EMPLOYMENT TRIBUNALS

Claimant: Mr T D Bellingham

Respondent: Eurorail Crash Barriers 2000 Limited

Heard at: Nottingham

On: Monday 7, Tuesday 8 and Wednesday 9 December 2020

Before: Employment Judge Blackwell
Members: Mrs G K Howdle
Mr C Bhogaita

Representatives
Claimant: In person with Andrea Bellingham
Respondent: Mr T Perry of Counsel

JUDGMENT

The unanimous decision of the Employment Tribunal is that all of the Claimant's claims of disability discrimination fail and are dismissed.

REASONS

1. Mr and Mrs Bellingham gave evidence on their own behalf and acted as joint advocates. Mr Perry represented the Respondents and he called Mr Phillipson their Managing Director, Mr Green their foreman and Messrs George and Geddes who were fellow employees of Mr Bellingham. There was an agreed bundle and references are to page numbers in that bundle.

2. The issues in this case are set out in the record of the Preliminary Hearing held by Employment Judge Clark on 2 April 2020 and are set out at paragraphs 4, page 58 of the bundle, paragraph 5 also on page 58 and claim 4, paragraph 8 onwards on pages 59 and 60 as follows:-

> "1) This hearing was listed to further identify the issues in the case following the hearing before EJ Broughton in November 2019. At that hearing, she identified in broad terms, the essence of the claimant's areas of complaint. For reasons she explains, it was not possible to develop those further at that hearing to identify the underlying legal elements of the claims by reference to the statutory forms of unlawful conduct set out in the Equality Act 2010.

The four broad issues were summarised as these:-

a) Humiliating treatment on 2 May 2018.

b) Failure to carry out meetings at his home from 26 March to 30 July 2018.

c) Putting him under pressure to return to work when he was absent with a disability.

d) Dismissal on 31 July 2018.

2) It was necessary to clarify at the outset the nature of the disability relied on. Mr Bellingham confirmed it flowed from his mental impairments defined as ADHD, Dyslexia and Learning Difficulties. The reason that needed to be clarified is because the underlying sickness absence from which this claim springs was a discrete physical injury to his foot following an accident at work. To be clear, that is not advanced as a disability.

3) We spent some time exploring the way the four claims translated into an appropriate form of statutory discrimination. I am grateful to Mr Hignett for his recognition that the Tribunal had a role to play in putting Mr Bellingham's claim into its proper form. I explained to Mr Bellingham that did not go so far as to find a case or new allegations for him to advance. In one respect I was, quite properly, invited to reflect on whether the second claim, as it was eventually articulated by Mr Bellingham, was actually pleaded. I concluded it was sufficiently intimated in the ET1, even though he may have conflated the issue of venue (meeting at home) with the real essence of having his wife accompany him. Conversely, when all aspects of the claim were fully understood, it became clear that the third complaint could not be sustained. Mr Bellingham was in agreement that his absence did not relate to his disability. That part of the claim is withdrawn. The elements of each claim of the remaining claims were summarised as follows.

"Claim 1 – Humiliating Treatment on 2 May 2018

4) This is a claim of harassment under s.26 of the Equality Act 2010.

a) The unwanted conduct spans the day of 2 May 2018 when the claimant attended work to attempt to perform light duties. In particular, and in addition to the matters set out in the ET1 about this day, the claimant alleges unwanted conduct in:-

i) Being told he had to stand up and ask permission to leave his workstation to use the toilet.

ii) Being constantly watched and captured on CCTV.

iii) Being made a mockery of all say, in particular at the end of the day his boss saying words to the effect of "fuck of home and don't return to work" and "that will show all staff that [I'm] not the sort of person to be messed with"

b) The claimant will say this conduct was related to his disability because his boss knew that these were the only duties he could do and because he knew of his learning difficulties, he knew that the claimant would not question what was happening to him.

