



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4103766/2020 (V)**

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**Open Preliminary Hearing Held by Cloud Based Video Platform (CVP) on  
14 June 2021**

**Employment Judge Jones**

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**Mr S Clelland**

**Claimant**

**Represented by:**

**Mr J Anderson of  
Counsel, instructed by  
Unionline solicitors**

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**Yodel Delivery Network Ltd**

**Respondent**

**Represented by:**

**Mr R Dunn of Counsel,  
instructed by  
DAC Beechcroft  
solicitors**

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**JUDGMENT**

1. It is the judgment of the Tribunal that the claimant was at all material times a disabled person for the purposes of section 6 of Equality Act 2010.
2. The respondent's applications for strike out and/or deposit orders fail.
3. The case will be listed for a final hearing on the merits before a full Employment Tribunal by way of CVP to consider the claimant's claims of unfair dismissal and disability discrimination.

**Introduction**

1. An Open Preliminary hearing took place in this case to determine whether the claimant was a disabled person for the purposes of the Equality Act. In addition, the respondent sought orders in relation to strike out and/or deposit in terms of Rules 37 and 39 Schedule 1 of the Employment Tribunal (Constitution and Practice and Procedure) 2013.  
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2. At the commencement of the hearing counsel for the respondent indicated that the issues to be determined had been somewhat narrowed. In relation to the question of the claimant's disability status. While the respondent accepted now that the claimant suffered from a physical condition which was long term it was not accepted that this had a substantial adverse impact on his ability to carry out normal day to day activities. It was also agreed between the parties that the material time for consideration as to whether the claimant was a disabled person was from March 2019 through to the outcome of the claimant's appeal against his dismissal on 21<sup>st</sup> April 2020.  
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3. Further while the respondent was of the view that there were time bar issues arising from the claimant's claims of disability discrimination, it was recognised that these would be determined at a final hearing.
4. The Tribunal heard evidence from the claimant. His evidence in chief consisted of his disability impact statement which had been produced and was taken as read together with some additional questions. He was also cross examined. The Tribunal found him a credible and reliable witness albeit he could be a bit vague on occasion.  
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5. A bundle of documents was produced and both parties helpfully submitted skeleton arguments although the Tribunal only received all documentation on the morning of the hearing.  
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**Findings in fact**

6. Having listened to the evidence and considered the documents to which reference was made, the Tribunal made the following finds in fact:

7. The claimant worked for the respondent from June 1992 until his dismissal on 3<sup>rd</sup> March 2020. He worked in the warehouse moving items from a conveyor belt and stacking them in cages for delivery.
8. The claimant has always been, in his words 'big', but carried out his duties despite being as he said 'morbidly obese' for some time.
9. The claimant began suffering from swelling in his legs in around 2015, although he did not initially seek medical assistance. The swelling caused his legs to feel heavy and made walking increasingly difficult.
10. The claimant was also thought to be suffering from sleep apnoea around the same time.
11. The claimant was diagnosed as suffering from odema and prescribed medication which was water tablets. He has taken these for a number of years other than a break for around 7 months in 2017. He was also prescribed surgical stockings but did not wear these for any length of time on a consistent basis as he found them too restrictive.
12. The claimant also had issues with ingrown toenails and had operations to remove these in August 2019 and then around 8 weeks later. This condition caused the claimant pain and exacerbated the claimant's difficulties in walking.
13. Since he has developed odema in his legs, the claimant walks much less than he used to and it takes him longer to walk the same distance, such as to the bus stop near his house and his local football club where he volunteers.
14. The claimant used to walk around 3 miles over a shift at work which lasted from 1.42am to 10.30am in carrying out his duties. He knew this from an app on his phone.
15. Other than work, the claimant has rarely gone out since he has suffered problems with his legs. He visits his grandchildren who stay across the road from him and goes to a local football ground where he is involved in the local team. This is around % to % mile away from his home. He generally gets lifts or taxis there.

16. Since the operations on his toenails, he has walked either there or back from the local football ground, which has been less painful for him than before the operation but has still been a challenge.

17. The claimant arranges for grocery shopping to be delivered or takes taxis to and from the local supermarket.

### **Issues to determine**

18. Was the claimant a disabled person for the purposes of section 6 of the Equality Act 2010 during the material period?

19. Does the claimant's claim of unfair dismissal have little prospects of success, such that a deposit order ought to be made?

20. Do the claimant's claims in terms of section 13 of the Equality Act have little prospects of success such that a deposit order ought to be made?

21. Does the claimant's claim under section 15 of the Equality Act have little or no prospects of success such that it should be struck out or that a deposit order ought to be made?

### **Relevant law**

#### **Disability**

22. Section 6 Equality Act 2010 provides that a person has a disability if they have a physical or mental impairment, and the impairment has a substantial and long term adverse effect on their ability to carry out normal day to day activities. Schedule 1 of the Equality Act also sets out matters relevant for the purposes of determining whether someone is disabled for the purposes of section 6. In addition, the EHRC Statutory Guidance on the definition of disability was set out in 2011.

