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**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4114505/19**

**Hearing held By Cloud Video Platform (CVP) on 10 and 11 March 2021**

**Employment Judge L Doherty**

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**Christopher Bannan**

**Claimant  
In Person**

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**Turners (Soham) Ltd**

**Respondent  
Represented by  
Mr Newman  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is ;

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- (a) the claimant is a disabled in terms of Section 6 of the Equality Act 2013 (the EQA);
- (b) the Tribunal shall exercise its discretion under Section 123 (1) (b) of the Equality Act 2010 to extend time to allow the complaint of disability discrimination on the grounds that it is just and equitable to do so.

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**REASONS**

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1. The claimant presented a complaint of unfair dismissal and disability discrimination on 16 December 2019. This was a Preliminary Hearing (P H) to consider two preliminary issues arising from the claim.
2. There have been two PH's for the purposes of case management, further to which this PH was fixed in order to determine whether the claimant was a disabled in terms of the EQA, and to consider whether the tribunal had jurisdiction to consider all or any part of his disability discrimination claim, on the grounds that it was time-barred

3. There were five sets of documents before the Tribunal which set out what the claimant identified as his disability discrimination claim. Those were;

a) the ET1;

b) an undated document called 'Claimant's Statement of Facts'

5 c) the claimant's further and better particulars of the claim, lodged on 22/06/20 after specific direction had been issued by EJ Hoey at a PH on 30/4/20 as to what information the claimant required to produce in relation to his disability discrimination claim;

10 d) the Claimants response to the Respondents Amended response, lodged on 31/08/20 ;

15 e) a schedule identifying alleged discriminatory acts and when they are said to have occurred, lodged on in 17/01/21 in response to a direction from EJ Eccles at a PH on 15/12 /20 that the claimant should provide a chronological list of the alleged acts of discrimination, and who is said to be responsible for them.

4. From the most recent schedule which the claimant produced it was apparent that he was alleging discrimination occurred on 31 July 2017, and in November 2017, followed by a number of allegations of discrimination which is said to have taken place over 2018. The claimant also identified what he categorises as two further acts of discrimination. One is said to have taken place on 20 28/01/20, which is an email to the respondent's HR department questioning missing correspondence from information available under a subject access request (SAR), from which the claimant says it was obvious that records had been kept from him. The second act said to have taken place on the 7 February 25 2020, which is his SAR to the OH provider.

5. It is the claimants position that there was a continuing act of discrimination culminating in the alleged act on 7 February 2020. It is also said by the claimant that he made a SAR from which he received documentation on 23 August 2019 which he had not seen before and which demonstrated that 30 discrimination occurred.

6. In considering disability status, the tribunal has to consider whether the claimant was disabled at the relevant time. On the basis of the claimant's schedule it was agreed that the relevant time runs from 31 July 2017 till the conclusion of the claimant's employment in September 2019.

35 7. It is accepted by the respondents that the claimant has an impairment, which is arthritis in his left hip. It is also accepted that arthritis is a progressive condition. It is not accepted that that impairment had an adverse effect on the claimant's ability to carry out day to day activities during the relevant period.

8. In considering whether the tribunal has jurisdiction to consider the claim, it has to consider if the claim was made on time, and if not whether time should be extended on the grounds that it is just and equitable to do so. If relevant, the Tribunal also has to consider whether the complaint was of acts extending the period, and whether the last alleged act was in time.
9. The hearing took place by way of CVP. The claimant represented himself, and the respondents were represented by Mr Newman, solicitor.
10. The claimant gave evidence on his behalf, and he lodged a bundle of documents,

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### Findings in Fact

11. The claimant, whose date of birth is 29/07/1965 was employed by the respondents as an HGV driver from May 2012 until he resigned from that employment in September 2019.
12. From around 2106 the claimant had experienced back pain, which was noticeable when he drove at work. He had complained about this at work.
13. Around the beginning of 2017 the claimant began to experience pain in his groin which he described as 'slowing him down.' He noticed he was unable to kick a ball with his left foot.
14. The pain which the claimant was experiencing did not subside, and the claimant decided to attend his GP in July 2017. His GP told him that she thought he had arthritis, and he was referred immediately for an x-ray.
15. The claimant was x-rayed at the hospital on 31 July 2017, the report of which is produced at page 10 of the claimant's bundle. Under clinical history, the report states;

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*Pain in left groin radiating to the knee Ltd external rotation query osteoarthritis. Findings; Moderate to severe degenerative change affecting the left hip joint with almost complete loss of joint space height at the weight bearing lateral part. Somewhat presumed phleboliths seen in the pelvis on the right. Presumably you refer this patient to an orthopaedic surgeon?*

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16. The claimant was referred to an orthopaedic surgeon, whom he saw in Monklands hospital approximately 6 to 8 weeks after his x-ray. He was diagnosed by the surgeon as having osteoarthritis in his left hip. He was advised that arthritis is a degenerative condition, and that ultimately it may require surgery, by way of a hip replacement. The advice he was given was to hold off as long as he could before having a hip replacement operation in order to give that operation the best chance of being effective over a longer period.

