EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Tagg	**v**	Speedboard Assembly Services Ltd

Heard at: Bury St Edmunds **On:** 2, 3, 4 and 5 March 2020

Before: Employment Judge KJ Palmer

Members: Mrs L Daniels and Mrs S Lawrence-Doig

Appearances
For the Claimant: Mr R Elchao (Free Representation Unit)
For the Respondent: Mr R Higgnett (Counsel)

JUDGMENT having been sent to the parties on 4 June 2020 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Judgment in this matter was signed by EJ Palmer and sent to the administration for despatch to the parties on 17 March 2020. It was sent out by the administration on 4 June 2020. Reasons were requested shortly thereafter, but only referred to EJ Palmer on 1 December 2020. These are now provided. The claimant was employed by the respondent from 10 May 2010 to the 7 May 2018 when he resigned with immediate effect. He presented claims to this Tribunal in disability discrimination, age discrimination and constructive unfair dismissal. These were clarified in a preliminary hearing on 10 January 2020 before Employment Judge Postle. The list of issues set out in that hearing before Judge Postle forms the basis of the claims dealt with in this hearing.

2. The Tribunal heard evidence from the claimant and for the respondent from Mr Neil Owen the Managing Director of the respondent. Mr Owen produced a supplementary witness statement to be added to his exchanged statement, much of this consisted of hearsay evidence in

respect of conversations he had with Mark Coxhead, as Mr Coxhead who also gave an exchanged witness statement was not in Tribunal. It is important to say that hearsay evidence is admissible in Employment Tribunals and the rule against hearsay evidence does not apply here. We had a witness statement from Mr Mark Coxhead but he did not attend the Tribunal therefore whilst we read the statement we gave little weight to it as he was not here to be tested on that evidence.

Withdrawals

3. During the giving of his evidence before this Tribunal the claimant essentially withdrew two elements of his claim. First, he accepted that there was no force in the third element of his reasonable adjustments claim as he accepted that he had not given any evidence to support that part of his claim in his witness statement and this was the aspect of his claim which argued that it would have been a reasonable adjustment for the respondent to consider moving him to another role. When it was pointed out to him in cross examination that at a meeting on 20 March 2018 he had made it clear that he did not want to make such a move he said he had forgotten that aspect of the meeting and at that point he was invited by the respondent's counsel to withdraw that part of his claim.

4. Further, whilst the claimant includes a claim for direct age discrimination in his claim before this Tribunal, he offered no evidence to support it, there was nothing in his witness statement and this was something that subsequently he admitted in cross examination. He said that it was merely an observation that he was the oldest person at the factory and was subject to the performance management process. We thought about this and we consider that this does constitute a further withdrawal of his age discrimination claim, but in any event there was no evidence before us to support a claim of age discrimination and the inevitable outcome could only have been that we would have dismissed such a claim in any event.

The Without Prejudice Issue

5. The claimant referred to in his ET1 and produced in disclosure evidence of a Without Prejudice meeting and a follow up letter which took place as an adjunct to the performance management meeting of 15 January 2018. The issue had come up in various preliminary hearings throughout these proceedings and was due to be dealt with on 10 January 2020 before Employment Judge Postle but there was insufficient time. We understood therefore that at the outset of this hearing this still remained a live issue. The issue was whether that meeting and an offer contained in the letter dated 15 January 2018 which was in the bundle before us and which was marked Without Prejudice and was marked subject to s.111A of the Employment Rights Act 1996 should be excluded from any considerations of the Tribunal in this case or whether they should be part of the evidence we can consider.

6. The issue of whether something is covered by the Without Prejudice cloak and is therefore inadmissible before this Tribunal is a slightly different issue to the issue of whether something is inadmissible under s.111A of the ERA. During the course of this hearing Mr Elchao produced an email from those instructing the respondent which said amongst other things, "the respondent would also like to confirm that it will no longer be disputing the Without Prejudice point and therefore this will not be an issue to be determined at the final hearing", that email was dated 13 January 2020. Apparently neither counsel was aware of this concession until the beginning of this hearing or close to it.

