EMPLOYMENT TRIBUNALS

Claimant: Mr D Kiely

Respondent: Smiths of Bury Limited

HELD AT: Manchester **ON:** 30 September, 1 October and (deliberations) 27 October 2019

BEFORE: Employment Judge B Hodgson
Mr D Williamson
Mr W K Partington

REPRESENTATION

Claimant: In person

Respondent: Ms L Kay, Counsel

RESERVED JUDGMENT ON LIABILITY

The unanimous judgment of the Tribunal is that:

1. The claimant was, at the relevant time, a disabled person as defined

2. The claim of direct discrimination because of disability contrary to the provisions of section 13 Equality Act 2010 is not well-founded and fails

3. The claim of discrimination arising from disability contrary to the provisions of section 15 Equality Act 2010 is well founded

4. The matter is to be listed for a Remedy Hearing

REASONS

Background

1. These claims were presented on 25 November 2019 with the claim form setting out the following:

    1.1. Unfair dismissal

    1.2. Disability discrimination

    1.3. Arrears of pay

    1.4. "Made redundant after a work accident"

2. In their response, the respondent admitted that the claimant had been dismissed, said to be by reason of redundancy, but denied all claims

3. The matter came before the Employment Tribunal at a Preliminary Hearing ("the first PH") on 5 February 2020 and Case Management Orders were made. The claim for arrears of pay was dismissed upon withdrawal and the claims being pursued at that stage were clarified to be the following:

    3.1. discrimination because of disability contrary to the provisions of section 13 Equality Act 2010

    3.2. discrimination arising from disability contrary to the provisions of section 15 Equality Act 2010

    3.3. automatic unfair dismissal contrary to the provisions of section 104 Employment Rights Act 1996

    Disability was not admitted, the disability claimed being a physical impairment, namely the claimant's right pilon fracture/broken right ankle

4. The parties attended a further Preliminary Hearing ("the second PH") on 17 June 2020. At that hearing, the claim of unfair dismissal was dismissed upon withdrawal leaving the two claims of disability discrimination to be pursued. Further Case Management Orders were made and it was agreed that the Hearing would be limited to issues of liability, then to be listed for a Remedy Hearing if that proved necessary

5. The parties and the respondent's representative attended the Hearing in person. One of the Tribunal members (Mr Williamson) attended throughout by video link, the two others being physically present. All three members of the

Tribunal attended the deliberations remotely. This therefore being categorised as a hybrid hearing, it is designated in the heading as "Code V"

Issues

6. A List of Issues had been discussed and agreed at the first PH. These were further discussed at the outset of the Hearing and agreed, insofar as the remaining claims were concerned, as follows :

Disability

7. Did the claimant have a disability at the relevant time as defined by section 6 Equality Act 2010? The claimant relies upon his right pilon fracture/his broken right ankle. The relevant time is 27 September 2019

Direct discrimination because of disability (section 13 Equality Act 2010)

8. Was the dismissal of the claimant less favourable treatment, that is did the respondent treat the claimant less favourably than it treated or would have treated others in not materially different circumstances? The claimant relies upon a hypothetical comparator

9. If so, was this because of the claimant's disability?

Discrimination arising from disability (section 15 Equality Act 2010)

10. Did the following things arise in consequence of the claimant's disability: his absence and/or his inability to do the job for which he was employed?

11. Did the respondent treat the claimant unfavourably by dismissing him because of any of those things?

12. Has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

Facts

13. The parties had agreed a bundle of documents and references to numbered pages in this Judgment are to pages as numbered within such bundle

14. The claimant had prepared two Impact Statements pursuant to Orders made at both the first PH and the second PH (pages 56 and 57) and had also prepared a further witness statement for the Hearing which together stood as the claimant's evidence in chief. He gave oral evidence on his own behalf. The respondent called as its only witness Mr Anthony Smith, the Managing Director, who had also prepared a witness statement for the Hearing

15. The Tribunal came to its conclusions on the following facts on the balance of probabilities having considered all of the evidence before it, both oral and documentary

16. Credibility was a significant issue in the course of the Hearing and in the context of the Tribunal's deliberations and conclusions

