



# EMPLOYMENT TRIBUNALS

## Claimant

Mr Matthew Paul Haydon Brown v

## Respondent

L & B Ventilation Supplies Limited  
Steve Oakley  
Darren Foyster  
Craig Callaway

**Heard at:** Norwich

**On:** 10-13 October 2023

**Before:** Employment Judge S Moore  
Mrs J Costley  
Mr L Hoey

## Appearances

**For the Claimant:** In person

**For the Respondent:** Mr K McNerney, Counsel

## JUDGMENT

The claims of discrimination arising from disability and of disability related harassment under, respectively, sections 15 and 26 of the Equality Act 2010 are dismissed.

## REASONS

### Introduction

1. This is a claim for discrimination arising from disability under s. 15 Equality Act 2010 (EqA) and for disability related harassment (s.26 EqA).
2. The claim form was lodged on 16 January 2023 following a period of ACAS Early Conciliation as regards the First Respondent between 14 November 2022 and 26 December 2022; the Second Respondent

between 2 December 2022 and 13 January 2023; the Third Respondent between 2 December 2022 and 16 December 2022; and the Fourth Respondent between 2 December 2022 and 13 January 2023. References in this judgment to “the Respondent” in the singular are to the First Respondent.

3. At a previous Public Preliminary Hearing, the Respondent conceded the Claimant is and was at the material time a disabled person within the meaning of s. 6 EqA by reason of Post-Traumatic Stress Disorder (PTSD).
4. At today’s hearing we heard evidence from the Claimant and, on his behalf, from Mr Paul Willmott (PW), the Claimant’s stepfather, and for the Respondents, from Mr Lee Foyster (LF), branch manager, Steven Oakley (SO), delivery driver, Darren Foyster (DF), delivery driver, Craig Callaway (CC), sales administrator, and Elliot Buys (EB), assistant manager. We were also referred to a bundle of documents.
5. On the basis of that evidence, we make the following findings of fact.

### **The Facts**

6. The Claimant was employed by the Respondent as a sales administrator between 10 August 2021 and 25 January 2023, when he resigned. During his employment he reported to LF, the branch manager.
7. His contract of employment provided for a probationary period of 3 months, which could be extended. At the end of the initial 3-month probation period, his probation period was extended to 6 months, namely 10 February 2022, when his employment was confirmed. At that time the Claimant asked LF if he could work from home, but this request was refused. The Claimant then asked if he could take breaks from his workstation to assist with his concentration, and LF agreed.
8. For a period of time, the Claimant was moved to a non-sales department office to see if by removing the distraction of calls and general noise his performance improved. However, he was subsequently given a verbal warning for wandering around the warehouse on his phone for personal matters and taking it upon himself to do jobs such as shelf stacking that he hadn’t been asked to do. He was then moved back into the main sales office.
10. On or about 26 April 2022 the Claimant attended a Performance Improvement meeting. A letter sent to the Claimant stated, “As you are aware from previous conversations I am concerned about your performance. Specifically, the following areas: general processing errors costing the company money; timekeeping; personal phone calls and errands within working hours; focus and concentration; and attendance”. The letter stated that further action would be taken if there was no improvement but the process was intended to be collaborative with the aim of agreeing measures to help the Claimant improve his performance. A follow up meeting was scheduled for 25 July 2022.

11. The Claimant responded by saying something along the lines that the Respondent was not allowed to single him out because he had medical conditions which made him exempt. LF stated this was the first time he had heard of the Claimant suffering from any medical condition whatsoever, and further that he never made any enquiries of the Claimant at the time to ask him what medical conditions the Claimant was referring to.
12. The Claimant said he had already told LF that he suffered from PTSD in February 2022 when he said he needed breaks from his workstation to assist his concentration, and after he took time off work following the death of his pet rabbit.
13. We find that the dispute of evidence in this respect is not material since it is clear that by the end of April 2022 LF knew, or could reasonably have been expected to know, had he made reasonable enquiries of the Claimant, that the Claimant had been diagnosed as having the mental impairment of PTSD.
14. On or about 12 July 2022, the Claimant obtained a fit note from the nurse at his GP's practice covering the period 12 July 2022 to 11 August 2022 stating that on account of "anxiety" he "may be fit for work taking account of the following advice" namely "will need regular breaks". The Claimant said he gave the fit note to LF. The Claimant continued to attend work during this period and LF says he never received the fit note.
15. Again, we do not find this dispute of evidence material because it was common ground between the Claimant and LF that the Claimant had been allowed to take breaks to assist his concentration since February 2022.
16. In September 2022 the Claimant reported to LF that he "was being made fun of", in particular that in the warehouse SO had made the comment "it's like working with a retard" and DF had made the comment "you must be a fucking retard or something", and that in the sales office CC had said "you're like someone from children in need".
17. LF spoke to SO, DF, and CC who all denied making the comments. LF also spoke to the Warehouse Supervisor in particular to ask if he had heard anything, but he hadn't, and to all other members of staff. On 21 October 2022 LF sent the Claimant a letter setting out his findings and stating, "Without the evidence to back up Matthew's claim we will not look to investigate further, however I have made it very clear to everyone that such behaviours would not be tolerated and...should be reported to me immediately."
18. On 8 November 2022 there was an incident where the Claimant recorded in a work diary left visible on his desk that CC had gone home for the day at 1pm. The implication was this had been done to get CC into trouble. This caused upset in the office because LF had allowed CC to go home early as his wife had suffered a miscarriage.