7. We decided to hear both counsel on the issue including the possible question of waiver by virtue of this email.

   7.1 Mr Higgnett tells us that we can ignore this email because the issue of Without Prejudice privilege is a matter of public policy which essentially overrides any withdrawal, waiver or concession. He also argues on the relevant authorities that there was a dispute at the time of the Without Prejudice offer and that therefore the Without Prejudice cloak applies.

   7.2 Mr Elchao argued that there was no dispute as such and therefore the meeting and the offer should not enjoy the privilege of exclusion from these proceedings.

8. We were referred to all the relevant authorities and we considered them, including **Framlington Group Ltd v Barnetson [2007] EWCA Civ 502**, **BNP Paribas v Mezzotero [2204] IRLR 509** and **Woodward v Santander UK Plc UKEAT/0250/09; [2010] IRLR 834** amongst others. We also considered **Faithorn Farrell Timms LLP v Bailey UKEAT/0025/16/RN** and in particular the consideration in that case of the juxtaposition between the Without Prejudice rule and the different yet rather parallel rule set out in s.111A. We also considered the case of **Graham v Agilitas IT Solutions Ltd UKEAT/0212/17DA**.

9. We conclude that the email of 13 January did amount to a clear waiver of Without Prejudice privilege on behalf of the respondent. The fact that there was a failure of communication between those instructing Mr Higgnett and Mr Higgnett is a matter for them. There was an unequivocal waiver of the privilege. However, there was no waiver of the privilege effected by s.111A of the ERA and indeed there can be no such waiver. So, the question is whether s.111A applies insofar as the claimant's unfair dismissal claim is concerned. We find that it does. We are not persuaded by Mr Elchao's argument that s.111A(4) is engaged as we find there is no evidence of improper behaviour. Therefore, in respect of the claimant's discrimination claims we find we are entitled to take into account and consider any implications raised by the meeting and the Without Prejudice letter but not insofar as the claimant's unfair dismissal claim is concerned.

Findings of Fact

10. The claimant was employed by the respondent on 10 May 2010 as a stores person.

11. On 13 August 2016 the claimant had an optician's appointment where he was told he had a problem with his right eye and the optician recommended he was referred to see an eye specialist.

12. On 23 August 2016 he was referred by his GP to the Prince Charles Eye Unit. He attended an appointment at the eye unit on 26 September 2016 where the problem was diagnosed as a macular hole in his right eye. The eye clinic continued to monitor his condition and on subsequent appointments on 23 November 2016, 4 January 2017, 9 August 2017 and 13 March 2018 improvements as to his condition were noted. On 9 August 2017 it was noted that the macular hole had apparently closed. Evidence before us throughout this period also showed that the visual acuity in his right eye had improved from what had been 6/18 to approximately 6/7.5.

13. The respondent manufactures and sells printed circuit boards. The parts required for each board are listed on a bill of materials. The claimant's job was to select the required parts from stores and put them in a kit box which was then sent to the shop floor for assembly. The claimant had to type the part number from the bill of materials into a computer. He then had to select the correct number from the store, record how many were left in the box or reel and then place the parts selected in a bag, record the contents on the outside and place it in a kit bag.

14. A revised system was introduced in stores in 2017. The labels for individual parts were changed. The new labels had slightly smaller font size but had a bar code which could be scanned into the computer instead of typing.

15. In September 2017 there were concerns about the claimant's performance, specifically the number of errors he was making. The claimant met with his supervisor, Mark Coxhead on 18 October 2017 to discuss this. The claimant said there was poor lighting in the department and that he had an eye condition that needed to settle down before he got prescription lenses in he estimated around March 2018.

