EMPLOYMENT TRIBUNALS

Claimant: **Mr D Williams**

Respondent: **DT (Automotives) Ltd**

Heard at: **By CVP** **On: 8th March 2021**

Before: **Employment Judge R F Powell**

Representation:
Claimant: Did not attend and was not represented
Respondent: Mr Chambers, Solicitor

JUDGMENT

The Judgment of the Employment Tribunal is:

1. The claim of direct associative discrimination contrary to section 13 of the Equality Act 2010 is dismissed:

2. The Claimant's allegations of unfair dismissal contrary to section 99(3)(d) of the Employment Rights Act 1996 has little prospect of success.

3. The Claimant is ORDERED to pay a deposit of £500.00 (five hundred pounds) in respect of this unfair dismissal claim not later than 28 days from the date this Order is sent as a condition of being permitted to continue to advance those allegations or arguments. The Judge has had regard to any information available as to the Claimant's ability to comply with the order in determining the amount of the deposit.

REASONS

1. By the claim form presented to the employment tribunal on 28 May 2020 Mr Williams asserted that he had been subject to disability discrimination by

association and that, having exercised his statutory right under section 507A of the Employment Rights Act 1996 he had been dismissed principally for that reason; contrary to section 99 (3)(d) of the same act.

1. The essence of this claim is straightforward; he asserts that Mrs G Williams, his wife, has an impairment which amounts to a disability within the meaning of section 6 of the Equality Act 2010. The averred impairment is that of backache; which he asserts is long-term and has, on differing occasions, a debilitating effect upon her.

2. The claimant argues that, on the 2nd to 4th of January 2019, his wife was due to take care of their daughter however, due to her impairment, she was unable to do so and the claimant therefore remained at home to care for their daughter.

3. The claimant asserts that when, as is not disputed by the respondent, he was subject to a verbal warning on 10 January 2094 for his unauthorised absence, this amounted to an act of direct discrimination on the grounds of his wife's disability.

4. The respondent does not admit that the claimant's wife had a condition which met the statutory test for disability. In any event, it asserts that it was unaware of the claim of her disability at the date upon which the verbal warning was imposed. Further, the respondent argues that the claim is out of time. It asserts that the last date on which such a claim could have occurred, and been within the jurisdiction of the employment tribunal, was 31 January 2019.

5. The respondent argues that, as the claimant's dismissal, which took effect on 27 March 2019, was not one which is alleged to have been an act of discrimination the claimant cannot therefore argue that the 10 January verbal warning formed part of the continuing course of conduct.

6. In the alternative, the respondent argues that the claimant has not put forward any explanation or evidence to sustain an application for a just and equitable extension of time for the presentation of that element of his claim.

7. With regard to the dismissal contrary to section 99(3)(d) of the Employment Rights Act 1996, the respondent argues that there were a number of reasons why the claimant was dismissed.

8. Firstly, the claimant had a poor record of attendance in his first year of employment; 15 days of sickness absence which the respondent believed was usually associated with a weekend or annual leave and about which the respondent was doubtful of the claimant's honesty.

9. Secondly, following the imposition of the verbal warning the claimant became absent from work on 21 January 2019 with stress or work-related stress. This period of absence continued to 27 March; the date of dismissal.

10. In that period the respondent believed that the claimant had in late in providing evidence of the reason for his sickness absence, had not returned to work on

25 March in accordance with his medical certificate and offered no explanation for his absence. Further the claimant had declined to meet with the respondent in order to investigate the causes of his sickness absence, declined to allow the respondent to obtain a medical report, had in his appeal against the imposition of the verbal warning, made a dishonest accusation against his line manager.

11. Lastly, in the claimant's email of 18 March he had indicated that, from the claimant's perspective, the relationship of trust and confidence between the parties had broken down.

12. The case was first considered by the employment tribunal at an open preliminary hearing conducted on 10 March 2020 by employment Judge Ryan at that hearing two ancillary claims of breach of contractual notice non-payment holiday pay were settled and the claims were formally withdrawn and dismissed.

13. Judge Ryan ordered the claimant to provide better particulars of the two substantive claims and allow the respondent to amend its response accordingly. The judge also ordered that Mrs Williams, the claimant's wife should provide an Impact statement in relation to the issue disability disclose relevant medical evidence.

