RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr Ali Askor**

Respondent: **EE Limited**

Heard at: **East London Hearing Centre**

On: **23 July 2020**

Before: **Employment Judge John Crosfill**

Representation

Claimant: Mr A Prosper – a Lay Representative

Respondent: Mr J Crozier of Counsel instructed by DAC Beachcroft LLP

JUDGMENT

1. **The Claimant has failed to establish that his VSD/Heart condition amounts to a disability for the purposes of section 6 of the Equality Act 2010.**

REASONS

1. This has been a remote hearing on the papers which was not objected to by the parties. The form of remote hearing was 'V: video fully (all remote)'. A face to face hearing was not held because it was not practicable. The documents that I was referred to are in the Tribunal file, the contents of which I have recorded.

2. The Claimant filled in his ET1 giving Askor as his family name and Ali as his first name. In fact, he uses the two interchangeably and told me that he was not concerned about which order his names were used. I have left the title of the claim as above as it matches the witness statement that he has produced. Some of the medical records reverse the order of his name but that is of no concern.

3. The hearing had been listed by me at a preliminary hearing that took place on 6 April 2020 to deal with the question of whether the Claimant was able to satisfy the statutory definition of disability set out in section 6 of the Equality Act 2010. In my record of that preliminary hearing I set out the following summary of the Claimant's case:

> *The Claimant worked for the Respondent in one of its retail shops. In July the Claimant had cause to contact the Respondent's customer Services team on his own behalf. His conduct caused the Respondent some concern and an investigation commenced. The Claimant was invited to a disciplinary meeting that was due to take place on 8 August 2019. The Claimant says that he became unwell. It is common ground that he did not attend work. There is a dispute about the extent that the Claimant informed his line manager about his absence.*
>
> *On 5 September the Claimant was dismissed. The reason given was his 'unauthorised absence'. The Claimant appealed against his dismissal but his appeal was not upheld.*
>
> *In his ET1 the Claimant suggested that he had been discriminated against on the grounds of disability. The Claimant was born with a heart condition 'VSD'. He has had an operation to address that heart defect. He says the residual effect upon him amounts to a disability for the purpose of section 6 of the Equality Act 2010.*

4. In accordance with my orders made at the preliminary hearing the parties had agreed a schedule of the issues to be determined by the tribunal at any final hearing. The claims brought by the Claimant under the Equality Act 2010 were brought under section 15 (a claim to have suffered a detriment because of something arising in consequence of disability), sections 20 and 21 (reasonable adjustment claims) and section 26 (a claim of harassment) of the Equality Act 2010. Consistently with the way that the Claimant put his case at the preliminary hearing the list of issues asked whether the claimants congenital heart disease – Ventricular Septal Defect ('VSD') amounted to a disability.

5. I had made directions in order that the parties could properly prepare for the preliminary hearing. These were as follows:

> *The Claimant shall by **18 May 2020** serve upon the Respondent and the Tribunal a witness statement which shall set out:*
>
> > *the nature of the impairment he relies upon as amounting to a disability; and*
> >
> > *when that impairment first arose and whether it has been the subject of any formal diagnosis;*

a description of how that impairment affects him (and has affected him over the period from January 2019 to date) and in particular identifies any difficulties he has with day to day activities. The Claimant is encouraged to give practical examples of the things that he cannot do at all and the things that he can only do with difficulty.

*The Claimant shall by **18 May 2020** serve upon the Respondent copies of his GP records for the past 2 years and any notes or reports of any consultant or other treating doctor that he has in his possession or could obtain by asking. He can comply with this order by serving redacted (blacked out) records concealing any matter which is wholly irrelevant to his impairment but if he does so he shall retain an unredacted copy to show to the tribunal in order to resolve any disputes.*

*The Respondent shall by **1 June 2020** write to the Claimant and the Tribunal setting out whether it does or does not admit that the Claimant was disabled at the material time by reason of the impairment(s) identified by the Claimant. If the Respondent does not admit that the Claimant had a disability it must say why. If the Respondent contends that the issue cannot be determined without expert evidence it shall state its proposals in that regard and shall inform the Tribunal whether it believes it remains possible to deal with the issue on 23 July 2020*.