17. The overall manner in which the claimant gave his evidence gave the Tribunal a more favourable impression of his credibility than that presented by Mr Smith. However, specific issues of credibility will be covered further within this Judgment and, notwithstanding its general overview in that regard, the Tribunal looked at the available evidence surrounding each aspect of the claims before reaching its conclusions and did not automatically assume that in every respect where there was a dispute the claimant was to be believed in preference to Mr Smith

General

18. The respondent company is a long-established family owned and run business. Its operation is haulage. At the relevant time, September 2019, it employed, in addition to the Directors, a total of ten staff including seven HGV drivers

19. The claimant had worked on and off for the respondent company as an HGV driver going back over many years. His relationship with the owners, including the Managing Director Mr Smith, was agreed by both sides to be more of a friendship than a straightforward employer/employee relationship

20. The most recent employment of the claimant by the respondent, again as an HGV Class I driver, commenced on 21 November 2017 and ended on 27 September 2019 when he was dismissed

Disability

21. On or about 30 July 2018, the claimant suffered an accident at work causing severe damage to his lower right leg. The claimant's medical records (see pages 74 – 75) indicate that he was admitted to hospital on that date

22. The entry in the claimant's medical records on 3 September 2018 (see page 75) records the following telephone consultation:

    "Pt still in a lot of pain post op – has pins in ankle, struggling to walk. Waiting to start physio. Needing oramorph every 4-5 hours. Says he saw consultant on Fri

(letter awaited) and advised he will likely need more surgery in next few months …"

23. The claimant had a metal frame attached to the lower part of his right leg by drilling into the bones (see page 93) which was ultimately removed in or about June 2019

24. There are subsequent entries confirming his attendance at orthopaedic clinic on 24 September 2018, 17 December 2018, 15 February 2019 and 4 September 2019 followed by attendance in the physiotherapy department on 7 and 23 September 2019 (see pages 74 and 75)

25. Two further entries were highlighted on behalf of the respondent, one on 8 November 2018 stating "re pain control, controlled ok, doing ok" and one on 24 June 2019 which records "capable of work on work capability criteria" (see page 75)

26. The claimant's Consultant wrote to his GP by letter dated 2 September 2019, referring to a consultation on 23 August 2019, (page 71) which states:

"… He is roughly one year following his injury which was right pilon fracture. Approximately three months ago he underwent removal of the external fixator frame and he was asked to mobilise full weight bearing ever since.

Today on review he tells me that he is quite comfortable mobilising with one stick. However, he does not have flexion or plantar flexion. The tendo Achilles does fell quite tight and shortened. I have noted from the previous entries that there was a plan for him to undergo a tendo Achilles lengthening if necessary. However, he tells me that he has not received any physiotherapy with regard to the ankle. I think it would be prudent initially if we start mobilising the ankle very gradually and slowly. I have told him to begin his physiotherapy for the ankle and his right knee. He tells me that he has a private Physiotherapist [who] will see him for this and I have agreed to this. I have told him that I would like to see him in three months' time to see how he is doing to make a clinical decision regarding the tightness of his tendo Achilles …"

27. The medical entry for the claimant on 3 September 2019 refers to "reduced movement right leg due to injury" in the context of a consultation concerning vertigo said to have arisen since the accident (see page 74)

28. Subsequent letters were sent to the claimant's GP from the Orthopaedic Department of his treating Hospital. One, dated 12 June 2020 (page 73), records that the claimant "continues to have significant pain in his right ankle as well as the foot and this is associated with on and off swelling around the ankle. He tells me that his range of movement is 70 – 80% of normal. The pain is significant on walking. He is well in himself. Considering the ongoing pain, we have agreed that he may benefit from a face to face consultation with an x-

ray on arrival which I will arrange for him in 2 weeks' time…" The follow up letter, dated 30 June 2020 (page 72) records that the claimant "is 2 years down the line after pilon fracture fixation. The fracture has healed. However, he has got pain and stiffness in his right ankle. It affects his walking and his activities. On clinical examination all of the wounds have healed nicely. His ankle has movement of about 20 degrees of plantar flexion and zero degrees of dorsal flexion. He has a good subtalar movement. X-rays today confirm the post traumatic arthritis of his ankle and has showed the fracture has healed …"

29. The claimant remained off work by reason of the injury to his leg from when the accident occurred throughout the rest of his employment with the respondent until his dismissal. He submitted fit notes covering his absence (see pages 95 – 103), the first of which refers to a "limb injury" and the rest to "fracture of ankle"

