



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4103049/2019

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Held in Glasgow on 18, 19, 20, 21 (deliberation day) & 22 November 2019

Employment Judge: D Hoey
Members: Mr MacFarlane and Mr Muir

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Mr S Whitton

**Claimant
Represented by:
Mr T Pacey –
Counsel**

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Construction Labour Supplies Limited

**Respondent
Represented by:
Ms J Barnett -
Consultant**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

- 1 The respondent's designation is changed, of consent, to Construction Labour
25 Supplies Limited.
- 2 The claimant was at the relevant times a disabled person in terms of section
6 of the Equality Act 2010.
- 3 Upon the respondent admitting the wrongful dismissal claim, damages are
payable by consent in the net sum of £900, and that the respondent will pay
30 by consent the net sum of £201.13 in respect of the unlawful deduction from
wages claim.
- 4 The remaining claims are not well founded and are dismissed.

E.T. Z4 (WR)

REASONS

Introduction

- 1 In a claim form presented on 13 March 2019 the claimant claimed indirect/direct discrimination on the grounds of disability, discrimination
5 because of something arising from disability, wrongful dismissal and unlawful deduction of wages. An earlier preliminary hearing had focused the issues in dispute and the parties had worked together to identify the issues that required to be determined.
- 2 The case called for a 5 day Hearing. The parties were represented and had
10 agreed a bundle of 181 pages of productions together with 521 pages of medical records.
- 3 This Judgment represents the unanimous Judgment of the three members of the Tribunal.
- 4 I began the Hearing by reminding the parties of the importance of the
15 overriding objective as set out in terms of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and of the need to work together to secure the overriding objective and of the need to deal with matters justly and fairly with due regard to cost and proportionality.
- 5 The parties agreed that the correct designation of the respondent is that as
20 set out above and the designation is changed accordingly.
- 6 As the Hearing progressed, the claimant confirmed which claims were being progressed, which had narrowed from those set out in the pleadings and before the case management preliminary hearing.
- 7 The Tribunal was able to work with the parties to ensure that evidence was
25 timetabled to ensure that the best use of the time allocated was achieved and that a fair Hearing could take place.

Issues

8 The issues to be determined in this case were discussed with the parties and confirmed by the parties when they gave their submissions. The issues to be determined by the Tribunal are as follows:

- 5 a. **Wrongful dismissal:** This claim had been resolved of consent.
- b. **Disability status:** the issue was whether or not the claimant was a disabled person in terms of section 6 of the Equality Act 2010 at the relevant time, between March to November 2018. The respondent accepted that the claimant had three impairments at the relevant time, namely a heart condition, superior quadrantanopia and fifth disease. It was also accepted by the respondent that the claimant had suffered from a serious stroke a number of years prior to commencing employment. The issue to be determined by the Tribunal was whether or not individually or combined the effect of these impairments was such as to amount to a disability under section 6 of the Equality Act 2010, namely, did the impairments individually or collectively have a substantial, long term and adverse effect upon the claimant's ability to carry out day to day activities.
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- c. **Direct disability discrimination** under section 13 of the Equality Act 2010: The claimant maintained that he was dismissed because of his disability. The question for the Tribunal was what the reason for the claimant's dismissal was and whether it was because of his alleged disability.
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- d. **Indirect disability discrimination** under section 19 of the Equality Act 2010: This was a claim that the parties and the Tribunal spent some time discussing. The key issue in this case was what the provision, criterion or practice (PCP) was that was relied upon by the claimant. Initially the claimant's position as set out in the case management discussion note and subsequently was that the PCP relied upon was the "requirement to do two jobs in one day". He argued that it was part of being part of the rapid response team and
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that it was “semi-regular”. Having heard evidence, at the submission stage in the Hearing, the claimant confirmed that the PCP in this case was in fact “a requirement on the part of the respondent that, on occasion, operatives complete two boiler installations within one day”.
5 The respondent denied such a PCP existed. The first issue under this claim for the Tribunal was therefore whether or not that PCP was in place. If so, the next issue was whether or not the claimant was put at a disadvantage by the application of that PCP and then whether or not disabled persons generally were placed at such a disadvantage. The
10 respondent did not seek to justify the treatment.

e. **Discrimination arising from disability** under section 15 of the Equality Act 2010: The claimant argued that he was treated unfavourably because of something arising in consequence of his disability. The “something” the claimant relies upon in this case was
15 the fact that he contends he was told to complete two boiler installations within the one day and that he was dismissed because he could not do so (which was something arising in consequence of his disability). The respondent did not seek to justify the treatment in question. The respondent argued that it did not know or could not
20 reasonably know that the claimant was a disabled person. The Tribunal therefore requires to determine what the “something” was, namely what was the reason for the claimant’s dismissal and whether the “something” was (objectively) something that arose in consequence of the disability and whether or not the respondent knew
25 or ought reasonably to have known of the claimant’s disability.

f. **Unlawful deduction of wages**: At the outset of the Hearing the claimant’s agent confirmed that the only claims being advanced under this head were in respect of hotel room fees, parts and a deduction
30 made by the respondent in respect of his wages. No other claims were proceeding and by submissions the parties had reached agreement such that a consent judgment could be issued.

9 The parties had agreed that liability would be determined at this Hearing and if necessary remedy would be determined thereafter.