6. In accordance with my directions the Claimant had prepared a short statement set out over two pages. He had also disclosed letters from the Barts Health NHS Trust, his GP records and a letter from the Stratford Health Centre signed by Dr Anil Shah and dated 8 June 2020 which summarised his medical history. Before the hearing Mr Prosper had provided some information on the Internet from the British Heart Foundation and the Mayo Clinic which he had supplied both to the Tribunal and to the Respondent.

7. The hearing was conducted via CVP. At the outset, only Mr Prosper attended on behalf of the Claimant. He had anticipated that the question of whether the Claimant had a disability for the purposes of section 6 of the Equality Act would be dealt with by submissions. I explained that unless the Respondent was prepared to accept the Claimant's evidence the tribunal would usually expect the Claimant to give evidence. Mr Prosper was able to contact the Claimant who fortunately was able to participate in the hearing.

8. The Claimant gave evidence and was cross-examined by Mr Crozier. The parties then each had an opportunity to make submissions. In the course of his submissions Mr Prosper accepted that he was essentially giving evidence based on his own Internet research which he thought demonstrated a mechanism connecting a "bundle branch block" with breathlessness suffered by the Claimant. He then asked whether the hearing might be adjourned in order to fill any gap with expert evidence. His application to adjourn was opposed by Mr Crozier. I held that it was not in the interests of justice to adjourn the hearing in order to permit the Claimant to provide expert evidence. I considered that it was reasonably clear to the Claimant from my case management order that it was possible to seek expert evidence. In particular, I

had instructed the Respondent to say whether it wished to instruct any expert. In fact, the Claimant had commissioned a report from his GP. If I were to grant an adjournment and an expert report was prepared fairness would demand that the Claimant was recalled to the witness box to give the Respondent an opportunity to put any issues that arose from the expert evidence to the Claimant. Essentially the hearing would be starting all over again. I consider that that would unduly prejudice the Respondent.

9. It is for the parties to gather together their evidence before the hearing. The fact that a party who has had an ample opportunity to prepare for a hearing recognises mid hearing that there are difficulties with their case which might or might not be filled by expert evidence is not a compelling reason for granting an adjournment. I am far from convinced that any expert evidence would have supported what was no more than a theory. The most plausible explanation for the breathlessness on the evidence thus far was the diagnosis of Asthma that had been made after investigation by the respiratory team at St Barts Hospital. Whilst I recognise that this might cause prejudice to the Claimant that would be outweighed by the prejudice to the Respondent and I therefore refused the application for an adjournment.

10. I shall not set out the parties' submissions in full but I deal with the rival contentions below.

The evidence – a summary

11. The Claimant was born on 13 October 1986. At birth he was diagnosed with a VSD commonly but perhaps not entirely accurately referred to as a hole in the heart. The Claimant had an operation to repair the defects in his heart in August 1990 when he was about 4 years of age. The Claimant's condition has been the subject of bi-annual reviews the most recent of which have taken place at the Barts Health NHS Trust ('Barts').

Medical Evidence specific to the Claimant

Letters from Barts

12. I was provided with letters summarising the most recent consultations at Barts. The first dated 10 November 2017 records that the Claimant reported an increase in breathlessness and the fact that he had had two episodes of vomiting blood in the last 2-3 months. A heart echo test was carried out and showed a slight decrease in his RV function. A recommendation was made for an MRI scan and an assessment of his Parenchyma and vasculature at the same time with a review to take place in 6 months.

13. On 23 May 2018 the Claimant attended for a review appointment at Barts. A letter to the Claimant's general practitioner summarising the conclusions that were reached was written by Dr Carla Canniffe on 30 May 2018. In that letter she records that the Claimant continues to complain of breathlessness on exertion. He had had a further instance of vomiting blood. She says that *"his cardiac investigations to date*

have been reassuring". She carried out an examination including a ECG and records that the Claimant has a *"right bundle branch block pattern"*. She went on to review previous tests including the MRI scan that took place on 5 December 2017 in accordance with the previous recommendation. She sets out a plan for further treatment at the foot of her letter and suggests that history warranted further respiratory investigations.

