



EMPLOYMENT TRIBUNALS

Claimant: Mr R Midgley

Respondent: Enterprise Rent-A-Car UK Limited

RECORD OF A PRELIMINARY HEARING

Heard at: Watford (in private; by telephone) **On:** 28 April 2021

Before: Employment Judge George (sitting alone; remotely)

Appearances

For the claimant: In person

For the respondent: Ms J Coyne, counsel

JUDGMENT

The claim of breach of contract for unpaid or underpayment of notice pay is dismissed on withdrawal.

CASE MANAGEMENT SUMMARY

Listing a preliminary hearing

1. There will be a preliminary hearing in the case, before an Employment Judge sitting alone at **the Employment Tribunals, , 30-31 Friar Street, READING, RG1 1DX** , on **15 September 2021**, starting at 10 am or as soon as possible afterwards with a time estimate of **1 day** to determine the following issues:
 - a. Was the claimant disabled within the meaning of s.6 of the Equality Act 2010 at the relevant time for the claim, namely August 2018 to 31 July 2020?

Final hearing

2. The listing for the final hearing is extended to a time estimate of 5 days. It will now take place at the Employment Tribunals, **30-31 Friar Street, READING, RG1 1DX** on Monday to Friday **6 to 10 December 2021**.

3. The final hearing may not need 5 days. The parties are to write to the Tribunal and each other within 7 days of the date on which the respondent states whether or not they accept that the claimant was disabled within the meaning of s.6 of the EQA stating whether they consider that the time estimate of 5 days is still appropriate. The claimant(s) and the respondent(s) **must** inform the Tribunal as soon as possible if they think there is a significant risk of the time estimate being insufficient and/or of the case not being ready for the final hearing.

The hearing before me

4. The hearing today had been listed as a remote hearing for the clarification of the issues which was not objected to by the parties. The form of remote hearing was by telephone, fully remotely. A face-to-face hearing was not held because it was a closed preliminary hearing and therefore in accordance with the overriding objective of saving costs that the parties be not put to the expense of attendance.

The claim

5. The claimant [was employed by the respondent, a car-rental company, latterly as a National Strategic Account Manager, from 31 July 2001 until dismissal with effect on 31 June 2020. By a claim form presented on 11 September 2020, following a period of early conciliation from 24 July 2020 to 19 August 2020, the claimant brought complaints of unfair dismissal, disability discrimination and breach of contract relating to unpaid or underpaid notice pay. The claimant has withdrawn the breach of contract claim at this hearing.
6. The claim is essentially about allegations by the claimant (which are set out in the timeline appended to his claim form) that there had been a failure to make reasonable adjustments to his workload for a period of months from August 2018 onwards which had a negative impact upon his mental health and led to sickness absence. He relies upon the long-term mental impairments of stress, and depression. He described meetings in June 2019, on 17 September 2019 and on 16 January 2020 at which, on his case, he asked to have particular accounts removed and was willing to accept a reduction in pay but was told there was no resource to facilitate that. His case is that he was then placed on furlough on 1 April 2020 and selected for redundancy because of his managers' personal opinions of him due to his mental health condition and their inability to provide the support to him which he needed as a disabled person.
7. In summary, the respondent's defence is the claimant was chosen to be placed on furlough because his experience meant that he was less versatile than a colleague who was not put on furlough and that his previous absences were not taken into account in the decision. The respondent also claims that the claimant's sickness absences were disregarded when scoring him in an objective and transparent matrix which was used to select employees for redundancy and denies discrimination arising in consequence of disability in relation to the decision to dismiss for redundancy.

8. Although, in his timeline, the claimant refers to having made a protected disclosure on 4 February 2020 about receiving bullying treatment from a senior manager, he confirmed at the telephone preliminary hearing that that was only relied upon as part of the timeline relevant to the “ordinary” unfair dismissal claim and part of his complaint of lack of support generally but that he did not intend to complain of detriment or dismissal on grounds of protected disclosure.

