

**Case No. 1300354/2018**

# **EMPLOYMENT TRIBUNALS**

**BETWEEN**

**Mr R O'Sullivan**

**AND DSM Demolition Limited**

**Claimant**

**Respondents**

**HELD AT Birmingham**

**ON**

**28 November 2018**

**EMPLOYMENT JUDGE Self**

## **Representation**

**For the Claimant: Ms Simmonds-Clark – Lay Representative**

**For the First Respondent: Mr Maratos - Consultant**

## **WRITTEN REASONS REQUESTED BY THE CLAIMANT**

1. By a Claim Form received by the Tribunal on 25 January 2018 the Claimant asserted that he has been unfairly dismissed and discriminated against because of his disability. The disability that the Claimant asserts is an injury to his left hand.
2. In the Response to the Claim the Respondent took two points that have become the subject of this hearing. Firstly, they assert that the Claimant is not a disabled person within the meaning of the Equality Act 2010 (EqA) and if they are correct that would bring an end to that Claim. Secondly, they assert that the Respondent does not have the required two years' service to bring an unfair dismissal claim pursuant to section 108 of the Employment Rights Act 1996 (ERA) which, again if correct, would bring an end to that Claim.
3. I have heard oral evidence from the Claimant on his own behalf and Miss Wood on behalf of the Respondent. Both were cross examined and they also provided written statements. There is a large bundle of mostly

irrelevant documents exceeding 500 pages. I also gave both parties the chance to address me in closing. Oral Judgment was given out on the day and my notes of that Judgment has provided the basis of these Reasons which were requested some time after the hearing had taken place. I did not have an opportunity to explain the right and the requirements for written reasons at the time as the Claimant and his representative left the hearing immediately upon oral Judgment being handed down with the Claimant proffering the pithy view upon his departure that the judgment was a “f\*\*\*ing joke”.

4. At the outset there was an application from the Claimant to extend the Claim so as to include in his disability claim his dyslexia. I refused that application on the basis that the application to amend was substantially out of time, the hearing today would have to be postponed in order for there to be further medical assessments and because the Claimant was unable to enunciate precisely or indeed at all where the inclusion of dyslexia would take his case. In all the circumstances the overriding objective was best met by proceeding with the matter today on the basis of the impairment that had been clearly identified as being relevant in the pleadings.

## **5. Disability**

The Claimant has provided a disability impact statement. He states that he injured his left hand at work which caused pain up his arm and some numbness in the fingers. Following the injury, the Claimant took painkillers, but the hand was swollen, and the Claimant eventually sought medical help on 25 April 2017 and the Claimant was diagnosed with a fractured finger, but the Claimant continued to suffer from a loss of strength to the hand and numbness. The Claimant was signed off sick from 25 April 2017 with what his GP described as “hand symptoms under investigation” and then from 5 May as “left hand pain”.

6. The GP’s letter dated 13 July suggests a slightly different chronology and reports that the Claimant attended A & E on 19 April 2017 and was seen in the surgery on 25 April 2017 when the first fitness certificate was signed. The Respondent had asked a series of questions to the GP in a letter dated 31 May 2017. Dr Ahmad is extremely pithy in his responses but so far as they are relevant, I summarise them below. The answers are given at a point three months after the original injury to the finger.
7. Dr Ahmad stated that the Claimant was suffering from left hand pain and is no more precise than that. He stated that the last time he was seen in surgery was on 26 May 2017 some two months earlier. No prognosis was

given despite being asked for one and he was unable to say whether the injury was “temporary or permanent”. When asked whether the Claimant was fit to undertake his duties at work the GP replied that “Due to the pain the patient feels unable to undertake his duties at work”. There is no assessment from the GP as to whether that is in fact true but merely a recitation of what the GP is being told by the Claimant. When asked later what his condition is and how they prevent him doing his duties (Q.5) the GP repeats simply that the Claimant himself feels that the pain is too much.

8. The GP is asked to say whether the Claimant can provide “regular and efficient service” in the future but the GP considers that he is unable to comment and that an OH referral is required. The GP also did not feel that he knew enough about the EqA to answer whether the Claimant was a disabled person pursuant to its terms. In all the letter does little more than indicate that the Claimant is suffering pain from his left hand which the Claimant considers is too bad to return to work. There is no indication as to any day to day activities that the Claimant was prevented from doing on account of his hand. Further it is not clear whether the pain in the hand and the original finger injury are linked in any way whatsoever.
9. On 12 September Dr Halliday-Bell, a consultant occupational physician reported on the Claimant following a consultation. The report revealed that the Claimant had had issues with his left arm. He had been diagnosed with a fractured finger and returned to using it after two weeks “albeit somewhat restricted by pain and swelling”. He had a steroid injection that assisted with symptoms in the palm of his left hand. On examination the Claimant had some discomfort from the left shoulder to the left elbow when tested for power and had continuous pain in his ring and middle finger which led to a diagnosis of “some nerve disorder to the left arm”. There is no evidence within the report of the Claimant being caused any inconvenience to his day to day activities. The Claimant was fit to return to admin and clerical duties, and he could make a fist and could be tried on site machinery.
10. Again, there is no linkage between the finger injury and the arm pain and consequently I am unable to find that there was any link between the two. On the balance of probabilities, I find that the Claimant’s finger was fractured and separately he also started to suffer from symptoms in his left hand that were nerve related and for which he underwent nerve conduction studies in May.
11. Although the OH consultant did not consider that the Claimant had carpal tunnel syndrome a decompression operation was carried out on 5 December 2017 having been diagnosed on 18 September 2017 by Mr Tan. This cured the condition and the Claimant confirmed he had had no issues since.

12. The Claimant gave very limited evidence about the effect on normal day to day activities. His witness statement explained that at the outset of the injury (April) there were some difficulty in day to day activities but there was no evidence before me that these issues (inability to sleep and difficulty dressing) were ongoing at later points in the piece and certainly not at the material time of the dismissal.

13. The definition of disability is set out at section 6 of the EqA and reads as follows:

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.

14. At the material time (the date of dismissal) in this case I am satisfied that the Claimant had a physical impairment to his left hand. I do not consider that I have sufficient evidence from the Claimant to support the fact that it had a long-term substantial effect upon his normal day to day activities. In fact, the only evidence of restriction that I really have at the material time is that the Claimant was unable to do the heavy labour that he was employed to do which it seems to me goes far beyond that which would be expected on a day to day activity. As stated above there was no satisfactory evidence of inability to undertake normal day to day activities at the point of dismissal or indeed for some time before. I am mindful of the case law and the Guidance that suggests that “substantial” should be given the meaning of more than trivial. I have taken into account the statutory Guidance to the definition of disability.

15. I also do not accept that the physical impairment was long term as defined by the Act. There is no evidence to support any underlying condition before April / May and I must ask whether the substantial adverse effect was likely to last for more than 12 months. I have already found that at the material time that there is insufficient evidence of substantial adverse effects even at that 6-month stage.

16. Likely means “could well happen” (Guidance C3) and the issue of how long it was to last should be determined looking forward from the date of the discriminatory act not the date of the Tribunal hearing (**Richmond Adult Community College v McDougall (2008) ICR 431**). Paragraph C4 of the Guidance stresses that anything that occurs after the date of the discriminatory act will not be relevant which in this case means that the fact that there was an operation that cured the problem in December cannot be considered.

17. The Claimant had fractured his finger and told the Respondent in the absence meeting on 10 October that he was to have an operation on his hand. I find that at the material time on the information that I have the hand injury which had improved substantially so as to allow the Claimant to do

many things but which was causing him residual pain which was going to be addressed in the not too distant future does not lead to a conclusion that the physical impairment met the long-term test as laid down in the statute. Accordingly, the Claimant is not a disabled person pursuant to the EqA and his claim should be dismissed.

### **Unfair Dismissal**

18. Pursuant to section 94 of then Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by his employer. That section does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than 2 years ending with the Effective Date of Termination (EDT). In this case an issue has arisen as to whether the Claimant has the two years' service required pursuant to section 108 of the ERA. It should be noted that none of the exceptions to the continuous employment threshold in section 108(3) are relied upon in this case.
19. Factually there are issues to be determined as to when the Claimant commenced his employment and upon what date the effective date of termination took place. There is also an issue as to whether the Claimant had continuous employment with the Respondent averring that there was a break in it from 31 August to 3 October.
20. Within the Claim Form at box 5.1 the Claimant asserted that his employment started on 19 October 2015 and ended on 21 October 2017. The Respondent in their Grounds of Resistance asserted that the relevant dates were 2 November 2015 and 11 October 2017. It is fair to say that these positions have not remained stable and have shifted from time to time and their respective uncertainty and inconsistency is noted and will be considered. The lack of continuity point was raised for the first time by the Respondent in the witness statement from Miss Carol Woods but as it goes to a fundamental jurisdictional matter, I am obliged to consider it notwithstanding the fact that it has not been pleaded in the Response. The Claimant was able to make representations on this point.
21. The Respondent's position as to the Claimant's start date is that it is the date (2 November 2015) contained within a document headed Statement of Main Terms and Conditions of Employment. That document is unsigned by either employer or employee, although I do note that the Claimant was paid in accordance with that document. On the other side it is clear from the postal records kept by the Respondent that a copy of that document was not sent to the Claimant. I am satisfied that the postal records are accurate and indeed the Respondent seeks to rely upon them in other areas of this litigation.
22. The contract itself states that it was issued on 6 November 2015 but there is no evidence before me as to how it was issued to the Claimant. The Respondent has produced a weekly labour sheet that shows that the Claimant is working in Derby from Monday 2 November which is consistent with the start date shown on the contract of employment.

23. The pay roll records are also consistent with that date of starting. If the Claimant started work on 2 November, then the system would have been that he would have handed in his work sheet at the end of that week or on the Monday the following week. It would have been processed on 11 November and paid on 13 November. It shows the correct number of hours worked in the week of 2 November. There was no payment for the process date of 4 November which would have been for work done and a work sheet submitted for the week commencing 26 October.
24. I was told by Miss Wood that it was simply not possible to go on site for demolition work without the appropriate paperwork. The basic paperwork required was a certificate showing that a health and safety test had been passed. The Claimant passed his test on 22 October 2015 and I was told that this would be sufficient to allow the Claimant onto some sites but not all. The more stringent sites would require a CCDO Demo/Reclam Op D1 which the Claimant obtained on 2 December 2015.
25. On the Respondent's own evidence therefore, the Claimant could have been undertaking work from 22 October 2015 on some sites as that was when he passed his basic test and in particular it was accepted that he could have worked at the Derby site with this paperwork in place.
26. The Claimant asserted in his Claim Form that he started work from 19 October 2015. On 14 May 2018 the Claimant wrote to the Tribunal a letter which started with the assertion that he could demonstrate that he had sufficient service to bring a claim for unfair dismissal as "his employment was from 22 October 2015 to 23 October 2017 or up until 6 November 2017.
27. The Claimant goes on to say that "The Claimant's CPCS CSCS Registration ... obtained on 22 October will be used as the Claimant's offer of employment which was accepted on that date with the terms that were offered by the employer".
28. Pausing there for a moment, an agreement between the parties that the Claimant should work for the Respondent does not necessarily mean that employment commences on that date. Often an agreement is reached for a start date to be in the future as opposed to the day the agreement is made.
29. The Claimant further asserted that prior "to the start date of 2 November proposed by the Respondent" the Claimant had participated in a number of work activities directly related to his role including attending for uniform and mask fitting and 5 days' work dismantling a lift system in Derby. That was also his position at the first PH on 17 August 2018. In his statement he asserted that the lift job in Derby started on 26 October.
30. I have considered all the evidence before me on this point and I conclude as follows. I do not accept that the Claimant started work on 19 October as he asserted in his Claim Form. That predates his health and safety certificate and I do not consider he would have been allowed on site without it. I accept that there was an agreement that the Claimant should work for the

Respondent on 22 October 2017, but I do not accept either that that was the date when the contract of employment started. The Claimant himself says in his May letter that the proposed start date was 2 November.

31. The issue is whether the Claimant started on 26 October 2015 or on 2 November 2015. I am satisfied on the evidence before me that the Claimant did undertake some work in Derby on the week before the official start date of 2 November. I am satisfied that his recollection of working with Mr Duffy and the site was sufficiently precise to allow me to conclude that he did undertake work on that site and that he had the necessary paperwork to do so. That however is not the end of it because I also must consider whether that work was part of that encompassed in the contract of employment or other work that predated and was collateral to that contract.
32. The evidence from the Claimant was that he was not paid by the Respondent for the week he worked and that someone called Kieron paid him £100 out of his own pocket. I am satisfied that the Claimant's work sheets are accurate and that they did not charge the client for the Claimant's work and I am also satisfied that the Claimant did not put in a work sheet to the Company for the work done. There is no claim before this Tribunal for an unlawful deduction of wages and I can see no evidence at all the Claimant raising the non-payment of monies allegedly legally due during his employment. Having seen and heard from the Claimant I consider it very unlikely that he would have not raised the issue of outstanding monies over the course of his employment if he genuinely believed it was due from the Respondent for work done.
33. I have considered the case of **Koenig v The Mind Gym (2013) EAT 0201/12**. The legal question in that case was how a tribunal should approach activities undertaken by an employee at the request, but not the requirement of an employer prior to the date they have agreed between them that the contract of employment would start. In what circumstances would continuous employment start from a date earlier than that agreed.
34. Under section 211(1) (a) of the ERA an employee's period of continuous employment for the purposes of any provision of the Act begins with the day on which the Claimant starts work. It was accepted in Koenig that work under that section must mean work under and not collateral to the contract (para.5 Koenig).
35. At paragraph 19 of Koenig it is made clear that the start date under section 211 is a question of fact and the date to be adopted was the date which common sense dictated on the facts.
36. In this case I am quite satisfied on the facts that the work that was done from 26 October was collateral to the contract and not part of it. There is agreement that the contract of employment was agreed to start on 2 November (e.g. the Claimant's own letter at page 30) and it is from that date that the Claimant worked pursuant to the Respondent's payment systems and was invoiced for the work he did to the client and was paid according to the systems.