The Claimant's Current GP

14. The Claimant has changed his general practitioner from the Market Street Health Group to the Stratford Health Centre. The letter from the Claimant's current general practitioner sets out some details of the investigations that took place following that recommendation. Dr Shah writes:

> *'Mr Ali is also experiencing shortness of breath, and the symptoms occur on exertion but he states he is managing at present with his inhalers. He was seen in 2019 by the respiratory team, as he was complaining of breathlessness on exertion of around 200 m on the flat, wheeze on exertion, both resolved with 20 minutes of rest. He is waiting to be followed up by the respiratory team.'*

15. Dr Shah's letter confirms the Claimants diagnosis with a VSD and includes the fact that the Claimant reporting that *"the stress is impacting his cardiac problem"*. The letter does not provide any medical opinion as to whether the Claimant's report of an impact is accurate. In respect of the Claimant's mental health Dr Shah said this:

> *'His work-related stress has also triggered anxiety and depression. Is been referred to Newham Talking Therapy, and after discussing the treatment options recommended by the Psychiatrist, Mr Ali has been advised to start the session with the psychological well-being practitioner.*
>
> *The GP also prescribed him Seratraline 50mg in view of his anxiety and depression, but has been informed by the doctor, that he might experience side-effects with such: drowsiness, insomnia, tremor or shaking, therefore he will need to be reviewed in two weeks.'*

16. Rather unhelpfully Dr Shah includes in his letter the following sentence 'in summary his conditions are long-term which has lasted longer than 12 months'. No distinction is made between the conditions that had been identified in the letter.

17. The Claimants GP records from his previous general practitioner conclude with a consultation on 29 August 2019. There is no reference to any mental health issues and the record of prescribed medication lists no current medication. From that I infer that Dr Shah's reference to the Claimant's mental health relates to a condition that arose, or at least became significant, after 29 August 2019.

The Claimant's GP Records from his previous GP

18. The GP records produced by the Claimant only set out details of the past 3 consultations but do give a summary of the Claimant's medical history since birth. Under a heading 'Significant Past' the notes record the fact that the Claimant was born with a ASD and an issue with his right ventricle. It is recorded that on 15 August 1990 the Claimant had an operation to repair the VSD and a double repair of his right ventricle. The most recent entry under this heading was a diagnosis of Asthma in June 2019. It is noted that the Claimant was first diagnosed with Asthma as a teenager.

19. The second consultation recorded in the GP notes disclosed by the Claimant took place on 18 July 2019. It references a scanned document from 'SBH Respiratory' dated 12 June 2019. I 'SBH' understand to be shorthand for St Barts Hospital as it is used elsewhere in the records. It seems that this is the report which followed on from the respiratory investigations recommended by Dr Carla Canniffe. The problem identified is said to be Asthma - mild. At the same time it appears that there was a diagnosis of allergies to cat/dust/grass. The Claimant has not disclosed a copy of the letter from Barts that sets out that diagnosis.

20. The consultation notes relating to 29 August 2019 disclose that three weeks before that the Claimant had attended King's Hospital and had been given oral antibiotics for a chest infection which he reported had got better. However, for the last week he had been suffering from Coryzal symptoms, a blocked nose sore throat and a headache all over body ache, fever and a cough. The records record that the Claimant had a viral upper respiratory tract infection he was advised to take paracetamol, rest and drink plenty of fluids. The Claimant reported that he was suffering from stress at work and the history taken reads as follows:

> *'Works at a telephone company, went into telephone debt with same phone company and called customer service line to help, he ended up getting a complaint from the customer service person he spoke to and is causing him a lot of stress and has taken seven days of [sic] work already. Feels like he needs to recover from his viral illness and the work at stress is adding up and would like a sick note for one month. Mood otherwise okay, no suicidal/self-harm ideas.'*

21. The GP records include a heading 'Values and investigations'. These show that the Claimant had a chest X-ray on 16 February 2015. No significant abnormality in the lungs, plura or mediastinum was identified and no action was considered necessary. The Claimant underwent a Spirometry test which I understand tests the lung function. It is recorded that the results were 'satisfactory' and that no action was required.

22. I note that recently the Claimant has been offered a winter flu vaccination. I take judicial notice of the fact that that is unusual for a person of the Claimant's age.

The Claimant's evidence

23. The Claimant's witness statement sets out his history of having a VSD and a branch blockage. He asserts that there is a connection between the branch blockage and his breathlessness. He does not say that he was told that that was the case by any of his treating doctors. He says that he has a mildly dilated right ventricle. That assertion is supported by the letters from Barts which do suggest that he has a mild lack of functionality in his right ventricle. The Claimant then reverts to assertion stating that he is at a higher risk of heart failure. He states that he needs to take constant care to avoid/mitigate anything that could be detrimental to his heart. He says that he's been advised to exercise regularly but within his own limits. He said that he needs to be acutely aware of what is eating and drinking and avoid high amounts of sugar and fat.