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17. It was recommended to the claimant that he manage his condition by taking painkilling medication. The claimant took ibuprofen and paracetamol as required to manage his condition.
18. The claimant attended an orthopaedic surgeon again in February 2018, and  
5 from time to time he attended his GP during the period from 2017, to September 2019.
19. The claimant has recently been referred for a hip replacement operation.
20. The claimant's condition has progressively worsened during the period from 2017 to date.
- 10 21. In July 2017 the claimant experienced difficulty in bending down to pick things up. He experienced difficulty in putting on his socks, or to tying his bootlaces. He could not stretch down sufficiently to do so without discomfort.
22. His condition developed so that the claimant can longer get up from a kneeling  
15 position without assistance. By July 2018 he was experiencing discomfort in doing so and by he now he needs assistance to so; he finds it difficult to get out of an armchair without the assistance of family members to pull him up out of the chair.
23. The claimant has become more limited in how long he can walk. In 2018 any  
20 walking occasioned pain but the claimant could walk for a maximum of 60 minutes before he had to stop. The length of time which the claimant is able to walk has diminished, and he can now only walk for 20 minutes, and he cannot walk at all on uneven ground.
24. The length of time which the claimant can stand has been affected by his  
25 condition. By 2018 he was experiencing pain standing at work. His ability to stand has reduced, and the claimant can now only stand for around 10 minutes.
25. By 2018 the claimant experienced pain at night which caused him to wake.
26. From 2018 the claimant experienced discomfort driving. He suffered pain in his  
30 leg up to his knee when driving. He had to adjust the chair in the cab of his HGV vehicle so that he could stretch his left leg. Since the beginning of 2019 the claimant has experienced difficulties in getting in and out all vehicles particularly small vehicles.
27. Because of the walking involved, the claimant now avoids shopping.
28. The respondents made a referral for the claimant to occupational in June 2018.  
35 As part of the referral the claimant completed an occupational health questionnaire. In response to a question about details of his condition the claimant stated;

*'I have arthritis in my hip. I get back, leg, groin pain standing for long periods of time'.*

The claimant saw Occupational Health Advisor on 4 July 2018. His report is produced page 15/16 of the claimant's bundle.

5 The report contains the following;

*Chris states that he has been diagnosed with arthritis affecting his left hip. This is a progressive condition that results in pain and stiffness in the joint and will ultimately require a hip replacement at some point in the future. His symptoms are variable on a day-to-day basis and Chris informs me that the symptoms are affected by prolonged static positions such as standing. At present Chris does not need to take any medication, however, this could change should his symptoms dictate in the future. Chris states that there is no current impact upon his normal day function although he can experience some sleep disturbance due to his condition but this settles after changing position.*

*One assessment today Chris has a full range of movement in all his major joints although he did have some very slight difficulty getting up from a kneeling position. He informs me that he is able to walk for up to 60 minutes without any great difficulty.*

20 *Recommendation*

*Given the above, I would advise that Chris is fit to undertake his role. However, due to his current symptoms, he will have to be able to alternate between sitting and standing. You should arrange it for a review of Chris's manual handling risk assessment and explore the opportunity of providing him with portable sitting at jobs as required that can be used for those tasks that required him to stand'.*

29. Prior to seeing occupational health the claimant signed a declaration consenting to the occupational health report being sent to him at the same time as his employer. The claimant received a copy of the OH report which was dated 4 July 2018. The claimant believed that his employer should have provided him with some kind of support to use work, and that they should have done so from some point in 2017 or 2016 when he first complained of suffering back pain. He considers that they discriminated against him by not doing so.

30. The claimant also believes that his employers have discriminated against him in that he considers that they should have entered into a dialogue with him about his disability and the effects of this on his ability to carry out his job, from

August 2017 when he made his diagnosis known to his line manager, Jenna Deans, but that the respondents did not do so.

31. The claimant received documents from a subject access request on 23 August 2019. These included an email from Ms Santos of the respondent's HR Department to occupational health dated the 18/08/18 . The email stated that on receiving the occupational health report she had some concerns/comments and she sought further assistance.