14. The matter was further considered on 5 March 2020 by employment Judge Povey. He directed that there should be a proven preliminary hearing to determine three matters:

    a. Whether Mrs Williams was, at the relevant time, a disabled person for the purposes of section 6 of the equality act 2010.

    b. Whether by the claim should be struck out because it had no reasonable prospect of success.

    C. Whether either claim should be subject to a deposit order because it had little reasonable prospect of success.

15. At this hearing I am tasked with addressing the issues outlined by Employment Judge Povey.

16. The hearing was fixed to start at 10 am, by 10:10 was apparent that the claimant nor his wife had joined the CVP hearing.

17. With the assistance of my clerk a telephone call was made and a message left on the claimant's mobile telephone number; no response was received by 4.30 pm on the day of this hearing.

18. An email was sent to the claimant's given email address again, by the time of the writing up of this judgement on the afternoon of this of the day of the hearing there had been no communication from the claimant.

19. I caused records to be checked to be sure the claimant had received notice of this hearing.

20. In discussion with Mr Chambers, solicitor for the respondent, I asked what contact he had had with the claimant. He informed me that in the preceding weeks he had sent a number of emails the claimant who had not acknowledged or responded to those emails. For this reason, he had sought an order from the employment tribunal directing the claimant to make contact with the respondent for the purposes of agreeing bundle of documents for this hearing. That order was made but there had been no contact from the claimant.

21. In light of the above. I considered whether it was in accordance with the overriding objective to adjourn this hearing for further enquiries. I considered we had sought to make contact with the claimant through the available means known to the tribunal and, in light of the claimant's apparent disinterest in prosecuting his case, (as described by Mr Chambers), and his further failure to comply with the direction of the employment tribunal, it was not in the interest of justice to adjourn the hearing today. However, as I indicated to Mr Chambers if the claimant had, at any point in the day, indicated his intention to take part I would have reviewed at that stage whether it was possible to enable the claimant to take a full part in today's hearing and, if not, a decision would made whether the matter should be relisted for a fresh hearing on the issues before me today.

The issue of disability

22. in the bundle presented to this tribunal, prepared by the respondent, there is a two-paragraph statement unsigned on behalf Mrs Williams wherein she refers to having an on-going complaint of back pain which she generally manages in such a way that she is able to carry out normal day-to-day activities. There is reference to taking mild pain relief once or twice a day however there is no indication of the degree to which she would not be able to function but for that pain relief.

23. The 2nd paragraph of her statement identified the effects upon her back pain on very bad days when she maybe unable to get out of bed, attend work or be able care for her daughter. Her statement refers to medical reports upon which she relies as corroboration.

24. There are NHS letters available to me. One which records the cancellation of an appointment for the pain clinic at Wrexham Maelor hospital. The other is a report from a physiotherapist, dated December 2018, which records Mrs Williams description of a history of several years of low back pain and reports, based on this Williams account, that such pain was very severe on a bad day. On examination it was found that Miss Williams mobilised without distress and that she had no discomfort with sitting or standing but her lumbar range of movement was limited throughout with pain.

25. The impact statement from Mrs Williams is not signed, the medical reports to which she refers in that statement as corroboration, is limited to the one document to which I have referred above.

26. The evidence in the physiotherapist's letter is a description of Mrs Williams' account during the examination, set out above. The respondent sought to challenge the accuracy of the impact statement, to challenge the frequency or lack of frequency, of any occasion of a "bad day" and sought her to rely on some inconsistencies between the content of the impact statement and the December 18 letter to the claimant's general practitioner.

27. It emphasised that, in any event, the unsigned account which not been confirmed or tested on oath along with the unexplained absence of Mrs Williams, made reliance on the documents unsafe; in themselves they could not mount to sufficient reliable evidence to discharge the burden upon the claimant.

28. I do not know why Mrs Williams or Mr Williams have not attended before the employment tribunal today certainly they have not offered any explanation and I persuaded by Mr Chamber's submissions that I should be cautious of an unsigned, untested account which although partly corroborated by the same persons description to a physiotherapist it is not corroborated by any formal medical report and that brevity of the statement inhibits me from understanding, accurately, the degree of impairment and the regularity of any such impairment.