24. At paragraph 15 of his statement he says the effect of his condition varies and that he often has episodes of breathlessness particularly when exposed to high-pressure situations. He goes on to expand upon that in later paragraphs talking about his difficulties reacting to adverse situations. The paragraph 20 and 21 he talks about his breathlessness. He lives on the ninth floor of a building and says that when the lift doesn't function he struggled to climb the stairs particularly in the summer months when the air is heavy. He says that he is unable to train (I understand him to be referring to going to a gym) with his friends as often as he liked and that he was unable to do extreme sports such as skydiving.

25. When he was cross-examined by Mr Crozier the Claimant gave a further example of how his breathlessness affects him saying that he likes to play football but that he could not manage to play for long.

26. The Claimant says that his dismissal had a negative impact on his heart condition and refers to having been referred for cognitive behavioural therapy since the dismissal.

27. Paragraph 25 of his witness statement Claimant says that when the effect of his disability are, at its worst, he cannot sleep properly, eat correctly, walk or run long distances, engage in high-pressure situations, breathe normally. Other than his description of his breathlessness and the fact that he avoids fizzy drinks and fatty foods the Claimant gave very few examples to illustrate these assertions. He did say that he was unable to train in the gym with his friends as often as he would like and said that he misses out on high octane activities such as skydiving.

Guidance materials

28. The Claimant had provided three separate documents two sourced from the British Heart Foundation which talked about the effects of stress. The third was a document from the Mayo Clinic which contained a description of a Bundle Branch Block. I shall not endeavour to summarise those documents but refer to the material parts below.

29. In the paragraphs above, I recite the evidence before me. It is necessary for me to draw my own conclusions about the effect of any impairment on the Claimant which I do below in the section headed discussion and conclusions

Disability – the legal test

30. The Statutory definition of disability is set out in Section 6 of the Equality Act 2010 the material parts of which are as follows:

6 Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

(2) – (4) omitted

(5) A Minister of the Crown may issue guidance about matters to be taken into account in deciding any question for the purposes of subsection (1).

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

31. Section 212 of the Equality Act 2010 provides that the meaning of the word 'substantial' in Section 6 means that the effect is more than minor or trivial.

32. Schedule 1 of the Equality Act 2010 includes at paragraph 2 a definition of when an impairment will be treated as 'long term'. The material parts read as follows:

2(1) The effect of an impairment is long-term if—

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

(b) it is likely to last for at least 12 months, or

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

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

33. The statutory guidance produced under Section 6(5) of the Equality Act 2010 was published in 2011 and is entitled 'Guidance on matters to be taken into account in determining questions relating to the definition of disability'. That guidance does not have the force of law but a tribunal should have regard to the guidance when assessing whether a person meets the statutory definition of disability.

34. In ***Goodwin v Patent Office*** **1999 ICR 302, EAT** the Employment Appeal Tribunal held that the starting point in determining whether a claimant had a disability would be to have regard to the way the parties put their respective cases in their ET1 and ET3. The Employment Appeal Tribunal identified for conditions that need to be met to establish that a person has a disability these are (1) the impairment condition (2) the adverse effect condition (3) the substantial condition and (4) the long-term effect condition.

35. In ***J v DLA Piper UK LLP*** **2010 ICR 1052, EAT** the Claimant argued that, if she could establish that there was a substantial adverse effect on her abilities to undertake ordinary day to day activities then there was no need for a tribunal to concern itself with what the impairment might be that caused those difficulties. The Employment Appeal Tribunal did not accept the entirety of that argument. It said:

'39. But we do not think that it follows – if Mr Laddie really intended to go that far – that the impairment issue can simply be ignored except in the special cases which he identified. The distinction between impairment and effect is built into the structure of the Act, not only in section 1 (1) itself but in the way in which its provisions are glossed in Schedule 1. It is also reflected in the structure of the Guidance and in the analysis adopted in the various leading cases to which we have referred, which have continued to be applied following the repeal of para. 1 (1) of Schedule 1 (see, e.g., the decision of this Tribunal (Langstaff J. presiding) in Ministry of Defence v Hay [2008] ICR 1247 – see paras. 36-38 (at pp. 1255-6)). Mr Laddie's recognition that there will be exceptional cases where the impairment issue will still have to be considered separately reduces what would otherwise be the attractive elegance of his submission. Both this Tribunal and the Court of Appeal have repeatedly enjoined on tribunals the importance of following a systematic analysis based closely on the statutory words, and experience shows that when this injunction is not followed the result is all too often confusion and error.

