EMPLOYMENT TRIBUNALS

Claimant: **Mr T Duncan**

Respondent: **Clearance and Clean Up Ltd**

Heard at: **Leeds** **On:** **23, 24 and 25 November 2022 (Hybrid)**

This was a hybrid hearing – the claimant appeared in person and the respondent and its representative and witnesses appearing by CVP video link.

Before: **Employment Judge Shepherd**

Members: **Ms L Fawcett**
Mr G Corbett

Appearances:

For the Claimant: **In person**
For the Respondent: **Mr Bourke HR Consultant**

Judgment having been given on 25 November 2022 and the written judgment having been sent to the parties on 28 November 2022. Written reasons have been requested by the respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant represented himself and the respondent was represented by Mr Bourke,

2. The Tribunal heard evidence from:

Tyron Duncan, the claimant;
Andrew Bourke, HR,consultant;
Tom Pickering, the respondent's Managing Director;
Craig Dinnewell, Insurance Broker.

3. The Tribunal had sight of a bundle of documents which was numbered up to page 241. However, a number of pages were missing. The claimant provided further documents including medical records and some benefits information. The Tribunal also had sight of the respondent's handbook.

4. At a Preliminary Hearing on 17 May 2022 before Employment Judge Evans a case summary was set out as follows:

Background

1. The claimant was employed by the respondent, a company that deals with waste collection, to drive and collect waste from a date in February or March 2021 until a date in February 2022.

2. The claimant suffers from (1) panuveitis (an eye condition as a result of which the eyes became inflamed) and (2) sciatica. He was absent from work between September 2021 and January 2022. His claim is about how he was treated following his return to work. The claimant says that when he returned to work he was able to perform the job he had performed before he went on sick leave and that he should have been allowed to do so. The respondent says that he was not able to perform this job and that is why he was dismissed, no alternative work being available for him.

Information provided by the claimant in relation to his health

3. The claimant explained that he had been diagnosed with sciatica in October 2021. He suffered from it on and off. On good days it did not present a problem; on bad days it caused him to be in continuous pain and to limp. He took codeine when it was bad and paracetamol at other times. By January when he returned to work for nine days he was able to do the portering which was part of his job. He would have continued to be able to do this if he had not been dismissed.

4. The claimant had started to suffer from an eye condition in April 2021. He had received a diagnosis of panuveitis in September 2021. The condition was controlled by medication but would be triggered by stress. The claimant said that by January 2022 the eye condition did not prevent him from driving. He was able to drive then and that continued to be the case.

Unfair dismissal

5. The claimant had included a complaint of unfair dismissal in his claim but had not completed two years' service. I explained to him that in these circumstances he could not pursue a complaint of unfair dismissal. The claimant withdrew this claim and I have dismissed it by a separate judgment.

Disability discrimination

6. The claimant insisted that by the time he had returned to work he was able to perform his job normally. The eye condition did not prevent him from driving and the sciatica did not affect his ability to carry out the portering aspect of his role. He did not accept that his condition affected his ability to do either.

7. I asked the claimant to confirm that what he was complaining about was his dismissal. He confirmed that it was. I asked the claimant how he believed the dismissal and his disability were related. After a fairly length discussion, during the course of which I explained the nature of the comparator in a direct disability discrimination claim, the claimant said that he believed his dismissal was related to his disabilities because:

   7.1 He had taken a considerable amount of time off work due to his disabilities between September 2021 and January 2022. He believed that this was the reason he had been dismissed, because the respondent was concerned that it had had to pay him sick pay and would have to do so again if he had further disability related absences.

   7.2 His employer was prejudiced against him because of his disabilities. By dismissing him it had treated him differently to how it would have treated an employee with comparable medical conditions which were not disabilities/ abilities.

8. It seemed to me that this meant that the claimant's claims were for discrimination arising from disability (section 15 Equality Act 2010 ("EQA")) and direct disability discrimination (section 13 EQA).

9. Because the claimant was quite insistent that he could perform his job in January 2022 when he returned to work without any adjustments being made, it seemed to me that he was not in reality arguing that the respondent had failed to make reasonable adjustments and accordingly no such claim is set out in the list of issues below.

Discussion

10. The respondent's case is that the claimant was unable to perform his job in January 2022. His work partner had complained that he was not safe to drive and could not do the necessary lifting. The respondent's insurer had said that it would not provide cover for him or for anyone with whom he worked.

11. I could see that the respondent would have been in a difficult position if its insurer had withdrawn cover and that that might well be relevant to the merits of the claims. I asked whether the respondent had provided a copy of the correspondence from the insurer withdrawing insurance cover to the claimant. The respondent said that it had not and, indeed, that there was no such correspondence. What had happened was that the insurer had conveyed this message in a phone call.