The issues

9. The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

Time limits / limitation issues

- 9.1. Were all of the claimant’s complaints presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 (“EQA”) / sections 23(2) to (4), 48(3)(a) & (b) and 111(2)(a) & (b) of the Employment Rights Act 1996 (“ERA”)]? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a “*just and equitable*” basis; when the treatment complained about occurred; etc.
- 9.2. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 25 April 2020 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

Unfair dismissal

- 9.3. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (“ERA”)? The respondent asserts that it was redundancy.
- 9.4. Had the requirements of the Respondent’s business for employees to carry out work of a particular kind ceased or diminished or were they expected to cease or diminish?
- 9.5. If so, was the dismissal wholly or mainly attributable to that fact?
- 9.6. Was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called ‘band of reasonable responses’?

Remedy for unfair dismissal

- 9.7. If the claimant was unfairly dismissed and the remedy is compensation:
 - 9.7.1. Has the Claimant failed to mitigate his loss pursuant to s.123(4) ERA so that his award needs to be reduced accordingly?

- 9.7.2. What is the chance that the Claimant could and would have been fairly dismissed in any event and when would this have occurred?
- 9.7.3. Has the Respondent unreasonably failed to follow the ACAS code and if so should the Tribunal exercise its discretion to award an uplift on the compensatory award (s.124A ERA and s.207A Trade Union and Labour Relations (Consolidation) Act 1992)?
- 9.7.4. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?
- 9.7.5. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?
- 9.7.6. Finally, is there any need to apply the statutory cap on the award?

Disability

- 9.8. Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of stress and depression?

EQA, section 13: direct discrimination because of disability

- 9.9. Has the respondent subjected the claimant to the following treatment:
- 9.9.1. **{the claimant is to state which incidents in his timeline he relies upon as allegations of direct disability discrimination}.**
- 9.9.2. It is not disputed that Adrian Bewley placed the claimant on furlough from 3 April 2020 (the respondent's case is that the claimant consented to being placed on furlough);
- 9.9.3. It is not disputed that Adrian Bewley selected the claimant for redundancy and dismissed from his role with effect on 31 July 2020.
- 9.10. Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the following comparators [**the claimant is to specify any actual comparators**] and/or hypothetical comparators.
- 9.11. If so, was this because of the claimant's disability and/or because of the protected characteristic of disability more generally?

EQA, section 15: discrimination arising from disability

9.12. Did the following thing(s) arise in consequence of the claimant's disability:

9.12.1. The claimant's absence from the business from October 2019;

9.12.2. The claimant not being able to work the same hours; and

9.12.3. The claimant asking for a change in his work schedule.?

9.13. Did the respondent treat the claimant unfavourably as follows:

9.13.1. It is not disputed that Adrian Bewley placed the claimant on furlough from 3 April 2020 (the respondent's case is that the claimant consented to being placed on furlough);

9.13.2. It is not disputed that Adrian Bewley selected the claimant for redundancy and dismissed from his role with effect on 31 July 2020.

9.14. Did the respondent treat the claimant unfavourably in any of those ways because of any of the matters set out in para.9.12 above?

9.15. If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the following as its legitimate aim(s):

9.15.1. [***the respondent will particularise the legitimate aim in their amended grounds of response***]?

9.16. Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had the disability?

Reasonable adjustments: EQA, sections 20 & 21

9.17. Did the respondent not know and could it not reasonably have been expected to know the claimant was a disabled person?