19. On Friday 11 November 2022 LF asked the Claimant to meet him in the canteen. LF wanted to give the Claimant a letter inviting him to a meeting the following week to discuss continuing problems his performance. The Claimant brought PW to the canteen – PW being his stepfather. The meeting deteriorated as the Claimant, at least initially, refused to take the letter from LF. Their conversation continued in the upstairs sales office at which point, the Claimant was being sufficiently disruptive that LF told CC, to terminate his telephone call to a customer and pack up the office. LF then told the Claimant he was being suspended and he had to leave the premises. As they walked downstairs the Claimant took out his phone and began to record their conversation. We listened to the Claimant's recording of the conversation which included LF telling the Claimant he (the Claimant) had to read the letter he had been given and that he had been suspended for "standing up and walking off when [his] boss was trying to talk to him".

20. On 12 November 2022 LF sent the Claimant a further letter, being the same as the one he had tried to give the Claimant the previous day, inviting him to attend a Formal Disciplinary Meeting on Wednesday 16 November 2022. The letter states:

"Following concerns regarding your performance and conduct you are required to attend a disciplinary meeting....

The purpose of the meeting will be to discuss the following:

- Negligence leading to repeated loss of profits and expense to the company. This includes the loss of circa. £628.32 this month due to failing to complete the cancellation of orders. Email trails and PO are provided with this letter.
- Poor attitude to your work and refusal to follow reasonable management instructions. In particular, repeatedly leaving your position in the office during normal working hours, forcing management to come and find you and others to pick up your work load.
- Causing conflict in the workplace by making comments about other employees have caused serious personal stress. Photo evidence of the L & B diary with such comments is available.

At the meeting you will have the opportunity to state your case, explain your conduct and put forward any mitigation factors...I must advise you that one possible outcome could be a final written warning."

21. On 14 November 2022 by email at 11.23 the Claimant asked for the disciplinary meeting to be postponed until Friday 18 November 2022. On the same day he also contacted ACAS for the purpose of starting Early Conciliation.

22. LF replied by email on 14 November 2022 at 11.31 stating it wasn't a problem to delay the meeting to 18 November 2022 and on 17 November 2022 sent the Claimant an email timed at 11.42 telling him the time and date.
23. At 14.31 on 17 November 2021 the Claimant sent a lengthy email to LF setting out "mitigating factors to the actions being taken against me".
24. The Claimant didn't attend the meeting on 18 November 2022.
25. Later the same day a letter was collected from LF by DPD and delivered to the Claimant's home address on 19 November 2022. There is photographic evidence to support the collection date, the delivery date, and the fact of a letter being delivered.
26. The Claimant's evidence was that the letter contained a Final Writing Warning (FWW), however we reject that evidence for reasons set out below at paragraphs 36-40. We find that that letter was a letter inviting the Claimant to a further meeting on 22 November 2022.
27. On 21 November 2022 the Claimant emailed LF at 15.41 he would not be attending "tomorrow's hearing" due to "mental anguish".
28. On 21 November 2022 LF emailed the Claimant at 16.58 stating, "As no effort was made to inform us that you would not attend the Friday meeting you requested, this has been marked as an unauthorised absence without leave...As you have decided not to attend the meeting tomorrow, also, we will complete the meeting in your absence and a decision will be made without your input".
29. On 22 November 2022 the Claimant provided LF with a fit note covering the period 22 November 2022 to 5 December 2022 stating he was not fit to work because of PTSD.
30. On 22 November 2022 at 17.33 LF sent the Claimant a further email stating the Claimant's suspension had expired and the normal statutory sick pay rules applied. The email also stated "If you do not feel able to contact me yourself, please ask someone else...to get in touch me on your behalf. It is important that we maintain contact throughout your absence so we can make the necessary arrangements while you are away."
31. There is no reference to the disciplinary meeting on 22 November 2022 having gone ahead, and we accept LF's evidence that the meeting was cancelled in view of the Claimant having provided a sick note.
32. On 6 December 2022 the Claimant submitted a further sick note. An email from LF to the Claimant at 08.49 states "All received. Just let me know when you're ready to return and we'll continue from there."
33. The Claimant continued to submit fit notes on grounds of "Anxiety/Depression/PTSD".

34. On 16 January 2023 he lodged his Claim Form.
35. On 25 January 2023 the Claimant sent LF an email stating "Please confirm this previous message was considered as my resignation". The email in question was the one sent on 17 November 2022, making the Claimant's mitigation representations prior to the meeting on 18 November 2022.