40. Accordingly in our view the correct approach is as follows:

(1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin.

(2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in para. 38 above, to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.

(3) These observations are not intended to, and we do not believe that they do, conflict with the terms of the Guidance or with the authorities referred to above….'

36. Where there may be competing causes for any substantial adverse effect it is essential that the Tribunal makes findings as to whether the causes arise from the impairment relied upon by the claimant in his or her pleaded case see ***Morgan Stanley International v Prskavec*** **EAT 0209/13**. This will be of particular importance where, as here, knowledge of any disability and/or the fact that it placed the Claimant at a substantial disadvantage is an issue to be determined by the tribunal.

Discussion and conclusions

37. As directed in ***Goodwin v Patent Office*** the starting point is for me to look at how the Claimant put his case in his ET1. He said:

'*My Manager was aware I had a heart condition called VSD. I was getting stressed at work which affects my condition. On 19 August 2019 I fell too ill to work.'*

38. At the Preliminary Hearing that took place on 6 April 2020 I gave the Claimant permission to amend his claim to provide additional particulars of his claims of discrimination. At paragraph 1 the amended claim form said:

'Mr Ali Askor was diagnosed with VSD (Ventricular Septal Defect) a form of Congenital Heart Disease. This requires he attend hospital once a year for check-ups.'

39. Paragraph 8 repeats the fact that the Claimant became unwell on 19 August 2019 and paragraph 10 says that the Claimant informed somebody at the store that he was feeling unwell, very stressed out and had discomfort in his chest.

40. In the section in which the Claimant explains his claims under Section 15 he said that his absence from work arose as a consequence of his disability. He does not deal with the question of knowledge but knowledge is dealt with in the reasonable adjustments claim where the Claimant says that the Respondent cannot show that it did not know or ought to have known about the Claimant's disability. In the Claimant's claims under Section 26 he suggests that the treatment he complains of was related to

his disability the connection being his absence and the provision of a sick note. The Respondent denies that it had any knowledge at all the Claimant's alleged disability.

41. What I take from the ET1 together with the amendments I permitted is that the Claimant relies on his diagnosis of a VSD as amounting to an impairment. I am reinforced in that conclusion by the fact that after the case management hearing, in accordance with orders that I made, the parties agreed a schedule of issues. Under a heading 'disability' the issue identified is:

> *'Is the Claimant's congenital heart disease – ventricular septial defect ('VSD' a disability as per S6'*

42. In his submissions Mr Prosper initially argued that I should have regard to the fact that the Claimant was born with a VSD and he suggested that because it was obviously an impairment I need not concern myself with the fact that there had been an operation to repair the Claimant's heart as Section 6(4) of the Equality Act 2010 provides that a person who has had a disability shall be treated as being disabled. I do not accept that that argument assists the Claimant in any way.

43. Whilst I would accept that having an unrepaired VSD would satisfy the impairment condition it would be a question of fact whether an untreated VSD would have a substantial effect on ordinary day to day activities. The Claimant was a small child when his VSD was patched. I was told nothing about the effect of his unrepaired VSD on his ordinary day to day activities as a baby and as a small child. This was an entirely new way of putting the Claimant's case and one different to his pleaded position that the residual effects of the VSD caused the Claimant to fall ill on 19 August 2019. His pleaded case makes no sense relying only on a past disability. Pleadings aside there was simply no evidence from which I could have concluded that the unrepaired VSD amounted to a disability. The Claimant said nothing about the effect of his unrepaired VSD when a child in his witness statement and it was clearly a point that had occurred to Mr Prosper at a late stage. It was an imaginative point but not one that could assist the Claimant on his case and on the evidence he relied upon.