37. Whilst the Claimant did undertake work in the week before 2 November it seems to me that he did so “unofficially”, and his status was as a sub-contractor / extra pair of hands helping out on site for which he was paid cash in hand by one of the other workers for his help. There is nothing within any of the facts founds that could lead me to a conclusion that he was working under a contract of employment with the Respondent for that week. The Claimant himself did not believe that he was due money for that period from the Respondent and that is why I find that he never escalated the matter of wages due at a later stage. My conclusion is that the Claimant’s contract of employment started on 2 November 2015 as per the Respondent’s case.
38. During the course of the hearing and in the evidence of Miss Wood it was suggested that there was a break in the Claimant’s continuous employment between 31 August 2016 and 3 October 2016. The facts supporting that is set out in paragraphs 18 to 27. The Claimant was already absent on sick leave and it was asserted that because the Claimant’s mother had passed away it was not known if the Claimant was going to return and so he was taken off the books. The source of this was information from a Mr Kelly, who did not give evidence before me.
39. Whilst it is apparent that the Claimant was taken off the books I do not accept that was appropriate in the circumstances and that in actual fact on the best evidence I have which was the Claimant’s testimony the agreement was that the Claimant could go on a period of bereavement leave and the Claimant was to contact them as and when he had sorted out his affairs. The Claimant remained on leave either bereavement or sickness over that period. I find that there was no temporary cessation of work and the Claimant was certainly not informed that he had been laid off.
40. On 10 October 2017 the Respondent sent a letter to the Claimant headed Sickness Absence Review meeting and within that letter the Claimant’s employment was terminated. The letter so far as is material read as follows:
- “Your dismissal will take effect immediately and your final day of employment shall be recorded as being 11 October 2017. You shall be paid 2 weeks’ full pay in lieu of you are working your notice in accordance with your contract of employment”
41. The Claimant replied to that letter on 26 October and within that letter confirmed that he had received the letter on 20 October. Within his statement the Claimant’s position is different where at paragraph 12 he states that he did not receive the letter until 21 October 2017 and that he did not understand it until 23 October. His position as per his statement is that he was employed from 22 October 2015 until 23 October 2017 and that the Respondent is manipulating his service dates to “undermine the due process to benefit their own means”. The Claimant in cross examination cited 20 October as the date he received the letter.
42. I reject the suggestion that the Respondent is seeking to manipulate matters and consider that it is, in fact, the Claimant that is seeking to do the very



thing he accuses the Respondent of. I have already rejected the date of 22 October 2015 as being the actual start date but can see how the Claimant may equate the agreement to work with his start date. I do not accept the Claimant's contention in respect of his "understanding of the letter" which is inconsistent with the dates given on his claim form and is an attempt by the Claimant to manipulate the situation so as to achieve 2 years' service having considered his employment started on 22 October.

43. I have also considered the detailed postal records produced by the Respondent and note that there is a clear record of the letter being posted to the Claimant on both 11 and 19 October. I accept the accuracy of those records and accept that the letter was sent on both of those days. I also accept that the first letter was not received by the Claimant thus necessitating the second letter of dismissal to be sent. Taking all the evidence as a whole I consider that the termination letter was received by the Claimant on 20 October 2017 and that was the date of his dismissal.
44. This is a situation where for the purposes of calculating the EDT section 86 of the ERA comes into play and so for calculating the EDT for unfair dismissal continuity purposes a week should be added on so that the EDT for statutory purposes in this case is actually 27 October 2017.
45. The Claimant was continuously employed between 2 November 2015 and 27 October 2017. He does not have the required two years' service to bring an unfair dismissal claim and that Claim is dismissed.

**Employment Judge Self**

**Dated: 13 March 2019**