Claim 2 – Failure to conduct the meetings at home

5) This is a claim of failure to make reasonable adjustments. It flows from the claimant's concern that when he attended meetings with his employer, particular in respect of his personal injury claim arising from the accident at work, he was concerned that he would not be able to read any documents put before him and that he might end up signing away his rights. There was clearly some conflation of the issue in the way the claimant had previously expressed this as being about the venue of the meeting. The reason he has previously referred to the meeting taking place at home was because he wanted his wife present, as she supports him with reading and writing. The reality, however, is that the issue was not the venue but the need for her support at the meeting.

a) The PCP alleged, therefore, is that where the employer invites and employee to be accompanied (whether the meeting engages the statutory provisions or not) the employer applies the categories of employee companion as set out in section 10 of the Employment Relations Act 1999 (i.e. TU official or representative or a work colleague).

b) The substantial disadvantage is said to be that the claimant cannot read sufficiently well and was put at a greater worry or anxiety that he may be put in a position whereby he signs away his rights. This is said to have been between 26 March and 30 July 2018 but specifically in respect of the meeting of 26 June 2018 when the situation with his personal injury claim was discussed.

c) The adjustment contended for was for the respondent to permit his wife to be present.

d) The claimant will say the Respondent had knowledge of the disadvantage as by then it was aware that the claimant had difficulty reading and he made a specific request for his wife to accompany him which was refused.

6) I did agree to record that the respondent appears to have offered to hold meetings at the Claimant's home (but not with his wife as his companion). It also invited a note taker, Neil Newman and invited the claimant to pick a colleague from work to attend with him to help with documents. The claimant will have to demonstrate why this did not remove any disadvantage.

Claim 3 – being pressurised to return to work whilst off sick with a disability

7) It is agreed that the claimant was off sick with the infection to his foot following the accident at work. It is agreed that there is no aspect of his absence that relates to his disability. Whether or not there were aspects of fairness, this claim cannot succeed as one of disability discrimination. The Claimant understood the implications of this and agreed that his disability was not the reason for his absence.

Claim 4 – Dismissal on 31 July 2018

8) There was potentially some overlap between this allegation and claim which would have created similar difficulties for the claimant save in one respect. It is common ground that the respondent and claimant discussed alternative employment when it became known that he could not continue with his substantive role and could not undertake any "physical" activities in the immediate future. It is also common ground that the potentially available office work was work the claimant agreed he could not do due to his literacy skills. The claimant accepted that had he been able to do that office work, it would have been available to him. The claimant asserts that within that discussion he asked to be able to do some form of menial sedentary work in the office, such as staking papers. He says the respondent refused on the basis that there simply wasn't any such work or any need for it.

9) So far as that scenario unfolds within the provisions of the Equality Act, it seems it is either or both a claim of reasonable adjustment and/or a claim of unfavourable treatment although in many respects they can be said to be two sides of the same coin.

10) As a claim of a failure to make a reasonable adjustment:-

a) The PCP appears to be the respondent's approach to considering alternative temporary redeployment from physical work in the warehouse, to sedentary work and limiting it to existing office roles/functions.

b) The substantial disadvantage this is said to put the claimant to is that he was unable to undertake any of the existing office roles because of his learning difficulties, dyslexia and literacy skills generally and therefore missed out on the opportunity of saving employment by temporary redeployment.

c) The adjustment that the claimant contends for is that the employer should have created a role that he could have performed doing menial, sedentary tasks such as stacking papers.

11) As a claim of unfavourable treatment because of something arising in consequence of a disability under s.15 of the Equality Act 2010:-

a) The unfavourable treatment is the decision to dismiss.

b) The something arising is said to be the claimant's inability to perform the only potentially available alternative sedentary office work.

c) The claimant will say the casual link is established because were it not for his inability to perform the existing office based functions due to his disability, he would not have lost his employment at least not on 31 July 2018.

d) Subject to the determination of the related reasonable adjustment claim, the respondent may of course seek to justify its decision.

12) Again, without giving any view on the reasonable prospects of success, the claimant will have to have some evidential basis to advance why the creation of such a limited role would have been reasonable in circumstances where he appeared not to be engaging with the employer in its requests for medical information to assess the likely duration of his absence. Similarly if there is found to be no failure to make a reasonable adjustment, and even if the s.15 claim is otherwise made out, there would appear to be some force in the likely justification defence."

