



## EMPLOYMENT TRIBUNALS

**Claimant:** Mr D Neale

**Respondent:** Mitie Limited

**Heard at:** London South (Croydon)      **On:** 14/5/2024 - 17/5/2024

**Before:** Employment Judge Wright  
Ms B Leverton  
Mr A Peart

**Representation:**

**Claimant:** In person

**Respondent:** Mr R O'Dair – counsel

## RESERVED JUDGMENT

It is the unanimous Judgment of the Tribunal that the claimant's claim under the Equality Act 2010 (EQA) is not well founded, it therefore fails and is dismissed.

## REASONS

1. The claimant presented a claim form on 2/4/2023 following a period of early conciliation which started on 10/2/2023 and ended on 10/3/2023. The

claimant is employed by the respondent as a Surveyor from 16/11/2020 and he remains employed.

2. A case management hearing took place on 10/11/2023 and that resulted in an agreed list of issues to be determined by the Tribunal.
3. The issues as per the case management Order are recorded as (page 61):

*3 Discrimination arising from disability (Equality Act 2010 section 15)*

*3.1 Did the respondent treat the claimant unfavourably by:*

*3.1.1 "Locking him out of work" and not providing him with suitable alternative work.*

*3.2 Did the following things arise in consequence of the claimant's disability:*

*3.2.1 The event which affected the Claimant during the meeting on 22nd December 2022?*

*3.2.2 The Claimant (allegedly) being told that his emotional stress may mean that he would be unable to perform a tower rescue?*

*3.3 Was the unfavourable treatment because of any of those things?*

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

*3.4.1 [TBC – see below]*

*3.5 The Tribunal will decide in particular:*

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

*3.5.2 could something less discriminatory have been done instead;*

*3.5.3 how should the needs of the claimant and the respondent be balanced?*

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

*In respect of 3.4.1 the respondent pleaded:*

*If the Respondent treated the Claimant less favourably because of something arising in consequence of the Claimant's disability (which the Respondent denies), the Respondent contends that the treatment*

*was a proportionate means of achieving a legitimate aim, namely to ensure the health and safety of the Claimant, his peers and the client to have a business service, as per the contract.*

4. The case management Order recorded that the list of issues was agreed at the preliminary hearing and if it was wrong or incomplete, the other side and Tribunal must be informed within seven days. There was no such correction and therefore the list of issues was agreed.
5. At the outset of the hearing, the respondent referred to the claimant making an application to amend his claim. No such application was made.
6. Under the Equality Act 2010 (EQA), the claimant claims the protected characteristic of disability (s.6). The respondent conceded the claimant was disabled on the 5/1/2024 (page 64). The prohibited conduct upon which he relies is discrimination arising from disability (s.15). The complaint is detriment (s.39(2)(d)).
7. The respondent initially took issue with the time limit, however, following discussion, it agreed the claim had been brought in time.
8. The Tribunal heard evidence from the claimant and from Mr David Lloyd the claimant's friend and supporter. The Tribunal is grateful to Mr Lloyd in giving up his time to support the claimant, which in turn assisted the Tribunal. There was also a witness statement from the claimant's partner, Mr Jay Curtis. Mr Curtis did not attend the hearing to give evidence and he was not therefore cross-examined in respect of his evidence. For the respondent it heard from: Ms Kate Campbell (HR Manager); Mr Alan Maunder (Account Director); Mr Ian Pearson (Director Program Management Office); and Mr Neil Aubeelack (Director Police Services).
9. There was a 577-page bundle. The Tribunal had both a hard and electronic copy.
10. Submissions were heard and considered.
11. The following findings of fact were reached by the Tribunal, on the balance of probabilities, having considered all of the evidence given by the witnesses during the hearing. It included the documents referred to by the witnesses and took into account the Tribunal's assessment of the evidence.
12. Only relevant findings of fact pertaining to the issues and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read

and/or was taken to in the findings below but that does not mean it was not considered if it was referenced in the witness statements/evidence.