12. I decided not to order a preliminary hearing to deal with the issue of disability. The claimant is unrepresented and I was unconvinced that this was likely to result in any significant saving of Tribunal time.

The Complaints

13. The claimant brought the following complaints:

13.1 Unfair dismissal. However the claimant had not completed two years' service when he was dismissed and so the Tribunal has no jurisdiction to hear this claim. After I had explained this to the claimant he withdrew his unfair dismissal claim and I have dismissed it by a separate judgment.

13.2 Disability discrimination in respect of his dismissal comprising:

13.2.1 Unfavourable treatment because of something arising in consequence of his disability;
13.2.2 Direct disability discrimination

The Issues

14. The issues the Tribunal will decide are set out below.

1. Disability

1.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

1.1.1 Did they have a physical or mental impairment: (1) an eye condition called Panuveitis and/or (2) sciatica?
1.1.2 Did they have a substantial adverse effect on his ability to carry out day-to-day activities?
1.1.3 If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
1.1.4 Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?
1.1.5 Were the effects of the impairment long-term? The Tribunal will decide:
1.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
1.1.5.2 if not, were they likely to recur?

2. Discrimination arising from disability (Equality Act 2010 section 15)

2.1 Did the respondent treat the claimant unfavourably by dismissing him?

2.2 Did the following things arise in consequence of the claimant's disability the claimant's absence from work from 4 October 2021 until 17 January 2022.

2.3 Was the unfavourable treatment because of that sickness absence?

2.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

2.4.1 [***respondent to plead justification***]

It was submitted that the justification was in respect of the health and safety of the claimant, other employees and members of the public to carry out the business of the respondent

2.5 The Tribunal will decide in particular:

2.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

2.5.2 could something less discriminatory have been done instead;

2.5.3 how should the needs of the claimant and the respondent be balanced?

2.6 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

3. <u>Direct disability discrimination (Equality Act 2010 section 13)</u>

3.1 Did the respondent do the following things:

3.1.1 Dismiss the claimant.

3.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated.

The claimant has not named anyone in particular who they say was treated better than they were. They rely on a hypothetical comparator.

3.3 If so, was it because of disability?

4. Remedy for discrimination

4.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

4.2 What financial losses has the discrimination caused the claimant?

4.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

4.4 If not, for what period of loss should the claimant be compensated?

4.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

4.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

4.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

4.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

4.9 Did the respondent or the claimant unreasonably fail to comply with it?

4.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

4.11 By what proportion, up to 25%?

4.12 Should interest be awarded? How much?

5. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings the Tribunal made from which it drew its conclusions.

6. Where the Tribunal heard evidence on matters for which it makes no finding, or does not make a finding to the same level of detail as the evidence presented, that reflects the extent to which the Tribunal considers that the particular matter assists in determining the issues. Some of the Tribunal's findings are also set out in its

conclusions, to avoid unnecessary repetition, and some of the conclusions are set out within the findings of fact.

7. The claimant was employed by the respondent as a driver/operator from March 2001 until his dismissal on 14 February 2022.

8. It was conceded by the respondent that the claimant was a disabled person within the meaning of section 6 of the Equality Act 2010.

9. The claimant suffered from panuveitis, an eye condition, and sciatica. He was absent from work between September 2021 January 2022.

10. The claimant was unable to drive as a result of his condition. When he returned to work in January 2022 he carried out portering duties which were part of his role.

11. It was made clear by Tom Pickering, the respondent's managing director, that he made the decision to dismiss the claimant. A risk assessment had been carried out by Andrew Bourke, HR Consultant. The respondent's insurance brokers discussed the claimant's impairment with the underwriters and they would not provide the respondent with employers liability insurance or motor insurance.

12. There were no other duties that the claimant could be employed to carry out.

13. It was not clear what medical evidence the respondent considered in making the decision to dismiss the claimant. The medical report of 15 January 2022 indicated that the claimant's eyesight was improving and the consultant ophthalmologist stated:

> "You are tolerating all the medications very well and you feel that your eyesight is improving. Your confidence has increased and you are due to start work again very soon.
>
> I felt that your eye signs are continuing to improve and I suggested that you now reduce the dose of prednisolone… Until the next review.
>
> I will review you again in my clinic in six weeks time…"

14. This was the most recent medical report available at the time of the claimant's dismissal.

15. It is shown in the transcript that the claimant had informed Andrew Bourke at the first disciplinary hearing on 2 February 2022 that

> "… It's classed as uveitus in my eyes what it is, is that, when there's a lot of information it adapts the light. Where you take strong doses of medication to see what it is and to help it improve, my right eye is perfect."
>
> "I've got all my professor letters with signatures who deal with brains and brain surgery and eye surgery, and everything is improving and, this is – this is the reason that I had a month off, to get myself better and then to come back even better than ever"

16. The claimant had informed the respondent that he would be on the medication for four years. This had been interpreted as meaning that the claimant would continue to have the impairment and that meant he could not drive for that time. This is not necessarily the case. The claimant could continue to have an impairment which might improve and it was indicated by the claimant and the consultant that he was improving.

