



## EMPLOYMENT TRIBUNALS

**Claimant** Mr E Benham  
**Represented by** in person

**Respondents** LTE Group  
**Represented by** Ms C Jennings (counsel)

**Before:** Employment Judge Cheetham QC

Hearing held on 25 August 2020 at  
London South Employment Tribunal by Cloud Video Platform

### JUDGMENT

1. The Claimant was not a disabled person within the definition of the Equality Act 2010 at the material time. The complaints of direct disability discrimination and harassment related to disability are therefore dismissed.
2. The complaints of automatically unfair dismissal for making a protected disclosure and of suffering detriments for making a protected disclosure are struck out as having no reasonable prospects of success.
3. The complaint of suffering detriments on the grounds of health and safety is struck out as having no reasonable prospect of success.

### REASONS

1. *This has been a remote hearing on the papers, which the parties have not objected to. The form of remote hearing was: V - video. A face to face hearing was not held because it was not practicable and the issue of the future determination of the claim could be resolved from the papers. The documents that I received were those contained in the Tribunal case file.*

2. The issues in the case were identified at a Preliminary Hearing on 9 June 2020. The complaints are (in summary):
  - (a) “ordinary” unfair dismissal under the Employment Rights Act 1996 s.98;
  - (b) unfair dismissal for making a protected disclosure under ERA s.103A;
  - (c) suffering detriments for making a protected disclosure;
  - (d) health and safety detriments under ERA s.44;
  - (e) direct disability discrimination (dismissal only);
  - (f) direct race discrimination (dismissal only);
  - (g) harassment related disability;
  - (h) harassment related to race; and
  - (i) unpaid notice pay and holiday pay.
  
3. This hearing was listed to consider 3 things:
  - (i) Was the Claimant a disabled person within the definition of the Equality Act 2010 at the material time?
  - (ii) Was the Claimant’s wife a disabled person?
  - (iii) Should the claim or parts of it be struck out or be made subject to a deposit order?

**The Claimant’s wife’s disability**

4. Taking this issue first, it was not listed as an issue at the last Preliminary Hearing (9 June 2020), but was added subsequently to the issues for today by EJ Hyams-Parish. In a letter dated 24 July 2020, he amended the previous order to include a *“requirement on the Claimant to send to the Respondent proof of his wife's diagnosis of cancer, if he seeks to rely on this as part of his claim of disability discrimination.”*
  
5. However, with all due respect to the Judge, I anticipate that he did not have the agreed list of issues before him at that time. Had that been the case, he would have seen that the issue of the Claimant’s wife’s health was limited to the claim for “ordinary” unfair dismissal, in that the Claimant alleges that the Respondent failed to take his wife’s poor health into consideration.
  
6. There has been no allegation of discrimination connected with the Claimant’s wife’s health and the Claimant confirmed that to me at this hearing. Therefore, whether or not she was disabled for the purposes of the Equality Act 2010 is not relevant.

**The Claimant’s disability.**

7. Pursuant to section 6(1) of the Equality Act 2010, disability is defined as a physical or mental impairment which has a substantial and long-term adverse effect on the individual’s ability to carry out normal day-to-day activities. It is agreed that the relevant period in which the Tribunal has to determine disability is from August 2018 to February 2019

8. Before setting out my findings, I shall summarise the documentary evidence that was relevant to this issue, which I read through and which was helpfully and concisely summarised in Ms Jennings' written submissions.
9. The Claimant was employed from 2012 until February 2019. During this time, he was off work for a number of periods between October 2014 and January 2016. Before his dismissal in February 2019, his last sickness absence was February 2016.
10. There were 16 Statements of Fitness for Work during the Claimant's employment, which went from October 2014 to February 2016. They were variably for work related back pain and/or stress and depression. I should note here that the Claimant has not disclosed any GP records relating to the above illnesses, nor to any subsequent illness. He told me that his usual GP during this time has retired and he felt constrained in discussing his case with any other GP. As a result and owing to the difficulties created by the Covid-19 pandemic, he had not tried to obtain his medical records.
11. The Claimant attended an occupational health assessment on 4 June 2015 and was assessed as medically 'fit' to undertake the duties of his post and was not considered disabled under the Equality Act 2010. The report noted as follows:
  - a. As to the impact of his work-related stress on his day to day activities:

*"His symptoms have included loss of appetite and disturbed sleeping. Low energy and a feeling of anxiety has resulted. Reassuringly [the Claimant] had adequate concentration and motivation to do the duties of his post when he returned to work."*

*"[The Claimant's] present level of psychological health, I consider to be 'reasonable' though symptoms of stress and of depression and anxiety of a mild nature are present. The level of symptoms are strongly tied to events experienced at work..."*

*"Work related issues, namely the breakdown in working relationship and loss of trust with [the Claimant's] management is the primary factor in his absence... The issues impacting on [the Claimant's] attendance at and ability to work are wholly work related... the working relationship between management and [the Claimant] is severely strained..."*
  - b. As to the impact of his back pain on his day to day activities:

*His back pain flared in September/October 2014. At the time of assessment his symptoms were "overall improved... He can sit reasonably and walks with relative ease".*

*He required to stand from sitting on a regular basis (every 15 to 20 minutes). "Any books, files or teaching materials required to be carried by him should not weigh greater than 5kgs".*
12. The next reference to any stress or depression came in emails from the Claimant between September and November 2018 (two and a half years

later). In these, the Claimant complained about a new manager and his workload. He made comments such as “*I felt demoralised, depressed and too distressed by the new deputy manager’s attitude towards me*” and “*Such attitude does further cause me psychological stress leading to anxiety and depression*”. However, as noted above, he took no time off for sickness after February 2016 and there is no supporting medical evidence.

13. The Claimant has provided an impact statement and I would note the following as particularly relevant:
- a) He describes being prescribed Sertraline. However, the only documentary evidence of this is a partially legible prescription dated 22 July 2020, which obviously post-dates the period we are looking at. It does not show the dose, prescribing circumstances or the duration of the prescription.
  - b) He refers to his stress and depression being exclusively work-related.
  - c) He states that the effects of his work-related stress “may re-occur”, but he gives no further detail or specific examples.
  - d) The Claimant refers to loss of appetite, sex drive, concentration and motivation, as well as disturbed sleep, but – as the Respondent has pointed out - he provides no detail as to severity, frequency, day to day impact, or the period of these symptoms.

Findings of fact: the Claimant’s back pain.

14. I heard evidence from the Claimant, who gave his evidence in a clear and unexaggerated way.
15. The last documented reference to back pain is the Statement of Fitness of Work in February 2016, which is therefore about 2½ years before the relevant period. The OH report dated eight months earlier referred to his back symptoms as “*overall improved*”.
16. The Claimant told me – and I accept – that from time to time he still experiences sharp pain in his back. However, he could not say how often this occurred, even when I asked him whether it was once a month, for instance. He also could not say how long the pain would last, but gave the impression that it was for a short time. Certainly, it has never prevented him from attending work since February 2016 and that would be consistent with the OH report’s conclusion that, by June 2015, it had improved.

Findings of fact: the Claimant’s stress and depression.

17. The position with the Claimant’s stress and depression is similar, in that the OH report considered the symptoms to be of a mild nature in June 2015 and, since February 2016, they have not prevented the Claimant from working. Apart from the recent prescription of Sertraline, there is no medical evidence of any continuing symptoms after February 2016.

18. The Claimant told me that at work he had feelings of worry and fear, which varied in degree. He referred to having an “anxiety disorder”, but on closer questioning, he was not suggesting this was a diagnosis, but a reference to the use of the word “anxiety” by his GP from time to time. The Claimant did not suggest that the OH report gave an incorrect assessment.

The Claimant’s disability: conclusions

19. There is insufficient evidence to allow me to conclude that the Claimant was suffering from either a physical or a mental impairment at the relevant time. By mid-2015, his back pain symptoms had improved and from February 2016 onwards did not cause him to miss any work. There is no medical evidence suggesting that the Claimant suffered from back pain during the relevant time and, while I accept that the Claimant suffers from occasional back pain, that falls short of suggesting a physical impairment.

