



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr J Langdale

Respondents

And 1. Future Industrial Services Ltd
2. Cemex UK Operations Ltd

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL ON AN OPEN PRELIMINARY HEARING

HELD in Birmingham

ON 18 February 2019 &
27 February 2019 (Judge sitting alone)

EMPLOYMENT JUDGE Dimbylow

Representation

For the claimant: In person

For the 1st respondent: Mr C McDevitt, Counsel

For the 2nd respondent: Mr R Anderson, Employment Law Consultant

JUDGMENT

1. By consent, the claimant's claim for damages for breach of contract is dismissed on withdrawal by the claimant.
2. I declare that the claimant was not a disabled person within the meaning of the Equality Act 2010 ("the EQA") at the relevant time; and therefore, his claims for disability discrimination are dismissed against both respondents in their entirety.
3. I declare that the 2nd respondent shall be removed from the proceedings altogether as it is not a proper respondent to any other claims advanced by the claimant.
4. I declare that the claimant's application to amend his claim form to add an additional complaint of whistleblowing is refused and dismissed.
5. I declare that the claimant's claim form included a claim pursuant to section 100 of the Employment Rights Act 1996 ("the ERA"). That claim and the claimant's claim for outstanding holiday pay will be considered at a Closed Preliminary Hearing (CPH) to be held at 10am on 8 July 2019 when directions

for the just disposal of the case will be given and the final hearing date fixed. It will have a time estimate of one day and any judge may hear it. If the parties consider that the time estimate for the CPH should be reduced they should notify the tribunal office as soon as possible. The claimant is ordered to give full particulars of his holiday pay claim to the 1st respondent by 4pm on 4 March 2019.

REASONS

1. The claim and its history in the tribunal. This is a claim by Mr John Langdale (the claimant) against his former employer Future Industrial Services Ltd (the 1st respondent) and the 1st respondent's client Cemex UK Operations Ltd (the 2nd respondent) at whose premises the claimant worked. Following a period of early conciliation against the 1st respondent which commenced and ended on 3 October 2018; and against the 2nd respondent which commenced on 2 October 2018 and ended on 3 October 2018, the claim form was presented at the tribunal office on 5 October 2018. In it, the claimant brought claims for: (1) unfair dismissal, (2) disability discrimination, (3) notice pay, (4) holiday pay, (5) arrears of pay and (6) other payments. In the narrative which accompanied the claim form the claimant indicated that he was bringing proceedings over failure to receive equal pay for equal work. He also attached a schedule of loss claiming the sum of £27,640.00.

2. The claim form was placed before Employment Judge Woffenden, and on 9 October 2018 she ordered: (1) that the claimant shall by 20 November 2018 serve on the respondent copies of any medical notes etc. that he was relying upon for the purposes of the disability issue and a witness statement dealing with the effect of his alleged disability on his ability to carry out normal day-to-day activities at the relevant time (an "impact statement"), (2) thereafter, the respondents shall by 4 December 2018 inform the tribunal and the claimant whether the disability question was conceded, (3) there to be a Closed Preliminary Hearing (CPH) on 12 December 2018, and (4) a strike out warning be issued against the claimant in relation to his unfair dismissal claim on the basis that he did not have 2 years continuous service to bring such a claim. He was ordered to give reasons why that claim should not be struck out by 17 October 2018. In the claim form the claimant had signified that he was disabled because of depression and anxiety.

3. The claimant replied to the strike out warning on 14 October 2018 giving reasons why the unfair dismissal claim should not be struck out, and stated shortly, this was because of the fact he was bringing an automatically unfair dismissal claim pursuant to section 100 of the ERA. The claimant then wrote to the tribunal again on 21 October 2018 making an application to amend his claim form on the basis that he believed the claim qualified for a protected disclosure claim pursuant to section 43B (d) of the ERA and gave notice of the application to the respondents. The claimant made a further application dated 4 November 2018 to amend the details of his complaint. The claimant submitted a "Disability and Sex (Equal Pay) Impact Statement" on 10 November 2018. The claimant made another application to amend on 2

December 2018. He produced further early conciliation certificates for both respondents. The response form of the 1st respondent was lodged on 4 December 2018 and all the claims were resisted; and it did not accept that the claimant was disabled within the meaning of the EQA.