30. The respondent was in receipt of insurance payments relating to the claimant's absence and these were paid to the claimant in addition to his entitlement to Statutory Sick Pay. They were initially in the sum of £200 per week then reducing to £100 per week from October 2018 until the termination of his employment (see payslips at pages 147 – 178)

31. The claimant was assessed as entitled to Personal Independence Payment, for help with both his "daily living needs" and his "mobility needs", from November 2018 through to January 2021, confirmed in February 2019 (see page 64)

32. The claimant's application for a 'Blue Badge' was successful and a "disabled person's parking badge" was sent to him in February 2019 (see page 63)

33. At an unknown date (but with effect from May 2019), he successfully applied for Industrial Injuries Disablement Benefit (see page 66), the decision being that "the industrial accident on 30/07/2018 has caused you a loss of faculty. By loss of faculty we mean some loss of power or function to a part of your body

    - The loss of faculty is reduced right ankle movements

    - You have been assessed as 25% disabled from 23/05/19 to 16/01/20 because of the loss of faculty …"

34. This was said to be a provisional assessment and in December 2019, the claimant's entitlement to this Benefit was further confirmed (see page 65), the decision again being that "the industrial accident on 30 July 2018 has caused you a loss of faculty. By loss of faculty we mean some loss of power or function to a part of your body.

    - The loss of faculty is difficulty with walking, stairs, [bending], engaging with DIY activities and driving affecting daily routine. Difficulties with low mood, nightmares, sociability affecting daily routine

- You have been assessed as 29% disabled from 17/01/2020 to 17/01/2022 because of the loss of faculty…"

35. As indicated, the claimant's evidence in chief as to his claim that he is a disabled person is principally set out in two "Impact Statements", prepared pursuant to Orders made at both the first PH and the second PH, at pages 56 and 57

36. At page 56, he states that " … day to day activities now for me consist of getting up at 8am after a restless night. The restlessness is due to my leg being uncomfortable and painful. This is every night not just now and again. I'm still on medication 2 years down the line. I'm on oramorph 5ml 2 paracetamol & 2 ibuprofen all taken 4 times a day plus Movicol to help me go to the toilet due to oramorph bunging me up … I struggle to get out of bed in the morning because my ankle is stiff and sore. I struggle to walk and getting up and downstairs is difficult. When I get up to go to the toilet in the night I'm hobbling about like an old man as my ankle is very stiff. I'll go on my exercise bike every other day. I can't do every day due to me ankle pain and swelling. I can walk but now use a walking aid of a stick all the time whilst I'm outside. I struggle on uneven surfaces due to lack of flexibility in my ankle. I can't walk as fast as I could do. Everything is at a much slower pace now. It doesn't matter how long I'm on my feet from first getting up the swelling starts. After 15 to 20 mins you can see the swelling. When the swelling happens, the pain is there I must rest the following day with my leg raised to help ease the swelling and pain. My medication I plan around having to go out shopping [etc]. If I didn't take any medication, I wouldn't be going anywhere due to the pain …"

37. At page 57 (dated 12 March 2020), he states that "my disabilities are, right pilon ankle fracture with 8 screws inserted above ankle which gives me limited movement in right foot of roughly 75%. Still in a lot of pain and swelling also discomfort even while resting. Still on medication Oramorph and paracetamol. [Ongoing] physio and hospital check ups with possible surgery further down the line. I still have the aid of a stick to help me around on a daily basis. The driving side is only short distances and limited …"

38. It was put to the claimant in cross-examination that what he was describing in these statements was the up to date positon rather than the position as it pertained in September 2019. The claimant accepted that this was correct and he had not understood – as an unrepresented litigant – that anything different had been required of him. His evidence was however that his condition was an improving one and the situation as at September 2019 would have been, in all the respects covered and particularly in relation to the impact upon his mobility, significantly worse than the statements now describe. The Tribunal accepted this evidence, it being entirely consistent with the medical evidence produced to the Tribunal. His major issue both at the relevant time and since has been his inability to work more than a short distance, and having to have the aid of a

walking stick to do so, together with the pain arising for which he continues to take medication