Findings of fact

3. Mr Bellingham was employed by the Respondents as a labourer/forklift truck driver from 18 May 2017 to 31 July 2018 when he was dismissed with pay in lieu of notice.

4. The Respondents are a small company manufacturing safety barriers employing some 14 people at the relevant time. Mr Phillipson who is the Managing Director interviewed Mr Bellingham on 18 May 2017 and completed with him the questionnaire that we see at page 122. There is a conflict of evidence between Mr Bellingham and Mr Phillipson. Mr Bellingham says that he told Mr Phillipson that he had dyslexia and could not read and write and gave full details of his upbringing and education. Mr Phillipson denies that there was any such conversation. We think it likely that Mr Bellingham did say that he struggled to read and write and the response would have been well that is not an issue. We do not accept that he went into his educational background at that time.

5. We do accept that Mr Bellingham has very limited ability to read and write and we further accept that all of the correspondence that we see in the bundle whether letters, e-mail or texts were all typed and sent by Mrs Bellingham.

6. Mr Bellingham performed his tasks well and had no difficulties in dealing with matters such as the acceptance of deliveries. Mr Phillipson described Mr Bellingham as being "bloody good at his job".

7. On 13 November 2017 Mr Bellingham says that he stood on a nail at work and it penetrated his work boot which he says was split at the time. There was an accident report at page 138. It is entirely plausible that Mr Bellingham knows that he will find it difficult to find work and is in a job that suits him and fears being out of work and unable to support his wife and family will tend to ignore an injury that he thinks is minor, hoping that it will clear up without intervention. Unfortunately, the injury to his foot worsened and at page 130 we see a lengthy text from Mrs Bellingham describing in some detail how the condition has deteriorated and that there needs to be an operation. That led to Mr Bellingham being signed off work for 2 weeks from 22 March 2018 and it is further recorded that he was unable to wear safety boots.

8. At about this time Mr Bellingham had begun personal injury proceedings against the Respondents in respect of the injury to his foot. Mr Phillipson had an investigatory meeting on 11 April 2018 and the transcript begins at page 186. Mr Phillipson was obviously concerned that the details of the accident had taken 4 months to fully emerge.

9. At page 188 the following exchange between Mr Phillipson and Mr Bellingham is recorded:

> "So I mean there's if the doctor says standing up on it makes you limp I am thinking what else we could put you on because if that's going to damage your back further I can't be responsible for damaging your back. I mean Andy's in here because he's because you're inaudible, you're not really office material are you?"

Mr Bellingham replies:

> "Well I've got dyslexia and I can't read or write."

10. Mr Phillipson explained what he meant by "you're not really office material" in the following terms namely that the Respondents manufacture crash barriers to a statutory standard which have to be quality tested and therefore the paper trail has to be both transparent and meticulous.

11. The meeting was recorded by the Respondents without Mr Bellingham's knowledge or permission. Mr Phillipson now accepts that that was wrong.

12. After Mr Bellingham left the meeting the recording continued and the Phillipson's were joined by Mr Green, Mr Bellingham's line manager and Ms Piper. The discussion is unsympathetic to Mr Bellingham and some highly offensive remarks are made for example "limpy Tim". There appears to be a general belief that Mr Bellingham is exaggerating his symptoms in relation to the foot injury. There is also anger and irritation that Mr Bellingham is pursuing a personal injury claim.

13. At page 197 is the only remark that is relevant to the impairments that are the basis of the claim before us in that Mr Phillipson is recorded as saying "had Tom in bits earlier on. Phone Tom said it isn't me that's sending the texts. Tom says he can't read and write. Do you think I can send texts like that. He is on his uppers, he's got no money". That was met with laughter. Some of the remarks about Mr Bellingham in this private meeting are disgraceful and the Bellingham's have every right to be offended.