4. The 2nd respondent's response form was lodged on 7 December 2018, and although it was out of time there was an application to extend the time. That application was placed before Employment Judge Benson on 11 December 2018 and she granted the application enabling the 2nd respondent to have an opportunity to defend the proceedings. The claimant asked Judge Benson to reconsider her decision and she did so in a judgement with reasons signed by her on 15 February 2019, when she found that the original decision would stand.

5. The CPH ordered by Judge Woffenden took place before Employment Judge Algazy QC on 12 December 2018. Some useful progress was made, in that the claimant agreed that the claim for "ordinary" unfair dismissal should be struck out as he did not have qualifying service, and the claims for arrears of pay and "other payments" were struck out. He also clarified that he no longer pursued an application to amend his claim for sex discrimination/equal pay dated 8 November 2018. Judge Algazy ordered that there be an Open Preliminary Hearing (OPH) for one day to be heard on 18 February 2019 to deal with 3 issues which he defined. He also made various directions for the just disposal of the OPH.

6. The issues. The 3 issues for me to determine were these, and I use the wording from the order signed by Judge Algazy:

- (1) The claimant's applications to amend his claims as identified in box 2.2 of his case management agenda save for the application amend his claim for sex discrimination/equal pay dated 8 November 2018. For the avoidance of doubt, if not already done so, every amendment that the claimant seeks to add to his claim as identified in box 2.2 is to be clearly set out in writing and served on the respondent by 4pm on 19 December 2018. The claimant is reminded that this is not an opportunity to add to his proposed amendments beyond those previously identified.
- (2) Whether the 2nd respondent should be removed from the proceedings altogether as it is not a proper respondent to the claims advanced.
- (3) Whether the claimant suffers from a qualifying disability for the purposes of s.6 of the Equality Act 2010. The parties are agreed that no further directions or information is required to deal with this issue.

7.1 The law. THE DEFINITION OF DISABILITY

- (1) Section 6 of the EqA provides that 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."

(2) Schedule 1 of the EqA sets out Supplementary Provisions in relation to disability.

(3) Paragraph 2 of Schedule 1 provides the effect of an impairment is long-term if: -

"(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected."

(4) Paragraph 5 of Schedule 1 provides that: -

*"(1) An impairment is to be treated as having a **substantial adverse effect** on the ability of the person concerned to carry out normal day-to-day activities if: -*

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

(2) "Measures" includes, in particular, medical treatment and the use of prosthesis or other aid."

7.2 The amendment application. Rule 29 of the tribunal rules gives a broad discretion to the Employment Tribunal to allow amendments at any stage of the proceedings either on its own initiative or an application by a party. This discretion must be exercised in accordance with the overriding objective of dealing with cases fairly and justly in Rule 2, which states:

"Overriding objective

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.”

7.3 I know from Selkent Bus Co Ltd v Moore [1996] ICR 836, EAT that when making a determination of an application to amend I am required to carry out a careful balancing exercise of all relevant factors, having regard to the interests of justice and the relative hardship that would be caused to the parties by granting or refusing the amendment. Relevant factors include: the nature of the amendment, the applicability of time limits, and the timing and manner of the application. I also had regard to the Employment Tribunals (England and Wales) Presidential Guidance-General Case Management (2018) where it deals with amendments.