9.18. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

9.18.1. the requirement of a normal or average workload of a National Strategic Account Manager;

9.18.2. The requirement of a normal full day or normal hours of work, and

- 9.18.3. The requirement to service accounts which required a manager to travel a long distance from their home base ?
- 9.19. Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that: they had a negative impact upon the claimant's mental health and put him to the risk of continued negative impact on his mental health?
- 9.20. If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?
- 9.21. If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:
- 9.21.1. removal of particular accounts DECA (defence electronics components authority) and the CAA (civil aviation authority);
 - 9.21.2. to have administrative help with the number of reports which needed to be produced on a daily basis;
 - 9.21.3. an Alternative Work Arrangement (or AWA) – to enable the claimant to work flexibly, pick up his children and to continue working at a later stage in the evening;
 - 9.21.4. a reduction in hours – which the claimant accepted would be reflected in a reduction in pay;
 - 9.21.5. a review meeting that every 2 to 3 week to monitor the effects of his workload on his mental health.
- 9.22. If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Remedy

- 9.23. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

Other matters

10. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at:

www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/

11. The parties are reminded of rule 92: “Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of “cc” or otherwise)...”. **If, when writing to the tribunal, the parties don’t comply with this rule, the tribunal may decide not to consider what they have written.**
12. The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.
13. The following case management orders were uncontentious and effectively made by consent.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. Amendment

- 1.1 By consent, the respondent’s name is amended to Enterprise Rent-A-Car UK Limited

2. Applications

- 2.1 Leave is granted to the claimant to amend his claim to complain about being put on furlough as unfavourable treatment, contrary to s.15 of the EQA and to specify the reasons for which he alleges he was put on furlough and selected for redundancy.
- 2.2 I was of the view that the final sentence in the first paragraph on page 10 indicated selection for redundancy because of “a need to remove me from the business as they were unable to provide support”. The claimant agreed that, as explained at the preliminary hearing and set out above, this complaint was not explicitly stated in his claim form. The respondent accepted that they could not point to significant prejudice from the amendment and the complaint overlapped the same factual basis as that already pleaded so this amendment was effectively made by consent.
- 2.3 Leave is granted to the respondent to amend their grounds of response to reply to the claim as now understood by **2 June 2021**. In doing so, they are to specify the legitimate aim relied upon in defence of the s.15 EQA claim.

3. Judicial mediation

- 3.1 The parties are referred to the “*Judicial Mediation*” section of the Presidential Guidance on ‘General Case Management’, which can be found at: www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/

directions/. The parties are not presently interested in judicial mediation. If they change their minds, they must inform each other and the tribunal of this as soon as possible.

4. Complaints and issues

- 4.1 The parties must inform each other and the Tribunal in writing **within 14 days of the date this is sent to them**, providing full details, if what is set out in the Case Management Summary section above about the case and the issues that arise is inaccurate and/or incomplete in any important way.

5. Further information

- 5.1 The claimant is to write to the respondent and the Tribunal by **12 May 2021** stating which incidents set out in his timeline of events appended to his claim form are relied upon as acts of direct disability discrimination.
- 5.2 The claimant is to write to the respondent and the Tribunal by **[+ 14 days]** stating whether he compares his treatment with that of any other employees of the respondent and, if so, is to identify them.

6. Disability issue

- 6.1 The claimant must by **9 June 2021** serve on the respondent copies of any medical notes, reports, occupational health assessments and other evidence in their possession and/or control relevant to the issue of whether the claimant was at all relevant times a disabled person under the EQA ("disability issue"). For the purposes of this paragraph: documentation already in existence that can be obtained by the claimant by requesting it from their GP or other treating healthcare provider is deemed to be within the claimant's possession and/or control.
- 6.2 The claimant must by **6 June 2021** provide the respondent with the following information expanding upon para.2.7 of the impact statement dated 29 March 2021:
- 6.2.1 the dates over which he was prescribed medication as treatment for his mental health condition;
- 6.2.2 the dates during which he has received any other treatment (including talking therapies) giving details of the treatment concerned; and
- 6.2.3 the effect on him over those periods of his mental health condition specifying any change in those effective before, during and after the treatment concerned.

The claimant is referred to the part of the Presidential Guidance issued on General Case Management, referred to above, that relates to disability.

- 6.3 The respondent must by **30 June 2021** inform the Tribunal and the claimant of the extent to which the disability issue is conceded, and if it isn't conceded in full, the reasons why and whether they make any application for further directions for expert medical evidence. This communication, and this communication only, is to be copied to ukcourt.skype.0893@ejudiciary.net.