14. On 30 April Mr Bellingham asked for a meeting with Mr Phillipson and again that meeting was recorded without Mr Bellingham's knowledge. The transcript begins at page 190. Mr Bellingham is in dire financial straits. He is £900 in debt and he asked for a loan. In return he offers to work for 3 weeks without pay to repay that loan of £900. Mr Phillipson offers £500 to be repaid at £100 a month. Mr Phillipson identifies a drilling role drilling caps, sitting at a fixed drill.

15. At page 194 Mr Phillipson says "you'll be basically be cordoned off in your area and you don't go anywhere outside. You sit there and you drill clips". There is further reference on that page to a risk assessment and we see that risk assessment at pages 152(a) and (b). We accept that that risk assessment and its actions were compiled on the advice of Ms Cuff of Proactive.

16. On 2 May Mr Bellingham reported for duty to carry out the role of drilling clips. It is common ground that this was a one-off task. The events of that day form the basis of the first claim and there are many conflicts of evidence and we will return to that in our conclusions.

17. Mr Bellingham did not return to work after 2 May. On pages 132 to 134 are records of texts etc between Mr Phillipson and Mr Bellingham dealing with Mr Bellingham's continuing absence from work and that is for the period 2 May to 21 May.

18. There then follows a series of letters from the Respondents to Mr Bellingham the first of which is dated 22 May at pages 155 and 156. In that letter Mr Phillipson sets out the chronology of the events up to and including 2 May and thereafter a record of the texts to which we have already referred.

19. There then follows at 156(a) on 24 May a request "we would like to contact your GP to request a full copy of the medical details regarding your current sickness". Thus, the request was for medical evidence in respect of the foot injury and nothing more. The consent form is attached and in accordance with the Access to Medical Reports Act Mr Bellingham was entitled to withhold consent or he had the ability to see the report before it was sent or to carry out any amendments that he thought were appropriate.

20. On 8 June a further letter is sent at page 157 and the consent form is sent again.

21. On 15 June a further letter is sent at page 158 requesting a welfare meeting "we propose to hold the welfare meeting at your home address on Tuesday 26 June at 9:00 am.

That letter was responded to by the Bellingham's at 158a and the letter read as follows:

> "Dear Colin
>
> I am writing to inform you I will not be holding a meeting at my address on 26 June the reason being that I have discussed this with my solicitor and he has advised me against this deeming it unnecessary. Also I am not willing to give permission for you to access my medical records as advised by solicitor also."

22. There is a further letter at 159 on 28 June repeating the request for a meeting and the need to access medical records. A similar letter is sent on 13 July at page 160.

23. On 20 July a further letter is sent inviting Mr Bellingham to a formal meeting on 31 July. The letter states that an outcome of this meeting could be the termination of employment due to medical capability. Apart from the letter at 158(a) there was no response from Mr Bellingham. As a consequence on 31 July by letter at page 161 Mr Bellingham's employment was terminated and a payment was made in lieu of notice.

Conclusions

24. We turn now to the issues that we have to determine but there needs to be an introductory passage because the Bellingham's approach before us was that because of the injury suffered at work on 13 November 2017 Mr Bellingham lost his job, he lost his dignity and as a consequence suffered economic loss including loss of wages from May 2018 onwards. We have every sympathy with that position.

25. However, at page 57 again from the hearing held on 2 April 2020 Employment Judge Clark said at paragraph 2:

> "It was necessary to clarify at the outset the nature of the disability relied on. Mr Bellingham confirmed it flowed from his mental impairments defined as ADHD, dyslexia and learning difficulties. The reason that needed to be clarified is because the underlying sickness absence from which this claim springs was a discrete physical injury to his foot following an accident at work. To be clear that is not advanced as a disability."

26. This led to two e-mails from the Bellingham's and in particular one dated 1 May which appears at pages 68 and 68(a). At 68(a) the following is said:

> "Because I was unable to do my day to day activities and the condition worsened to the point where I couldn't walk resulting in surgery and immense pain I consider this as a disability under the Equalities Act and not just an injury."

27. That correspondence was referred to Employment Judge Clark and at 86(aa) we see his response of 26 May. He makes it clear that the disability relevant to the determination of these issues remains ADHD etc and he says for the avoidance of doubt the claims remain as articulated in the order of 2 April as set out as claim 1, claim 2 and claim 4. Those then are the issues that we have to determine.