#### Findings of fact

13. The burden of proof is upon the claimant in respect of the claim under the EQA.
14. The claim concerns one narrow and specific issue. Much of the detail is not in dispute. The terminology used may have been contentious, however, the claimant did not make a complaint in respect of that.
15. The claimant's employment transferred to the respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006 in August 2021.
16. The claimant had been on long-term sickness absence since August 2021.
17. In early 2022 the respondent was managing the claimant's absence and an Occupational Health (OH) report was obtained dated 16/3/2022 (page 422). That report suggested the claimant would be fit for a phased return to work when his fitness for work note expired on 7/3/2022.
18. The return to work did not take place in March 2022 and there was a further meeting on 15/7/2022 (page 188). That meeting referred to a medical report of 13/6/2022 (page 175). It was agreed that further medical reports were not needed and a phased return to work was again discussed. Full pay would cease from the end of July 2022 and the claimant would move onto statutory sick pay. The claimant was advised he could use the balance of his accrued annual leave if he wished to do so. There was a follow-up meeting on 29/7/2022 (page 190). A further meeting took place on 19/8/2022 which confirmed the claimant's phased return to work, with his first day back being the 6/9/2022 (page 192). Other adjustments were made.
19. On the 14/10/2022 the claimant attended a working at heights medical, which he failed. He took issue with this and felt that reasonable adjustments were not made. That was not an allegation before this Tribunal.
20. As part of the phased return to work, there were weekly catch-up meetings. The claimant felt that these meetings were not assisting him.
21. One such meeting took place on 2/12/2022 at 10am. During this meeting at approximately 10.21am (according to the claimant page 212) the claimant had what he described as an event/episode/incident; in which he, according to Ms Campbell (page 340):

'... blanked out for a couple of minutes, blank on the screen, staring, non-responsive he was just blank and getting nothing from him. When he did come round, he didn't know why he was on the call. [The claimant's] response was "oh I don't know what happened then, it doesn't normally happen, especially when I'm driving".'

22. This was obviously concerning for all involved. The claimant was due to have a medical/some tests the following week of the 5/12/2022 related to his reaccreditation to climb a tower/work at heights. There was a follow-up conversation between the claimant and Ms Campbell on the 2/12/2022.
23. It is the claimant's case that the 'event' (him becoming non-responsive) during the meeting on the 2/12/2022 is the 'something arising in consequence of his disability'.
24. The claimant has nocturnal sleep epilepsy (page 425). The result is that any seizures he has are when he is asleep and he is permitted to drive by DVLA. It seemed to be the claimant's case that the event was perceived by the respondent to be related to his epilepsy (a disability). The respondent described the event in a letter to the claimant's consultant as a 'vacancy/seizure' (page 268).
25. The claimant's case is that the event was completely unrelated to his nocturnal sleep epilepsy, as any seizures are nocturnal only (as described by the claimant's Specialist Epilepsy Nurse page 199). He blames the event on the 2/12/2022 upon: only waking up two minutes before the meeting started; poor sleep the night before/fatigue; too much caffeine; not having time to put in place his usual morning routine; boredom/not taking matters in/screen use (page 212). In short, there were other reasons for the event.
26. The claimant therefore was adamant that the event on the 2/12/2022 was nothing to do with his nocturnal sleep epilepsy; but that the respondent who had knowledge of his epilepsy (page 422) had made such a link (the event was a seizure as a result of his epilepsy) due to it describing the event as a 'vacancy/seizure'.
27. The claimant also made much of the respondent's response to the event on the 2/12/2022. For example, the fact that no ambulance was called and no accident or incident report was made. Ultimately, this was not a matter before the Tribunal for it to determine.
28. The claimant had a consultation with his Specialist Epilepsy Nurse on 5/12/2022 at 8.45am (page 198). The report indicated that the Nurse would like to see the claimant again in five months. There was no mention of the event on the 2/12/2022. The claimant stated that this was because there was no concern on the part of the Nurse. The claimant sent this report to the

respondent on the 20/12/2022 (page 222). The claimant stated in his covering email that there were no issues with him continuing to drive. The claimant said that this was an emergency appointment at 8.45am on the 5/12/2022, which he had arranged after the event the previous Friday. There is no reference by the Nurse to this being an emergency appointment.