Conduct of the Hearing

10 The Tribunal heard evidence from the claimant and a former colleague and a
5 medical expert in support of the claimant's position who had met with the
claimant and subsequently considered his medical notes which he said
supported his formal Opinion. The Tribunal also heard from the Dismissing
Officer following which the parties presented detailed submissions. The
Tribunal spent a day deliberating and then issued its oral judgment which set
10 out the main reasons for the decision. Written reasons were requested by the
claimant's agent.

Findings of fact

11 The Tribunal makes the following findings of fact following the evidence that
it heard and with reference to the productions to which the Tribunal's attention
15 was directed. The Tribunal makes its decision on the basis of the balance of
probabilities, that is to say, what it considered more likely than not to have
happened. The Tribunal only makes findings which it considers necessary to
determine the agreed issues and not in relation to all areas where there is a
conflict in evidence. Reference to page numbers is to the relevant page
20 numbers within the bundle.

Findings in relation to disability status

12 At the relevant time, namely from March to November 2018, the claimant
suffered from three impairments, namely a heart condition, superior
quadrantanopia (a loss of a quarter of the claimant's vision) and fifth disease
25 (a skin condition). It was also accepted by the respondent that the claimant
had suffered a serious stroke a number of years prior to commencement of
his employment.

13 While page 93 sets out the medication the claimant was taking, the evidence
presented to the Tribunal was on the basis of how the claimant presented at
30 the relevant time (with the benefit of medication). The Tribunal finds that the

claimant's impairment taken together did have an impact on the following seven activities which occurred throughout the period in question:-

- 5 (1) Short term memory function. The claimant would forget things. He suffered from short term memory loss, evidenced by him forgetting to pay bills and complete parts of his work, such as sealing pipes and flues.
- (2) Using a computer or i-pad. The claimant was unable to operate these items as a result of his impairment. This caused him frustration.
- 10 (3) Concentration and focus. The claimant struggled to concentrate and focus on day to day tasks which led to the claimant not completing work such as again forgetting to seal flues and pipes and having to be reminded to complete tasks.
- (4) Dropping things. The claimant would drop things he was holding in his hands, including tools, which happened fairly regularly.
- 15 (5) Socialising, having conversations and managing relationships. These were matters the claimant found difficult to sustain.
- (6) The ability to cook meals which often resulted in the claimant relying upon takeaways.
- 20 (7) Getting dressed. The claimant took an hour or so to get dressed as a result of his impairment.

14 The Tribunal considered carefully the evidence in relation to the suggestion that the claimant's intolerance and short temper arose as a result of his impairments. The Tribunal decided on the balance of probability that these issues did not stem from his impairments but arose as a consequence of the claimant's underlying personality.

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15 The claimant struggled to carry out the seven activities set out above more so than those who did not suffer from the impairments the claimant had.

16 The impairments and their effect are likely to last for the rest of the claimant's life and had lasted for twelve months by November 2018.

17 The impairment and effects as set out above would have been obvious to the respondent from the information available during the relevant time, namely
5 March to November 2018, and existed throughout that period.

Findings of fact in relation to the substantive claims

18 The respondent is an all trades company carrying out joinery work, electrical work, drainage work, gas central heating installation and repair, plumbing, pest control and roofing work. The respondent has 250 employees at two
10 separate sites.

19 The claimant was employed as a heating engineer. The claimant was employed from March 2018 until 28 November 2018. The recruitment form at page 176 described the claimant's rate of pay as "price work" which means he was paid a fixed rate per job with the specific jobs and rates set out at that
15 page. He would, on occasion, be paid an hourly rate too.

20 Upon employment on or around 23 March 2018 the claimant completed a specific detailed health questionnaire found at page 178. The claimant ticked the box to say that he had or has a visual defect as set out above, that he suffered a stroke, had heart disease (a leaking valve) and suffered from a
20 skin condition. He also ticked the box to say that he was or is a registered disabled person. The claimant also stated on that form that he saw his doctor every three months, was taking regular medication and had eyesight problems. That information was communicated to the respondent at its request on 23 March 2018.

25 21 The respondent knew of the impairments the claimant had as a consequence of the information asked of the claimant. The respondent made no attempts to seek any clarification in relation to the specific impairments the claimant had nor their effect on his ability to carry out day to day activities.

22 Had the respondent made reasonable enquiries in light of the information
30 available to it, the respondent would have found and understood that the

claimant was a disabled person as defined by the Equality Act 2010. It would have been obvious that the claimant's impairments affected his ability to carry out day to day activities in a more than minor or trivial way, that it was adverse and had lasted for at least 12 months (and would in all probability last for the remainder of the claimant's life).

The claimant's role

23 The claimant's role was to install and maintain gas appliances as directed by the respondent. This is an area that is heavily regulated by law, regulation and manufacturer's requirements. It is an essential part of the claimant's role that the claimant comply with the relevant requirements of the law, regulation and manufacturer's requirement given his work related to gas which gave rise to serious health and safety issues.

24 The respondent had a number of different contracts with different bodies including local authorities, commercial companies and individuals to whom the respondent had to deliver a high quality service and whose instructions the respondent had to follow.

25 The claimant was required to carry out such work as required by the respondent. The work required to be done by the claimant varied in complexity depending on the nature of the job in question. It could last potentially for a few minutes up to a number of days depending on the job.