<u>The impairment condition</u>

44. Mr Crozier on behalf of the Respondent suggested that I might have little difficulty accepting that the Claimant's VSD amounted to an impairment. Whilst I do think he was right to make that concession I do not think the matter is entirely straightforward. The Claimant was born with a VSD and the outlets to his right ventricle were abnormal. I accept that this would amount to an impairment because the ability of the heart to pump blood would be affected. However, the Claimant had a repair to both heart defects in 1990. Had that repair eliminated the defects I do not consider that there would still be an impairment. I therefore need to look at the medical evidence to see what if any residual impairment existed.

45. I note that in the letter provided by Dr Carla Canniffe she reviews an echo performed in November 2017 she notes that there was no residual VSD seen but goes

on to comment that the right ventricle was mildly dilated with a mildly impaired systolic function. She also notes that the Claimant has a right bundle branch block.

46. The information provided by the Claimant from the Mayo Clinic gives the following description of a Bundle Branch Block which I accept is accurate:

> *'Bundle branch block is a condition in which there is a delay or blockage along the pathway that electrical impulses travel to make your heartbeat. It sometimes makes it harder for your heart to pump blood efficiently through your body*
>
> *The delay or blockage can occur on the pathway that sends electrical impulses either to the left or to the right side of the bottom chambers (ventricles) of your heart.*
>
> *Bundle branch block might not need treatment. When it does, treatment involves managing the health condition, such as heart disease, that caused the bundle branch block.*

47. Under a heading "symptoms" the document records that in most people a branch block does not cause symptoms and that many people do not know they have one. Where there are signs and symptoms they may include fainting or feeling a you are going to faint. Under a heading "causes" the document identifies that a right bundle branch block might be caused by a heart abnormality that is present at birth.

48. Whilst Dr Carla Canniffe does say that the cardiac investigations have been "reassuring" her letter does not contradict the suggestion that the Claimant has some residual impairment both of the right ventricle and of the electrical pathway through his heart. I would therefore accept that the Claimant has demonstrated that he has a physical impairment which he has loosely described as having a VSD. I accept that he has used that as shorthand for the residual effects of the VSD but have referred to the impairment as 'VSD/Heart condition to include those residual effects and the Right Bundle Branch block.

The adverse effect condition

49. I reach the following conclusions as to whether the impairment I have identified has an adverse effect on ordinary day to day activities. The Claimant has set out a number of effects and I shall deal with each in turn.

Breathlessness

50. I accept that the Claimant suffers from breathlessness upon exertion. He struggles to walk up the stairs to his flat becoming breathless by the third floor. I also accept that he does not attend the gym as often as he might like because he gets breathless. I accept that the Claimant cannot play a full game of football. I did not

understand Mr Crozier to challenge the Claimant on that evidence. I consider that the evidence is consistent with the history given to the various doctors before the present dispute. I note that the Claimant says that he avoids extreme sports but I accept the submission made by Mr Crozier that extreme sports could not realistically be considered ordinary day to day activities.

51. Mr Crozier concentrated his submissions on the question of whether any interference with day to day activities caused by the tendency to become breathless was substantial. However, he took the point that there was no evidence that showed that the Claimant's breathlessness had anything to do with the residual effects of his VSD including his Bundle Branch block. When he cross examined the Claimant, he extracted a concession that there was no entry in any of the medical records to show that that was the case.

52. Mr Prosper valiantly sought to plug the evidential gap. As I note above he seized on a reference in the document produced by the Mayo Clinic which suggested that a right branch block might cause the heart rate to slow. That he postulated would lead to less oxygen in the bold in turn causing breathlessness. When I questioned the evidential basis for that submission Mr Prosper very properly conceded that this was his own theory. That theory had been repeated in the Claimant's witness statement but no basis was given for it and as it could only be the Claimant's own opinion it carries little weight. It was at that stage that he sought an adjournment to seek expert evidence. I have dealt with that above.

53. Before me there no evidence at all that breathlessness was a symptom of the residual effects of the Claimant's VSD or any other aspect of his heart condition. On the contrary such evidence as there was pointed away from that conclusion. The result of the respiratory investigations that culminated in June 2019 was a diagnosis of mild asthma. I note that at the same time the Claimant was diagnosed as having allergies. The Claimant's account of feeling more breathless in the heavy summer months is consistent with that. I do not need to make a finding that asthma is the cause of any breathlessness. The fact is that there is simply no evidence to show that the breathlessness was caused by the Claimant's pleaded disability.