39. In addition to the entries referred to in paragraph 26 above, the respondent's representative also highlighted the reference in the Hospital letter dated 23 August 2019 (page 71, referred to above) to the claimant being "quite comfortable" (notwithstanding that it immediately goes on to state this to be by way of "mobilising with one stick")

40. The Tribunal rejects the contention that these entries contradict in any way, certainly in any material way, the conclusion it has reached in accepting the claimant's evidence as to the impact of his injury upon his mobility

Knowledge

41. It was agreed between the parties that Mr Smith regularly visited the claimant at his home whilst he was on sick leave. Specifically, he did so each time the claimant obtained a fit note from his GP - Mr Smith attended at the claimant's house to pick up the fit notes. At each such meeting, given their friendly relationship, Mr Smith would stay and chat for perhaps up to an hour

42. When visiting the claimant, Mr Smith witnessed directly that he was struggling to walk other than with the aid of a walking stick. He noted that the claimant had the use of a wheel chair. He had seen the claimant's mobility scooter in the house (although he had not witnessed the claimant actually using it)

43. Mr Smith accepted that he had been shown by the claimant the holes left in the claimant's leg after the removal of the metal frame. He did however not accept that he had been shown X-rays of the claimant's injury as was alleged by the claimant. The Tribunal accepts the claimant's evidence in this regard. In addition to the Tribunal's overall assessment as to credibility, given the relationship between the two and the open discussions they clearly had regarding the claimant's injury, it is inherently more probable than not that the X-rays would have been shown to Mr Smith

44. There was further dispute between the claimant and Mr Smith over the claimant's allegation that he showed his Blue Badge to Mr Smith when calling in at the respondent's premises whilst off on the sick, in the early part of 2019, and they had had a laugh and joke about the clamant having the badge. Mr Smith's rebuttal of this allegation centred upon his assertion in evidence that this exchange could not possibly have occurred as described because it is a fact well-known to his colleagues and acquaintances that he has no sense of humour and does not ever engage in jokey behaviour. This somewhat unusual defence was weakened by Mr Smith, soon after making the assertion in his evidence, purporting to make a joke as to the longevity of his father's presence at the respondent's premises. Again, given its overall assessment as to

credibility and the inherent probability involved, the Tribunal prefers the evidence of the claimant to that of Mr Smith in this regard

Dismissal

45. In September 2019, the respondent was facing a downturn in work. Specifically, it had been notified of the loss of two very significant contracts

46. Upon review of the situation and having taken advice from his accountants, Mr Smith decided that he would have to reduce the workforce. Having not been responsible for such an exercise previously, he took legal advice

47. In addition to the seven HGV Class I drivers employed by the respondent, they had also, as recently as August 2019, employed a trainee, a Class II HGV driver. This recruitment was said by Mr Smith in his evidence specifically to have been done to attempt to lower the age profile of their workforce. A Class II driver is limited in the size of vehicle they are permitted to drive in comparison to a Class I driver and is accordingly paid at a lower rate

48. The decision taken by Mr Smith was to reduce the number of drivers by two and he had to apply his mind as to which two that would be. Other costs savings were also put in place, including reduced hours of working

49. The claimant was one of the two drivers selected by Mr Smith for their employment to be terminated. The second employee selected was an HGV Class I driver who had been employed by the company for some 35 years. The rationale given by Mr Smith for this decision was that the employee in question was approaching retirement and, as indicated, Mr Smith had been looking to reduce the age profile of the respondent's workforce in any event

50. Mr Smith approached this employee on 27 September and put the proposal to him that he was to be made redundant. The employee did not object. When asked in the course of his giving evidence what would have ensued had the employee raised an objection, Mr Smith's reply was that he was unsure what he would have done

51. On the morning of 27 September, Mr Smith sent a text to the claimant saying that he would be coming out to see him. He then attended the claimant's house at about 9.30 in the morning

52. What occurred at that meeting ("the September meeting") is crucial to the outcome of this claim and is disputed between the parties

53. Mr Smith's basic evidence is that he attended only very briefly, told the claimant of his decision and then left without any further discussion. The claimant's basic evidence is that Mr Smith stayed for upwards of an hour and they sat and discussed not just the decision but also the reasons for it

54. The claimant has given a number of descriptions of the September meeting in his various witness statements and his oral evidence