26 The respondent encouraged the development of each staff member with dismissal being a last resort. Staff were given the opportunity to improve if their performance was found wanting

27 The respondent required to retain the trust and confidence in its staff given the nature of their role and their interface with the respondent's customers.

Issues regarding the claimant

28 Three specific issues arose during the claimant's employment with the respondent which led to his dismissal.

29 First, on or around March 2018, the claimant was “red carded” from a
customer’s site. This meant he was sent off site. It was because he had
narrowly missed live cables during the course of drilling works. A similar
5 incident had occurred the previous day or so which had been considered of
sufficient seriousness that a briefing had been given to all staff to ensure no
repetition. The respondent’s client required the respondent to take the
claimant off site.

30 On or around 19 September 2018, (which was discovered by one of the
respondent’s large customers having carried out an audit of the claimant’s
10 work) the claimant’s work had given rise to serious concerns in connection
with his workmanship. This was in respect of a specific job that he had carried
out. Seven specific items were identified which were potentially very serious
and could have resulted in breach of the law/manufacturer’s requirements.
This had been communicated to the respondent and claimant at the time. The
15 respondent later sought written confirmation but the issues had been raised
verbally at the time.

31 On or around 3 October 2018, the claimant having been moved again to
another contract, the respondent received another complaint about the
claimant. This complaint related to the claimant’s conduct on site in
20 connection with an alleged statement to a female apprentice electrician on
the client’s site. The respondent was again told that they required to move
the client from site immediately.

Rapid response team

32 The respondent asked the claimant to work as part of a team (the rapid
25 response team) to service a large client which would involve travelling to
England. The claimant and respondent agreed that the claimant would be
paid a daily rate for each day’s work. We did not accept the claimant’s
evidence that he would receive a weekly rate but preferred the evidence of
the respondent that the claimant would be paid £240 for each day that he
30 worked on this client’s work. The claimant had not been paid the rate he
said was agreed and we preferred the respondent’s evidence.

33 It was a matter of agreement between the claimant and respondent that the
claimant's witness did not hear what the claimant was told the rate would be.
Instead the claimant told his witness what the rate was. The claimant's
witness did not assist in determining what the respondent agreed with the
5 claimant.

34 The claimant expected to work five days a week which explained why he
believed he (and his witness) would earn £1200 per week, but the rate was
in fact a day rate. The respondent would cover accommodation and travel
costs via the van that was provided.

10 35 This arrangement was not exclusive and where work was not available for
this client, the claimant would carry out other work, predominately in Scotland,
at the rates agreed for that work.

Purchase of parts

15 36 The respondent also had a contract with most of the parts and material
suppliers in the industry throughout the UK such that it was not necessary for
the claimant to pay money himself for items required for the carry out of his
duties. The claimant could obtain a purchase order or contact his line
manager to ensure that any parts or materials needed could be collected
without the need to intromit with cash.

20 Jobs per day

37 The respondent did not apply any provision, criterion or practice whereby it
would, on occasion, require operatives to complete two or more boiler
installations within one day. We accepted the respondent's evidence in this
regard in preference to the claimant's evidence. The respondent would
25 provide each operative with jobs each day but there was no requirement or
expectation to complete such jobs and if it was not possible or likely to
complete such jobs, operatives would advise their line manager who would
ensure someone else completed the work. This was in fact the claimant's
position and was confirmed by the respondent's evidence.

38 We also note that the claimant's evidence was that when he said he was asked to work on 2 jobs on 26 November 2018, this was the first occasion the respondent had asked him to work on two jobs.

39 We find that it was the claimant's perception that he must take the jobs and
5 complete them. This was not what was asked of the claimant as he was not required to complete the jobs within the day. We find as a fact that the claimant was given 2 jobs, which he accepted. He was under no obligation to complete the jobs.

40 The respondent would routinely offer staff voluntary overtime if work required
10 to be done.

Events arising between 26 and 28 November 2018

41 On Monday 26 November 2018, the claimant attended work early in the morning and was given two jobs which he accepted without raising any issue. He attended the merchants to obtain the parts for the jobs and was delayed.
15 The parts were not ready. At around 11.30am the claimant called his line manager to advise that it was not now going to be possible for him to attend to the two jobs that he had been given because of the delays occasioned that day.

42 The respondent raised no issue with the claimant's decision, which was his
20 decision in the circumstances, and the respondent arranged for another operative to complete the work in question. The claimant was not required to complete the two jobs and the other job was passed to another operative with the claimant completing his first job by 6pm. That was the respondent's normal practice. The claimant acted appropriately by telling the respondent
25 he could not deal with both jobs, as did the respondent when they gave the work to another operative. The matter was resolved and the parties moved on.

43 There was no disagreement or concern raised by either party on 26 November 2018 when the discussion took place. The claimant's decision not
30 to take both jobs was accepted by the respondent without issue.

44 We accepted the respondent's evidence that there was never any issue with operatives advising the respondent jobs could not be carried out, in which case other staff would be found to complete the work, which failing the work would be relisted.

5 45 The reason why the claimant was unable to complete the two jobs on this date was due to the late start as a result of the delay in securing the correct parts for the jobs in question. (There was no connection with the claimant's impairments and the reason for not being able to work on both jobs).