17. In the risk assessment completed by Andrew Bourke on 3 February 2022 it states

> " Tyron suffers from dendritic corneal ulceration. This is normally treated in 2-3 weeks with medication. Tyron's body developed an autoimmune issue with the drugs, which have taken longer to attempt to work. He was off circa 3 months, only returned to work mid January 2022 and has said that he will need to keep taking the drugs for 4 years."
>
> "This needs to be put to the insurance companies for both the employee cover and the van cover. Given this disclosure, this needs to be fed over to the company insurance to see if this is an issue or not."

18. Craig Dinnewell, Insurance Broker, forwarded the Risk assessment to the Managing General Agent who passed it on to the insurers. The insurers indicated that they would not cover the claimant due to the nature of his role and his ongoing medical conditions.

19. The claimant attended two meetings with Andrew Bourke and on 14 February 2022 Andrew Bourke wrote to the claimant. Within that letter it was stated:

> "You had been informed that if it was found that you were not able to continue in work that you would be dismissed for the fair reason of capability. You are not capable of carrying out your duties at present and the company insurers have stated that they cannot cover you to carry out any work with or for Clearance and Clean Up Limited.
> …
> After our meeting, on behalf of Clearance and Clean Up Limited you are dismissed for the fair reason of Capability from Friday the 11th of February 2022."

20. It was made clear by Mr Bourke and Mr Pilkington that the decision to dismiss had been made by Tom Pilkington.

The law

Direct discrimination

21. Section 13 of the Equality Act 2010 provides;

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2)

22. In **Islington Borough Council v Ladele** [**2009] ICR 387** Mr Justice Elias explained the essence of direct discrimination as follows:

> "The concept of direct discrimination is fundamentally a simple one. The claimant suffers some form of detriment (using that term very broadly) and the reason for that detriment or treatment is the prohibited ground. There is implicit in that analysis the fact that someone in a similar position to whom that ground did not apply (the comparator) would not have suffered the detriment. By establishing that the reason for the detrimental treatment is the prohibited reason, the claimant necessarily establishes at one and the same time that he or she is less favourably treated than the comparator who did not share the prohibited characteristic."

23. In **Glasgow City Council v Zafar [1998] ICR** Lord Browne-Wilkinson stated:

> "Those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them"

24. It is sufficient for a claimant to establish direct discrimination if he or she can satisfy the Tribunal that the protected characteristic was one of the reasons for the treatment in question. It need not be the sole or even the main reason for that treatment; it is sufficient that it had a significant influence on the outcome

25. Since the House of Lords' Judgment in **Shamoon v Chief Constable Royal Ulster Constabulary [2003] IRLR 285** the tribunal should approach the question of whether there is direct discrimination by asking the single question of the reason why. That case has been expanded on by **Chief Constable of West Yorkshire Police v Khan** [**2001] IRLR 830**, **Ladele, Amnesty International v Ahmed [2009] IRLR 884**, **Aylott v Stockton on Tees Borough Council [2010] IRLR 994**, **Martin v Devonshires Solicitors [2011] ICR 352, JP Morgan Europe Limited v Cheeidan** [**2011] EWCA Civ 648**, and **Cordell v Foreign and Commonwealth** Office [2012] ICR 280.

Discrimination arising from Disability

26. Section 15 of the Equality Act 2010 states:

> "(1) A person (A) discriminates against a disabled person (B) if –
>
> (a) A treats B unfavourably because of something arises in consequences of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Sub-Section (1) does not apply if A shows that A did not now, and could not reasonably have been expected to know, that B had the disability.

27. Under section 15 there is no requirement for a Claimant to identify a comparator. The question is whether there has been unfavourable treatment: the placing of a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person; see Langstaff J in **Trustees of Swansea University Pension & Assurance Scheme & Anor v Williams UKEAT/0415/14** at paragraph 28. As the EAT continued in that case (see paragraph 29 of the Judgment), the determination of what is unfavourable will generally be a matter for the Employment Tribunal.