55. In his ET1 Claim Form (see page 7), he states: " … I asked would you have made me redundant if I wasn't injured and I was told not a chance. But because you're off I'm getting rid of you first"

56. In his witness statement of 12 March ((page 57), he states: " … I asked [Mr Smith] 'if I wasn't in this position would you have got rid of me'? His reply was 'not a chance but I have no choice because you are on the sick I have to let you go first'"

57. In his witness statement prepared for the Hearing, he states that Mr Smith said: "I have some bad news I am making you redundant. I have spoken to my solicitor and been told to get rid of you first due to you being off sick and unable to return to work yet'. I asked Anthony Smith if I were not off sick would you have chosen me, and he said 'no way, but I have no choice'"

58. In his oral evidence to the Tribunal, the claimant stated: " we discussed instead of getting rid of me the fact Mr Smith wanted to get rid of other drivers but he couldn't. I took this to mean because I was off work sick and he chose me because I could not return to work"

59. The respondent argues that these various versions show inconsistency and therefore lack any credibility. The Tribunal does not agree with this analysis. Although the precise detail of the specific words allegedly spoken differ, their basic content remains consistent – that the reason given for the claimant being selected for dismissal was discussed and the reason was his being absent from work through ill health

60. There was also a dispute between the parties as to the length of time they had met on this day. The claimant was adamant in his view that the meeting had lasted upwards of an hour. Any inconsistency in this regard was in the respondent's evidence. It was put to the claimant in cross-examination that the meeting lasted no more than 15 minutes. In cross-examination, Mr Smith suggested that the meeting may have lasted 5 – 10 minutes but later, in answering questions from the Tribunal, indicated that it had been no more than 5 minutes. The respondent's own account of the meeting – that Mr Smith had told the claimant that he was being dismissed by reason of a downturn in work and then, being embarrassed, had immediately left – is such that it would not have lasted even approaching five minutes

61. In all the circumstances, and given the Tribunal's overall view as to credibility and their friendly relationship, the Tribunal concludes that the claimant's description of the content of the September meeting is much more likely than that of Mr Smith. He came to advise the claimant of the decision to dismiss and the overwhelming probability is that they would discuss the reason for that

decision. The Tribunal accordingly finds as a fact that, although not in a position to specify the precise words used by Mr Smith at the September meeting, they essentially comprised of an explanation being given to the claimant that he had been selected for dismissal owing to him being off work sick as a result of the work accident and had he not been absent he would not have been selected

62. Subsequent to the September meeting, the respondent confirmed its decision by letter to the claimant dated 27 September (page 104). This letter indicates that the reason for dismissal is a "downturn of work" and states that "there is no right of appeal against this decision". Dismissal was with immediate effect with a payment in lieu of notice

Statutory Framework

63. The definition of a disabled person for the purposes of the statute appears at section 6 Equality Act 2010 ("EqA"). This is supplemented by Schedule 1, Part 1 EqA, headed "Determination of Disability"

64. Section 6(1) EqA states:

"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."

65. Within the interpretation section, section 212 states that, "in this Act … 'substantial' means more than minor or trivial"

66. Paragraph 2 of Schedule 1 Part1 EqA states that the effect of an impairment is long-term if –

(a) it has lasted for at least 12 months, [or]

(b) it is likely to last for at least twelve months ,,,

67. "Guidance on matters to be taken into account in determining questions relating to the definition of disability" was issued in 2011. This guidance does not impose any legal obligations in itself, nor is it an authoritative statement of the law. Any aspect of this guidance, however, which appears to the Tribunal to be relevant in determining whether a person is a disabled person must be taken into account

68. Section 13 EqA states that:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic [in this case, disability], A treats B less favourably than A treats or would treat others

69. Section 15 EqA states that:

(1) A person (A) discriminates against a disabled person (B) if -

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

70. The burden of proof in discrimination claims rests initially with the claimant but section 136 EqA provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent has acted in a way that is unlawful, the Tribunal must uphold the complaint unless the respondent shows that it did not so act

71. This requires a two-stage process. First, the complainant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act of discrimination against the complainant. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' (namely, that a reasonable Tribunal could properly conclude from all the evidence before it) that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. The second stage, which only applies when the first is satisfied, requires the respondent to prove that it did not commit the unlawful act. However, it is not necessary for the burden of proof rules to be applied in an overly mechanistic or schematic way