8. The evidence. I received oral evidence from the claimant only. I also received documents from all parties, which I marked as exhibits in the following way:

C1 claimant’s bundle of documents (without an index, unnumbered, not agreed, and ultimately not referred to)

C2 claimant’s skeleton argument

C3 claimant’s list of issues

R1 1st respondent’s bundle (agreed by the claimant and the 2nd respondent) comprising 545 pages

R2 1st respondent’s skeleton argument with attachments

R3 2nd respondent’s skeleton argument

R4 2nd respondent’s case report of Unite the Union v Nailard [2019] ICR 1203

9. At the start of the OPH I discussed the structure of the hearing with the parties because I was concerned that with the great volume of documentation before me I may not be able to get through the evidence, take the submissions and give a judgement with reasons. Helpfully, the parties pointed out that I would not be required to read everything in the bundle R1. The claimant indicated that his disability impact statement at pages 101 to 104, his medical notes at 105 to 122, and his skeleton argument contained at 453 to 472 would be sufficient for his part. The representatives of the respondents took a similar view and considered that if I were to read their skeleton arguments as well then, I should be in a position to complete the case today. We agreed a timetable, but we struggled to meet it. In the end, having taken the oral evidence and submissions I ran out of time to give a decision and agreed that I would make a reserved judgement on another day and send the parties the reasons with it.

10. During the course of the OPH the claimant confirmed that he abandoned his breach of contract claim and withdrew it. The respondents consented to its dismissal upon withdrawal. The claimant clarified that he was still pursuing a claim for holiday pay. The 1st respondent was unclear about the claimant's approach to it and had put figures to him; but he had not responded. I made an order, by consent, that the claimant would give a full calculation as to how his holiday pay claim was made up to the respondents by 4pm on 4 March 2019. The 1st respondent had applied to amend the response form in relation to a point over the hourly rate of pay pleaded at £9, and had given notice to the claimant of the application on 4 December 2018 (203). It was agreed that rather than create a formal amendment to the pleading I would make a note of it here, as it was agreed as follows: (1) the daily rate is £9 per hour from 6am to 6pm from Monday to Friday only, (2) £10 per hour from 6pm to 6am Monday to Thursday, (3) £13.50 per hour is the weekend rate, which applies from Friday night at 6pm to Monday morning at 6am, and (4) the hourly rate is doubled on bank holidays.

11. My findings of fact. I make my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities.

12. The claimant was born on 12 January 1985 and is now 34 years of age. The 1st respondent is in the business of providing waste management and industrial services, which includes hazardous and non-hazardous waste recovery and recycling; and cleaning and decontaminating of industrial plant at its clients' premises across the UK. The 2nd respondent is one of the 1st respondent's clients. The 1st respondent provides labour (employees) to the 2nd respondent at their various sites including that in Rugby where the events the subject of this case took place. The claimant was employed as a "bypass dust operative" and worked a shift pattern, 12 hours per shift, on a 4-on, 4-off rota covering all days of the week including weekends and bank holidays

13. In accordance with the order made by Judge Woffenden, the claimant made disclosure of his medical records held by his GP and served an impact statement. Having seen those documents the respondents did not concede that the claimant is or was at the material time a disabled person.

14. The claimant's evidence in chief to me in this hearing was his impact statement, wherein he described suffering from mental impairments, depression and anxiety. Although the statement is 4 pages long, the bulk of it is spent by the claimant describing his remuneration and workplace events. There is only one page dealing with the medical evidence. The claimant states that he was diagnosed with an anxiety disorder and sociophobia in January 2003. He did not rely on the latter during this hearing. It was on 28 December 2016 that he asserts he was diagnosed with depression, which he never had before. The claimant has never taken any psychiatric medication; but uses self-help techniques, including the use of relaxation CDs and breathing techniques. He takes a herbal remedy, which is made from an African shrub named "Griffonia Simplicifolia" and which he is able to buy over-

the-counter under the name of "Super 5-HTP". The claimant failed to deal with how his impairments impacted on his normal day-to-day activities, although he does expand upon this on page 462 in his skeleton argument. Stated shortly, it describes his living arrangements, wherein he lives in a large house with multiple occupation, he is occupying one flat, his mother and her sister occupying another and his mother's partner having a 3rd. The claimant's mother cleans and cooks for him and assists when she can. He describes having panic attacks and isolating himself from society, which is his way of dealing with things. He repeated his self-help techniques.