The email goes on to state;

*'The report we had access to from Chris is dated July 2017, did the employee say that he has been checking the progression of his arthritis with his GP? A routine/follow-up appointments? Is there a measurement to say his current level of arthritis/restriction?*

*When we initially saw Chris, he mentioned specific concerns with Ineos (he is asked to stand for 40 minutes, but this can happen as often as four times per day). For the duration of the delivery (i.e. 40 minutes) it's mandatory that he is standing alert to everything around him, controlling the delivery.*

*You recommended a portable seating but it is illegal to have. It's a legal requirement that the driver is standing, walking around if necessary and control all aspects of a delivery, especially when he is delivering such dangerous substances. This will not be deemed as a recommendation as will be instructing a driver to break the law.*

*At this delivery site (Ineos) such as the others, the driver is required to stand, walk around if he prefers but only for the full length of the vehicle. Are there any exercises/stretch movements that you recommend? Could it be that would restrict his Ineos duties to one delivery every 1 or 2 weeks?*

32. The claimant considers that this email misrepresented the position in relation to the mandatory nature of his standing, the length of the delivery time, and the ability of the driver undertaking such a delivery to walk around the length of his vehicle.

33. The claimant considered that this disclosed evidence to the effect that the respondents were discriminating against him. He considered that the email challenged the occupational health report with false statements, and was therefore discriminatory. He considered that respondents were trying to get the OH provider to change their recommendation, which was discriminatory on their part.

34. As part of his SAR the claimant also received emails between the respondent's Ms Santos, and the occupational health provider regarding the report issued

by OH in September 2018 and their letter with further information in October 2018.

35. The occupational health provider provided supplementary information on 4 October 2018 (page 25), which the claimant received shortly before the commencement of a welfare meeting he attended with the respondents on 24 October 2018.
36. The claimant understood that the welfare meeting had not reached a conclusion. He believed it had been 'abandoned' after he became upset about comments made to him in the course of the meeting. The claimant believed that the meeting was it was to be continued. He did not ask for a resumption of the meeting at any point prior to his resignation.
37. The claimant received notes of the welfare meeting in the SAR documents he received in August 2019, from which he understood that the company regarded the meeting as having been reconvened and the matter closed off. He did not agree that that was how matters were left at that meeting.
38. By October 2018 the claimant felt under a very significant amount of pressure at work due to a number of factors. Those were the fact that he considered he had been receiving death threats from another driver who was in a relationship with his manager, Ms Deans; the fact that he considered that HR were not responsive to his grievances; and the Welfare meeting in October had been abandoned.
39. The claimant was absent as unfit for work from April 2019 until September 2019, when he resigned.
40. The claimant has had previous experience of being involved in Employment Tribunals. He was aware of the function of an Employment Tribunal and that it was able to consider complaints of discrimination in the workplace.
41. The claimant contacted ACAS to commence early conciliation in the 16 August 2019, prior to his employment coming to an end. An Acas certificate was issued on 30 September 2019.
42. After the claimant resigned he contracted ACAS again, on the 4 October. The date of issue of the ACAS certificate is 4 December 2019.
43. The claimant presented his complaint of constructive unfair dismissal and disability discrimination on 16 December 2019.

#### **Note on Evidence**

44. The Tribunal heard from the claimant and formed the impression that his evidence was in the main and credible and reliable, albeit it also formed the impression that the claimant's view of matters was from time to time

influenced to a degree by the extent to which considered he had been wronged by the respondents.

45. For purposes of the issues which the Tribunal has to determine that this PH, there was not a great deal of relevance which was in dispute.

5 46. There was one point in issue however, and that was in relation to whether what was recorded in the OH report about the claimant's condition in 2018 accurately reflected the position. The relevant part of that report is set out above, and notes that the claimant advised there was no impact on his day-to-day function. It was also noted that the claimant has some slight difficulty  
10 in getting up from a kneeling position.

47. In his evidence the claimant disputed that he only had slight difficulty in getting up from a kneeling position; he also said that he had advised the OH clinician that he could walk for 60 minutes absolute maximum, as opposed to without any great difficulty.

15 48. The claimant's evidence was that he always suffered pain when he was walking, but in 2018 he could tolerate walking for a maximum of 60 minutes before he had to stop, and that distance has reduced over time.

49. The claimant also said that he told the OH adviser that he experienced pain when he was driving, and explained the changes he had to make to the seat  
20 in the cab of his truck to accommodate this.

50. Mr Newman attacked the credibility of the claimant's evidence on the basis that he had not previously challenged the content of the OH report, and that to do so was self-serving.

51. On balance, the Tribunal accepted the claimant's evidence about these  
25 matters, even if there was a degree of conflict between his evidence and what was recorded in the OH report. In reaching this conclusion the Tribunal take into account that in its view the claimant did not seek to embellish or exaggerate the effects of this condition. For example, the claimant accepted that he could walk for 60 minutes and 2018; when asked about how long he could stand for the purposes of cooking, he accepted he could stand for a much  
30 longer period in 2018 than he can now. He explained that he had enjoyed cooking, and would take sometimes hours to prepare a meal, and that he could do so in 2018, but that he can no longer do this. He also accepted that he can still stand for a sufficient period in order to make dinner for the family.