29. In these circumstances, I consider that the limited and untested evidence before me is insufficient to discharge the burden upon the claimant establishing that Mrs Williams was a person with a long-term impairment which had a substantial adverse effect on her day-to-day activities for these reasons, I find that, on the evidence before me, that claimant has not established that Mrs Williams was a disabled person, the purposes of section 6 of the Equality Act 2010, in January 2019.

The claim of direct discrimination on the grounds of disability by association

30. By reason of my finding above, a fact which is the essential foundation for the claim of associative discrimination has not been proven and consequently the claim has no reasonable prospect of success and is dismissed.

31. Had I found that the claimant had produced sufficient and tested evidence to establish disability, I would in any event have been very cautious of the merits of the claimant's case in circumstances where, taking his pleaded case at its highest, he did not inform the respondent that his wife was a disabled person, or for that matter set out sufficient detail that, in my judgement any lay person might perceive that Mrs Williams was a disabled person during the telephone conversations on the mornings of the 2nd, 3rd and 4 January 2019 when he reported his absence. Furthermore, having seen transcripts of the audio recordings of those telephone calls the claimant informed his employer that he was absent not the purpose of caring for his wife but for the purpose of caring

for his daughter. Moreover, is equally difficult to see when the claimant's reason for his absence as childcare (because his wife was poorly) that the imposition of a verbal warning is in any way tainted by the claimant's wife's stated disability.

32. Lastly, the claim was presented out of time and, on the evidence contained in the documents and pleadings, the claimant has indicated no reason for the delay which might enable him to establish grounds upon which a tribunal might exercise its discretion to extend the time for presentation of that claim.

Dismissal solely, or principally, by reason that the claimant exercised his right to time off for dependents in accordance with section 57A of the Employment Rights Act 1996.

33. Following the imposition of the verbal written warning on 10 January 2020, the claimant submitted a written appeal in which he stated that the reason for this disciplinary was based on his absence due to caring for a dependent. He said that he complied with all the respondent's processes regarding contact with the respondent and that the imposition of a verbal warning, given he was exercising his statutory right, was automatically unfair. He made several criticisms of the respondent's procedure for investigation, conduct of the hearing, the absence of evidence and a lack of clarity over the grounds for imposing a verbal warning in relation to the claimant's level of absence and reporting of such absences. He concluded;

    "I believe that threatening my employment with regards to exercising my statutory right to appeal is both victimisation as well as unlawful. With regards to the length of service I can only assume that the two years is referring to a claim for unfair dismissal. However, it is my belief that this would be unlawful dismissal which does not come with the prerequisite with regards to length of service".

34. It is evident the claimant had a sound grasp of the principles behind section 57A and sections 99 and 104 of the Employment Rights Act 1996.

35. The claimant was then absence through sickness from 21 January 2019 that absence was supported by a series of statements of fitness for work. The last of those statements indicated the claimant would be fit to return to work on the 25th March.

36. On the 18th March the claimant was invited to attend a meeting with the respondent in relation to the claimant's continuing absence and to explain why he had not been presenting his medical certificates in good time or reporting his absence in accordance with the respondent's procedures. The latter issue I note is identified as a potential misconduct offence within the claimant's particulars of his employment with the respondent.

37. The claimant was also asked that consent medical report. The Claimant responded the same day, stating he did not consent to a medical report because he believed the statements on the fitness to work certificates were

sufficient. He also indicated that before he could return to work, in accordance with the current medical certificate:

"I will need to see the doctor to be assessed as I have been advised I need to make sufficient recovery progress before returning to work close speech"

38. The claimant repeated the comment made in his appeal; that he had been threatened that if he did not accept the verbal reference that he would be dismissed.

39. Although the claimant said that he was too ill to attend a meeting with the respondent to discuss his health he complained that he had received no update on the progress of appeal. He finally added:

"I feel that my trust and confidence in the company has been lost due to what I believe are breaches of contract where been treated. It has had a huge impact been a cause of great distress myself and my family. So, in the interests of both parties, I will be contacting ACAS to partake in their early conciliation service. I have tried everything I can do to resolve the situation and I hope third party can work out the best solution."