46 The claimant was on leave the following day, Tuesday 27 November 2018.

10 47 On Wednesday 28 November 2018, upon attending the office early, the claimant approached the gas divisional manager who was his line manager's boss. The claimant had heard a rumour the previous evening that he was to be dismissed, albeit he did not know for what reason.

15 48 The claimant noticed that no jobs had been allocated to him for that date. The gas divisional manager told the claimant to await the arrival of his line manager so a discussion could take place. The claimant was angry and wanted an immediate answer.

20 49 The gas divisional manager intended to meet with the claimant and the claimant's line manager to explain the position. The gas divisional manager planned to arrange a formal meeting with the claimant in connection with the issues in question. The claimant was angry and following discussion he swore at the gas divisional manager and left.

50 The gas divisional manager tried to discuss matters with the claimant over the telephone but the claimant would not take the calls.

25 51 The gas divisional manager reflected upon matters following the events of the day. The gas divisional manager and the claimant's line manager had intended to explain to the claimant that they were proposing to dismiss him due to customer complaints and that a process would take place to discuss this.

The decision to dismiss

52 The gas divisional manager took advice from his HR department and took
account of (1) the fact that the claimant had less than two years' service and
(2) that the reason why the respondent was proposing to dismiss the claimant
5 was because of the customer complaints in relation to the claimant. In relation
to (2), the gas divisional manager decided that no explanation the claimant
could give would make any difference and therefore the gas divisional
manager decided not to seek to contact the claimant further and instead
summarily dismissed the claimant.

10 53 The respondent issued the claimant with a letter which states: "This letter is
to confirm your employment has been terminated with immediate effect. As
you have less than two years' service, we are entitled to dismiss you without
following a formal procedure. In view of the allegations against you, we do
not see the merit in taking you through a formal process that will inevitably
15 result in your termination as we are satisfied that there is no explanation that
can be provided by you that we would accept as satisfactory."

54 That letter was sent to the claimant by the gas divisional manager at 5.07pm
on 28 November 2018.

55 The decision to dismiss the claimant was taken by the gas divisional
20 manager. He took the decision to dismiss after attempting to contact the
claimant. The reason why the respondent decided to dismiss the claimant
was the combined effect of the three complaints from customers as set out
above. By 28 November 2018, the respondent had decided, upon reflection,
that it could no longer continue to employ the claimant given the complaints
25 that had been made to them given the impact upon their business and given
the nature of the clients in question.

56 The decision the respondent took to dismiss the claimant had no connection
with any impairment the claimant suffered, any consequence of any
impairment nor any alleged requirement to carry out two jobs on one day.

57 The Tribunal found the dismissing officer's evidence on this point to be
credible and reliable. We accepted the evidence that the respondent would
normally support and encourage operatives and we accepted the
respondent's evidence that they had taken time to consider whether or not to
5 proceed and decided in light of the issues that had occurred in the time that
had passed that, in the circumstances, summary dismissal of the claimant
would be appropriate, taking account of his length of service and the
complaints.

58 We find that the respondent initially proposed to go through a procedure but
10 that given the claimant had less than two years' service, given the complaints
had come from clients, and given the respondent had already moved the
claimant from a number of contracts at the clients' insistence, the respondent
decided that nothing the claimant would say would make the decision any
different and following a procedure would make no difference. In the
15 respondent's mind, dismissal was inevitable as a result of the three
complaints. The dismissing officer decided that no explanation the claimant
could offer would have made any difference to the outcome and that his
dismissal for those reasons would have been inevitable.

59 From the evidence the Tribunal heard, we concluded that the fact this
20 happened 2 days after the day the claimant advised the respondent he could
not deal with the 2 jobs was coincidental and had no bearing on his dismissal.

60 The respondent asked the claimant to return company property following the
discussion in the morning (after which the claimant left the office). The gas
divisional manager had been told by the claimant during that discussion that
25 he intended to raise a grievance. The gas divisional manager told the
claimant to send his grievance to the respondent.

61 The decision to dismiss the claimant was taken before the claimant sent his
grievance and had no bearing upon the decision to dismiss.

The law

30 62 Section 6 of the Equality Act 2010 ("the Act") states that:

“A person (P) has a disability 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 63 Paragraph 12 of Schedule 1 of the Act provides that when determining whether a person is disabled, the Tribunal “must take account of such guidance as it thinks is relevant.” The “Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability” (May 2011) (the “Guidance”) was issued
10 by the Secretary of State.

64 In **Goodwin v Patent Office** 1999 ICR 302, Morison J (President), provided some guidance on the proper approach for the Tribunal to adopt when applying the provisions of the (then) Disability Discrimination Act 1995. Morison J held that the following four questions should be answered (which
15 apply as much today for the Equality Act 2010 as it did then), in order:

- a. Did the claimant have a mental or physical impairment? (the ‘impairment condition’);
- b. Did the impairment affect the claimant’s ability to carry out normal day-to-day activities? (the ‘adverse effect condition’);
- 20 c. Was the adverse condition substantial? (the ‘substantial condition’);
- d. And was the adverse condition long term? (the ‘long-term condition’).

65 That case also contains a reminder that a purposive approach should be taken of the legislation in this area and that Tribunals should bear in mind that even although a claimant can carry out a task with difficulty, the relevant
25 effects can still be present. Persons with disabilities often downplay the effects of their impairments. Tribunals should also ensure they do not lose sight of the overall picture in making their assessment.