20. Similarly with the Claimant’s stress and depression, by mid-2015 it was characterised as mild and it did not contribute to any sickness absence after February 2016. There is no supporting medical evidence to suggest the Claimant suffered from stress and depression at the relevant time and the single prescription for Sertraline from 2020 does not assist.

21. Even if this were wrong, there is no evidence of any substantial adverse impact on day to day activities. Unfortunately, there is a lack of detail in the Claimant’s impact statement and, at this hearing, his oral evidence did not take this any further. It would be impossible to form any clear conclusions as to how any continuing back pain or stress and depression was affecting him in terms of his day to day activities. Although there is evidence of these conditions occurring during the period between October 2014 and February 2016, there is also insufficient evidence to suggest any recurrence after that period.

22. That being so, the conclusion is that the Claimant was not disabled at the relevant time. It follows that the claims for direct disability discrimination and harassment are dismissed.

**The Respondent’s application to strike out/obtain a deposit order**

23. Ms Jennings accepted that the claim for “ordinary” unfair dismissal would proceed to a final hearing, as would the claims for unpaid notice pay and holiday pay.

24. Her application concerned the whistleblowing dismissal and detriments, health and safety detriments and the race discrimination claims. With regard to the last, she restricted her application to a deposit order.

The whistleblowing claims

25. The Claimant relies on two alleged protected disclosures dated 22 November 2018. One is said to be contained in an email timed 18.45 and

the other is said to have been conveyed orally at a meeting with Sharon McDermott earlier that day. The Claimant states that the disclosures made were the same on each occasion.

26. Although the Claimant has explained in his Further and Better Particulars what the qualifying disclosures were, they do not appear in the email or the meeting notes. The Claimant explained at this hearing that what he was complaining about was the Respondent claiming excessive hours from the Skills Funding Agency. The only part of the email that comes close to that is this passage: *"I will only be credited Three hours for when we are claiming nine hours delivery. Is this justified?"*.
27. However, even if that did amount to a qualifying disclosure – which I very much doubt – there were no obvious detriments. The Claimant told me that as a result of being told this, Ms McDermott (also the recipient of the email) became "rather arrogant" and not very happy with what he said. Other managers became negative and critical. That is too vague and imprecise to amount to a detriment. The Claimant has provided no specific examples of this behaviour at all, apart from an undated and separate allegation that he was asked to carry bottles of drinking water.
28. Overall, the claim for whistleblowing, both dismissal and detriments, has no reasonable prospect of success and I agree that it should be struck out.

#### The health and safety claims

29. The basis upon which a claim relating to health and safety can be brought is under the Employment Rights Act 1996 s.44. I do not criticise the Claimant, who is self-representing, for failing to appreciate the precise requirements of that section. His pleadings and Further and Better Particulars do not reveal a claim. When he explained to me that his case was essentially that his managers did not care much about health and safety, it was clear that he did not come near the s.44 requirements of "serious and imminent danger" and so on. The health and safety claims are also struck out as having no reasonable prospect of success.

#### The race discrimination claims

30. The claim for direct discrimination relates exclusively to the Claimant's dismissal. He argues that he was dismissed because of his race, but these are essentially bare accusations. The claims for harassment are also relatively unclear in respect of the unwanted conduct and how it related to race. The examples have no obvious link to the protected characteristic – for example, *"Ineffective timetabling of staff... Denying me from taking special annual leave due to family bereavement... Refusing my request for a photocopy of her hand notes... Accusing me of talking loudly... Passing on my email login details to Mark Morgan"*.
31. I would agree that, on that basis, the race discrimination claims have little reasonable prospect of success. It may be helpful for the Claimant to

discuss these claims with a legal advisor if he wishes to continue with them, because they need to be clarified if they are to have any hope of succeeding.

32. I am ordering the Claimant to pay a deposit in order to continue with the discrimination claims. He explained his financial position to me and that his net monthly income is £1,900, out of which he pays rent of about £650. He has no savings and has debts to pay and described himself as “just surviving financially”. In those circumstances, I make a deposit order in the sum of £200, which is £100 for the direct race discrimination claim and £100 for the harassment claim. The deposit order is contained within a separate Order, to accompany this Judgment.
33. I have set out in a separate case management order the directions for the final hearing.

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Employment Judge S Cheetham QC  
1 September 2020