



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Verdin

**Respondent:** M & S Transport

**HELD AT:** Manchester (by CVP)

**ON:** 21 March 2023

**BEFORE:**

Employment Judge B Hodgson (sitting alone)

## REPRESENTATION

**Claimant:** In person

**Respondent:** Mr D Flood, Counsel

# RESERVED JUDGMENT ON PRELIMINARY HEARING

The Judgment of the Tribunal is that

- 1 the claimant was not, at the relevant time, a disabled person as defined
- 2 the claims of direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments and harassment are accordingly dismissed
- 3 the claimant is ordered to pay to the respondent the sum of £1,250.00 by way of costs
- 4 the matter is listed for a further Preliminary Hearing on 13 June 2023

# REASONS

## Background

1. The claimant initially presented an ET1 Claim Form on 10 February 2022 which was given case number 2400894/2022. The form set out claims of:
  - 1.1. Direct disability discrimination
  - 1.2. Discrimination arising from disability
  - 1.3. Failure to make reasonable adjustments
  - 1.4. Harassment
  - 1.5. Victimisation
  - 1.6. Failure to provide written statement employment particulars
  - 1.7. Unauthorised deduction from wages
2. The claimant subsequently presented a further ET1 Claim Form on 12 June 2022 which was given case number 2404704/2022. The form set out a claim of constructive unfair dismissal
3. All claims were defended by the respondent with separate ET3 Response Forms. It was denied that the claimant was, at the relevant time, a disabled person as defined
4. The matter came before the Employment Tribunal by way of Preliminary Hearing on 23 August 2022 ("the first PH")
5. At the first PH, case management orders were made culminating in a Final Hearing listed for 22 – 26 January 2024. The matter was also listed for a further Preliminary Hearing on 1 December 2022 'to determine whether or not the claimant was a disabled person by reason of the impairments of spinal stenosis and arthritis and emotional unstable personality disorder' ("the disability issue"). Further case management orders were made in respect of the disability issue
6. The matter came before the Tribunal as scheduled on 1 December 2022 but was adjourned to 23 December and was further adjourned on that day to 21 March 2023. The Record of the Preliminary Hearing on 23 December 2022 sets out the background and reasons for the two adjournments and the further case management orders made

7. The matter proceeded on 21 March 2023 by way of Preliminary Hearing to determine the disability issue

#### Disability Issue

8. What was to be considered and determined at this Preliminary Hearing was discussed at the outset
9. The issue to be determined by the Tribunal is whether or not at the relevant time the claimant was a disabled person as defined
10. The claimant confirmed at the outset that he was relying on the conditions of Emotional Unstable Personality Disorder and Spinal Stenosis and Arthritis although he clarified that, in respect of the latter condition, he would describe it more generically as a "spine and shoulder condition". The respondent's representative took the position that the claimant's pleadings had been clear in the two impairments to be relied upon and this was an attempt at the last minute and without prior notification to widen the position. The Tribunal noted the parties' respective positions
11. In terms of the relevant period, it was agreed that, in accordance with the pleaded case, the discriminatory acts complained of commence in August 2018 and run through to February 2022. This was accordingly agreed by both parties as the relevant period

#### Facts

12. The parties had agreed a bundle of documents ("the Bundle") and references to numbered pages in this Judgment are to pages as numbered within the Bundle. The Tribunal makes reference within these findings to certain entries within the claimant's medical records but all documentation put before the Tribunal was considered by it
13. The claimant had prepared, as he had been ordered to do, a written statement ("the Impact Statement") which had been forwarded to both the Tribunal and the respondent by email dated 6 October 2022 [pages 93 – 94] and gave oral evidence on his own behalf. What was needed to be covered within such statement was fully set out in the Record of the first PH [see page 78 at paragraph 3.2]. The respondent's representative did not call any witnesses to give oral evidence
14. The Tribunal came to its conclusions on the following facts on the balance of probabilities, having considered all of the evidence before it, both oral and documentary, and the submissions made by both parties

*General background*

15. The claimant was employed by the respondent as a Driver from early 2019 until February 2022. On the face of the papers, there is a dispute as to the actual start date. The Record of the first PH sets out a brief case summary [see page 75 at paragraphs 11 – 14]