54. I would accept that the Claimant's breathlessness did have a more than trivial effect on the Claimant's ability to climb stairs and play amateur sport and attend the gym. I would accept that these three things are ordinary day to day activities. I might deduce that the Claimant has an impairment from those conclusions but could not conclude that the impairment was the Claimant's VSD/Heart condition.

55. I am conscious that my findings are to the effect that the Claimant may well meet the definition of disability for some reason other than his VSD/Heart condition but does not do so by reference to that condition. ***Morgan Stanley International v Posavec*** reminds me why I should not permit a Claimant to set out a case on one basis then find that he or she is disabled on some other basis because of a previously unidentified impairment. In fairness Mr Prosper did not invite me to do that. The case he presented stood or fell on showing a link between the breathlessness and the heart condition. The Claimant did not come close to establishing that link.

56. In his witness statement the Claimant makes two references to breathlessness not associated with exertion. At paragraph 15 he said that he suffered from breathlessness at work 'particularly when exposed to high pressure situations'. At paragraph 27 he says that when he fell ill on 19 August 2019 he felt 'nauseated, breathless and his heart was pounding'. The medical evidence that the Claimant has provided does not suggest that he has ever reported any such issue to his GP or to Barts. The issue of breathlessness was linked in each report to exertion. I would accept that stress can cause breathlessness. That is referred to in the second of the information documents from the British Heart Foundation. However there is no evidence at all that the Claimant suffered from breathless when stressed as a symptom of any impairment of any description

Diet and avoiding certain foods

57. I accept that the Claimant follows the advice he has been given about following a healthy diet and avoiding fizzy drinks and fatty foods. Again, this was not a matter of dispute. I would accept that eating is a normal day to day activity. What I cannot accept is that following a healthy and sensible diet is an adverse effect of the Claimant's VSD/heart condition. If the condition requires a healthy diet then in my view it is a positive benefit to the Claimant. I go on to find that such effects as there are on the Claimant's ability to choose what to eat are in any event minor or trivial.

Future complications

58. The Claimant suggested that the effect of his VSD/heart condition is that he is more vulnerable to future complications. In that he is supported by the information he has provided from the Mayo Clinic. However, I am concerned with the effect of the impairment at the time of the alleged discrimination and not the question of whether the impairment will cause a disability at some future point. Other than following a healthy diet and exercising responsibly the Claimant did not give any evidence that would suggest that concerns about future problems affected his abilities to carry out day to day activities. I do not accept that following an ordinary healthy lifestyle with a good diet and exercise is an adverse effect. There is no evidential basis for a conclusion that the Claimant's concerns about the future adversely effecting ordinary day to day activities.

Response to high pressure situations

59. The Claimant suggests that his VSD/heart condition causes him to become stressed in high pressure situations. I put to one side the question of whether a high-pressure situation is an ordinary day-to day activity.

60. I am not satisfied that the Claimant has provided any evidence that shows that any stress he might have experienced was a symptom of his VSD/Heart condition. Dr Shah's letter does not suggest that is the case. His letter suggests that the Claimant's mental health has declined after his dismissal but is otherwise silent on the issue of stress. The Barts letters are silent on the subject.

61. The information from the British Heart Foundation is not entirely consistent. The first information sheet says that stress by itself does not directly cause heart disease but may lead to bad habits which in turn might affect the heart. The second information sheet did suggest that there is some evidence that stress might lead to heart disease more directly. I am not concerned with whether stress causes heart disease but with whether the Claimant's VSD cause him to become stressed and therefore unable to engage in ordinary day-to day activities. That is an entirely separate question.

62. Whilst the Claimant says he gets stressed in high pressure situations that does not assist me at all in determining whether that is an effect of his impairment. Many people without the Claimant's condition would become stressed in high pressure situations.

63. Other than an assertion I have no evidence on which I can base any finding that an effect of the Claimant's VSD/heart condition was that he is adversely affected in stressful situations. I cannot make a finding that he was.

64. I am not satisfied that any stress that the Claimant feels in adverse situations is caused by his pleaded impairment (or any other impairment).

65. Finally, I should say that I do not consider that a 'high pressure situation' could ever be properly described as an ordinary day to day activity. It is the exact opposite.

Ability to sleep

66. I do not accept that the Claimant had abnormal sleep patterns as a consequence of any impairment associated with his heart condition. There is no record of this in his GP records or in any of the letters he provided. I do not disbelieve the Claimant when he says that he sleeps badly on occasions. He has lost his job and his mental health has been affected. However, it is only after the events said to be discrimination that his mental health has declined.