Submissions

72. Both parties prepared and spoke to written submissions which the Tribunal does not propose to repeat in this Judgment but full account was taken of all that was put forward by both representatives including the various caselaw referred to by the respondent's representative

Conclusions

Disability

73. The respondent conceded that at the relevant time the claimant had a physical impairment (namely the injury to his right leg) but made no further admissions as to whether the claimant was a disabled person as defined

74. The respondent's essential argument was that there was no cogent evidence as to the impact on the claimant of that impairment at the relevant time, namely September 2019

75. The Tribunal rejects that contention. It is not necessarily surprising that the claimant, as an unrepresented litigant, had not appreciated that his Impact Statements should have expressly addressed the position as at September 2019. He gave clear evidence as to an improving situation which is supported by the medical evidence that has been produced to the Tribunal

76. The Hospital letter of 2 September 2019 (accordingly a matter of weeks prior to the date of dismissal) (see page 71) makes clear the ongoing problems for the claimant as to mobility at that time

77. Even now the claimant can only walk for very short distances, and only with the aid of a walking stick, and with constant medication to alleviate the pain arising

78. Blue Badges are issued to those who can prove they require assistance with mobility issues. The assessment for Personal Independence Payment expressly referenced "mobility needs". Industrial Injuries Disablement Benefit was expressly allocated with reference to the claimant being "25% disabled, the loss of faculty being reduced right ankle movements". These assessments were all made prior to September 2019

79. It is accordingly clear to the Tribunal that, in terms of mobility, the admitted impairment had, at the relevant time, an adverse effect upon the normal day to day activities of the claimant

80. Noting the statutory definition of "substantial", the Tribunal is clear in its conclusion that, on the evidence, this effect has to be categorised as "more than trivial"

81. In terms of whether or not the effect is "long-term", the Tribunal notes that the injury occurred in July 2018. The claimant was absent from work from that date until his dismissal in September 2019, a period of some fourteen months, as a result of the injury and its impact. It is difficult for the Tribunal to follow any argument on the part of the respondent that the effect was not "long-term" as defined

82. The respondent's representative also highlights a number of entries in the medical records concerning other medical issues, particularly references to

shoulder pain. Whilst there may potentially be a cross-over in terms of pain generally and impact upon, for example the claimant's ability to sleep, there is no discernible way in which the Tribunal can see these entries materially influence its conclusions as to the impact of the leg injury upon the claimant's mobility at the relevant time

83. The Tribunal accordingly concludes that the clamant was at the relevant time a disabled person as defined

Knowledge

84. The respondent denies that it knew or ought reasonably to have known that, at the relevant time, the claimant was a disabled person

85. Mr Smith regularly visited the claimant during his period of absence. The Tribunal refers to its findings of fact that Mr Smith had seen: the claimant's metal frame and the holes left in his leg once it had been removed; the difficulty the claimant had in walking; the fact that he had the use of a wheelchair and a mobility scooter; that the claimant had been issued with a Blue Badge. All the time whilst the claimant was off work by reason of his injury for a period of some fourteen months and continuing

86. Mr Smith puts it in his evidence in chief: "I did not know anything about any restrictions his injuries may have caused to him or how they may have affected his day to day life". This assertion is plainly contradicted by the evidence, and even by the respondent's own admissions of what Mr Smith had directly witnessed. It does not assist Mr Smith in terms of the Tribunal's assessment of his credibility that he sought to maintain a denial of knowledge in the face of such overwhelming evidence to the contrary

87. The Tribunal has no hesitation in concluding that Mr Smith knew, certainly ought reasonably to have known, that the claimant was, at the relevant time, a disabled person

Direct Discrimination

88. The claimant was dismissed and the Tribunal is satisfied that dismissal is an example of potential less favourable treatment. This is not disputed on behalf of the respondent. Was the decision to dismiss "because of disability"?