16. The respondent installed magnifiers which included lights within those magnifiers and one was placed on each person's work desk in stores. There was a further meeting between the claimant and Mark Coxhead on 22 November 2017 to discuss error rates. They discussed the installation of the magnifiers and their benefits. There had been eleven new errors, simple mistakes such as not putting parts away correctly, adjusting quantities on labels and adjusting waste incorrectly. He was asked to concentrate on reducing his errors.

17. In a letter dated 21 December 2017 the claimant was invited to attend a formal performance management hearing on 15 January 2018. The claimant was told he had the right to be accompanied. The record of the meeting on 15 January 2018 was before us.

18. The claimant had made a further 10 simple errors, the knock-on effect of these errors on the business as a whole was explained to him. Data was produced to show the claimant was making 3-4 times as many errors as his colleagues. The claimant said it was due to carelessness. Mark Coxhead had asked him about his eyes and his fitness for work. The claimant said his eyesight was not an issue or a reason for the errors. A target was agreed of no more than 5 mistakes per month. The claimant's then current error rate was 10 or higher. His colleagues average was roughly 2. This figure was based on normal working rates in terms of speed. It was agreed that the claimant would be allowed to rotate tasks as required. Mistakes in any section would be monitored. The claimant was told he had right of appeal and he did not take this up.

19. A letter dated 13 March 2018 invited the claimant to a formal performance management hearing on 20 March 2018. The target set had not been met in that the claimant had not adhered to normal working rates in terms of speed and his attendance had fallen long way below the norm. The claimant again had the right to be accompanied. Since the last review the claimant had attended work on 12.5 days out of a possible 29. In order to resolve his error rate, the claimant had slowed down and had not reached the normal work rate required. A final written warning was issued which included clear targets in relation to absence, error rate and work rate. The claimant was told he had a right to appeal but he chose not to exercise this.

20. There are a number of other issues in the evidence that we needed to consider. A letter dated 2 May 2018 invited the claimant to a formal performance management hearing on 10 May 2018. The letter stated that the claimant had not met his error rate target and the claimant was again told he the right to be accompanied and it was then on 8 May 2018 that the claimant sent an email to Mark Coxhead resigning with immediate effect. The claimant stated:

> "I have deliberated over the weekend and it does seem that decreasing levels of concentration in my work are leading to unacceptable errors."

21. After the installation of the lit magnifiers we find there is no evidence to suggest that the claimant indicated to the respondent that the lit magnifiers were ineffective. Before this Tribunal it is his case that they were and that a high intensity angle poise lamp could have been provided. It is difficult to imagine how the respondent could have provided such a lamp when they would quite reasonably have taken the view that the magnifiers were sufficient.

22. There is also an area of dispute on the evidence in that the claimant argues that he told Mark Coxhead about his eye issue albeit not the details of it in August 2016. He was uncertain about this under cross examination. The respondent says that Mark Coxhead was not told about an eye issue before the first performance management meeting in October 2017. We have heard evidence from Mr Owen but no evidence directly from Mr Coxhead. We consider that the claimant generally gave his evidence with great honesty, often admitting to issues which harmed his case albeit we accept that it is not impossible that he might have been mistaken on events. Nevertheless, on balance we do think it more likely that he did informally mention his eye issue and the need to visit specialists to Mr Coxhead in or about August 2016. However, he did not provide details and he did not keep the respondent appraised as to the progress of his condition, and the improvements which took place more particularly he down played the condition and more specifically in January 2018 when specifically asked about the condition he said there was no such problem and that was certainly not the reason for the errors.

23. It is important to mention that despite his claims before this Tribunal the claimant's resignation letter made no mention of the disability issue, the alleged failure to make adjustments, the alleged breaches in which he now relies upon indeed in terms of his unfair dismissal claim or indeed any mention of age discrimination. In cross examination he was clear that he had not considered any of these issues until after he had left and therefore he admitted that he did not resign in reliance on any such alleged breaches.