35 52. The fact that the claimant did not seek to exaggerate the position, and was prepared to make appropriate concessions as to his abilities, persuaded the Tribunal that on balance his evidence as to what he could do in 2018, and what he reported to the OH advisor in 2018, was to be accepted. Further it did not appear to the Tribunal that the degree of conflict between the claimant's



evidence and the OH report was not so significant that it could not be reasonably be explained by different emphasis in the claimant's recollection of what was said at the OH consultation and what was recorded at the time by the OH clinician.

- 5 53. The Tribunal has also made some findings as to what occurred in the workplace on a limited basis, given the remit of this PH. The Tribunal accepted the claimant's evidence as to his engagement with the respondents in relation to advising them in 2016 that he was experiencing pain, and his attendance at the Welfare Meeting in October 2080, and how he understood this had been  
10 concluded. These findings have been made on the basis of the claimant's evidence only, and the Tribunal has not heard from the respondent's witnesses these points. This Tribunal's findings in fact on matters which may subsequently become contested will not bind any future Tribunal.

### **Submissions**

- 15 54. Both parties helpfully produced written submissions, which they supplemented with oral submissions.

### **Claimant's Submissions**

55. The claimant submitted that his claim was in time and referred to the two ACAs certificates he had obtained.
- 20 56. The claimant made submissions with regard to his interactions with his manager, and his diagnosis of arthritis in his left hip in August 2017.
57. The claimant also submissions with regard to his arthritis, the effect this had upon him, the medical advice which he obtained.
58. The claimant submitted that when he obtained information from an SAR in  
25 August 2019 this showed that there had been a continuing act of discrimination based on his disability, in that the respondents had failed to make reasonable adjustments for him, and he made submissions about the basis of his complaints of disability discrimination.
59. The claimant took some issue was part of the contents of the OH report, and  
30 made submissions in relation to that. He also made submissions about an email from the respondent's HR department to the OH advisor on 31 August 2018, submitting that the questions asked then should have been asked earlier. He also submitted he should have been included in a dialogue about his condition. The claimant also submitted that this email demonstrated there  
35 was a failure to make reasonable adjustments on the part of the respondents.
60. The claimant referred to information obtained through the SAR about a Welfare Meeting which took place in October 2018. He submitted the reason he had not raised the disability discrimination claim was that he was told there would

5 be a further the meeting and he was under mental stress due to another incident. His admitted he had been signed off work ill, and it was not until he received the SAR in August that he realised the full extent of the disability discrimination which had occurred. At that stage he was still carrying on with grievances with the respondents in relation to bullying and harassment.

61. The claimants submitted the information in the SAR demonstrated that there was a continuing act of discrimination.

### Respondents Submissions

10 62. Mr Newman for the respondents took the tribunal to the questions which it had to address at this PH, and the relevant law.

63. He referred the tribunal to *Swift v Chief Constable of Wiltshire Constabulary (2004) IRLR 540*, and the four questions which the tribunal should ask in considering disability status.

15 64. Mr Newman submitted that the burden of proof rested with the claimant to establish disability status and referred to *Kapadia v London Borough of Lambeth (200) IRL all699 (CA)*. He also referred the tribunal to the Equality Act 2010 Guidance on determining for the purposes of the Act whether a person is disabled.

20 65. Mr Newman submitted that the claimant had not established disability status in that he had not provided any medical evidence to support the assertion that he was disabled in July 2017, save the radiology report which does not address any of the relevant questions apart from confirming the diagnosis.

25 66. He submitted the only document available to the Tribunal was the Occupational Health report, and he referred to the terms of that, submitting the claimant's evidence was imprecise, and refers to his current condition, as opposed to his condition at the relevant time.

67. Mr Newman accepted that the claimant suffered from a progressive condition, but his position was that there was no evidence that he had suffered an adverse effect as a result of that condition in 2017/2018.

30 68. Mr Newman referred the tribunal to the ECHR Guide in relation to normal day-to-day activities, and submitted that remaining in a prolonged static position was not normal day-to-day activity. He also made submissions as to substantial adverse effect, referring to the Appendix to the EQA; experiencing some tiredness or minor discomfort as a result of walking unaided of a distance of around 1.5 km did not amount to a substantial adverse effect. Mr Newman submitted on the evidence available to the tribunal the claimant was able to do this.