28. The starting point for a Tribunal in a section 15 claim has been said to require it to first identify the individuals said to be responsible and ask whether the matter complained of was motivated by a consequence of the Claimant's disability; see **IPC Media Ltd v Millar [2013] IRLR 707**: was it because of such a consequence?

29. With regard to justification, The EAT in **Hensman v Ministry of Defence UKEAT/0067/14/DM, [2014] EQLR 670** applied the justification test as described in **Hardy and Hansons Plc v Lax [2005] ICR 1565**, CA to a claim of discrimination under section 15 Equality Act 2010. Singh J held that when assessing proportionality, while an ET must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer. In effect the Tribunal needs to balance the discriminatory effect of the stated treatment against the legitimate aims of the employer on an objective basis in considering whether any unfavourable treatment was justified.

30. The statute provides that there will be no discrimination where a respondent shows the treatment in question is a proportionate means of achieving a legitimate aim or that it did not know or could not reasonably have known the Claimant had that disability.

31. In the case of **Pnaiser v NHS England [2016] IRLR 170** it was provided as follows:

> "In the course of submissions I was referred by counsel to a number of authorities including **IPC Media Ltd v Millar [2013] IRLR 707, Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN** and **Hall v Chief Constable of West Yorkshire Police [2015] IRLR 893**, as indicating the proper approach to determining section 15 claims. There was substantial common ground between the parties. From these authorities, the proper approach can be summarised as follows:
>
> (a) 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 respects relied on by B. No question of comparison arises.
>
> (b) 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 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 section 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.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: **see Nagarajan v London Regional Transport [1999] IRLR 572**. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises.

(d) The Tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is "something arising in consequence of B's disability". That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of section 15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of section 15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, 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.

(e) For example, in **Land Registry v Houghton UKEAT/0149/14** a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The Tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. 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.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) Miss Jeram argued that "a subjective approach infects the whole of section 15" by virtue of the requirement of knowledge in section 15(2) so that there must be, as she put it, 'discriminatory motivation' and the alleged discriminator must know that the 'something' that causes the treatment arises in consequence of disability. She relied

on paragraphs 26 to 34 of **Weerasinghe** as supporting this approach, but in my judgment those paragraphs read properly do not support her submission, and indeed paragraph 34 highlights the difference between the two stages - the 'because of' stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the 'something arising in consequence' stage involving consideration of whether (as a matter of fact rather than belief) the 'something' was a consequence of the disability.

(h) Moreover, the statutory language of section 15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of section 15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under section 13 and a discrimination arising from disability claim under section 15.

(i) As Langstaff P held in **Weerasinghe**, it does not matter precisely in which order these questions are addressed. Depending on the facts, a Tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to 'something' that caused the unfavourable treatment."

32. In the case of **A Ltd v Z [2019] IRLR 952** it was stated by Eady J*:*

"(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see ***City of York Council v Grosset [*2018] EWCA Civ 1105, [2018] IRLR 746, [2018] ICR 1492 CA** at para 39**.**

(2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of s 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect, see ***Donelien v Liberata UK Ltd (2014)* UKEAT/0297/14, [2014] All ER (D) 253** at para 5, per Langstaff P, and also see **Pnaiser v NHS England *(2016)* UKEAT/0137/15/LA, [2016] IRLR 170** EAT at para 69 per Simler J.

(3) The question of reasonableness is one of fact and evaluation, see **[2018] EWCA Civ 129, [2018] IRLR 535 CA** at para [27];

nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance:
(i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes *(see* **Herry v Dudley Metropolitan Council *(2016)* UKEAT/0100/16, [2017] ICR 610**, per His Honour Judge Richardson, citing **J v DLA Piper UK LLP (2010) UKEAT/0263/09, [2010] IRLR 936, [2010] ICR 1052)***,* and
(ii) because, without knowing the likely cause of a given impairment, *'it becomes much more difficult to know whether it may well last for more than 12 months, if it is not [already done so]'*, per Langstaff P in **Donelien** EAT at para 31.

(5) The approach adopted to answering the question thus posed by s 15(2) is to be informed by the Code, which (relevantly) provides as follows:

> '5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a “disabled person”.
>
> *5*.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.'

(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so *(***Ridout v T C Group (1998) EAT/137/97, [1998] IRLR 628; Alam v Secretary of State for the Department for Work and Pensions (2009) UKEAT/0242/09, [2010] IRLR 283, [2010] ICR 665).**

(7) Reasonableness, for the purposes of s 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code.”

33. In the case of **City of York Council v Grosset [2018] IRLR 746** the Court of Appeal held that section 15(1)(a) requires an investigation of two

> distinct causative issues: (i) did A treat B unfavourably because of an (identified) 'something'? (ii) and did that 'something' arise in consequence of B's disability?