40. The respondent replied on the same day inviting the claimant to attend a meeting and offering to hold that meeting away from the respondent's premises. It reiterated the purpose of the meeting was to discuss the claimant's absence and the prospects of his likely return to work. It emphasised that, if the claimant failed to attend the meeting, that could be a disciplinary matter and that a decision might be taken, in his absence, based on the information available to the respondent which could lead to the termination of the claimant's employment if it appeared that a mutually satisfactory resolution was unlikely.

41. After the claimant's last medical certificate had lapsed, he did not return to work. On the 27th March Mr Turner, the managing director of the respondent, drafted and sent a letter notifying the claimant the termination of his employment with notice the letter set out a number of reasons for the decision to dismiss they include the following: the claimant had been absent for two months, that there was no indication when the claimant was right likely to return, the claimant had not cooperated with the respondent's request for a medical report , he had failed to attend to meetings to discuss the claimant's medical condition and to try and resolve any outstanding issues, medical certificates were not being sent in on time and that the claimant had complied with the respondent's sickness absence reporting procedures.

42. It went on to say that the claimant had been warned that if he did not attend a meeting on the 22nd March a decision might be made in his absence and referred to the fact that, as of 25th March, claimant was absent without being supported by further medical certificate. It also made reference to "that marks for a variety of reasons it seems clear to me that the employment relationship has broken down irretrievably" in light of the above the respondent informed the

claimant that his employment was terminated. The claimant was invited, if he wished, to appeal against the decision. He did not do so.

43. In order to succeed in a claim under section 99 (3) (d) of the Employment Rights Act 1996 it is necessary that the unlawful reason for the dismissal to be the sole, or principal reason for the dismissal. The principal reason may course be no more than the "effective" or the operative reason.

44. In this case the claimant has less than two years' service and the authorities make clear that in such a case, the burden lies upon the employee to establish the reason, or principal reason.

45. To determine this issue an employment tribunal will necessarily have to hear evidence from Mr Turner was the decision-maker in this case and it will be a matter for the tribunal, after hearing Mr Turner's evidence, as to whether or not they are persuaded that the letter of 27 March accurately reflects the factors which operated on his mind at the time of the dismissal. As this is a matter in dispute which depends on findings of fact, I do not consider this is a case with no reasonable prospect of success.

46. However, in the context of the claimant's own assertion (that the relationship of trust and confidence broken down and his intent there to commence early conciliation), along with the claimant's cumulative absence of around 78 days less than two years of his employment and the absence of any indication when the claimant might be fit to return to work there are manifestly more serious and more numerous reasons for the claimant's dismissal than the fact he had been absent for three of those 78 days by reason of taking time off to care for his dependents.

47. In the circumstances I consider the claimant case has little prospect of success.

48. In light of the above I then went on to consider whether it was, as a matter of principle, just and equitable to make a deposit order in this case.

49. It's quite apparent, that the respondent, if it succeeds in defending this case, will seek costs against the claimant in respect of this allegation. It is also clear that respondent is likely to incur several thousand pounds worth of costs for preparation and presentation of its defence at a final hearing. On the information before me it has little hope of recovering any award

50. The conduct the claimant, so far as I can discern based on his interaction with the tribunal, does not fill me with confidence that is acting in a reasonable or responsible fashion in the manner of prosecuting the proceedings. It is also in the claimant's interests that he should appreciate the possible consequences of progress a claim of limited merit. Thus, I consider the making of a deposit order to be in accordance with the overriding objective of the employment tribunal in this case.

51. Had the claimant attended this hearing I would have gone on to consider the claimant's finances. I am aware, from the claimant's correspondence with the

tribunal, that he is in employment. I am also aware that Mrs Williams is in employment and that they have a child of school age.

52. The respondent argues that a proportionate order would be £500. In my judgement, any sum ordered should not be so high as to effectively debar the claimant from proceeding because he cannot afford to pay the deposit and yet sufficient to act as a sobering warning to the claimant as to the risks and consequences of pursuing a claim with little prospect of success. Taking into account all the information before me I am persuaded by the respondent's submission and accordingly, I order the claimant to pay a deposit, as a condition for the continuance of these proceedings, in the sum of £500.

_____

Employment Judge Powell

Dated: 9th March 2021

ORDER SENT TO THE PARTIES ON

11 March 2021

FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS