



EMPLOYMENT TRIBUNALS

Claimant: Mr M Robertson

Respondent: British Telecommunications PLC

Heard at: London South by CVP (Croydon) **On:** 19/7/2022
and in chambers on 28/7/2022

Before: Employment Judge Wright
Mrs C Wickersham

Representation:

Claimant: Ms M Martin – counsel

Respondent: Mr H Sheehan - counsel

RESERVED JUDGMENT

Upon remittal by the Employment Appeal Tribunal (EAT) it is the unanimous Judgment of the Tribunal that the claimant's absence from work arose in consequence of his disability of his neck/shoulder injury for the purposes of s. 15 Equality Act 2010 (EQA).

REASONS

1. The chronology, findings of fact and the conclusions are set out in the Tribunal's reserved Judgment on liability dated 17/12/2019.

2. The issue remitted to the Tribunal by the EAT was whether the claimant's absence from work, arose in consequence of his disability. The only disability which the Tribunal found the claimant had (at the relevant time) was his neck/shoulder injury.
3. The Tribunal had an updated electronic bundle of 452-pages and references to the bundle are to the electronic page number.

The Law

4. The relevant section of the EQA is:

15 Discrimination arising from disability

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

(a) A treats B unfavourably 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.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

5. The parties were in agreement in respect of the relevant law. The respondent set out the relevant principles.
6. It is well established that s.15 EQA involves a two-stage causal test, firstly there must be 'something arising in consequence of [the claimant's] disability'. Secondly [the claimant] must be treated unfavourably 'because of that 'something arising' (City of York Council v Grosset [2018] IRLR 746, at [36]). The Tribunal's determination that the reason for the claimant's dismissal was his absence from work still stands, and so only the first stage, whether the claimant's absence arose from his disability remains to be decided.
7. As the claimant's only disability was his neck and shoulder injury, the claimant must satisfy the Tribunal that his absence from work arose in consequence of that injury.
8. So far as is relevant, the EHRC EQA Code of Practice gives the following relevant guidance on the meaning of 'arising in consequence of disability':

5.8

The unfavourable treatment must be because of something that arises in consequence of the disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability.

5.9

The consequences of a disability **include anything which is the result, effect or outcome of a disabled person's disability**. The consequences will be varied, and will depend on the individual effect upon a disabled person of their disability....

(emphasis added)

9. The phrase 'arising in consequence of' can refer to a state of affairs that is caused indirectly by a disability, via a series of steps. It does not require 'an immediate causative link', but it does require a 'sufficient causative link' (Grosset at [50]).

10. In Basildon & Thurrock NHS Trust v Weerasinghe [2016] ICR 305, Langstaff J (as he then was) said:

'The words 'arising in consequence of' may give some scope for a wider causal connection than the words 'because of', though it is likely that the difference, if any, will in most cases be small; the statute seeks to know what the consequence, the result, the outcome is of the disability and what the disability has led to.' [28]

11. In Weerasinghe, Langstaff J referred to, 'the dangers of failing to distinguish between context on the one hand and cause or consequence on the other' [43]. That difference is highly material in the present case.

12. In Pnaiser v NHS England and anor [2016] IRLR 170, Simler J (as she then was) summarised the effect of the authorities on s.15 EQA at that time at [31]. She noted:

'... more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.'

[31(d)]

And

‘However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.’ [31(e)]

13. In iForce Limited v Wood (unrep, EAT, 3 January 2019), HHJ Eady QC¹ said that:

‘Section 15 may have a looser causation test, as recently confirmed in Sheikholeslami, but still requires a degree of connection between the disability and the ‘something’ that led to the unfavourable treatment. Mere content is not sufficient to establish cause...’ [29]

14. Two propositions can be drawn from the above which are of particular importance in the present case:

a) Firstly, although there is dicta to the effect that ‘arising from’ is looser causal test than ‘because of’, what this means is that something can arise from a disability via one or more intermediate steps or that it can arise indirectly from the disability. The fact that it is a ‘looser’ causal test does not mean that there is any lesser burden on the claimant to show that this test is satisfied. It is a matter of objective fact which is to be assessed robustly (per Pnaiser) and in most cases there will be little difference between the two causal tests (per Weerasinghe).

b) Secondly, the relevant causal test is not satisfied merely because the disability is a relevant aspect of the background to the ‘something arising’. In both Wood and Weerasinghe, the claimant would not have been in a position to be unfavourably treated if not for their disability, but in each case it was held that the ‘arising from’ test was not satisfied. In both cases, the EAT has specifically warned of the need to distinguish between the context of the ‘something arising’ and its cause (Weerasinghe at [43] and Wood at [29] where HHJ Eady QC refers to ‘mere content’).

15. Both parties provided written skeleton arguments and made oral submissions, which the Tribunal found helpful and was grateful for.

16. Mr Sheehan’s submissions, in summary were:

the claimant’s neck and shoulder injury pre-dated his time off work and his absence in 2017 only started when he began to suffer from stress and anxiety;

in May 2017 the claimant confirmed that the cause of his absence was his IBS and not his neck and shoulder symptoms;

¹ As she then was.

the claimant was able to return to work when, but not before, his stress and anxiety resolved; and

the claimant's absence from work actually arose from his stress and anxiety.

- 17 In short, it was the respondent's case that the true and only cause of the claimant's absence from work was his stress and anxiety. The neck and shoulder issues were part of the context in which the claimant suffered from the stress and anxiety and the neck/shoulder problem was not the cause of the absence.
- 18 Ms Martin for the claimant submitted that the claimant's absence from work arose in consequence of his disability and that there were two causal links between the absence and the disability: he was absent from work because he was experiencing stress; and; the stress was because of his disability.

Findings of fact

- 19 The Tribunal finds the claimant did link the neck/shoulder problem to his stress, with varying degrees of importance or reliance throughout the relevant period which ended with his dismissal in 2017.
- 20 On 16/1/2017 with his then line manager, a *well-being passport* was created (page 62). That document referenced (page 66):

'The reason for the home working was to reduce travel and in turn help me manage my symptoms. The symptoms that I suffer are sharp pain to the lower back and stiffness of the neck, this causes me stress as when I suffer this pain...'

- 21 A letter from the claimant's GP to the respondent dated 2/2/2017 recorded (page 75):

'This 39 year old man who is registered with this practice has a long-term problem with back pain and neck pain which results from an accident he had in 2009.

He has seen various specialists, including Neurosurgeons and has had musculoskeletal advice and physiotherapy.

He was managing at work quite satisfactorily by working at home, 3 days a week, and spending the other 2 days working at BT In the office

I understand he works as a programmer

He tells me that he is under considerable stress at the moment as new management has stopped him working at home and this is causing his symptoms to become worse again.'

- 22 The claimant was referred to Occupational Health (OH) on 17/2/2017 and after documenting the claimant's neck/shoulder/back problems and the ongoing pain, OH reported (page 101):

'...[the claimant] did tell me about stressors which he perceives as being of issue in his work I would therefore like to suggest that you carry out a documented stress risk assessment'

- 23 OH suggested the adjustment of:

'of working from home some days of the week rather than at the office, according to what he is prepared to bear and you are prepared to accommodate. As his neck and back pain are ongoing it would appear that these adjustments would also need to be ongoing, although one option can be to put these in place for a fixed period (perhaps 6 months) and then review the situation again after that...'

- 24 There was also reference to the suggested adjustment of later start time, which the claimant said would not help as he was his father's carer (page 102). OH reported that the later start time was proposed so that the claimant could get a seat on public transport, rather than travelling in the main rush hour, when this was less likely. The Tribunal finds that the later start time was suggested as a result of the claimant's neck/shoulder problems and it was proposed to alleviate his symptoms by ensuring he travelled at a time when getting a seat on public transport was more likely. That the claimant said it would not assist as he had caring responsibilities was immaterial; it was an adjustment suggested as a result of the claimant's disability. It was not solely suggested as a result of the claimant's caring responsibilities.

- 25 As will be recalled, in the absence of the respondent carrying out the stress risk assessment as recommended by OH, the claimant conducted his own test on 8/3/2017, with the result being 'red'. The claimant was then absent from work from 9/3/2017, he did not return and he was eventually dismissed for capability on 27/10/2017.

- 26 Another letter from the claimant's GP was sent on 23/3/2017 (page 103):

'I am writing to confirm that this 39 year old man has on-going problems with stress from work which is aggravating his aches and pains, especially behind his neck and shoulders and back. He is currently receiving

physiotherapy and hopefully this will help to alleviate some of the symptoms. ...

He hopes that reasonable adjustments to his work environment and situation and location can be continued, as this has helped in the past with his symptoms.

In the past he has found that working from home has greatly improved his ability to cope...'

- 27 The first absence review meeting took place on 29/3/2017 (page 105). The minutes record:

'What's caused this absence?

Work related stress due to management style from line manager [the claimant] has stated that the stress caused by his line manager is inflicting further chronic pain in his shoulder, neck and lower back. The chronic pain in [the claimant's] shoulder, neck and lower back were originally caused by an accident which took place in 2011.'

- 28 One of the matters which the claimant said were preventing him from returning to work, was:

'Personal issues are preventing me from returning to work. The cause of this is work stress and caring commitments (*Work stress related, chronic pains shoulder neck and back/Personal issues*).'

[The Tribunal understands the words in italics were added by the claimant or his representative.]

- 29 The claimant's GP produced a fit note on 31/3/2017, which gave the reason for the absence as (page 112):

'work stress related to proble², and aches and pains in joints'

- 30 It seems that during the claimant's absence, steps were taken by his new line manager to put in place a *carer's passport* in respect of the claimant's commitments, although the passport is undated (page 117). The document records that the claimant's father was suffering from dementia and that working from home assisted him and provided him with flexibility to care for his father.

² The Tribunal assumes this was supposed to read as 'problems'.

31 Understandably, this *passport* focused on the demands placed upon the claimant as a carer, rather than adjustments which would alleviate the claimant's own needs. It is however accepted that working from home had a two-fold advantage for the claimant. It assisted him in managing the pain which resulted from his disability (as previously recorded in his own *wellbeing passport*); and, it allowed him the flexibility to care for his father.

32 The Tribunal had previously found that working from home three-days-per-week had become a term of the claimant's employment. As such, it was open to the claimant to factor that into the arrangements he made to care for his father, such as making appointments on the days he would be at home. That advantage did not however remove the reason for working from home; that being the pain management of his disability by reducing travel. The original reason for home working was the claimant's disability, not his caring role. It is also noted that on 17/2/2017 OH had suggested putting in place this adjustment, with a trial period of six months, to assist the claimant in managing his disability.

33 The second absence review meeting took place on 5/4/2017 (page 127). The claimant was asked how he was and he said that he was a bit better. He also:

'... advised he was off sick with work related stress and that this was also affecting his neck and back. He had asked for some adjustments to be made. This was to be allocated a new line manager and to also be allowed to work from home three days per week.'

34 The claimant's physiotherapy was also discussed, as were his caring responsibilities. That meeting was followed by a further referral to OH on 12/4/2017. The OH report summarised the claimant's present circumstances, which included his disability, his caring commitments and his request to work from home and concluded (page 151):

'We would be happy to provide further input and guidance at your request, for example if there were any changes with regards to [the claimant's] health or employment situation. My inference is that [the claimant] has ongoing concerns regarding the viability of homeworking and this may be driving his feelings of stress. There is a link between psychological and physical health and individuals suffering with stress can find it more difficult to cope with chronic pain.'

35 A GP fit note of 5/5/2017 recorded the reason for absence as being unfit for work due to (page 156):

'work stress related problem'

36 The Tribunal notes that this particular fit note did not indicate the cause of the stress, whether that be the claimant's disability or for any other reason.

37 There was a third sickness absence review meeting on 25/5/2017 (page 164). This was the first time the claimant mentioned his symptoms of IBS. The minutes record:

'What's caused this absence?
[the claimant's] neck and shoulder pain originally caused the pain and he is currently off because of stress and anxiety - specifically an bout³ of Irritable Bowel Syndrome'

38 The claimant also referenced that the recommendations from OH had not been put in place in respect of his neck and shoulder pain, although he did not go into detail what they (the recommendations) were. It was also noted that in respect of adjustment and support, the claimant asked for:

'Flexible working - consider the option to work from home 3 days a week [the claimant] has caring responsibilities and also a bad back, so working from home 3 days a week would allow him to maintain a work/life balance [the claimant] doesn't want to come back in the office 5 days a week, as he is concerned that the worry of managing his personal situation on top of improving his performance would create more stress'

39 The bundle contains an illegible fit note, which according to the index was dated 1/6/2017. This note does not assist the Tribunal as it cannot be read. A further GP fit note was produced on 5/7/2017, which gave the reason for absence as (page 181):

'anxiety, pain management problems and gastrointestinal symptoms'

40 A final resolution meeting was held on 27/7/2017 (page 186). The Tribunal finds that by now, the IBS was the condition which was causing the claimant the most anxiety and was his main focus. This is understandable, particularly as he had only started taking medication for the IBS after the previous meeting. Furthermore, this was a new condition, not something which the claimant had been managing for a number of years.

41 The claimant referred to the stress the situation was causing him, in that he was at risk of losing his job, in addition to the IBS; which was clearly an additional stressor. Also, the claimant also referred to an appointment at Charring Cross Hospital for physiotherapy. That treatment clearly related to his disability and shows that whilst it was not at this time at the forefront of the claimant's mind, it was still operative.

³ Presumably this should read 'a bout' rather than 'an bout'.

42 The respondent's outcome letter terminating the claimant's employment was dated 4/8/2017 (page 200). The rationale for the decision recorded that at the second absence review meeting, it was noted that the claimant had accepted a referral to OH in respect of his neck and back and that he was waiting for referrals for his IBS and back problem.

43 The claimant's GP wrote a further letter dated 10/8/2017 which referred to (page 208):

'I have conducted a mental capability assessment and to the best of my ability I conclude that [the claimant] is fit and well enough to return to work and carry on with a full range of duties.

[The claimant] has also been assessed by Charing Cross Hospital regarding back and neck injury and is now able to continue with his duties which include, stretching, bending and climbing, which is now 85%. He is also receiving physiotherapy treatment which will impact his ability to continue working.

His IBS condition is under control with medication which [the claimant] takes when necessary'

44 This letter, received by the respondent prior to the claimant's employment terminating confirmed three things. Firstly, that the claimant was fit for work and was no longer impaired by stress and anxiety. Secondly, that his disability was being treated and managed. Thirdly, that his IBS was under control.

45 If, as per the respondent's case, the disability was no longer operative in terms of the claimant's absence, there would be no need for his GP to have updated the respondent in that respect.

46 Internally, on 17/8/2017 the claimant's Trade Union representative was escalating his case and she also referred to (page 212):

'[The claimant] has recurring neck and shoulder pain which flares up and was under considerable stress due to pain management, IBS flare up and work related stress with the work and with the manager.'

47 In the claimant's claim form, which he presented on 14/11/2017 (in which he appeared to be unrepresented), his particulars of claim ran to approximately 22-lines. In respect of his disability, the claimant set out:

'I have a Disability passport for neck and shoulder injury and the adjustment of working from home was put in place for my disability-OHS

also advised in various reports that I would be covered by the Equality Act. I was put into a job on the advice that I could have flexible working - ie working from home for 3 days a week. I was then moved to a different role under the same manager and told no flexible working so the company has failed to continue my reasonable adjustment. I was advised that I needed to improve my performance to improve despite having had no formal training and was not on a coaching plan. I had been assured I could continue in my previous role.'

48 The claimant's witness statement was undated, but clearly predated the liability hearing in November 2019. The claimant made the following references:

'5

I had a road traffic accident in 2010 which I suffered injury to my neck and shoulder. I have a recurring neck and shoulder pain which flares up and was under considerable stress due to pain management.

13

In February/March, I was still suffering from extreme stress due to issues with my manager, the lack of training affecting me fulfilling my role, and predominately, the problems with my neck and shoulder due to my adjustment of WFH being removed.

14

I had an OHS referral on 17/2/2017 due to concerns about my health (shoulder/neck pain) which lead to me WFH as travel can exacerbate my pain. I was also extremely stressed as I was unhappy and struggling in the programming role and was already being told my performance needed to improve (I had only been in the role for just over a month and had no formal training). I was also stressed with pain, relationship with manager and I am a carer for my father who has Alzheimer's.'

29

They have linked taking away my WFH to underperformance which is totally unacceptable. My manager (Ruby) has continued to cause me considerable stress by moving me into an unsuitable role, not providing adequate training and then removing the adjustment in place until my performance improves. Along with my pain, this was too much for me.'

Conclusions

- 49 The Tribunal wishes to assure the parties that it has approached the remittal by the EAT with a genuine open mind. The Tribunal understands that an express finding was not made and understands the reason for the appeal and the subsequent remittal. The Tribunal has not sought to ratify its earlier findings and has sincerely reconsidered the remitted issue.
- 50 The Tribunal concludes and agrees with the claimant's submission that the disability (the neck/shoulder/back pain) contributed to the stress which the claimant then suffered from and caused his absence in 2017. The disability led to the need to adjust his working arrangements, which was to work for part of the week from home. This adjustment was removed by the respondent and the Tribunal found the requirement to attend the office every day was a breach of s.20 EQA. This change, along with his other health issues and caring responsibilities resulted in the stress and anxiety which was one reason for his absence. There was a clear causal chain of events, which started with the claimant's disability and ended with his absence.
- 51 There was an intervening event, which was a combination of the new role, new line manager and the removal of the claimant's arrangement that he could work from home for three days per week. This happened in December 2016 and the claimant tried to cope with the new arrangement, but he could not. The claimant had been managing his pain/disability and he is to be commended for his commitment to his role and his continued and sustained attendance, until this change in circumstances. After the changes took place, the claimant's health suffered and his absence, amongst other reasons was due to stress at work and anxiety. This was exacerbated by his underlying health condition, which was his disability. There was a causal link and it is not correct to say his absence was unrelated to his disability.
- 52 Furthermore, the claimant was consistent in his references to his pain/neck/shoulder/disability. At some points, particularly once the IBS was diagnosed, it was not his main focus. Nevertheless, the disability was a constant feature of the claimant's explanations and discussions about his health.
- 53 The Tribunal also concludes that the claimant did not know and could not have known which condition the Tribunal would find to be a disability. This is evidenced by his claim form, where he focuses solely on his neck and shoulder injury and not the other conditions he relied upon.
- 54 It is also of note, that apart from one fit note, all of the remaining ones and the medical evidence referred to the disability, alongside the stress and anxiety.
- 55 The claimant's Trade Union representative and GP also, referred to his disability and the impact that it had upon him. Even if it could be said they

were only referencing what the claimant had told them, rather than it being their independent opinion, the result then must be that the claimant repeatedly said and believed that his disability caused his absence. It being accepted that the disability was not the only cause.

- 56 In respect of the claimant's claim form and witness statement, the Tribunal concludes that he was untutored and he was referring to the medical condition/disability which, along with others, he perceived was contributing to his difficulties.
- 57 All of the examples have been set out in the findings of fact and to take one example, when the claimant asked his GP to write to the respondent once he had been informed of his dismissal, he clearly asked his GP to refer to the three things which were causing him difficulty. They were the stress and anxiety, the pain/disability and the IBS. The Tribunal concludes that this corroborates the claimant's position that his disability significantly contributed to his absence and was an operative cause of his absence.
- 58 For those reasons, the Tribunal finds the cause of the claimant's absence from work was, amongst other reasons, his pain resulting from his neck/shoulder problem – namely his disability. The absence was because of something arising from the consequences of his disability. The consequence or result or outcome of his disability was his absence. The unfavourable treatment arising as a result of that was his dismissal.
- 59 The Tribunal fully accepts there were other matters which factored into the claimant's absence, including initially his issues with his line manager and his caring responsibilities. The intervening event however which triggered the absence, was the removal of the claimant's working from home arrangement. That then exacerbated the claimant's pain management which arose from his disability and that resulted (not solely, but it did significantly contribute) to his absence from work.
- 60 In light of that finding, as suggested by the respondent, the balance of the remedy awarded to the claimant is now due and the stay is lifted. That sum is £16,939.95 and the respondent has 14 days to make payment of the outstanding sum.

28/7/2022

Employment Judge Wright