89. The Tribunal accepts the respondent's evidence as to a downturn in work and therefore that there was a potential redundancy situation. The issue for the Tribunal is the reason for the claimant being selected for dismissal rather than,

for example, an analysis of whether or not the respondent has proven a redundancy situation or whether or not the dismissal of the claimant was fair or unfair. Accordingly the fact that the respondent followed no process whatsoever, there being no prior consultation with the claimant, who was subsequently advised that there was no right of appeal against the decision, is not directly relevant

90. The Tribunal refers to its findings of fact as to what was said at the September meeting

91. There is nothing in the content of that meeting, as found, that suggests that the claimant's disability itself played any part in the decision. Reference was made by Mr Smith to the claimant being off sick rather than to the claimant's injury itself. No evidence was before the Tribunal that Mr Smith, at any time during the claimant's lengthy absence, had, whether in his regular friendly get-togethers or otherwise, raised any concern over the fact of the injury itself in terms of ongoing employment

92. The Tribunal refers to the analysis which follows as to the claim of discrimination arising from disability but, on the findings of fact as to the content of the September meeting, there is, in the Tribunal's view, nothing that operates to shift the burden of proof to the respondent in the claim of direct discrimination

93. That being the case, the claimant has not proved the claim and it must therefore fail

Discrimination arising from disability

94. Again, it is not in dispute that the dismissal of the claimant amounts to unfavourable treatment. Was this unfavourable treatment "because of something arising in consequence of the claimant's disability"?

95. The "something arising" relied upon by the claimant is his sickness absence. There is no dispute that the sickness absence arose as a consequence of the claimant's disability. Was the dismissal "because of" that?

96. The "something arising" need not be the main or sole reason but must have at least a significant (namely more than trivial) influence on the unfavourable treatment and so amount to an effective reason for or cause of it (see *Pnaiser v NHS England and another [2016] IRLR 170 EAT*)

97. The Tribunal refers to its findings of fact as to what was said by Mr Smith at the September meeting despite the contradictions of Mr Smith. The very fact alone, as found by the Tribunal, that the reason given by Mr Smith was precisely the fact of the claimant's sickness absence is clear evidence to this effect. At the very minimum, it goes to shift the burden of proof. The background context lends further weight to such a conclusion

98. The stated aim of Mr Smith was to make essential financial savings. At that time, the claimant was only being paid the moneys received by the respondent by way of insurance payments and therefore his ongoing employment was not a cost to the respondent in terms of salary. It is correctly pointed out on behalf of the respondent that the claimant was accruing holiday pay during his sickness absence. The value of this however would be a minor cost to the respondent in comparison to the saving made, for example, by dismissing any other member of staff

99. The reason given for not dismissing the newly appointed Class II driver was that he was paid at a lower rate than a Class I driver. It was however always the intention that he would train to qualify as a Class I driver and he did so in January 2020

100. The respondent contends that the selection process applied was 'last in, first out' ("LIFO"). The evidence does not however support this. If LIFO had been applied to identify the two employees at risk, the second person would have been either the Class II driver who had recently been appointed or the next longest serving Class I driver (depending on the make-up of the pool for selection, either being potentially possible). In fact the second employee identified was said by the respondent to have been selected because he was approaching retirement. In other words, different criteria are said to have been used to identify the selected individuals. Rather than a selection process identifying the individuals at risk, therefore, selection of those individuals was made and a different rationale was retrospectively applied in each separate case. On that analysis, LIFO is not the selection process applied and there must be another reason for the selection of the claimant

101. On Mr Smith's own evidence, the respondent, having taken legal advice, was aware of the rights the claimant would have accrued once he had reached two years' service (which he would have in a matter of weeks) and thus the difficulties that may have arisen in having to deal with the claimant's potential ongoing absence at a future date. The respondent's Grounds of Resistance make specific reference to this (see page 22)

102. The Tribunal is accordingly satisfied that the burden of proof has shifted to the respondent and the respondent has failed to show that the claimant's sickness absence did not play a significant (as defined) part in the decision in question, namely the selection of the claimant for dismissal.

103. At the first PH, it was anticipated by the respondent that it would not be relying on the justification defence available to it (see page 28). This was confirmed at the Hearing – no reference was made in Mr Smith's evidence as to a potential "legitimate aim" and no such argument was pursued in the closing submissions made on behalf of the respondent

104. The claim under section 15 is accordingly well-founded

105. The matter will now be listed for a Remedy hearing

Employment Judge B Hodgson

Date 3 December 2020

JUDGMENT SENT TO THE PARTIES ON

4 December 2020

FOR THE TRIBUNAL OFFICE