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69. Mr Newman submitted that when assessing the claimant's condition at the relevant time which was 2017/18, there was the fact no effect on his day-to-day activities, and the progressive development of this condition in the context of adverse effect on day-to-day activities commenced later.
- 5 70. Mr Newman then addressed the tribunal on the question of jurisdiction, referring to the provisions of section 123 (1) of the EAQ. He reminded the tribunal that the burden of proof rests with the claimant - *Department of Constitutional Affairs v Jones (2008) IRLR 128*. He also tribunal reminded the tribunal that the exercise of discretion to extend time remains the exception and not the rule - *Robertson Bexely Community Centre t/a Leisure Link 2003 IRLR 434 CA*.
- 10 71. Mr Newman made submissions as to the factors which it was relevant for the Tribunal to take into account in considering the exercise of this discretion with reference to *British Coal Corporation v Keeble (1997) IRLR 336*.
- 15 72. In relation to the duty to make reasonable adjustments, Mr Newman submitted that the period within which the employer is reasonably expected to comply with this duty to make reasonable adjustments is assessed from the employees point of view - *Kingston upon Hull City Council v Matuszowicz (2009) EWAC 22*, adopted in *(Abertawe Bro Morgannwg University Local Health Board v Morgan (2018) EWCA Civ 640*.
- 20 73. Mr Newman submitted that the claimant's complaint regarding being placed on for Ineos loads arose in my 2018. He first complained about this in November 2017. The claimant first contacted ACAS on 16 August 2019 to commence conciliation, and did so again on fourth October 2019. This claim was lodged 16<sup>th</sup> December and therefore any complaints about matters before 5
- 25 74. In relation to the evidence, Mr Newman reminded the tribunal about the claimant's comments addressing questions about his Amended Grounds of Resistance. He submitted that the claimant said all of his complaints of discrimination related to the Ineos contract which he says arose in 2016, and the respondents submitted crystallised no later than May 2018.
- 30 75. Mr Newman submitted that the claimant was aware of the facts which gave rise to his claims, and accepted this in cross examination. He also accepted he was aware of the contents of occupational health report, and the follow-up letter from occupational health, and that he had attended the welfare meeting in
- 35 76. Mr Newman submitted that the claimant's evidence in relation to the SCR and knowledge that it provided was not compelling, and did not give rise to any knowledge of discrimination at all. The claimant has failed to establish that there was a continuing act of discrimination ending in 2019. All of the
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complaints were of acts said to have taken place in 2017 or 2018. The two alleged complaints said to have taken place in 2020 could not even be said to be complaints of discrimination and should be discounted.

- 5 77. Mr Newman submitted that the additional materials which the claimant received did not explain the delay.
78. Mr Newman referred to the length of the delay, and submitted the claimant provided no cogent explanation for it. He failed to act promptly, and he knew there were issues he could have complained about. He knew the protections afforded to him in the context of discrimination complaints being available as he has previous experience of Employment Tribunals, but did nothing until 10 2019.
79. Mr Newman submitted the cogency of the evidence could be affected by the delay in bringing proceedings. He submitted that the majority of the claimant claims would in all likelihood have been heard at a substantive hearing before 15 now, and even now, there would be a delay in the listing was of substantive hearing, which would be unlikely to be listed until the end of 2021. He submitted this delay in proceedings would inevitably affect the witnesses ability to recall events clearly, the respondents did not believe for a fair hearing could take place on all the issues being pursued by the claimant.
- 20 80. Mr Newman then addressed the Tribunal on the prejudice which should be caused to the respondents. That is that they would have to deal with allegations which in some cases were more than three years old, and that this was greater than the prejudice which the claimant faces, given that he had every opportunity to bring the claim on time. Mr Newman submitted that was no 25 credible explanation for the delay. Further, the claimant already has an unfair dismissal claim before the tribunal.
81. Mr Newman's position was that dismissal of the disability discrimination claims would allow matters to be dealt with in a manner which was consistent with the overriding objective in the Tribunal Rules. The claimant was seeking to 30 unreasonably complicate a case which is at its heart is unconnected to discrimination, and which his legal adviser was unable to explain for at the first preliminary hearing.
82. Mr Newman submitted that the claimant's discrimination complaint should be struck out, as the claimant had failed to show any good reason why the Tribunal 35 should exercise discretion to extend time to allow it.

### **Consideration**

### **Disability Status**

83. The Tribunal began by considering the relevant legislation.

Section 6 of the Equality Act 2010 provides:

(1) *A person (P) is disabled 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.*

5

*Schedule 1 provides:*

*PART 1*

*DETERMINATION OF DISABILITY*

...

10 *2. Long-term effects*

*(1) The effect of an impairment is long-term if –*

*(a) it has lasted 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*

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

*Progressive Conditions*

*Schedule 1 paragraph 8;*

20 *(1) This paragraph applies to a person (P) if-*

*(a) P has a progressive condition,*

*(b) as a result of that condition P has an impairment which has (or had) an effect on P's ability to carry out day-to-day activities, but*

*(c) the effect is not ( or was not) a substantial adverse effect.*

25 *(2) P is to be taken as to have an impairment which has a substantial adverse effect if the condition is likely to result in P having such an impairment.*

...