Claim 1

28. As to claim 1 at page 58 the impairment concerned is a mental impairment, namely ADHD and learning difficulties. Mr Perry sensibly concedes that dyslexia which is also advanced by Mr Bellingham overlaps with these other two matters and he takes no point.

29. Thus, we are concerned with the events of 2 May. Mr Bellingham's account of that day begins with an allegation that he was taken to Mr Phillipson's office, told he could not move from a cordoned off area and that there was a camera pointed at him and if he moved once "he is gone". Mr Phillipson denies that there was any such instruction and he tells us, which we accept, that the camera is in a fixed position and has always been in that fixed position as was the drill to be used by Mr Bellingham.

30. We think it likely that Mr Phillipson did instruct Mr Bellingham not to move from the area but did not threaten him with dismissal. Mr Bellingham may have taken the instruction literally ie that he could not move at all but we note that there are elements of exaggeration in Mr Bellingham's evidence for example he claims he was placed in the middle of the factory floor which was plainly not the case. As to the cordon we accept Mr Green's evidence that the purpose of the cordon was so Mr Bellingham did not have to get up and avoid passing traffic of forklift trucks whereas the norm would be that the forklift truck would take precedence and the individual would have to move.

31. Mr Bellingham also alleges that he could not go to the toilet without first raising his hand and being escorted like a school child to the toilet. Both Mr Phillipson and Mr Green deny that allegation. Mr George who was given the task of doing Mr Bellingham's heavy lifting could not recall seeing Mr Bellingham either go to the toilet or raise his hands but that was probably because Mr Green was screened off in his welding position. But Mr Green does recall seeing Mr Bellingham at break times outside the cordoned area.

32. Mr Bellingham also alleges that he was sniggered at by Mr Phillipson and by other employees he does not name. Mr Phillipson, Mr Green and Mr George all deny that they sniggered at him. Mr Geddes was not present and therefore could not give relevant evidence. We do not accept Mr Bellingham's evidence on this point principally because he has failed to name employees other than Mr Phillipson. Mr Bellingham further claims that at the end of the shift Mr Phillipson told him to "fuck off home" and not return to work. Mr Phillipson denies any such comment and points to the text messages immediately following 5 May. Indeed we see at page 132 a text message actually on 2 May at 8:02 in the evening ie a few hours after the shift had ended which says:

> "Just to remind you I've got doctor's appointment in the morning. I did tell you the other day. Will be in afterwards."

That is a message from Mr Bellingham to Mr Phillipson. That is wholly inconsistent with both the comment to "fuck off and not return to work" and to having been humiliated at work on that day. We note further that there is no reference thereafter to the events of 2 May. We also note that Mr Phillipson not wishing Mr Bellingham to return to work would be inconsistent with Mr Phillipson's desire to be repaid the loan of £500.

33. In determining whether there has been unwanted conduct as alleged by Mr Bellingham in accordance with Section 26 of the Equality Act, subsection 4 reads as follows:

> "(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account:-
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect."

34. Firstly is the perception of Mr Bellingham, we accept that he did feel humiliated by being cordoned off though we suspect that much of his anger is concentrated upon the recording that occurred after he left the meeting of 11 April which he did not see until after these proceedings began. As to the other circumstances we rely on the risk assessment and the evidence of Mr Phillipson and Mr Green to conclude that any measures that were put in place were with a view to the protection of Mr Bellingham's health and safety and further the protection of the Respondent's from future liability. Thirdly whether it is reasonable for the conduct to have that effect. Again we can fully understand Mr Bellingham's reaction but the camera was not deliberately placed so as to watch him and all of the other measures were there for his own protection.

35. In conclusion balancing the three factors therefore we do not consider that Mr Bellingham has suffered unwanted conduct. If we are wrong on that point and there was unwanted conduct we do not believe that it was related to a relevant protected characteristic as is required by Section 26. In this case the protected characteristic must be the impairment relied on ie ADHD, learning difficulties and dyslexia. Mr Bellingham submits that it was related to that disability because Mr Phillipson knew that the drilling was the only duty he could do because he was not capable of office/administrative duties and that was because of his disability. We do not accept that submission. We accept that the test is not a "but for test" but we cannot see that the conduct complained of is associated with the impairment but rather it is associated with the injury to Mr Bellingham's foot. It is one step too far removed. Not only was there no administrative work that Mr Bellingham could do, there was no such work at all.

<u>Claim 2, page 58, failure to conduct meetings at home</u>

36. The PCP alleged is accepted as being applied by the Respondents namely the invitation of the employee to be accompanied in accordance with Section 10 of the Employment Relations Act 1999. The second element is that there must be a substantial disadvantage to Mr Bellingham arising from that PCP and it is said that because Mr Bellingham cannot read sufficiently well he was put at a greater worry or anxiety because he feared he would sign away his rights at meetings.

37. We do not accept that there was a substantial disadvantage. Had Mr Bellingham been accompanied by a work colleague as was required by the PCP in our view any written material could have been read to him and then dealt with by Mr Bellingham.

38. Further we find as a fact that there was no such request for Mrs Bellingham to attend as companion and whilst that failure to make the request is not fatal to the claim nevertheless in our view the Respondents would have needed to have been clairvoyant to understand that that was what was required. We also note the letter at page 158(a) which made it plain that the reason for non-attendance at meetings was because of legal advice. That claim too must therefore fail.

Claim 4, dismissal on 31 July 2018

39. This is put firstly as a failure to make a reasonable adjustments under Section 20 and 21 of the Equality Act. The PCP relates to the Respondent's approach to considering alternative temporary redeployment from physical work to sedentary work and limiting it to existing office roles and functions. We accept that that is capable of being a PCP. As to the substantial disadvantage that is said to be that Mr Bellingham was unable to undertake any of the existing office roles because of his learning difficulties etc and therefore missed out on the opportunity of saving employment by temporary redeployment. We reject this because it is clear that there was no temporary sedentary work available.

40. As to the adjustment put forward that is that such a role should have been created. In terms of a creation of a role that is capable of being a reasonable adjustment but it is dependent on the facts of the case. Here we have a small employer manufacturing crash barriers to stringent specifications. All the administrative work supporting this thus needs to be meticulous and it is common ground that Mr Bellingham could not perform such task. However, as we have set out Mr Bellingham had refused all requests to attend welfare meetings, he had refused requests to provide medical evidence relevant to his foot injury and we therefore cannot see how in the circumstances, even of a limited role, how it could have been reasonable for the Respondents to agree to such a role because they had no basis upon which to determine what Mr Bellingham was capable of. They were working in the dark. Thus the claim of reasonable adjustment must fail.

41. As to the claim put under Section 15 the unfavourable treatment is accepted as the decision to dismiss. The something arising is said to be the inability to perform the only potential available sedentary office work but as we have said we do not consider that that was available. Mr Bellingham says that no causal link is established because were it not for his inability to perform existing office based functions due to his disability he would not have lost his employment at least not on 31 July, but there was no such work. However, if we are wrong and unfavourable treatment is made out then we accept the employer's submission as set out in their response form beginning on page 77 at paragraph 35:

> "Further, alternatively, the dismissal of the Claimant was justified in all the circumstances."

43. It is averred that the following represented legitimate aims:-

(i) Ensuring its staff are fit to carry out the duties required of them.

(ii) Not permitting staff to carry out duties which they are incapable of or cannot carry out safely.

(iii) Taking appropriate steps to maintain a work force with good attendance."

44. We accept that they are legitimate aims and we further accept that the dismissal was a proportionate means of achieving those legitimate aims there being so far as we can see no alternative less discriminatory approach. That claim must also fail and therefore we conclude that all of Mr Bellingham's claims fail. That is our decision.

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Employment Judge Blackwell

Date: 21 December 2020

JUDGMENT SENT TO THE PARTIES ON

23/12/2020.....

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FOR THE TRIBUNAL OFFICE