66 The Guidance gives indicators as to factors in respect of whether or not the effect was adverse. “Substantial” means more than minor or trivial.

67 In terms of the time the individual takes to carry out activities, the cumulative effect of the impairments is to be taken into account: paragraphs B2 to B5.

68 The Tribunal is required to concentrate on what the claimant cannot do or can only do with difficulty as compared to how an activity could be done if the individual was not impaired. The mere fact that the individual can do his job does not mean that he would not be disabled.

69 Long-term is defined in Schedule 1 as lasting for twelve months or likely to last the rest of the claimant's life. Normal day to day activities are given as examples in the Guidance.

10 70 The question is whether or not the claimant satisfies the definition as at the relevant date from the information known at the time.

71 In relation to direct discrimination, **section 13** of the Equality Act 2010 provides:

15 "A person (A) discriminates against another (B) if, because of the protected characteristic, A treats B less favourably than A treats or would treat others".

72 In determining whether the treatment was because of the protected characteristic, the Tribunal requires to look at the reason why the respondent acted– what is, consciously or subconsciously the reason. It is enough if the characteristic was the substantial or effective cause even if not the sole or intended cause.

73 **Section 15** of the Equality Act 2010 provides-

(1) A person (A) discriminates against a disabled person (B) if –

25 (a) A treats B less favourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

74 Paragraph 5.6 of the Equality and Human Rights Commission: Equality Act
2010 Code of Practice provides that when considering discrimination arising
from disability there is no need to compare a disabled person's treatment with
than of another person. It is only necessary to demonstrate that the
5 unfavourable treatment is because of something arising in consequence of
the disability.

75 In order for the claimant to succeed in his claims under section 15, the
following must be made out:

- a. there must be unfavourable treatment;
- 10 b. there must be something that arises in consequence of the claimant's
disability;
- c. the unfavourable treatment must be because of (i.e. caused by) the
something that arises in consequence of the disability;
- d. the alleged discriminator cannot show that the unfavourable treatment
15 is a proportionate means of achieving a legitimate aim

76 Useful guidance on the proper approach was provided by Mrs Justice Simler
in the well-known case of **Pnaiser v NHS England** [2016] IRLR, EAT:

“A Tribunal must first identify whether there was unfavourable treatment and
by whom: in other words, it must ask whether A treated B unfavourably in the
20 respects relied on by B. No question of comparison arises.

The Tribunal must determine what caused the impugned treatment, or what
was the reason for it. The focus at this stage is on the reason in the mind of
A. An examination of the conscious or unconscious thought processes of A
is likely to be required, just as it is in a direct discrimination case. Again, just
25 as there may be more than one reason or cause for impugned treatment in a
direct discrimination context, so too, there may be more than one reason in a
s.15 case. The “something” that causes the unfavourable treatment need not
be the main or sole reason, but must have at least a significant (or more than

trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.”

5 77 Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and the respondent's motive in acting as he or she did is simply irrelevant.

78 In relation to indirect discrimination, **section 19** of the Equality Act 2010 provides:

10 “(1) A person (A) discriminates against another person (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.

(2) For the purposes of subsection (1) a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B’s if

(a) A applies or would apply it to person with whom B does not share the characteristic,

15 (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts or would put B at that disadvantage, and

20 (d) A cannot show it to be a proportionate means of achieving a legitimate aim.”

79 Given the unlawful deduction claims were dealt with of consent, we do not need to set out the law under this head.

80 We also refer to the burden of proof provisions found at section 136 of the Equality Act 2010 in the following terms:

25 “(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

81 In the well-known authorities of **Igen v Wong [2005] IRLR 258** and
5 **Madarassy v Nomura [2007] IRLR 246** the Court of Appeal described a two
stage test arising under the equivalent burden of proof provisions in the
former anti-discrimination legislation. In **Hewage v Grampian Health Board**
[2012] IRLR 870 at paragraph 32 of its judgment, the Supreme Court said
this:

10 “.....it is important not to make too much of the role of the burden of proof
provisions. They will require careful attention where there is room for doubt
as to the facts necessary to establish discrimination. But they have nothing
to offer where the Tribunal is in a position to make positive findings on the
evidence one way or the other.”

15 82 In the present case the Tribunal has found itself able to make positive findings
on the evidence in the way envisaged by the Supreme Court in **Hewage**.

Claimant's submissions

83 Counsel emphasised that the Tribunal's findings of fact are crucial for this
particular claim. The burden of proof rules may also be relevant. The claimant
did receive unfavourable treatment: he was dismissed. The claimant argues
20 this arose as a result of his disability.

84 Knowledge is crucial and the onus is on the respondent to show it did not
know and could not reasonably have known of the claimant's disability. Page
176 shows the respondent knew as much as it needed to. The claimant had
ticked to say he was registered as disabled person. Any reasonable employer
25 would enquire as to the position and conclude the claimant was disabled.

85 The respondent ought to have taken action to consider the position.

86 The claimant maintains that he was asked to do 2 jobs on 26 November and
was unable to do so. His evidence was that this was due to his disability and

being unable to work. His disability affected his work rate. The dismissing manager must be shown to have dismissed the claimant for that reason.

87 Counsel argued that there was a *prima facie* case that the claimant had been
5 treated unfavourably because of something arising in consequence of his
disability which transfers the burden to the respondent. The respondent had
set out the 3 reasons why it says the claimant was dismissed.