*Medical Records - Spinal Stenosis and Arthritis*

16. The claimant's evidence was that this impairment arose from a Road Traffic Accident in July 2019 and he had been told of this specific diagnosis by his GP in January 2021. There is no record within the Bundle of such diagnosis nor in fact of any consultation between the claimant and his GP at all in the month of January 2021
17. While acknowledging the respondent's position as to the claimant's pleaded case and the specific impairments said to be relied upon, the Tribunal noted the following potentially relevant entries
18. 17 July 2019. *Pain in the shoulder and lower back* following a Road Traffic Accident the previous day [page 182]
19. 13 September 2019. *...increased pain in the back, getting pain in shoulder blade and in the middle of the back* [page 182]
20. 11 December 2020. Following x-rays on clavicle and shoulder, *nil found but ongoing private avanti physio not improving and very painful.... Suspecting undiagnosed rotator tear. HGV driver using paracetamol and not keen for further analgesia but impacting ability to work and needs sorting* [page 178]
21. 18 December 2020. *Minor osteophytosis C2 – 5. No vertebral body height loss/fracture* [page 177]
22. 12 February 2021. *There is moderate tendinopathy involving the supraspinatus particularly bursal surface fibres with overlying thickening of the subacromial bursa which looks longstanding. Rotator cuff tendons are otherwise intact. Mild degenerative ACJ OA ... tendinopathy and mild arthritis* [page 177]. This diagnosis was confirmed on 15 March 2021 with *longstanding back/neck pain since accident a couple of years ago ... some osteophytes* [page 176]
23. 11 April 2022. *Mild degenerative change in the imaged spine* [page 165]
24. There are earlier references to lower back pain including on 25 March 2015 confirming that *axial imaging through the lowest three lumbar discs shows no*

*disc prolapse, spinal stenosis, exit foraminal narrowing or nerve root impingement at any level [page 193]*

*Medical Records - Emotional Unstable Personality Disorder*

25. It is agreed that the claimant was formally diagnosed with the condition of Emotional Unstable Personality Disorder in 2011
26. The claimant's evidence was that he had not taken any medication for this condition since 2014
27. In response to a letter of enquiry from the DVLA [pages 210 – 212], the claimant's GP confirmed that as far as he could ascertain from the claimant's GP records, *his mental health has remained stable over the period you mention [page 214]*. It is not entirely clear what period is being referred to but it appears to be from 2011
28. There was also a request from the claimant dated 11 October 2021 [page 216] to his GP to supply a report to the respondent – *can you also confirm I am not medicated and no medication is required*. The GP did confirm this by letter dated 17 October 2021 [page 213] stating that the claimant "has not taken any medication for [the mental impairment] for several years"

*Impact Statement*

29. The claimant's Impact Statement is at pages 93 – 94. It is very generalised and the respondent's representative did not cross-examine the claimant, acknowledging that the evidence set out in the statement was accordingly unchallenged
30. Given that the claimant was not legally represented, the Tribunal gave him the opportunity to expand upon the content of his statement
31. In answer to the Tribunal's question as to whether either of the impairments relied upon prevented him from doing anything, his reply was that he struggles with his emotions, struggles to get up in the morning and struggles with crowds of people. He was however taking no medication and there was nothing that he could not do on a day to day basis as a consequence of his impairments. He referred the Tribunal to a letter from his GP dated 30 March 2020 which confirmed this evidence [page 257]
32. The Tribunal's assessment of this evidence is incorporated within its conclusions below

### Statutory Framework

33. The definition of a disabled person for the purposes of the statute appears at section 6 Equality Act 2010 ("EqA"). This is supplemented by Schedule 1, Part 1 EqA, headed "Determination of Disability"
34. The burden is on the claimant to show, on the balance of probabilities, that he had, at the relevant time, a disability as defined
35. Section 6(1) EqA states:

"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."
36. Within the interpretation section, section 212 EqA states that, in this Act ... 'substantial' means 'more than minor or trivial'
37. Paragraph 2 of Schedule 1 Part1 EqA states that the effect of an impairment is long-term if –
  - a) it has lasted for at least 12 months, [or]
  - b) it is likely to last for at least twelve months ,,,

Further at subsection (2), "if an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur"
38. The long-term requirement relates to the effect of the impairment rather than the impairment itself
39. In determining whether a person is disabled, the Tribunal should apply the appropriate test to the claimant's condition at the date of the alleged discriminatory act and not at the date of the hearing (see, for example *Cruikshank v VAW Motorcast Limited* [2002] IRLR 24
40. In the context of the definition of "long-term", "likely" means "could well happen" (see, for example, *SCA Packaging v Boyle* [2009] IRLR 746)
41. "Guidance on matters to be taken into account in determining questions relating to the definition of disability" was issued in 2011. This Guidance does not impose any legal obligations in itself, nor is it an authoritative statement of the

law. Any aspect of this Guidance, however, which appears to the Tribunal to be relevant in determining whether a person is a disabled person must be taken into account and the Tribunal considered the Guidance where relevant to its findings

### Submissions

42. The respondent's representative made oral submissions summarised as follows
  - 42.1. the pleadings make very clear the conditions being relied upon by the claimant
  - 42.2. the Tribunal was referred to what the representative considered to be the relevant entries within the claimant's medical records
  - 42.3. such entries when seen in the context of the evidence given by the claimant both within his Impact Statement and orally lead to the clear conclusion that the claimant does not fall within the definition of a disabled person during the relevant time
43. The claimant made oral submissions summarised as follows:
  - 43.1. there was a clear history of his mental health
  - 43.2. the medical records confirm the physical difficulties he has had with his back neck and shoulder and it has been made clear to him that without physio he would end up with arthritis
44. Neither party referred the Tribunal to any caselaw