The Law

24. The claimant pursues a claim in disability and that disability is disputed. Whether the claimant is a disabled person for the purposes of the Equality Act 2010 is governed by s.6 of the Equality Act 2010, more specifically:

> "A person has a disability if that person has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day to day activities."

25. The Tribunal must have due regard to these tests, and it is a decision for the Tribunal based on the evidence before it in any given case and it is usually the case that a Tribunal will have appropriate medical evidence in front of it to assist it. The Tribunal is guided by the Equality Act guidance on the definition of disability, statutory instruments and also the Equality Act Disability Regulations as well as various authorities including **Goodwin v The Patent Office [1999] IRLR 4, EAT**.

26. In a reasonable adjustment claim that is governed by s.20 and s.21 of the Equality Act and that places certain obligations upon an employer in circumstances where an employee is disabled.

26.1 The first requirement is a requirement where a provision, criterion or practice of the employer's puts a disabled person at substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to avoid that disadvantage.

26.2 The second requirement which is s.20(4) is a requirement where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled and to take such steps as it is reasonable to have to avoid that disadvantage.

26.3 The third requirement is a requirement where a disabled person would but for the provision of an auxiliary aid be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled and they should take such steps as is reasonable to have to take to provide that auxiliary aid.

27. There is an absolute defence to a claim for a failure to make reasonable adjustments and that is found in Schedule 8 and paragraph 20 of the Equality Act and is the knowledge defence. Essentially that says that an employer is not subject to a duty to make reasonable adjustments if it does not know and could not reasonably be expected to know that the claimant was a disabled person.

28. Age discrimination is governed by the direct discrimination legislation at s.13 of the Equality Act and s.39, and it is worth remembering that age discrimination is the only direct discrimination which can be justified.

29. A claim for constructive unfair dismissal is based on s.95(1)(c) of the Employment Rights Act 1996, that section tells us that a dismissal occurs where the employee terminates the contract under which he is employed with or without notice in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

30. It is for the claimant to prove that the dismissal took place and the leading authority still remains the case of **Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27** and that has been refined by various cases since but essentially any breach must go to the root of the contract entitling the claimant to resign and treat himself as dismissed. There have been various cases since that including **Tullett Prebon Plc v BGC Brokers LP [2010] EWHC 484**, **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA CIV 978**, but essentially there has to be a finding where the conduct complained of was likely to destroy or seriously damage the relationship of trust and confidence, unreasonable behaviour is not enough. Where there is a breach there must be evidence that the employee resigned because of it or in reliance upon it.

Conclusions

Disability Claim

31. Dealing with the claimant's disability claim first. The first question we have to answer is, 'Is the claimant disabled under s.6 of the Equality Act 2010?'.

32. Referring to the issues in Employment Judge Postle's order we know that it is common ground that the claimant had a condition known as a macular hole and that it is common ground that this was an impairment. The question is whether the tests under s.6 are satisfied and we know from the case of **Cruikshank v Vaw Motorcast Ltd [2002] ICR 729** that the time at which to assess whether there is a disability and that is whether there is an impairment which has a substantial adverse effect on normal day to day activities is the date of the alleged discriminatory act. This is called the material time and it is also the time when the assessment of whether the impairment had a long-term effect should also take place. A Tribunal is entitled to infer on the basis of evidence before it that an impairment found to have existed by medical expert at the date of a medical examination was also in existence at the time of the alleged act of discrimination.

33. Mr Higgnett rightly reminds us that the burden of proof is on the claimant to prove the disability under s.6 at the material time and usually Tribunals have before them a significant amount of medical evidence to assist them during the material time. Here the evidence is insubstantial.

34. We consider that the material time here was clearly the period before the performance management process started in October 2017, that is when the respondent first identified that they wished to start monitoring the claimant's performance. So therefore, the material period or the material time is September 2017 to May 2018.