29. It was the claimant's case that there was no mention of the event on the 2/12/2022 as it was of no consequence as far as the Nurse was concerned.
30. There was a meeting on the 5/12/2022 between the claimant, Ms Campbell and Mr Pearson. During the meeting, the claimant was told, on the respondent's case, that his return to work would be 'paused' pending medical advice. On the claimant's case, he was told he was 'suspended'.
31. The claimant raised a grievance about this exchange on the 13/1/2023 (page 208). The grievance outcome of the 20/4/2023 partially upheld the complaint (page 401):

'I partially uphold this element of the grievance as there is no supporting evidence to say whether you were suspended or paused from work after the meeting - you could argue they are the same thing. The managers should have been clearer and followed up with a letter after the meeting to explain the outcome and expectations.'
32. The claimant's certifications to work at heights (there were various references to 'medical and climbing training', 'accreditation training', 'expired certifications') had been due to take place during the week of the 5/12/2022. His accreditations had expired during his period of sickness absence and the re-accreditation was part of his phased return to work (page 170). Ms Campbell informed the claimant at the meeting on the 5/12/2022 that the recertification would be suspended.
33. The reason for this was that after the event on the 2/12/2022, Ms Campbell contacted the HCP (Ms Parker) to seek advice. The HCP was due to review the claimant the following week as part of the reaccreditation. The HCP had advised Ms Campbell to suspend the claimant from working at heights, pending receipt of advice from his specialist. Strictly speaking, there was no need to suspend the claimant from working at heights; he was not doing so as part of his phased return to work and in any event, he was no longer accredited to do so.
34. At some point, the claimant offered to contact his consultant to obtain a report regarding his health and the event on the 2/12/2022. After a discussion with the HCP, Ms Campbell took up the claimant's offer.
35. With input from the HCP, Ms Campbell drafted a letter for the claimant to give to his consultant and this was provided to him on the 16/12/2022 (page 268).

36. The claimant raised a grievance about the letter and it was upheld (page 401):

'I uphold this element of the grievance. I believe [Ms Campbell] and [the HCP] were acting in your best interests, but in hindsight and following Mitie processes you should have been referred to Occupational Support, rather than the HCP having direct contact with your consultants. The template letter and content should have been better controlled as it contained your health details. I have advised you to contact the Mitie Privacy Team if you feel your personal data has been inappropriately shared.'

37. Ms Campbell asked the claimant for his consultant's secretary's details on 14/12/2022 (page 260). The claimant however took control of this aspect and forwarded the letter to his consultant on the 21/12/2022 (page 470). The email was acknowledged by the secretary within three minutes, however, she said the claimant's consultant would not see it until the New Year. The Tribunal infers from this that the consultant was absent during the holiday period.

38. The claimant then sent an email on 26/12/2022 to Ms Campbell and Mr Pearson into which he had cut and pasted an email which he had sent to his consultant via her secretary (page 206). Ultimately, the claimant's consultant did not respond directly to Ms Campbell's letter of the 16/12/2022. The consultant did however respond to OH's request for information following a consultation on the 2/3/2023 (page 425). The consultant sent a report to OH dated 20/4/2023, which was referred to in the OH report of the 19/5/2023 (page 428). The Tribunal finds that once it became apparent in early 2023 that there was no response from the claimant's consultant and the 'shortcut' of going directly to her was not going to expedite matters; the respondent should have referred the claimant directly to OH. This was reflected in the grievance outcome.

39. At 8:53am on the 3/1/2022 (the first working day back after the New Year bank holiday), Mr Pearson forwarded this email to Ms Campbell and another and said: 'What do we do now!' (supplementary bundle page 13).

40. The respondent accepted that removing the claimant from training was unfavourable treatment. The claimant also made reference to 'locking him out of work', not providing him with suitable alternative work and being told that his emotional stress may mean that he would be unable to perform a tower rescue.

41. On the 20/12/2022 the claimant sent to Ms Campbell and Mr Pearson the copy of his Specialist Epilepsy Nurse's report dated 5/12/2022 (page 222). That report noted that a medication side effect was 'possible tiredness' (page 199).