7. Documents relevant to all the substantive issues in the case

- 7.1 On or before **16 July 2021** the claimant and the respondent shall send each other a list of all documents that they wish to refer to at the final hearing or which are relevant to any issue in the case, including the issue of remedy. They shall send each other a copy of any of these documents if requested to do so. These are to include, from the claimant, documents relevant to the search for alternative employment.

8. Preparation for the open preliminary hearing

- 8.1 By **30 July 2021**, the parties must agree which documents are going to be used at the open preliminary hearing. The respondent must paginate and index the documents, including the impact statement and all medical records, and put them into one or more files ("bundle"), and provide the claimant with a 'hard' and an electronic copy of the bundle by the same date.
- 8.2 By **8 September 2021** the respondent shall and the claimant may send to each other a written note or skeleton of the arguments which they shall rely upon at the open preliminary hearing.
- 8.3 ***On the working day immediately before the open preliminary hearing (but not before that day), by 12 noon***, the respondent must lodge the following with the Tribunal:
- 8.3.1 An electronic copy of the bundle of documents to be referred to at the open preliminary hearing via the Document Upload Centre.
- 8.3.2 (if the hearing remains listed for a face-to-face hearing) two hardcopies of the bundle.

9. Final hearing bundle

- 9.1 By **5 October 2021**, the parties must agree which documents are going to be used at the final hearing. The respondent must paginate and index the documents, put them into one or more files ("bundle"), and provide the claimant with a 'hard' and an electronic copy of the bundle by the same date. The bundle should only include documents relevant to any disputed issue in the case and should only include the following documents:
- the Claim Form, the Response Form, any amendments to the grounds of complaint or response, any additional / further information and/or further particulars of the claim or of the response, this written record of a preliminary hearing and any other case management orders that are

relevant. These must be put right at the start of the bundle, in chronological order, with all the other documents after them;

- documents that will be referred to at the final hearing and/or that the Tribunal will be asked to take into account.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is relevant to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle
- the documents in the bundle must follow a logical sequence which should normally be simple chronological order.

10. Witness statements

- 10.1 The claimant and the respondent shall prepare full written statements containing all of the evidence they and their witnesses intend to give at the final hearing and must provide copies of their written statements to each other on or before **8 November 2021**. No additional witness evidence will be allowed at the final hearing without the Tribunal's permission. The written statements must: have numbered paragraphs; be cross-referenced to the bundle(s); contain only evidence relevant to issues in the case. The claimant's witness statement must include a statement of the amount of compensation or damages they are claiming, together with an explanation of how it has been calculated.

11. Final hearing preparation

- 11.1 ***On the working day immediately before the first day of the final hearing (but not before that day), by 12 noon***, the following parties must lodge the following with the Tribunal:

11.1.1 An electronic copy of the bundle of documents to be referred to at the final hearing and a bundle of all of the witness statements (both for the claimant and the respondent) by the respondent via the Document Upload Centre.

11.1.2 four hard copies of the bundle(s), by the respondent ;

11.1.3 four hard copies of the witness statements (plus a further copy of each witness statement to be made available for inspection, if appropriate, in accordance with rule 44), by whichever party is relying on the witness statement in question.

12. Other matters

- 12.1 The above orders were made and explained to the parties at the preliminary hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.

- 12.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.
- 12.3 The parties may by agreement vary the dates specified in any order by up to 14 days without the tribunal's permission except that no variation may be agreed where that might affect the hearing date. The tribunal must be told about any agreed variation before it comes into effect.
- 12.4 **Public access to employment tribunal decisions**
All judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.
- 12.5 **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**
- 12.6 **Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.**

I confirm that these are my PH Judgment and Case Management Orders in the case of 3311673/2020 Midgley v Enterprise Rent-A-Car Ltd and that I have signed the Judgment(s)/Orders by electronic signature.

Employment Judge George

21 May 2021

Sent to the parties on:

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For the Tribunal:

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