#### The Final Written Warning

36. The Claimant's case as set out in his Claim Form, recorded in the List of Issues agreed at a Preliminary Hearing on 5 July 2023, and as set out in his witness statement was that the Respondent sent him by post a FWW either in January 2023 (List of Issues) or around mid to end November 2022 (paragraph 16 of his witness statement), however he had since lost the letter.
37. As stated above, the bundle contains a photograph of a letter being delivered by DPD and the Claimant's case was that this letter contained the FWW. At the time the Claimant gave his evidence the photograph did not have a date stamp and the Claimant said in answer to questions, that the letter said the FWW followed on from the meeting that had taken place on 22 November 2022 and, further, that his email of 17 November 2022, setting out his mitigating factors, had been used at that meeting as evidence in place of him being there.
38. The Respondent subsequently produced a time stamp for the photograph, showing it had been taken on 19 November 2022. It is therefore plain that the photograph in the bundle is not a photograph of a letter containing a FWW decided upon at a meeting on 22 November 2022.
39. Furthermore, the letter containing the FWW has never been produced, none of the email correspondence between the Claimant and Respondent between November 2022 and January 2023 refers to the Respondent having sent, or the Claimant having received a FWW, the Claimant's resignation email makes no mention of a FWW, and in his evidence to the Tribunal PW (the Claimant's step-father who also works for the Respondent), stated he knew nothing about the Claimant having received a FWW.
40. We are therefore satisfied that the Claimant was never issued with a FWW by the Respondent and that his evidence to the Tribunal in this respect has not been truthful.

#### **Conclusions**

##### *Discrimination arising from Disability*

41. Section 15 EqA provides:

"(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.”

42. In the list of issues agreed at a Preliminary Hearing on 5 July 2023, the unfavourable treatment relied upon by the Claimant is stated to be being placed on suspension on 11 November 2022, being invited to a disciplinary meeting, being given a FWW by letter, and being constructively dismissed.
43. The “something arising” in consequence of the Claimant's PTSD is said to be that he was required to take regular breaks from his desk to allow him to gather his thoughts.
44. We will consider the issue of constructive dismissal at the end of our judgment.
45. As regards the unfavourable treatment of being given a FWW, since we have found the Claimant was never given one, that complaint plainly cannot succeed.
46. As regards the unfavourable treatment of being suspended, we find that LF did not ask to meet the Claimant in the canteen with the intention of suspending him, rather he suspended the Claimant because of the Claimant's behaviour at that meeting, which we have set out above. The Claimant's suspension was therefore nothing to do with the Claimant being required to take regular breaks from his desk to allow him to gather his thoughts (and so was not because of something arising in consequence of his disability).
47. As regards, being invited to a disciplinary hearing, while, according to the letter dated 12 November 2022, one part of the reason the Claimant was invited to a disciplinary hearing was, broadly speaking, because he regularly left his desk during office hours, we do not consider that the problem in this respect was that he simply left his desk and/or needed regular breaks from his workstation.
48. We find that LF did not have an issue with the Claimant simply taking breaks from his work station to assist his concentration, but – as had been foreshadowed in the letter of 26 April 2022 and was set out in the letter dated 12 November 2022 – rather had an issue with the Claimant running personal errands, making personal phone calls and disappearing for extended periods of time so that management had to come and find him and others had to pick up his workload. We don't accept that the Claimant was required to take breaks of this kind from his workstation because of

his PTSD and we therefore don't accept that the invitation to a disciplinary hearing was even in part because of something arising in consequence of his PTSD.

*Disability Related Harassment*

49. Section 26(1) EqA provides:

“(1)A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) The conduct has the purpose or effect of-

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating, or offensive environment for B.”

50. In this case the Claimant relies on the alleged comments made by SO, DF, and CC.

51. SO, DF and CC all gave evidence and vehemently denied having made the comments or anything like them.

52. On the one hand we note that the Claimant complained about the comments at the time in September and/or October 2022. We also note that there are a lot of family relationships within the company, in particular DF is LF's father, EB is LF's brother-in-law, CC is LF's cousin, while PW is the Claimant's stepfather, so that factors of loyalty and collaboration between the witnesses may well be in play.

53. On the other hand, the Claimant's evidence as regards the details and context of the alleged comments was vague. Further we found DF's evidence as regards his denial persuasive, as it was clear he and the Claimant had enjoyed a good relationship. Finally, and most importantly, we consider the Claimant's credibility to be significantly undermined by the fact that despite maintaining that the Respondent gave him a FWW in November 2022 (or January 2023) we have found that no such FWW was ever given.

54. It is for the Claimant to prove (on the balance of probabilities) that the alleged comments were made, and in the light of the above, we are not satisfied he has discharged that burden.

55. It therefore follows that the complaint of harassment related to disability is dismissed.

*Constructive Dismissal*



56. Since the complaint of harassment has been dismissed and we have found that the Claimant was not suspended, invited to a disciplinary hearing, or given a FWW because of something arising in consequence of his disability, it follows there was no constructive dismissal and/or that he was not dismissed because of something arising in consequence of his disability.

57. The claim is therefore dismissed.

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Employment Judge S Moore

Date: 13 October 2023.....

Sent to the parties on: 6 December 2023.

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For the Tribunal Office