*PART 2*

*The Guidance*

*Impairment*

*An impairment can be physical or mental (A.3)*

*It is to be determined by reference to the effect that an impairment has on that person's abilities to carry out normal day-to-day activities (A.4, with original emphasis)*

*Substantial Adverse effect*

- More than minor or trivial (B.1)*
- Includes the time taken for, and way in which, an activity is carried out (B.2 & B.3)*
- The cumulative effect of impairments should be considered (B.4)*
- Account should be taken of how far a person can reasonably be expected to modify his behaviour – such as coping or avoiding strategies (B.7, with original emphasis)*

*It is important to consider the things a person cannot do, or only with difficulty (B.9)*

*Long term*

- Last or likely to last 12 months having regard to the cumulative effect (See C.2)*
- A person may still satisfy the long-term element of the definition even if the effect is not the same throughout the period (See C.7)*
- A person even if recovered to no longer be adversely affected may qualify as having been a disabled person for a relevant period of time if the effects lasted 12 months or more after the first occurrence, or if a recurrence happened or continued until more than 12 months after the first occurrence (A.16 and C.12)*

*Normal Day to Day Activities*

- Includes shopping, walking, driving and taking part in social activities (D.3)*
- Also includes standing up in the workplace, lifting, carrying everyday objects such as a vacuum cleaner (D.10)*
- Includes indirect effects of pain or fatigue restricting the way that it is carried out because of experiencing pain in doing so (D22)*
- Difficulty going up or down steps, stairs or gradients because movements are painful, fatiguing or restricted in some way (Appendix to Guidance).*

*Paragraph B19*

*A person who has a progressive condition, will be treated as having an impairment which has a substantial adverse effect from the moment any impairment resulting from that condition first has some adverse effect on his or her ability to carry out normal day-to-day activities, provided that in the future the effect is likely to become substantial....*

B22

*As set out in paragraph B19, in order for the special provisions to apply, there needs to be some adverse effect on the person's ability to carry out normal day-to-day activities. It does not have to be a substantial adverse effect....*

10 84. The respondents accept that the claimant suffers from an impairment which is arthritis in his left hip, and that this is a progressive condition. The respondent's argument is that during the relevant time, the effect of that impairment was not such that it could be considered as an adverse effect.

15 85. Mr Newman submitted that the claimant had not provided any medical evidence to support the position that he was disabled in July 2017, save the Radiology Report which did not address the relevant questions, save confirming diagnosis. He submitted the claimant's evidence was vague as to the effects of this condition 2017/18, and to the extent that there was such evidence it did not support the conclusion that it had an adverse effect upon  
20 the claimant's ability to carry out day-to-day activities. He submitted that the majority of the claimant's evidence about the effective of his impairment related to his condition now, and was imprecise as to when that adverse effect commenced. He referred to the terms of the OH report, which he submitted did not support the conclusion that there was any effect on day to day function.  
25 Mr Newman submitted that the claimant's evidence in chief had to be considered in context, and while the claimant is restricted now, the starting point for any adverse effect on any day to day activities must be after July 2018.

86. The Tribunal was satisfied that the claimant has suffered from arthritis in his left hip since from July 2017 and that arthritis is a progressive condition.

30 87. It therefore considered the effect of Schedule 1 paragraph (8) (1) and (2). The effect of that section is that when a person with a progressive condition experiences symptoms which have an effect on their normal day-to-day activities, they will be taken as having a disability. The effect does not need to be substantial. In order to benefit from the protection afforded by this section  
35 however, the claimant must show that his impairment has an adverse effect on his ability to carry out normal day-to-day activities, and that it is likely to have a substantial adverse effect in the future. The claimant still needs to demonstrate that the effect of the impairment is long-term.

88. In considering whether the claimant had established that this impairment had an adverse effect in 2017 or 2018, the tribunal reminded itself that it was not determining whether the effect of the claimant's impairment in 2017/18 was a substantial adverse effect on his ability to carry out day-to-day activities, but only if there was an adverse effect.

89. The Tribunal was assisted in this task by the examples given at B20 of the Guidance. Those include the following;

*A young boy aged 8, has been experiencing some muscle cramp and some weakness. The effects are quite minor at present but he has been diagnosed as having muscular dystrophy. Eventually it is expected that the resulting muscle weakness will cause substantial adverse affect on his ability to walk, run and climb stairs. Although there is no substantial adverse effect at present, muscular dystrophy is a progressive condition and this child will still be entitled to the protection of the Act if it can be shown that the effects are likely to become substantial.*

90. The Tribunal was satisfied that by July 2017 the claimant was experiencing difficulty in stretching down to pick things up and on bending down to put on his socks and to tie his bootlaces. He gave clear evidence as to this in evidence in chief. Dressing is a normal day to day activity (D 3 of the Guidance). Applying the Guidance the Tribunal was also satisfied that experiencing difficulty and discomfort in undertaking these tasks was sufficient to constitute an adverse effect on the ability to carry out day to day activities.