15. The claimant gave some further evidence about the issues I had to decide. He said that he wished to apply to amend his claim form to include a whistleblowing claim. However, rather confusingly, he said: "I did not make a disclosure to my employer." Then he went on to say he referred to a disclosure in the appeal notes which were not in the bundle. However, he could not say what detriments flowed from that, which is no surprise given that the relationship had ended by then. In relation to the health and safety issue, I took the claimant through section 100 ERA. The claimant said his case was that he had a designated role given by the 1st respondent which brought him within 100 (1) (a). He also stated that both subsections (b) and (ba) applied to him but was unable to explain how that was the case. The claimant added that the 2nd respondent had given him the "red card" which led to his dismissal and therefore the 2nd respondent was responsible for the dismissal even though it did not employ him. In relation to the disability discrimination claims the claimant gave evidence that he brought a claim for direct discrimination against both respondents because of the dismissal which was because of his disability. Both respondents were also liable for a section 15 claim, again because of the dismissal, and the something arising in consequence of his disability was the fact of: "There being no signage to say the area I was working in was dangerous". This posed a problem for the claimant in establishing such a claim; but I need not dwell on that now because of the way I dealt with the disability issue.

16. During cross examination the claimant confirmed that he had experience of litigation in the employment tribunal and had previously brought a discrimination claim. He confirmed that he had access to legal advice, which included going to the library. The claimant confirmed that he was aware of the procedure, was confident in dealing with the tribunal and familiar with it. He confirmed that he had been to a solicitor for help. When asked to explain how his medical history caused him to cross a safety barrier at the 2nd respondent's premises, he found it difficult to answer. He was asked if he had an inability to recognise danger; but his answer went off at a tangent. When asked what symptoms of his illness caused him to cross the barrier he said they were "frustration and anger". Turning to the issue of the health and safety dismissal, the claimant accepted in cross examination that all employees were encouraged to submit "alert cards" (about potential safety problems), and a bonus was triggered when they got to 5. The claimant asserted that it was arising out of these circumstances that he acquired the "designated" role, although he agreed that the additional payment bonuses were for everyone, not being specific to him. The claimant was asked about

his allegation that there had been harassment related to his disability. This had not been mentioned in the claim form. However, the claimant confirmed that he was not applying to amend the claim to include it.

17. The claimant confirmed that he had been married; but was now divorced. He has one daughter who lives with her mother in Poland. He visits her there and is able to take her away on holiday. He routinely goes abroad and has visited Ukraine about 10 years ago, been to Zanzibar in February 2018, Poland in July 2018, Costa Rica in October 2017, and Panama in October 2017. He has forthcoming trips to go to Zanzibar for 6 weeks and he may stay in Zambia. He has friends in both places. He does not hold a driver's license and never learned to drive. He has signed on at the local job centre; but has not found alternative work in spite of having a number of interviews. In October 2018 he commenced a course with a company called "Trackwork", which involved railway engineering, and led to him obtaining an NVQ Level 2. The course lasted for 6 weeks and he commuted from Monday to Friday to Ilkeston and Doncaster, where the course was held, by train.

18. In this case, where I am dealing with a preliminary point, I did not want to make too many further findings of fact which might interfere with the outcome of any later hearing.

19. The submissions. **I heard from Mr McDevitt first** and he spoke to his skeleton argument; and there is no need for me to repeat everything contained in it here. Attached to his skeleton argument was an extract from Harvey in relation to amending the claim; and a copy of the Presidential Guidance on the subject. I summarise the main areas emphasised by counsel.

The amendment application. (1) In relation to the whistleblowing claim, there was no such claim in the claim form and therefore the claimant's application to pursue this issue is an amendment. He submitted that there was no merit in the claim as there was no protected disclosure identified by the claimant today. If it was made in any appeal hearing, then it predated any detriment and there could be no causative link. He drew my attention to the claimant's skeleton argument at 431 in the bundle, which demonstrated the claimant was not pursuing a dismissal claim because of whistleblowing. The detriments listed on that page by the claimant could not be linked to any valid qualifying protected disclosure. (2) automatic unfair dismissal for health and safety reasons had not been pleaded in the claim form and therefore an amendment was required. The claimant had not stated that: "I was dismissed because of health and safety". Since an amendment is required I should consider the merits of the claim and the fact that the application to amend it is out of time. Whilst the claimant stated that he was the designated person for a health and safety role, he was unable to be specific. Generally, all employees submit alert cards and can be eligible for a bonus, and as the claimant had agreed everyone is able to do that and therefore he was not a designated person. I drew attention to the fact that the claimant raised this issue on 14 October 2018 in his letter to the tribunal in response to the strike out warning (39 and 40). This being the case, the application was in time, if an amendment was

needed. The claimant interposed at this stage and indicated that counsel need not make any further submissions on amendments as he was not proceeding with any others. He said there were no additional amendments or claims to be made by him.

The removal of the 2nd respondent. The 1st respondent was neutral on this point.

The disability issue. Counsel reminded me of some of the oral evidence given by the claimant at the OPH. In particular, his comment: "There is nothing I can't do." This undermined his argument that there was a substantial disadvantage. Furthermore, it was questionable whether it was long-term. Counsel submitted that I had only been provided with the medical notes to December 2016, which predated the claimant's employment. The claimant started work for the 1st respondent on 29 April 2017. There was nothing during the period of employment to demonstrate an adverse effect. The claimant had explained his extensive travelling around the world. He had friends around the world. He was a regular at the gym. The claimant had a full-time job with the respondent. Counsel submitted that I should find the claimant was not disabled.

20. I then heard from Mr Anderson with his submissions. He too spoke to his written skeleton argument and therefore I do not need to repeat everything he said here. He dealt with the 2nd issue 1st.

Whether the 2nd respondent should be removed from the proceedings. He submitted that in relation to the health and safety issue providing a claim for automatic unfair dismissal, his starting point was that there was no such claim in the claim form. If I was against him on that, then the 2nd respondent was not the claimant's employer and should be dismissed from the proceedings because of that fact.

The disability issue. Mr Anderson confirmed he adopted the 1st respondent's position here. The short chronology was that the claimant worked for a recruitment company called "Cordent" and was placed at the 2nd respondent's site on 6 January 2017. The claimant started work for the 1st respondent on 5 May 2017. Bearing in mind the claimant's case that the relevant time for the disability claim was from mid-2017 until dismissal on 11 September 2018 the 2nd respondent could not be liable. The claimant's contract of employment at 42 to 52 was with the 1st respondent and confirmed there was no direct employment between the claimant and the 2nd respondent, a fact which the 1st respondent agreed. Section 82 (2) EQA was not satisfied nor was section 109 (2), and he relied upon the case of Nailard for this proposition. Furthermore, the 2 officers that the claimant relied upon as being the perpetrators of conduct about which he complained were Mr Geddes and Mr Clewes, both of whom were employees of the 1st respondent. He submitted the 1st respondent exercised authority on behalf of the 2nd respondent. The 2nd respondent has the right to issue a red card to stop the claimant working at its premises and thereafter it was up to the 1st respondent if it decided to dismiss the claimant. There was no principal/agency relationship.

The amendment application. Mr Anderson submitted that he was neutral on this point as the claimant proposed no amendment which would include a claim against the 2nd respondent.

21. **Finally, I heard from the claimant with his submissions.** He too relied upon his written skeleton argument and I do not propose to recite it all here. He also addressed me orally and I summarise the main points he made.

The amendment application. In relation to the whistleblowing claim the claimant drew my attention to page 61 in the bundle which is part of the notes of the disciplinary meeting held on 11 September 2018 between he and the 1st respondent. He submitted this amounted to a public interest disclosure because he complained about no signage, no training and falling debris. Saying these things caused his dismissal. I reminded the claimant that he had said earlier that there was no such claim. He replied saying: "I'm confused and overwhelmed". He went on to submit that he saw a solicitor Mr Trevor Alsop on 20 September 2018 and he repeated the whistleblowing to him. The claimant was invited to explain what detriments this caused and how it related to his claim and he said: "I'm trying to get my head around it." The claimant then went on to say that he had complained directly to the Health and Safety Executive in Liverpool on 20 December 2018, but of course this was also after the proceedings had been issued. He submitted to me that no application to amend was required because the whistleblowing claim was already in the claim form and he drew my attention to page 24, paragraph 9. I asked him to clarify if he was making any application to amend; but he submitted that: "No, it's already in there."

The claimant then turned his attention to the automatic unfair dismissal claim for health and safety reasons. He submitted that it was already included in the claim form at paragraph 22 (page 28). Furthermore, he was a "designated" employee for health and safety purposes, as described in his written submissions (467).

Whether the 2nd respondent should be removed from the proceedings. The claimant submitted that his claims for both direct disability discrimination and his section 15 claim were against both respondents. The issuing of the red card because he crossed the barrier caused the dismissal. He submitted that the only claim he had against the 2nd respondent was in relation to his EQA claims.

The disability issue. The claimant submitted that he was 1st diagnosed with anxiety in 2003 and it had been ongoing since and therefore long-term. If he needed help and support, if he was unable to get out of bed, with cooking and cleaning, then he relied upon his mother. He qualified that by saying: "If she wasn't there I'd still manage. I wouldn't starve, I could cook." In dealing with the time when the medical notes ended, he submitted that he had learned to deal with anxiety and panic attacks without having to go to the doctors as

frequently as he did before. He had adapted much of his lifestyle. He reminded me of his submissions at page 463, paragraph 64.

22. Before I retired to consider my decision, both respondents submitted that they wanted to apply for an OPH to strike out any claims that may go forward and wanted it listed for one day. I was reluctant to do that at this stage. I canvassed with the parties fixing the date for the main hearing on the assumption that everything was still in play so that there was no loss of time. However, the parties were not interested in that. In the end, we agreed a course of action which was to list another CPH for one day on 8 July 2019, and if the respondents wanted to continue with any strike out and/or deposit application then they should do that and submit a formal application after they had seen my judgement and reasons arising out of this OPH. The claimant was about to go on a lengthy holiday and with other commitments, including for a holiday with his daughter later in the summer, we agreed a CPH to take place on 8 July 2019 commencing at 10am. The claimant wanted to revisit the issue of the 2nd respondent's response being out of time, but I told him that this was not a matter for me to deal with, he already had the reconsideration decision of Judge Benson, and I was not prepared to reopen that discussion.

23. My conclusions and reasons. I apply the law to the facts and explain my analysis. I will deal with the disability issue 1st. I remind myself that the burden of proof is on the claimant to show that he satisfies the definition of disability. In the previous legislation contained in the Disability Discrimination Act 1995 (DDA), there were 8 specific capacities which determined whether an impairment had the potential to have a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities. The EQA is different and a non-exhaustive list of examples of how the effects of an impairment might manifest themselves in relation to those capacities is contained in the 2011 Guidance at the appendix. It is considered that the effect of the change makes it easier for a claimant to show that an impairment has a substantial adverse effect on normal day-to-day activities.

24. The material time for establishing disability is the date of the alleged discriminatory act or acts. This is the time to determine whether the impairment had a long-term effect. In this case I must consider the period from mid-2017 to 11 September 2018 when the claimant's contract with the 1st respondent came to an end.

25. I recite some parts of the Guidance on the Definition of Disability (2011) which influenced my decision, mainly concerning "substantial" and "normal day-to-day activities".

SECTION B: SUBSTANTIAL

This section should not be read in isolation but must be considered together with sections A, C and D. Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend upon the full circumstances of the case. That is, whether the

adverse effect of the person's impairment on the carrying out of normal day-to-day activities is substantial and long term.

Meaning of "substantial adverse effect"

B1.

The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect. This is stated in the Act at s 212(1). This section looks in more detail at what 'substantial' means. It should be read in conjunction with Section D which considers what is meant by 'normal day-to-day activities'.

Section D: Normal day-to-day activities

This section should not be read in isolation but must be considered together with sections A, B and C. Whether a person satisfies the definition of a disabled person for the purposes of the Act will depend upon the full circumstances of the case. That is, whether the adverse effect of the person's impairment on the carrying out of normal day-to-day activities is substantial and long term.

D1.

The Act looks at a person's impairment and whether it substantially and adversely affects the person's ability to carry out normal day-to-day activities.

Meaning of 'normal day-to-day activities'

D2.

The Act does not define what is to be regarded as a 'normal day-to-day activity'. It is not possible to provide an exhaustive list of day-to-day activities, although guidance on this matter is given here and illustrative examples of when it would, and would not, be reasonable to regard an impairment as having a substantial adverse effect on the ability to carry out normal day-to-day activities are shown in the Appendix.

D3.

In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

Adverse effects on the ability to carry out normal day-to-day activities

D11.

This section provides guidance on what should be taken into account in deciding whether a person's ability to carry out normal day-to-day activities might be restricted by the effects of that person's impairment. The examples given are purely illustrative and should not in any way be considered as a prescriptive or exhaustive list.

D16.

Normal day-to-day activities also include activities that are required to maintain personal well-being or to ensure personal safety, or the safety of other people. Account should be taken of whether the effects of an impairment have an impact on whether the person is inclined to carry out or neglect basic functions such as eating, drinking, sleeping, keeping warm or personal hygiene; or to exhibit behaviour which puts the person or other people at risk.

A man has had paranoid schizophrenia for five years. One of the effects of this impairment is an inability to make proper judgements about activities that may result in a risk to his personal safety. For example, he will walk into roads without checking if cars are coming.

This has a substantial adverse effect on his ability to carry out the normal day-to-day activity of crossing the road safely.'

26. The claimant presented to me as articulate and intelligent. I understood the difficulties the claimant faced as a litigant in person, having to give evidence and to manage his case at the same time. However, he was familiar with the documentation and knew his way around it. He was confident in his own ability to manage his case and was familiar with the process, having issued proceedings before. However, the claimant found it difficult to be succinct. He also found it difficult to explain how the factual narrative of what happened at work fitted in with the legal framework of the claims he brings or seeks to bring.

27. The medical reports and notes confirm that the claimant visited his GP on a number of occasions with anxiety from 2003. The last note made on 28 December 2016 (122) offers a summary and describes the given history and symptoms of mixed anxiety and depression as "mild but recurring". It refers to a generalised anxiety disorder. I find that the claimant has anxiety and depression. He has had anxiety for some years and it is likely to recur. It is mild.

28. I found the claimant's case hard to follow in some respects. The claimant failed to use the opportunity of his impact statement to set out the things that he could or could not do. He was contradictory about the effect of his mental

impairment upon him. Having considered all of the facts, I find that the claimant has failed to establish a substantial adverse effect on his ability to carry out normal day-to-day activities. The claimant is well able to undertake long haul holidays, as well as in Europe. He can engage in work and also travel to work by public transport as he did in the autumn of 2018. Although his matrimonial relationship had its troubles, the claimant is able to communicate with his former wife and enjoy his daughter's company on holiday. The claimant lives in proximity to close family members and there is no doubt a mutual benefit to them all. The claimant's mother cooks and cleans for the claimant; but that is not due to any inability on his part to be able to carry out those tasks, it is more of a matter of convenience. He has a network of friends abroad and is able to travel with friends. Significantly, as Mr McDevitt submitted, the claimant's plain oral evidence was that: "There is nothing I can't do." I find the claimant has modified his behaviour and this has had a significant impact on his life and improved it. He has not been to his doctor for over 2 years. He is more relaxed and able to manage his anger. The claimant has not convinced me that the effects of the impairment were substantial at the relevant time. I looked very carefully at whether, taking into account his coping or other strategies such as the use of a herbal remedy, and frequenting the gym, there was still an adverse effect on the carrying out of normal day-to-day activities, but concluded that there is no such adverse effect. Of course, it is reasonable to expect someone to modify activities that might exacerbate the symptoms complained of, and the claimant has done that. He is able to maintain his personal well-being, his personal safety and the safety of other people. He carries out basic functions such as eating, drinking, sleeping and does not exhibit behaviour which puts him or other people at risk.