67. Again, I simply have no evidence that any poor sleeping pattern is caused by the Claimant's VSD/Heart Condition.

Fainting

68. I would accept that if the Claimant fainted as a consequence of his VSD/Heart condition that would give rise to an adverse effect on his ability to carry out day to day activities. In his witness statement the Claimant mentions the possibility of fainting as a future possibility if his condition deteriorated. The medical evidence has no record whatsoever of the Claimant reporting fainting. Fainting is mentioned in the Mayo Clinic document as a possible symptom of Bundle Branch Block. When cross examined the Claimant suggested for the first time that he does sometimes faint. Whilst I have accepted most of the Claimant's evidence I cannot accept that fainting has ever been a problem for him. If it had been I am quite sure it would have been recorded by his

doctors and he would have mentioned such a significant fact in his witness statement. I consider that the Claimant was in this minor, but not unimportant, respect attempting to mould his evidence to the information he had provided.

Conclusions on the adverse effect condition

69. I am not satisfied that the Claimant has demonstrated that his VSD/heart condition has any adverse effect on his ability to carry out ordinary day to day activities.

The Substantial Condition

70. If I had been satisfied that the pleaded impairment caused the Claimant's breathlessness I would have found that the effect on the ordinary day to day activities of climbing stairs, going to the gym and playing amateur sport was more than minor or trivial. A person of the Claimant's age and ordinary level of fitness would expect to carry out these activities without undue difficulty.

71. If I am wrong about my conclusion that following a healthy diet is not an adverse effect then I need to go on to ask whether it is substantial. I do not accept that a minor lifestyle alteration towards a lifestyle which is close to the norm is a substantial adverse effect.

72. I do not find that the Claimant has produced any evidence that he was any more effected by high pressure situations than anybody else. However, my conclusions above mean I do not have to take this point any further.

73. The Claimant simply asserted that 'at its worst' he did not sleep properly. He gave no evidence of the frequency of the problem. I do not have any basis for concluding that the effect was substantial.

74. I have not accepted that the Claimant has suffered from fainting.

The long term condition

75. I accept that the Claimant has had his VSD/heart condition since birth. Having decided that there were no substantial adverse effects of this impairment on the Claimant I am unable to deal with the question of whether the effects were long term. On my findings there are none.

Conclusion

76. I find that the Claimant does not meet the statutory test set out in Section 6 of the Equality Act 2010 by reason of his VSD or connected heart condition. That was the

case that he has set out in his ET1 read together with the amendments permitted and the agreed list of issues. That was the issue identified for determination at the preliminary hearing before me. I should not go beyond that.

77. It follows from the conclusions above that as the case is presently pleaded the claims under section 15 and sections 20 and 21 cannot succeed. It is not essential for a claim under section 26 that the Claimant demonstrate that he is disabled but it will be very hard for him to succeed if he does not.

78. The Claimant's GP record for 29 August 2019 sets out the reasons why the Claimant said he was unfit for work. These were the stress caused by the fallout from his conversation with EE's Customer services and the fact that he felt he needed to recover from a virus. On my findings those two matters did not arise in consequence of any disability either the VSD/Heart condition relied upon by the Claimant (which I have not found is a disability) or some other impairment (most likely in my view the mild asthma he has been diagnosed with) which causes breathlessness due to exertion.

79. It is open to me to strike out the claims brought under Section 15 and Sections 20 and 21 as they rely upon a finding that the Claimant's VSD/Heart condition caused him to be disabled. My provisional view is that in the light of my findings that I should strike out all the claims as having no reasonable prospects of success. However as that would take me beyond the agreed issue I shall not do so. I direct that the Claimant writes to the Respondent and the Tribunal (marked for my urgent attention) within 21 days from the date this judgment is sent to the parties saying, if he disagrees, why in the light of my conclusions all his claims should not be struck out or requesting a hearing to determine that issue. If the Claimant agrees that my findings mean that his claims cannot succeed he is invited to withdraw his claims.

80. The final hearing shall remain listed but the parties are not at this stage required to prepare for that hearing.

81. Finally, I apologise for the amount of time that it has taken me to produce these reasons. I am afraid that the pressures on the Tribunal made it impossible to provide them any earlier.

Employment Judge Crosfill

8 December 2020