88 Counsel urged the Tribunal to look at the case the respondent had run and
find that it was lacking in credibility. He urged the Tribunal to find that the only
credible explanation given the chronology and how the facts unfolded was
10 that the claimant was dismissed because he was unable complete 2 jobs.

89 Counsel noted the last act relied upon by the respondent was at the end of
September or early October. That was some time before the dismissal. The
alleged reason could not be the “trigger” for the dismissal. The respondent
has therefore failed to discharge the burden of proof. The only trigger for the
15 dismissal was therefore what happened on 26 November.

90 Counsel for the claimant argued that the respondent’s evidence was lacking
in credibility. There was a lack of evidence from the respondent as to
warnings, performance management or threats of dismissal. Yet the
allegations gave rise to serious consequences. There was no formal
20 investigation and references to historic concerns were obtained *ex post facto*
to justify the dismissal which arose because of events on 26 November and
the claimant’s inability to complete 2 jobs.

91 Counsel argued that it was also important to note the dismissal letter did not
give any reasons or set out the allegations. No disciplinary meeting took
25 place. The respondent did not provide details of the allegations.

92 Counsel accepted that the other claims “live and die” by the findings as to the
reason for the dismissal.

93 With regard to the section 13 claim, the Tribunal would need to draw an
inference and reject the dismissing officer’s evidence to conclude the
30 claimant was dismissed because he was disabled.

94 In terms of the section 19 indirect discrimination complaint, from the evidence
the PCP had become a requirement for gas engineers on occasion/when
requested to complete 2 installations on one day – complete boiler
installations. With regard to group disadvantage, counsel accepted no
5 statistics had been led but the Tribunal could conclude there would be group
disadvantage.

Respondent's submissions

95 With regard to disability, the respondent did not dispute the existence of the
impairments. They did not accept those collectively or individually had an
10 adverse effect on the claimant's ability to carry out day to day activities.
Specifically, the respondent did not accept the effect was long term or
substantial.

96 The claimant argued his work is slower than colleagues, he tires easily, has
chest pain on exertion, shows limited patience, gets angry and is intolerant
15 and his coordination is adversely affected such that he drops things.

97 The speed of his work was never an issue. The speed was not definitive. As
to the claimant tiring more easily and having adverse effect, this was not
accepted as having an adverse effect. The claimant worked long hours and
worked away from home. He travelled regularly, often excessively. The job in
20 itself was physically demanding. He was able to do his job notwithstanding
those challenges.

98 Similar issues arise with regard to chest pain on exertion. The work of the
claimant is more than what a reasonable person would do in their day to day
job. The claimant worked in extreme conditions and was able to maintain that.

25 99 The claimant's anger and intolerance and limited patience was not a factor
contributing to his dismissal. It stemmed from his personality.

100 It is not for the medical expert to say what the normal day to day activities are
nor that the effect is substantial. This is for the Tribunal. The expert should
deal with diagnosis of impairment, observations from the claimant and
30 opinion/prognosis.

101 The expert believed that formal adjustments had been put in place when they had not. At page 91 the expert explained his reasoning behind his opinion that in isolation impairments were unlikely to be substantial but taken together given the work relationship and home life, the condition was satisfied. But
5 there had been no formal adaptations.

102 The respondent disputed the effect of the impairments on the claimant. At the relevant time there was no adverse impact on his ability to carry out day to day duties because of his impairments

103 The Guidance states activities must be normal – general day to day – regular
10 things, such as shopping, reading, writing, having conversations, watching telephone, washing and dressing, household tasks, walking, travelling and social activities.

104 The respondent's agent accepted that use of ipad, preparing meals and managing relationships were day to day activities. The question was whether
15 they were attributable to his impairments given the evidence and his underlying personality trait.

105 With reference to the section 15 claim, the agent referred to **Pnaiser** and noted the question is whether the claimant was treated unfavourably and by whom. The treatment was his dismissal and it was the gas divisional manager
20 who dismissed the claimant.

106 The key issue was what caused the treatment. This required consideration of the reason within the mind of the alleged discriminator – his thought process. Motive was irrelevant.

107 The question is what the reason was and was it something arising in
25 consequence of the claimant's disability (irrespective of by how many causal links).

108 He respondent's agent urged the Tribunal to accept the evidence of the dismissing officer and the reasons he says he took the decision to dismiss the claimant. It was the result of the complaints and requirement to move the

claimant from 1 site to another. 3 examples were given of requests from clients.

109 The dismissing officer had been challenged on this but always came back to the fact he had given the claimant enough opportunities to improve.

5 110 The fact documentation was obtained after the dismissal simply showed the evidence the claimant and respondent had at the time.

111 There was no “trigger” for the dismissal – he was asked what caused him to dismiss and he said there was no one thing on that day that made him dismiss but it was a combination of the 3 complaints. He was not challenged any more than that. The dismissing officer had decided that he would dismiss by November. He originally intended to suspend and go through a process but subsequently changed his mind. There is no need for a process in this case. The only issue is whether the requirements under the Equality Act provisions are met. The Tribunal should assess what was in the dismissing officer’s head at the time that caused him to dismiss. The explanation was clear from the evidence.