91. In addition, the Tribunal was satisfied that by 2018 the claimant could not walk for more than 60 minutes, and that he experienced pain on walking, standing, and driving which are day to day activities (D3).

92. Again, applying the Guidance, the Tribunal was satisfied that experiencing some level of pain or discomfort in undertaking these tasks and some limitation in walking, was sufficient to constitute an adverse effect on the ability to carry out day to day activities.

93. Having reached that conclusion, the Tribunal went on to consider whether it had been shown that the effect of the claimant's condition was likely to have a substantial adverse effect on his ability to carry out normal day-to-day activities.

94. It was relevant in this regard for the Tribunal to take into account the claimant's evidence as to the effect of his impairment now.

95. The claimant has now been referred for a hip replacement operation. The Tribunal was satisfied that the claimant cannot walk for longer than 20 minutes, cannot stand for longer than 10 minutes as a result of his condition, and that he cannot walk at all on uneven ground. Standing, and walking are day-to-day



activities, and the Tribunal was satisfied that claimant's limitation in undertaking these activities meet the test of substantial adverse effect (in that they are more than trivial or minor), on his ability to carry out day-to-day activities. The evidence therefore demonstrated that the effect of the claimant's condition has become a substantial adverse effect.

96. Lastly, the claimant the Tribunal was satisfied that the claimant shown that the effects of his impairment were with long-term. The claimant was diagnosed in July 2017, when he was suffering an adverse effect, and continues to suffer a substantial adverse effect as a result of his impairment and therefore the effects of his impairment meet the definition of long term.

97. The Tribunal was therefore satisfied the claimant was a disabled in terms of Section 6 of the Equality act.

### Time Bar

98. Section 123 (1) of the EQA provides;

(1) ... *Proceedings on that complaint under section 20 may not be brought after the end of*

(a) *the period of three months starting with the date of the act to which the complaint relates, or*

(b) *such other period as the employment Tribunal thinks just and equitable.*

(2) ...

(3) *For the purposes of this section –*

(a) *conduct extending the period shall be treated as done at the end of that period*

(b) *failure to do something is to be treated as a occurring when the person in question decided on it.*

(4) *In the absence of evidence to the contrary the person (P) is to be taken to decide on a failure to do something-*

(a) *when P does an act inconsistent with doing it, or*

(b) *if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

99. The Tribunal has the broad discretion to extend time to consider a complaint of discrimination on the grounds that it is just and equitable to do so. The Tribunal reminded itself that the exercise of that discretion is the exception, not the rule, and that the burden of proof rests with the claimant to satisfy the Tribunal should exercise its discretion to allow his claim to proceed.
100. As indicated above, the claimant identifies complaints of disability discrimination over a number of documents.
101. The starting point for considering the issue of time bar is to identify the date upon which the alleged act of discrimination occurred, or in this instance are said to have occurred. The Tribunal was assisted in this regard by the schedule produced by the claimant further to a direction issued by employment Judge Eccles.
102. The schedule sets out a number of alleged acts commencing on 31 July 2017. One further act is alleged in November 2017, and the remainder of the acts (bar two) are alleged to have taken place in 2018 with last act said to have taken place on 24 October 2018 .
103. The other than two acts are alleged are is said to have taken place on 7 February 2020, and 28 January 2020. Both these alleged acts postdate the claimant lodging of his complaint to the Employment Tribunal in December 2019, and therefore neither of these acts are relevant for the purposes extending the time limit under section 123 (3) for the purposes of section 123 (1).
104. On the basis of the information provided, the last relevant alleged act of discrimination is said to have taken place on 24 October 2018. The claim was presented on 16 December 2019, and therefore the claim as a whole is out of time.
105. In considering whether time should be extended under section 123 (2) the tribunal has regard to the prejudice each party would suffer a decision if the tribunal allows the claim or refuses it, and had regard to the circumstances of this case, including the length of the delay and the reasons for it; the extent to which the cogency of the evidence is likely to be affected by the delay, the promptness with which the claimant acted once the he became aware of facts giving rise to the claim, and the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.
106. The Tribunal began by considering the length of the delay, which is significant. The claim was lodged with the tribunal on 16 December 2019, and adding the extension to the time limit provided by the ACAS certificate, any alleged act

which took place before 5 July 2019 is lodged out of time. The last act of discrimination is alleged to have taken place on 24 October 2018, and therefore the claim is some 8 months out of time.