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#### **Strike out/deposit order**

23. Rule 37 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 provide that a Tribunal may strike out all or part of a claim

or response for various grounds including that it has no reasonable prospects of success.

24. Rule 39 provides that where a Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospects of success, it may make an order requiring a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

### Submissions

25. Submissions were made on behalf of the claimant in relation to the disability status point, Counsel adopted his written submissions and made some additional comments. In particular, it was said that the respondent's approach to the question of causation (in relation to the claimant's section 15 claim) was wrong in law. It was also said that it was not open to the respondent to argue that the claimant's ingrown toenail condition was not caused by the claimant's odema, as this was not foreshadowed in the respondent's pleadings and would require medical evidence.
26. It was also said that even if the claimant's condition had no longer met the requirements of section 6 after he had undergone surgery on his toes, that the Tribunal should consider his condition in the context of a recurring condition.
27. Counsel for the respondent then adopted his written submissions. He also made reference to what constituted normal day to day activities, and by reference to the Statutory Code indicated that walking a mile was a normal day to day activity, but that the claimant had made reference in his disability impact statement to longer distances'. The Tribunal was invited to find that the claimant had difficulty only with longer distances. In addition, the Tribunal was invited to make a finding that it was the claimant's difficulties with his toenails which were causing him particular problems with walking and that the Tribunal should accept that as it had not been argued that this was a disability of itself, then the Tribunal could make a finding that it was the claimant's toenail condition which 'tipped him over\* the bar of what might amount to a disability. It was said that the claimant should have foreseen

such an argument and that it was not for the respondent to flag issues of difficulty for a claimant in establishing whether they met the requirements of section 6.

- 5 28. The respondent then went on to make submissions on the strike out and deposit order arguments.
29. It was now accepted on behalf of the respondent that it could not be said that the claimant's unfair dismissal claim had no prospects of success. However, the respondent did seek to argue, although without particular enthusiasm, that it could be said that the claimant's claim of unfair dismissal had little  
10 prospects of success and that therefore a deposit order might be appropriate.
30. The respondent was not seeking a strike out order in relation to the claimant's claims under section 13 of the Equality Act as it was accepted that it was arguable on the facts that the claimant had been subject to direct discrimination. However, it was said that the argument that reasonable  
15 adjustments which had been made for the claimant were then removed because of his disability was very unlikely.
31. The respondent did request that the claimant's claims under section 15 of the Equality Act be struck out. An alternative argument was made seeking a  
20 deposit order. It was said that while it was accepted that the test for establishing whether something had arisen from the claimant's disability was a loose test, particularly following the judgment of the EAT in Sheikholeslami v University of Edinburgh [2018] IRLR 1090, it was not without limit. It was said that each step which separated the alleged act of discrimination and the disability itself, made it less likely that that the alleged act of discrimination  
25 arose in consequence of a disability. On that basis, the claimant's claim that his dismissal arose in consequence of his disability had either no or little prospects of success.
32. In response to the respondent's arguments on strike out and deposit orders, the Tribunal was reminded by Counsel for the claimant that there was a  
30 difference between no and little reasonable prospects of success.

33. In terms of the claimant's claim under section 13, it was said that the respondent was not a benign entity with reasonable adjustments in place which were then removed. Rather, this was a nuanced unique set of acts and the respondent's characterisation of the position was an oversimplification. It was said the facts of this case required to be established at a final hearing.
34. In relation to the claimant's claim of unfair dismissal, it was highlighted that the claimant was not simply arguing that his dismissal was procedurally unfair but that his dismissal was tied up in the allegations of disability discrimination. As such, it was not appropriate to make a deposit order.
35. Turning then to the question of the claimant's section 15 claim, it was said that the issue of causation was binary and that therefore the remoteness of act of discrimination from the claimant's disability did not fall to be considered. Rather, particularly on the basis of Sheikholeslami v University of Edinburgh [2018] IRLR 1090, this was a paradigm case of discrimination arising from a disability.
36. Finally it was said on behalf of the claimant that the Tribunal did not have to enquire into the claimant's ability to pay any deposit as he was being supported by his trade union which would be responsible for making any payment on his behalf.

## Discussion and decision

### Disability

37. The respondent did not dispute that the claimant had a physical impairment, being odema and accepted that this was a long-term impairment. Where the parties disagreed was whether the condition had substantial adverse effect on the claimant's ability to perform normal day to day activities. The particular activities highlighted by the claimant as being adversely impacted upon by his condition were walking and cutting the grass. The claimant also said that he took taxis to and from the supermarket when doing grocery shopping.
38. Whether a physical impairment has a substantial adverse effect is a question of fact for the Tribunal to determine.