10

15

112 The dismissing officer had not followed up the health issues from the form but that does not mean the respondent must automatically assume the position. The respondent’s agent did not disagree that the respondent should have followed up the matter but they did not.

20

113 As to the reason for the dismissal, the respondent’s agent noted that counsel argued that absence anything, else the “trigger” or reason for the dismissal (since “trigger” was not a word used in evidence) has to be the events the claimant said happened on 26th November. Yet the claimant did not complete the jobs because of the delay, which was unconnected to any disability.

25

114 The respondent accepts that it was possible the claimant was asked to do 2 jobs but there was no necessity to complete the jobs and that was important. The evidence was clear in that regard. The claimant may well have been asked to take on 2 jobs but that does not mean he was asked to complete

them. On the evidence there was no provision criterion or practice that 2 jobs be completed. Overtime was used if needed. It was voluntary.

115 The claimant's witness added nothing in relation to the issues before the Tribunal. His evidence was based on hearsay which was of no assistance

5 **The claimant's response**

116 It was argued that there was a dispute on 26 November and this should be considered carefully.

Decision and reasons

10 117 The following represents the unanimous decision of the Tribunal following its detailed deliberations and consideration of the evidence presented by the parties, the productions to which reference was made and reference to the submissions and authorities and legal submissions.

Disability status

15 118 The issue in this case was whether or not the three impairments had the requisite effect at the relevant time. While no medical evidence was produced by the respondent, their challenge was on the effect of the admitted impairments. It was conceded that the activities found above were day to day activities by the respondent but the focus and argument was whether or not the relevant effect was adverse, substantial and long term.

20 119 The Tribunal carefully considered the evidence presented by the claimant and the medical expert and in particular the Tribunal carefully considered the statutory Guidance and the wording of section 6. The Tribunal finds the activities in question are day to day activities.

25 120 The Tribunal has also considered that the cumulative effect of the claimant's impairments as found from the claimant's evidence and supported by the medical evidence was that his ability to carry out those activities was impaired to a greater extent than those who did not have the impairments. The claimant struggled to operate computers or iPads. The claimant struggled to maintain conversations and relationships. He would drop things. He would

forget things. He would struggle to make meals and he took an hour to get dressed each morning. These effects upon his day to day activities had happened for sometime and at least 12 months during the period in question and in fact the medical evidence which we accepted that his impairments and the effects would likely last for the rest of the claimant's life.

5

121 While we accepted the respondent's submission that the claimant's intolerance and short temper did not stem from his impairments but from his personality, the Tribunal concluded that the remaining effects on his ability to carry out day to day activities as a result of his impairment as set out in the findings of fact were more than minor or trivial, they were substantial and they were long term having lasted for 12 months by the relevant time.

10

122 The Tribunal took a step back to assess the impact the claimant's impairment had on his ability to carry out normal day to day activities at the relevant time and made an assessment based on the information available at that time and concluded that at the material time, the claimant was a disabled person in terms of section 6 of the Equality Act 2010.

15

Section 13 claim - direct discrimination

123 The key question in this case is what was the reason within the respondent's mind as to why it summarily dismissed the claimant. The Tribunal carefully considered this matter and examined the respondent's evidence in detail. We concluded that the reason why the claimant's employment ended was because of the three specific customer complaints that had been made. The Tribunal carefully considered the claimant's counsel's submissions in this regard but found no evidence to support the assertion that the claimant's dismissal was because he was disabled or because of disability generally. The claimant's disability was not a substantial or effective cause of the dismissal.

20

25

124 We concluded that the claimant's disability was in no way connected to the respondent's decision to dismiss the claimant and his claim for direct disability discrimination is not well founded.

30

Section 19 claim – indirect discrimination by reason of disability

125 The first issue in this case was whether or not the claimant had established
that the provision criterion or practice relied upon existed. The claimant
carefully formulated the PCP as a requirement on the part of the respondent
5 that the claimant and other operatives, on occasion, would complete two
installations within a day. The Tribunal carefully considered the evidence in
this regard and concluded that no such PCP had been established. We
found as a fact that there was never a requirement practice or provision
whereby the respondent would require operators to complete two installations
10 within a day.

126 We note that it may on occasion be that operators were given two jobs in one
day and the claimant's evidence was that on 26 November, that was the first
occasion he had been asked to carry out two jobs but we found no evidence
that the claimant (or any operative) was asked to complete two jobs. If the
15 jobs could not be completed as happened on 26 November, the operatives
and in this case the claimant would contact their line manager who would
arrange for someone else to complete the work or relist the job. That was
what happened on this occasion and that was the practice that existed.

127 The claimant may have thought he had to complete the jobs in question but
20 that was not what was asked of him and there was no provision, criterion or
practice that required 2 jobs to be completed.

128 The Tribunal was satisfied that there was never pressure placed upon
operatives to complete work. The evidence showed (and the claimant
accepted) it was difficult in advance to foresee how long jobs would take.
25 Where work was likely to last longer than anticipated, such matters being
matters for the operatives to determine, there was often an opportunity given
by the respondent for individuals to complete voluntary overtime but said
matters were entirely at the discretion of the operative, there would be no
requirement placed upon individuals to complete the relevant tasks in
30 question. If the individual did not wish to do the work, someone else would be
given the work or it would be relisted.

129 As there was no provision criterion or practice applied to the claimant or other operatives, as advanced by the claimant, the indirect discrimination claim is not well founded.