5 107. The Tribunal considered the reason for the delay. The claimant's primary position appears to be that he explains the delay on the basis there was a continuing act discrimination, which arises from the information he recovered from his SAR, and therefore his claim is in time. For the reasons given above the Tribunal concluded there is no continuing act of discrimination upon which the claimant can rely in connection with this SAR request. Both of the alleged  
10 acts of discrimination which are said to arise out of the SAR request post-date the presentation of the ET1

108. The claimant also submits that the reason he had not lodged a claim was that he had been told the welfare meeting would be continued; further he felt under very considerable stress in 2018 because of his relationship with his line  
15 manager, and the respondent's failure to deal with his complaints and to deal with matters at the Welfare Meeting. The Tribunal attached a degree of weight to these factors, however it did not consider that they were of themselves sufficient to justify an extension of the time limit.

109. The Tribunal then considered the promptness with which the claimant acted  
20 once he was aware of the facts which give rise to the claim.

110. Mr Newman correctly points out that the claimant would have been aware in 2017 that the respondents, in his view, were not entering into a dialogue with them about his disability. He would also been aware in 2017/18, that the respondent had not implemented what he considered to be a reasonable  
25 adjustment.

111. Mr Newman submits that the claimant's evidence in relation to the SAR and the knowledge that it provided to him was not at all compelling. He submitted that the claimant received some emails in August 2019 which showed that the respondent sought clarity from its OH provider, but that that does not give rise  
30 to any knowledge of discrimination or discrimination at all. He submitted that the documents the claimant referred to as evidence add nothing to the complaints of discrimination by the claimant.

112. The claimant accepted he was aware that the respondents had not implemented what he considered was a reasonable adjustment in 2018, but  
35 he considered when he received a copy of Mrs Santos's email that she had deliberately provided OH with incorrect information with a view to avoiding implementing an adjustment. The first time he became aware of this was in August 2019.

113. Leaving aside the merits of such a position, it could not be said that there was  
40 no link between the content of this email and the claimant's belief that the

respondents had acted in a discriminatory manner in failing to implement reasonable adjustments.

5 114. Again, leaving aside the merits of the claimant's position, the notes of the welfare meeting which took place on 24 October 2018, which the claimant received in his SAR did not accord with his recollection of what had taken place. The claimant believed the company intended to continue a discussion with him, and the notes inaccurately recorded that the matter had been resolved. This information again cannot be said to be unconnected to the claimant's complaint that the respondents discriminated against by failing to enter into a dialogue with him.

15 115. Albeit the claimant's accepted that he was aware that the respondents did not enter into a dialogue with him in 2017, and did not make adjustments which he considered reasonable in 2018, the fact that the claimant became aware of information connected to his complaints of discrimination in August 2019, and which he considered disclosed that there had been discrimination on the part of the respondents, was a matter to which the Tribunal attached some weight.

20 116. There was no evidence that the claimant had obtained legal advice about his position, however the Tribunal was satisfied that the claimant was aware of the existence of Employment Tribunals and their function, including that they were able to deal with complaints of discrimination, and that he had a previous experience of dealing with the Employment Tribunal.

25 117. The Tribunal considered the degree to which the cogency of the evidence was likely to be effected by the delay. The delay in presentation of the claim is in the order of 8 months. Such a delay may impact on the cogency of the evidence to some degree, however the effect of the delay could be offset by the contemporaneous records kept, and which the Tribunal were taken to, such as the emails to OH and the minutes of the Welfare meeting.

30 118. Lastly, the Tribunal considered the prejudice which each party would suffer if the Tribunal granted or refused the application. If the application is refused, the claimant will be denied the right to pursue a complaint of disability discrimination. The Tribunal took into account that the claimant already has before the Tribunal a complaint of constructive unfair dismissal, however being prevented from pursuing a discrimination claim, which if successful entitles the claimant to compensation which is not capped unlike his unfair dismissal claim, does represents significant prejudice to the claimant.

119. If the claim is allowed, the respondents will have to face a complaint of discrimination which has been lodged out of time. It however remains open to them to defend those proceedings.

40 120. Mr Newman submits that the claimant is unreasonably seeking to complicate what is essentially a case which is at its heart about matters unrelated to

discrimination (i.e. the relationship between the claimant, Brian Shaw, a driver, and his manager, Ms Deans). The merits of the claimant's discrimination claim have however not been tested at this PH and the Tribunal was unable to conclude that there was an unreasonable attempt on the part of the claimant to complicate his case by introducing a disability discrimination claim.

121. The respondents are already facing a constructive unfair dismissal claim, which will proceed to a hearing, and it was not suggested that the inclusion of the disability discrimination claim would add significantly to the witnesses who will have be called to that hearing, and this is a factor which will mitigate the prejudice the respondents are likely to suffer if the claim is allowed,

122. Taking all the relevant matters into account and balancing all of these factors,  
the ribunal was satisfied that it should exercise its discretion to allow the  
claimant's disability discrimination claim to proceed on the grounds that it was  
5 just and equitable to do so.

10 Employment Judge: L Doherty  
Date of Judgment: 22 March 2021  
Entered in register: 13 May 2021  
and copied to parties