### Conclusions

45. It is for the Tribunal to determine whether as a consequence of his impairments, the claimant falls within the definition of a disabled person based upon the evidence both oral and documentary
46. There is no disagreement that the claimant has been formally diagnosed with the mental condition of Emotional Unstable Personality Disorder as long ago as 2011 or that he had a Road Traffic Accident in July 2019 which caused physical damage to the region of his neck, shoulder and back
47. The claimant has not been prescribed any medication with regard to his mental impairment for a number of years prior to the relevant period but there is clearly no argument as to this impairment falling within the definition of "long-term"

48. With regard to the physical impairment relied upon, the Tribunal noted that this was specifically described within the pleadings at a time when the claimant was legally represented as "spinal stenosis and arthritis". As indicated, at the outset of the hearing, the claimant suggested a more generic complaint of "spine and shoulder condition" and the respondent's representative's objection to this is also noted. The Tribunal's position is that it is not prepared to discount the potential of the claimant falling within the definition of a disabled person by reference to this impairment solely on a somewhat technical argument over the exact terminology used to describe it
49. Again, given the timing, the Tribunal concludes that there is no argument as to this impairment falling within the definition of "long-term"
50. In respect of each impairment therefore, the argument concerns whether or not either or both of them fall within the definition of having a substantial adverse effect upon the claimant's ability to carry out normal day to day activities
51. The claimant's Impact Statement does make reference, in regard to his mental impairment, to his mood, thoughts and emotions. In regard to the physical impairment, it states that "the pain was that severe I struggled to walk upright sit comfortably or even sleep in bed at night. I had broken sleep throughout my ordeal and I am still suffering now. I find that the only position I am comfortable since the accident is to sit on the end of the bed and rest my head on a suitcase or dressing table." Whilst the ability to sleep would readily fall within the category of day to day activities, these are somewhat generalised statements. Although the Tribunal is mindful that reference in the statutory framework is specifically to "normal day to day activities", the Tribunal does consider it relevant - particularly given the matters relied upon by the claimant – to note that effectively throughout the relevant period, the claimant was able to perform his work duties. It is further noted that his job was a commercial driver, a job that requires careful and prolonged attention given the potential severe consequences of any lapse in concentration and an element of physical dexterity
52. The most telling evidence however is the claimant's own oral evidence that "there is nothing I cannot do on a day to day basis"
53. The Tribunal is mindful that "substantial" is interpreted as "more than minor or trivial" but the Tribunal concludes, on the evidence and on balance of probabilities, that neither of the claimant's impairments had any substantial effect upon his ability to carry out normal day to day activities during the relevant period.



54. Accordingly, the Tribunal concludes that the claimant was not, at the relevant time, a disabled person as defined
55. It follows as a consequence that the claims of direct discrimination, discrimination arising from disability, failure to make reasonable adjustments and harassment fall to be dismissed
56. It was agreed that the appropriate next step, irrespective of the outcome of the Preliminary Hearing, was for the matter to be listed for a further Preliminary Hearing to consider any further case management orders that may be required prior to the Final Hearing which at present remains as listed

### Costs

57. As had been anticipated at the adjourned hearings, the respondent made an application for costs under Rule 76 which was opposed by the claimant
58. The application was put on the basis of the claimant having acted unreasonably in his conduct of the claim, specifically in the Preliminary Hearing being adjourned on 1 December 2022
59. The background to the adjournment, as indicated, is set out in the Record of the hearing listed on 23 December 2022 [pages 86 – 89]
60. The respondent, fairly, limited its claim to the consequences of the adjournment on 1 December 2022 arguing that it arose out of the claimant's failure to produce his medical records which amounted to unreasonable conduct on his part.
61. The claimant accepted that he had not produced his medical records in advance of the hearing. He explained this variously by reference to a misunderstanding with his prior legal representative, a misunderstanding as to what was required to be produced and difficulties as to formatting
62. The Tribunal noted the clear requirement as to production set out in the Record of the first PH [page 78 at paragraph 3.3] and the time available to comply
63. In all the circumstances, the Tribunal was satisfied that the claimant's conduct resulting in the hearing having to be adjourned was unreasonable and a costs order would accordingly be made
64. The Tribunal took brief evidence from the claimant as to his financial position (see Rule 84) . The claimant had secured further employment since the termination of his employment with the respondent at the rate of £34,000 per annum with standard outgoings

65. The respondent's representative valued the claim at Counsel's fees of £1,250 and solicitor's fees £1,750 and provided a breakdown. The Tribunal was satisfied that Counsel's fees had been unreasonably incurred in all the circumstances. The solicitor's fees however were somewhat peripheral to the adjournment itself and, on the information provided, better described as part of overall preparation. In such circumstances, the Tribunal considered it appropriate to make a costs order in the sum of £1,250

Further conduct

66. A further Preliminary Hearing is listed for 13 June 2023, starting at 10am with a time estimate of two hours, when the remaining complaints will be considered and further case management orders made with a time estimate of two hours.

This will be a remote hearing either by telephone or CVP and the parties will be sent joining instructions closer to that date

67. One of the matters that will need to be clarified is the correct identity of the respondent

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Employment Judge B Hodgson

Date 27 April 2023

JUDGMENT SENT TO THE PARTIES ON

3 May 2023

FOR THE TRIBUNAL OFFICE

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