Submissions

34. The Tribunal has considered the submissions provided by, or on behalf of, each party. The submissions are not set out in detail, but the parties should be assured that the Tribunal has considered all the submissions and any authorities referred to.

Conclusions

35. The first issue identified in the Preliminary Hearing for the Tribunal to decide was whether the claimant had a disability as defined in section 6 of the Equality Act 2010. It was conceded by the respondent that the claimant was a disabled person at the material time**.** In his submissions Mr Bourke said that there should be no case as the claimant cannot be disabled and fit to work and that one precludes the other. This is not the case, one of the purposes of the Equality Act is the protection of disabled employees in the workplace. You

36. The Tribunal finds it appropriate to set out its findings with regard to direct discrimination at this stage. The claimant was dismissed and the Tribunal has to determine whether that was less favourable treatment.

37. The Tribunal has considered the question of a comparator**.** There was no actual comparator identified

38. In the case of **Shamoon** it was said by Lord Nicholls that:

> "employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application?"

39. This approach has been adopted a number of subsequent cases. In **London Borough of Islington v Ladele** Elias J said that often, in practice, a Tribunal will be unlikely to be able to identify who the correct comparator is, without first asking and answering the question why the claimant was treated as he was. Until that question is answered, he said, the appropriate attributes of the comparator will not be known.

40. In this case the Tribunal considers that the reason for the dismissal of the claimant was explicit in the letter of dismissal. It was on the ground that the claimant was not capable of carrying out his duties at present and that the respondent's insurers had stated they could not cover him to carry out any work for the respondent. The Tribunal finds that it was not established that there were facts from which the Tribunal could conclude that there was a prima facie case of direct discrimination. The reason for the claimant's dismissal was the effect of his disability not because of that disability. This means that the case falls to be considered under section 15, discrimination arising from disability.

41. The next issue is whether the respondent treated the claimant unfavourably by dismissing him. The Tribunal is satisfied that the claimant was dismissed and that was unfavourable treatment.

42. The Tribunal is satisfied that claimant's absence from work from 4 October 2021 until 17 January 2022 was something arising in consequence of the claimant's disability. Also, arising from the erroneous conclusion that the claimant would continue to be unable to work as a result of the effects of the claimant's continuing impairment. The claimant's dismissal was because of the something arising in consequence of the claimant's disability.

43. The Tribunal has to decide whether the dismissal was a proportionate means of achieving a legitimate aim. It was submitted that the legitimate aim was the health and safety of the claimant, individuals working within the business, the general public and the respondent's ability to conduct its business efficiently.

44. The Tribunal is satisfied that was a legitimate aim and has gone on to consider whether the treatment was an appropriate and reasonably necessary way to achieve those aims.

45. It is provided in the respondent's Employees Handbook that:

"It is the responsibility of all managers to
:

… seek guidance from your manager on the appropriate management of sickness absence, in particular where an employee is absent on a long-term basis and/or issues of medical evidence arise;
obtain medical evidence from an employee's general practitioner and/or another doctor nominated by Clearance & Clean Up and/or Clearance & Clean Up occupational health advisor and/or an occupational health advisor from the government's Fit for Work service, where appropriate, to ensure Clearance & Clean Up has up-to-date medical information to assist with the management of employee attendance."

46. Also, Tom Pickering said that, if it had been indicated that the claimant's condition would improve, he would have been happy for him to remain on sick leave for three months. He had been misled by the risk assessment into believing that the claimant's condition was such that he would continue to be unable to drive or perform other work.

47. The respondent did not adequately consider the evidence with regard to the claimant's likely improvement. The respondent's sickness absence policy in the employee handbook provides for managers to obtain up-to-date medical evidence. This was not done.

48. The Tribunal is satisfied that something less discriminatory could have been done. Further medical evidence could have been obtained. The claimant could have been allowed more time off sick in order to establish his likely improvement.

49. The need of the claimant to remain in employment which he said he enjoyed outweighed the need of the respondent to dismiss the claimant on grounds of capability at the time of the dismissal.

50. In those circumstances, the unanimous judgment of the Tribunal is that claim of disability discrimination succeeds.

51. A hearing will be listed for the purposes of remedy. It will be necessary to hear further evidence and consider an up-to-date schedule of loss, recent medical evidence and details of benefits and the efforts of the claimant to mitigate his loss. The chance of a non-discriminatory dismissal may need to be considered pursuant to the case of **Abbey National plc v Chagger 2010 ICR 397.**

Employment Judge Shepherd

Date: 22 December 2022