Section 15 claim

5 130 The Tribunal carefully considered the authorities in this area together with the Equality and Human Rights Commission Guidance and spent a considerable amount of time carefully assessing the evidence presented by the parties with particular focus upon the dismissing officer's evidence and the reason why the claimant was dismissed. We considered the claimant's agent's
10 submissions in detail.

131 It was accepted between the parties that the unfavourable treatment was the claimant's dismissal.

132 In relation to knowledge, we find that the respondent ought reasonably to have known that the claimant was a disabled person at the relevant time.
15 The respondents specifically asked for information about the claimant's health and medical information and had details as to the number of different impairments the claimant had. The impact the claimant's activities would have had would have been obvious had the respondent made any attempt to follow up from the medical information it had asked the claimant to provide.

20 133 We then turned to consider what led to the claimant's dismissal. He alleged it was the requirement to complete 2 jobs in one day, which he said caused his dismissal (and was connected to his disability).

134 We found that the reason for the claimant's dismissal was not because of anything the claimant was asked to do on 26 November but due to the 3
25 customer complaints that had been made in the preceding months and the respondent deciding (after a period of reflection) that it could not continue to employ the claimant.

135 We accept the procedure that led to the claimant's dismissal was not perfect and that had this been an unfair dismissal claim the outcome may well have

been different. The respondent decided to dismiss the claimant summarily. But the issue in this case is why the respondent so acted.

136 The Tribunal accepted the evidence of the dismissing officer whose evidence
5 the Tribunal found to be credible and reliable as to the reason for the
dismissal. He was cross-examined repeatedly on this point. We found his
evidence consistent and clear. The reason for the claimant's dismissal was
the customer complaints about the claimant.

137 We accepted his evidence that the reason for the dismissal was in no way
10 connected with any of the claimant's impairments or any consequences
thereof.

138 It was relevant to note that the claimant's grievance (which was submitted
after the decision to dismiss had been taken) made no reference to any
requirement to complete two installations within one day being the reason for
the claimant's dismissal. We did not find that surprising since we found that
15 there was no requirement to complete two installations within one day and
that was not the reason for his dismissal.

139 We did not require to rely upon the burden of proof provisions in identifying
what the reason for the treatment was as we were able to make a positive
finding in this regard. Nevertheless the Tribunal considered that if there had
20 been facts from which an inference of discrimination could have been made,
what would we have decided. The Tribunal found the respondent's evidence
on the reason for the claimant's dismissal to be clear and cogent. Had the
burden of proof shifted we would have found that the reason for the claimant's
dismissal was in no sense whatsoever because of something arising in
25 consequence of the claimant's disability. The dismissal was because of the
customer complaints. The reason for the dismissal was in no sense
whatsoever connected to any of the claimant's impairments nor was it
connected in any way to something arising in consequence of the claimant's
disability.

30 140 We considered the claimant's counsel's argument that the fact the dismissal
took place two days after the event alleged by the claimant was relevant in

determining the “trigger” for his dismissal. The Tribunal found, from the evidence presented, that the claimant was not required to complete the two jobs within the one day in question and therefore on 26 November there was no incident that would be out of the ordinary or such as to provoke the respondent to dismiss the claimant. The reason why the respondent dismissed the claimant was as set out above and the timing (and connection with the events on 26 November) was coincidental. The fact the claimant told the respondent he could not deal with both jobs created no issue. The respondent arranged for another operative to deal with it. That had no bearing on the respondent’s decision to dismiss the claimant.

141 The Tribunal found no evidence to connect the incident relied upon by the claimant on 26 November and his dismissal. We found no evidence to suggest this issue (the claimant’s assertion he had been told to complete two jobs) had been referred to by the parties during their exchanges on 28 November. It was not referred to in the grievance nor in the oral evidence as to the discussions on the day in question. The claimant did his job on 26 November and the respondent did theirs.

142 The Tribunal considered the evidence carefully and found that the events on 26 November had no connection with the claimant’s dismissal on 28 November.

143 The reason why the claimant could not complete the two jobs on the day in question was due to the delay in securing parts. The reason why the claimant could not complete two jobs was not therefore because of something arising in consequence of the claimant’s disability; It was due to the delay in securing the necessary parts.

144 The Tribunal found that the “something” relied upon by the claimant in support of his claim, the being required to complete two jobs on one day, had not been established and in any event was in no way connected to the dismissal.

145 The Tribunal did not find that the something that led to the claimant’s dismissal was in any way connected to or arising out of the claimant’s disability. The section 15 claim is accordingly ill founded and is dismissed.

Summary

146 In summary:-

- (1) The respondent's designation is changed, of consent, to Construction Labour Supplies Limited.
- 5 (2) The claimant was at the relevant time a disabled person in terms of Section 6 of the Equality Act 2010.
- (3) Of consent and in terms of rule 64 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 the respondent will pay the claimant the net sum of £1,101.13 in respect of
10 his claim for unlawful deduction of wages.
- (4) The remaining claims are not well founded and are dismissed.

15 **Employment Judge: D Hoey**
Date of Judgment: 05 December 2019
Entered in register: 06 December 2019
and copied to parties

20

25 *I confirm that this is my judgment or order in the case of **4103049/2019 Whitton v Construction Labour Supplies Limited** and that I have signed the judgment by electronic signature.*