29. I find and conclude therefore that the claimant has failed to establish that he was a disabled person with the meaning of the EQA at the relevant time and his claims for disability discrimination against both respondents are dismissed.

30. I then deal with the claimant's application to amend the claim form. I find that the claim form included a claim for automatically unfair dismissal contrary to section 100 ERA. On the 2nd page of the claimant's "details of complaint" attached to his claim form (page 24) he uses the heading "Direct Discrimination and Automatic Unfair Dismissal." The detail is given in various numbered paragraphs which follow, but notably: 21, 22, 23 and 24. It is not easy to derive from the narrative precisely how the facts fit the legal framework; but the claim is there. Accordingly, no amendment is required.

31. There is an application to include a claim for public interest disclosure. The claimant's position on this application changed a number of times; but I'm prepared to find that there is an application. I find that it was not included in the original claim. Had that been the case I have no doubt that it would have appeared as another subject, next to the heading on the 2nd page of narrative, and he would have written "whistleblowing" and/or "public interest disclosure" claim. I am conscious of the fact that I must carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and

to the relative hardship that would be caused to the parties by granting or refusing the amendment. The amendment in this case is not a minor matter; it is a substantial alteration pleading a new cause of action. At the time when the amendment was 1st canvassed by the claimant the claim would have been in time and therefore I do not have to consider whether a time limit should be extended. If I refuse the application the claimant will be shut out from pursuing this claim. On the other hand, to allow it will mean the 1st respondent will have to defend another claim. I could not see how the 2nd respondent was drawn into this application.

32. A significant feature in dealing with this amendment application was consideration of the merits of the claim. The claimant found it very difficult to explain his whistleblowing claim. At one point he denied it had anything to do with his dismissal; but changed his mind. At another point he said that it was a detriment claim; but could not show how any detriments were linked to the disclosure. At the heart of this case is an incident when the claimant crossed a safety barrier and he was issued with a "red card" for breach of safety procedure by the 2nd respondent. The claimant took me to page 61 and the notes of the disciplinary meeting on 11 September 2018 with the 1st respondent. Here, the claimant gave an explanation as to the circumstances of his crossing the barrier. Giving the words their broadest interpretation, it is very difficult to see a qualifying protected disclosure. Even if there was one, the claimant would have to demonstrate (because he does not have 2 years qualifying service) that the reason for his dismissal (or, if more than one, the principal reason for the dismissal) is that he made a protected disclosure. This is a very significant legal hurdle for the claimant to surmount on the facts of the case. My decision may appear harsh, but seen in context, it is more understandable. I know that I must proceed with caution here, and I have done so. The claimant has had plenty of time to clarify this claim; but regrettably he has failed to do so. I conclude that the reason he has not been able to do so is that he too recognises that there is little merit in this claim going ahead. To change his position over when the qualifying protected disclosure was made, varying from: the dismissal meeting, the appeal meeting, to his solicitor and lastly to the H & SE undermined the claimant's argument that there was a valid claim that should be allowed to proceed. Similarly, he vacillated over whether there was just a claim for detriments rather than a claim related to the dismissal. He could not link any detriments to any alleged qualifying protected disclosure. A respondent is entitled to know the claim it has to meet. However, the claimant has failed to explain it in a comprehensible manner. Thus, the application to amend the claim to include a claim for whistleblowing is refused and dismissed. I did stand back at the end and made sure I had considered all the relevant factors; I concluded that I had, and it was just, fair and proportionate to refuse the amendment application.

Employment Judge Dimbylow
28 February 2019

