts that it was reasonable to expect him to avoid fizzy drinks and to eat a healthy diet as was advised to him on several occasions. It is also accepted that had this been done, this would have reduced the effects of his impairment on his normal day to day activities.
23. In conclusion, the Tribunal was given insufficient evidence that whether with or without the claimant’s medication, his diabetes had a substantial adverse effect on his ability to carry out normal day to day activities. The claimant has not overcome the burden of proof in that regard.

#### Condition Three: Neuropathy and Nerve Damage

24. The claimant told the Tribunal that he has a long history of problems with his left foot. He received a severe dog bite to his left foot in 2008 and was hospitalised for surgery to repair the damage inflicted and at that point was diagnosed with type 2 diabetes. However, from approximately 2000 to 2008 the claimant’s statement notes that he had difficulty with walking distances and required surgery to each leg due to blood constriction. After the 2008 injury had healed the claimant walked with a limp. He had difficulty walking and could not run.
25. The claimant has had several episodes of chronic pain and difficulties with his leg and was admitted to Accident and Emergency to deal with this on intermittent occasions. The Tribunal notes from the medical records in the Tribunal bundle that this occurred in July 2011, February 2015, August 2015 and February 2019. The claimant told the Tribunal that on admission to A&E he would be given medication that was a muscle relaxant and occasionally liquid morphine, however he found himself unable to tolerate the liquid morphine as it made him ill. He

- therefore told the Tribunal that he copes with his foot and leg condition by wearing a leg brace that helps correct his “foot drop”. He also used crutches for a period of time which the claimant estimated to be approximately eighteen months from early 2017 to 2018.
26. The claimant told the Tribunal that without the leg brace his gait would be unstable, his foot would drag and he would need to support himself on walls. His evidence was that he manages his symptoms by limiting his movement and wearing the leg brace.
27. The claimant told the Tribunal that his normal day to day activities were severely restricted because of his foot and leg condition. He very rarely used public transport, had difficulty in walking, found it difficult to carry objects, did not go outside often, and coped going up and down stairs by using hand rails and using the support of one knee. He also told the Tribunal that his mobility issues and pain had caused him low motivation and a loss of interest in everyday activities. The Tribunal accepts the claimant’s evidence in this regard. The Tribunal also notes that the claimant’s mobility issues are regularly recorded in the respondent’s internal documentation that was before the Tribunal in the bundle.
28. The respondent’s counsel asked the claimant whether his lack of use of pain killers for his leg condition indicated that his condition did not have a substantial adverse effect on his ability to carry out normal day to day activities. It was also put to the claimant that in an occupational health report in April 2017, the claimant was noted to be “*walking out of the house with support of two crutches which he reports managing well*”. Elsewhere, occupational health reports noted that the claimant, in March 2015, reported that he was “*managing all of his normal activities now that the pain has resolved*”. However, the claimant told the Tribunal that he managed his normal activities by severely restricting the activities that he undertook outside of work. The Tribunal accepted his evidence in this regard.
29. Therefore, on the balance of probabilities the claimant has established that his leg and foot condition had a substantial adverse effect on his ability to carry out normal day to day activities and is a long-term condition. He has also established that it has this effect even with the use of a leg brace and crutches and that without the leg brace and/or crutches the condition would be exacerbated.
30. There was some confusion, both in terms of the medical reports and also in the claimant’s witness evidence as to the precise cause of the claimant’s issues with his leg. It was unclear whether it was exacerbated by the dog bite, by compression in his spine, by some feature of his diabetes or some other reason. However, it was accepted by the respondent that it was irrelevant for the purposes of establishing whether the claimant is a disabled person what the original cause of the condition was.

## The Law

31. The statutory provisions relevant to a determination of whether the claimant is a disabled person are section 6 Schedule 1 of the Equality Act 2010. In particular s6(1) states:
- (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*

32. “Substantial” in this context means only “more than minor or trivial” (s212(2) of the Equality Act 2010).
33. Where a condition is being treated or corrected the impairment is deemed to have the effect that it is likely to have had without the measures in question. (Schedule 1, paragraph 6(1) Equality Act 2010).
34. The guidance from the Government’s Office for Disability “Issues on Matters to be Taken into Account in Determining Questions Related to the Definition of Disability (2011)” (“the Guidance”) suggests that a number of factors will be relevant when considering whether any adverse impact on normal day to day activities is substantial. The focus of the Tribunal should be on what the person cannot do or can only do with difficulty rather than focussing on the things that the person can do (*Paterson v Commission of Police for the Metropolis (2007) IRLR 763*).
35. The Guidance provides non-exhaustive lists of examples of normal day to day activities. These include going outside, using transport, going up and down stairs, difficulties in walking, difficulties carrying objects, low motivation and loss of interest in everyday activities.
36. Abstention from sugary drinks by a claimant with type 2 diabetes has been held not to be a “*treatment or correction*” for the purposes of Schedule 1, paragraph 6(1) Equality Act 2010 (*Metroline Travel Limited v Stoute (2015) IRLR 465*). Instead, such abstention is something that someone can reasonably be expected to do to modify his or her behaviour and is to be taken into account. This is also referred to in paragraph B(7) of the Guidance.
37. The focus of the Tribunal is to be on whether the claimant can be said to have had a disability at the date of the alleged discrimination rather than at the date of the hearing.

### **Application of the Law to the Facts Found**

38. Taking into account the findings of fact above, the Tribunal finds that in relation to the conditions of anxiety and depression and type 2 diabetes, the claimant has not established on the balance of probabilities that he meets the test set out in section 6 Equality Act 2010. In relation to the nerve damage and neuropathy in his leg, the claimant has succeeded in establishing that he is a disabled person for the reasons set out above.

### **Further Preliminary Hearing**

39. The matter was listed for a further preliminary hearing on 6 July 2020 at the Manchester Tribunal at a time to be notified to the parties by the administration in due course. This will consider any application to amend the claim by the claimant

and will set down case management orders to ensure the future good conduct of these proceedings.

40. The claimant's representative was given until 6 March 2020 to set down in writing in the context of the issues discussed and the decision on disability that has been given, what the claimant's claims for disability discrimination are going forward.
41. The respondent has been given the opportunity on or before 3 April 2020 to produce an amended response, and must also indicate in the light of the claimant's compliance with the direction above on or before 6 March 2020 whether any amendments are required to the claim or whether the respondent accepts that the clarification of the claimant's claims relates only to matters that were already pleaded in the original claim form. Should the respondent wish to renew its application for a strike-out of the claimant's claims, or an application that the claimant be required to pay a deposit to continue with his claims, it is to do so in writing in good time prior to the case management discussion preliminary hearing.
42. The Tribunal told the parties that in the event that the respondent accepted that the claimant's claims had merely been clarified and that the claim did not require amendment, it may be that the Preliminary Hearing could be converted into a closed telephone Case Management Discussion with an estimated length of one hour. This would become apparent on receipt by the claimant and the Tribunal of the respondent's amended response of 3 April 2020.

Employment Judge Barker

Date: 26 March 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
31 March 2020

FOR THE TRIBUNAL OFFICE

**Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.