42. At a meeting on 21/12/2022, Mr Pearson explained that the respondent was waiting for a 'medical professional' to respond (page 203). The Tribunal finds this refers to a response to the letter Ms Campbell sent to the claimant dated 16/12/2022.
43. In the meeting, Mr Pearson is recorded as responding to the claimant's question 'am I suspended?' by saying: 'You're not suspended. We have been looking for alternative work while we wait for the answer to come through'.
44. On the 23/12/2022 Mr Pearson set up an introduction between the claimant and a Design Manager and another colleague and said that a Teams meeting would be set up in the New Year (page 207 and supplementary bundle page 11). This was to provide the claimant with some QA work, in lieu of the site-based work he had been doing during the phased return to work. The claimant responded to that email (copying all in) on the 26/12/2022 (page 207).
45. The claimant's email was concerning and he referred to 'not wishing to communicate with anybody at this moment'. This email was sent almost four hours after the claimant's earlier email in which he referred to the email he had sent to his consultant's secretary (page 206).
46. This email caused the Managers who Mr Pearson had asked to meet with the claimant on the 4/1/2023 not to accept the invitation to the Teams meeting (supplementary bundle page 15).
47. The claimant and Ms Campbell had exchanged WhatsApp messages, however, due to the disturbing content of some of the claimant's messages, Ms Campbell had been advised by HR not to send anything to him without HR's input and that any calls should also involve Mr Pearson. The claimant said he found this intimidating (page 242).
48. In an email on the 5/1/2023 the claimant stated that the catch-up meetings in his diary were [Ms Campbell] and [Mr Pearson] vs [the claimant] (page 234). By return, Ms Campbell asked if she could have a conversation with the claimant the following morning, without Mr Pearson attending (page 233).
49. The respondent via Ms Campbell proposed to have a protected conversation with the claimant. On the 11/1/2023 the claimant confirmed that he did not want to pursue the protected conversation.
50. On the 13/1/2023 Ms Campbell emailed the claimant to confirm that he was on full pay and not on sickness absence or suspended (page 232). She confirmed that she wanted to rearrange the meeting with the two Managers to discuss the alternative work (QA).



51. In response the claimant said that he had requested a 'meeting to take place due to adjustments that were required to do the work'. He went on to say that he would need to talk about the adjustments before the allocation of the work to him. Ms Campbell responded and asked if they could discuss matters at 3.30pm to address any concerns and to move forward with training and to allocate work the following week. She said that this was an informal meeting to discuss business/work and so there was no right to be accompanied (page 231). In response the claimant said that he was declining the meeting 'concerning my adjustments that are required for the alternative work'. He went on to say that he needed more notice to arrange for his work advocate to be able to attend.
52. The Tribunal finds this was the first time the claimant had mentioned that adjustments would be required in respect of the alternative work which was proposed.
53. The claimant's grievance is dated 12/1/2023 and certainly by early afternoon on the 13/1/2023 an Employee Relations Advisor was sourcing two managers to hear the grievance (page 209). The Case Management Order records the grievance as being raised on the 13/1/2023. Ms Campbell had also responded to a query raised by the claimant on the 12/1/2023 as to whom he should send his grievance to (page 226).
54. On the 29/1/2023 the claimant emailed Mr Pearson and Ms Campbell to say (page 274):
- 'I have had communication with Kings College Hospital concerning a medical dosage where my Consultant Dr [LN] has actually found it more important to review and allow me a dropped dosage to continue than your questions that I sent back in December.
- I have clearly told you two that the questions are to an extent irrelevant and not being looked at as a medical emergency.
- Therefore I do not know how long you will have to wait on this panic problem that both of you created.
- I'm not sure where this is going but you both still seem to make me feel like I'm an extremely bad problem in the workplace.
- Not treating me fairly over my protected characteristics and I'm starting to feel due to your attitudes towards my protected characteristics that I'm not welcome in this company anymore.'
55. It would appear from these comments that the claimant's consultant considered the respondent's questions in the letter of 16/12/2022 to be a low priority and there would be a delay before she responded. There was no

reference to her thinking the request was unprofessional or that it should have come directly from a medical professional, as the claimant suggested.

56. Prior to that on the 27/1/2023 the claimant had a lengthy discussion with an Employee Relations Advisor about an OH referral. The same was discussed on the 31/1/2023 (page 281). The claimant raised questions about the referral on the 8/2/2023. The claimant went onto question the nature of the referral to OH and stated that the original date was no longer available and that a further referral would need to be made (page 278).
57. This must have happened as the OH consultation took place on 2/3/2023 and was adjourned pending input from the claimant's consultant (page 425). That was received on the 20/4/2023 and the OH referral resulted in a report dated 19/5/2023 (page 428). That report confirmed the claimant was fit for work.
58. In the meantime, the claimant had contacted Acas on the 10/2/2023 for the purposes of early conciliation and that ended on the 10/3/2023. The claimant presented his claim form on the 2/4/2023.

## The Law

59. S.136 EQA provides:

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
- ...
- (6) A reference to the court includes a reference to-
  - (a) an employment tribunal;...