39. Substantial is defined in s.212(1) of the Equality Act as meaning 'more than minor or trivial'. In determining whether an adverse effect is substantial, the tribunal must compare the claimant's ability to carry out normal day-to-day activities *with the ability he or she would have if not impaired*.
- 5 40. The claimant gave evidence about how he had worked in the same role without difficulty for many years before developing odema which caused him difficulties. He also said that as the odema got worse it was taking him longer and longer to walk short distances, in particular to the bus stop. While it was accepted by him that during a shift he would walk around 3 miles, his shift  
10 lasted for a long period. The claimant also said that he rarely went out anymore and got taxis when he did.
41. The Tribunal accepted the claimant's evidence and while he was challenged on the content of his disability impact statement and claim form referring to walking long distances, rather than short distances, there had been no  
15 specification (or indeed request for specification) as to what was meant by long distances. It was said by the respondent that this would be, following guidance, more than 1 mile and therefore not a day to day activity. The respondent also appeared to suggest that the claimant's weight might have been a factor in the limitations he was suffering. The Tribunal was of the view  
20 that this was an irrelevant consideration. The claimant said that he had always been as he put it 'a big man' but that it was not until he started suffering from odema that his difficulties with walking developed.
42. Further, while the Tribunal accepted that the claimant's ingrown toenails would undoubtedly have exacerbated the claimant's difficulties in that it  
25 caused him pain, the Tribunal was of the view that as the claimant has now had operations for this condition and still suffers from difficulties, the issue of his ingrown toenails was not relevant to the determination of whether the claimant was a disabled person. It was therefore not necessary to consider the claimant's alternative argument that the ingrown toenails were caused by  
30 the claimant's odema. In any event there was no medical information available on what had caused the claimant's in grown toenails.



43. The Tribunal accepted that the claimant could not walk 1 mile without considerable difficulty. He said that when he walked to the football ground where he carried out voluntary work, which was between % and % mile away from his home, he had to rest on the way and now mainly got a lift or taxis.
- 5 44. The Tribunal also considered the question of "deduced effects" were the claimant no longer to take the medication he had been prescribed for his disability. The Tribunal was satisfied that the effect of the medication was minor and did not impact upon the Tribunal view of whether the claimant was a disabled person.
- 10 45. In these circumstances, the Tribunal was of the view that the claimant was a disabled person at all material times for the purposes of his claim by virtue of suffering from odema in his legs.
46. The Tribunal then went on to consider the orders sought by the respondent in respect of Rules 37 and 39.
- 15 47. In the first instance, the Tribunal considered the application for strike out, which at the time of the hearing, had been limited to the claimant's claim under section 15. Parties accepted that there were limited circumstances in which it would be appropriate for a claim of discrimination to be struck out without hearing evidence. Reference was made on behalf of the claimant to
- 20 North Glamorgan NHS Trust v Ezsias [2007] IRLR 603 is the leading authority on the point. Maurice Kay LJ held

*It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the*

25 *Employment Tribunal to decide otherwise. In essence that is what Elias J held. I do not consider that he put an unwarranted gloss on the words "no reasonable prospect of success". It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute.*

30 *An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed*

*contemporaneous documentation. The present case does not approach that level.* ” (para 29)

48. The claimant's claim under section 15 is that his dismissal was something  
5 arising from his disability. It was said on behalf of the respondent that as the  
claimant had been off work with stress for some time and it was that absence  
(which was not caused by his disability) on which the respondent relied when  
dismissing the claimant, that there was no prospect of the claimant  
demonstrating that dismissal had arisen from his disability. The Tribunal  
10 disagreed with that proposition. Evidence will require to be led about what  
caused the claimant's absence from work and the reasons for dismissal,  
together with evidence about the procedures which were followed. Therefore,  
it would not be appropriate to dismiss this claim without the Tribunal having  
the opportunity to hear the evidence on these matters. It was clear that there  
15 were factual issues in dispute which required to be determined at a final  
hearing.

49. The Tribunal then considered the respondent's application for a deposit order  
in relation to the claimant's claims of unfair dismissal and section 13 and 15  
of the Equality Act. The Tribunal was of the view that it could not be said that  
20 there were little prospects of success in these claims. It is clear that the  
various claims are interrelated, and that evidence will require to be led by  
both parties. Without hearing that evidence, the Tribunal cannot say that  
there is little prospect of success of any of these claims. In the Tribunal's  
view, they are all on the face of it statable and as such it is not appropriate to  
25 make an order requiring a deposit to continue with these claims.

### **Directions**

50. The case should now be listed for a final hearing before a full Tribunal.  
30 Parties were content to conduct proceedings by CVP. The Tribunal was not  
of the view that this was a case where written witness statements would be

appropriate. Standard Orders should therefore be issued for final preparations for the hearing.

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Employment Judge: A Jones  
Date of Judgment: 25 June 2021  
Entered in register: 2 July 2021  
and copied to parties