35. All the evidence we have suggests that between 2016 and the beginning of the material time, the claimant's eye problem improved and in fact there is plenty of evidence to suggest it was temporary and that the macular hole closed and that his eyesight in his right eye improved. This improvement is rather supported by the claimant's own behaviour during the material period most particularly when in January 2018 at one of the performance review meetings he made it clear that his eyesight was not in any way contributory to the errors that he was making. Throughout the period when he was first diagnosed and then regularly treated, and then less regularly as there was the improvement, he did not produce any evidence to the respondent to keep them appraised of the position.

36. Moreover, when he resigned after being invited to what might probably have been a final meeting his resignation letter made no mention at all of any eye condition and simply cited a lack of concentration as the reason. After careful consideration and taking into account the guidance, we conclude that the claimant has not discharged the burden of proof on him to show that he was a disabled person under the test set out in s.6 and under 134 and 135, and (a) and (b) of the issues as set out. His claims under s.20 therefore fail.

37. We are bound to say however that even if we had found that the claimant was a disabled person under s.6, we would have concluded that the respondent did not know and could not reasonably have been expected to know that the claimant was disabled, which is an absolute defence to a s.20 claim. We accept that on balance the claimant perhaps mentioned informally to Mr Coxhead in 2016 and in October 2017 that he had an eye issue, but he made very little of it possibly because it was improving and when specifically asked in January he clearly said it was not an issue. No further mention was made. The claimant chose not to appeal against any of the sanctions. We do not consider that the brief mention of the condition in 2016 and 2017 followed by the absolute confirmation that it played no part in the errors would have constituted actual or constructive knowledge under the s.20 tests.

<u>The Unfair Dismissal Claim</u>

38. The claimant relies on constructive dismissal under s.95 of the Employment Rights Act 1996 that the respondent breached his contract in a repudiatory sense entitling him to treat himself as dismissed and resign, and pursuant to that he claims unfair dismissal.

39. The breaches he relies upon are:

    39.1 A failure to make reasonable adjustments and that is the failure to improve the lighting;

    39.2 The disadvantage as against non-disabled people to be required to work with speed and accuracy; and

    39.3 The third breach he relies upon is the process conducted by the respondent, that is the way in which the respondent dealt with the performance management process.

40. It is also crucial to the claimant's case that he resigns as a result of these alleged breaches. In cross examination the claimant admitted that he did not resign in respect of these alleged breaches. He makes no mention of them in his resignation letter and he said that he had only thought about the issues that he has brought before this Tribunal after his employment terminated. He therefore clearly did not resign in reliance on the alleged breaches.

41. Nevertheless, we do not consider that the respondent perpetrated any breaches which would have amounted to repudiatory breaches entitling him to do so.

    41.1 With respect to the lighting, there was evidence that the claimant complained about the lighting, but there was no evidence that once the lit magnifiers were provided that he complained about the failure of them until these proceedings. The respondent had provided what on the face of it was a very decent extra lighting and magnification to all of those in stores and the claimant did not suggest that they were inadequate and in fact quite to the contrary in his email of 21 October 2017 he referred to them as something that might help. He did not at any stage defer from this until these proceedings. That could not therefore be a repudiatory breach.

    41.2 The requirement to work with speed and accuracy was not a disadvantage, we found that the claimant is not a disabled person so this requirement could not be a repudiatory breach. Even if the claimant was disabled it would be difficult to see how this could be.

    41.3 The way in which the respondent dealt with the performance management process, the respondent followed its own procedure which was not challenged as unfair by the claimant at any part in this case. On its face it was fair, the claimant was given some seven months to improve his work to a position which was both satisfactory in terms of errors and speed. He failed to appeal any of the sanctions along the way. This process in our judgment could not amount to a repudiatory breach entitling the claimant to treat himself as dismissed.

42. For the above reasons all of the claimant's claims fail and are dismissed.

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Employment Judge KJ Palmer

Date: 15 December 2020

Sent to the parties on: 17 December 20

For the Tribunal Office