60. S.15 discrimination arising from disability 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.

61. In Madarassy v Nomura International plc [2007] ICR 867, CA, Mummery LJ stated that: 'The bare facts of a difference in status and a difference in treatment only indicates a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent has committed an unlawful act of discrimination'.
62. If a claimant establishes a *prima facie* case of discrimination, then the second stage of the burden of proof test is reached, with the consequence that the burden of proof shifts onto the respondent. According to the Court of Appeal in Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong [2005] ICR 931, CA, the respondent must at this stage prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever based on the protected ground.
63. In respect of the vagueness of the allegations, it is important to establish that the treatment was because of a protected characteristic it must be shown that a named individual (or a number of individuals) who subjected the claimant to a detriment was consciously or subconsciously influenced by the protected characteristic. Unless the claimant identifies the alleged discriminator(s), that exercise cannot be conducted and the claim will fail Reynolds v CLFIS (UK) Ltd [2015] IRLR 562.
64. In closing submissions, Mr O'Dair referred the Tribunal to the authorities of: City of York Council v Grosset [2018] EWCA Civ 1105; Chief Constable of Norfolk v Coffey [2019] EWCA Civ 1061; and Pilkington UK Limited v Jones EA-2022-000431-BA. The Tribunal preferred the Court of Appeal authority of Grosset, in which the claimant was disabled and had brought his claim under s.15 EQA.

## Conclusions

65. The 'something arising in consequence' of the claimant's disability was the event on the 2/12/2022. Although the claimant denied that the event had anything to do with his nocturnal sleep epilepsy; he did say that one of the reasons for the event was extreme fatigue. The Tribunal finds objectively the fatigue arose as a result of the claimant's disabilities and in turn, that fatigue contributed to the event on the 2/12/2022.
66. The respondent did not 'lock' the claimant out of work. It took the decision to pause or to suspend the phased return to work and in particular, it withdrew

him from the reaccreditation process during the week of the 5/12/2022. The respondent accepts this is unfavourable treatment.

67. The respondent relies upon the justification defence. It contends that its aim was legitimate, which was to ensure the health and safety of the claimant, his peers and its client (the end user). This is referred to as the legitimate aim of health and safety.
68. Besides the more routine business-related correspondence, there was, in the background other correspondence which concerned the respondent. Examples of that are the WhatsApp messages which the claimant sent to Ms Campbell between 9/12/2022 – 13/12/2022 (pages 235-238), an email of 11/12/2022 (page 263) and his emails of the 26/12/2022 (pages 206-207).
69. The Tribunal finds that the respondent was justified in relying upon its legitimate aim of health and safety. It was proportionately applied. The claimant was no longer certified to work at heights and therefore, the respondent did not impose any sanction upon the claimant. There was currently no requirement for the claimant to perform a tower rescue and he was not certified to work on a tower.
70. It was not detrimental to confirm the claimant could not perform a task he was not accredited to perform, for which he needed to renew his accreditation and of which there was no immediate prospect of him performing.
71. The respondent did withdraw the claimant from the recertification process during the week of the 5/12/2022. This was however, only temporary and was pending a response from (at that point in time 21/12/2022) the claimant's consultant. Once that response was received on the 20/4/2023 and the claimant was assessed by OH on the 19/5/2023 he was deemed fit for work (page 429).
72. The respondent did attempt to provide the claimant with suitable alternative work in December 2022 and January 2023. The claimant put the barrier in place of wanting to discuss reasonable adjustments, before there was a discussion about the alternative work. There was little point in agreeing adjustment *before* there had been a discussion about the alternative work and it being agreed the claimant would perform that work (QA). The first step was to discuss the alternative work and once the work was allocated, to then put in place reasonable adjustments.
73. In view of the proactive steps the respondent had taken during December, January and February, the Tribunal has no doubt that once it was on notice of the claimant's issues with working from home (not using a screen for long periods of time and sole working), it would have made any necessary adjustments the claimant required (page 216).

74. The respondent had comprehensive policies in place, which included manager's guides. It was also in the respondent's interest for the claimant to perform some duties whilst he was unable to perform his substantive role, as the respondent would benefit from that input. It would make sense for the claimant to contribute in some way, by performing alternative duties. Clearly, the respondent did not want to exacerbate the claimant's conditions and in exercising its duty of care in respect of health and safety (particularly focussing on the claimant) the steps it took were proportionate and reasonable.

75. For those reasons, the claimant's claim is not well-founded and is dismissed.

23 May 2024

Employment Judge Wright