EMPLOYMENT TRIBUNALS

Claimant: Mr M Lidbetter

Respondent: Automobile Association Developments Ltd

Heard at: by CVP **On:** 16 March 2021

Before: Employment Judge Craft

Member:

Representation
Claimant: Mr J Bradbury, TU Representative
Respondent: Mr C Ludlow, Counsel

RESERVED JUDGMENT
FOLLOWING A PRELIMINARY HEARING

1. The Claimant was not disabled within the terms of s.6 Equality Act 2010 at the material time.

2. The Claimant's claims of disability discrimination are dismissed.

3. The remaining claims in these proceedings will now proceed to the full hearing before a Judge and Members that has already been fixed and notified to the parties who have confirmed to the Tribunal that no further Directions / Orders for preparation for that hearing are required.

REASONS

Introduction

1. The Claimant commenced employment with the Respondent as a Recovery Patrol Officer on 18 November 2018. He was dismissed by the Respondent by reason of capability on 5 August 2019. At the Preliminary Hearing held on 8 April 2020 it was confirmed that the Claimant was pursuing claims of detriment and automatically unfair dismissal for making a protected disclosures; direct disability and age discrimination; discrimination arising

from a disability; failure to make reasonable adjustments; and harassment related to disability and age

2. The Claimant suffers from diabetes and is disable within the terms of the **Equality Act 2010 ("EqA")** by reason of that illness. However, he does not rely on diabetes in pursuing his disability claims in these proceedings. He relies on a physical ailment which can be broadly described as a musculoskeletal condition affecting his back. The Respondent submits that the Claimant was not disabled within the terms of the EqA at the material time and that his claims for disability discrimination should be dismissed for that reason. The parties have agreed that the material time is the period from 11 April to 5 August 2019. Therefore, the preliminary issue before this Tribunal is to determine whether the Claimant was a disabled person within the meaning of **s.6 EqA** at the material time.

The Law

3. The **EqA** defines a "disabled person" as a person who has a "disability" (S.6) (2)). A person has a disability if she or she has "a physical or mental impairment" which has a "substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities" (S.6) (1)]. The burden of proof is on a Claimant to show that he or she satisfies this definition. This definition is the starting point for establishing the meaning of "disability". However it is not the only source that must be considered. The supplementary provisions for determining whether a person has a disability are found in Part 1 of Schedule 1 to the **EqA**. In addition, the Government has issued Guidance on Matters to be taken into account in determining questions relating to the definition of disability (2010)" ("The Guidance") under **s.6(5) EqA**. The Guidance does not impose any legal obligations in itself but courts and tribunals must take account of it where relevant. Finally, the Equality and Human Rights Commission (EHRC) has published a Code of Practice on Employment ("the EHRC Employment Code") that has some bearing on the meaning of disability under the **EqA**. Like The Guidance, the Code does not impose legal obligations but tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.

4. The time at which to assess the disability (ie whether there is an impairment which has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act. This is also the material time when determining whether the impairment has a long term effect.

5. There is no statutory definition of either a "physical impairment" or a "mental impairment" and nor is there any definition in The Guidance or the EHRC Employment Code. The Court of Appeal has held that impairment should bear its ordinary and natural meaning. It has also stated: "It is left to the good sense of the tribunal to make a decision in each case and whether the evidence available establishes that the applicant has a physical or mental impairment with the stated effects." It is generally accepted the term is meant

to have a broad application and Part A3 of The Guidance tends to support this view. It states that in many cases there will be no dispute as to whether a person has an impairment, adding that any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition. It is the degree to which a person is affected by a particular impairment that in most cases will determine whether that person is afforded the protection of the **EqA**.

6. The impairment must have a "substantial adverse effect" on the person's ability to carry out normal day-to-day activities. Substantial is defined in S.212(1) **EqA** as meaning "more than minor or trivial". Appendix 1 to the EHRC Employment Code provides guidance on the meaning of "substantial". It states:

"The requirement that an effect must be substantial reflects the general understanding of a disability's limitation going beyond the normal differences in ability which might exist among people. Account should also be taken of where a person avoids doing things which, for example, causes pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation."

7. In **Goodwin v Patent Office 1999 ICR 302 EAT**, the EAT said that, of the four component parts to the definition of a disability in what was then the Disability Discrimination Act 1998, judging whether the effects of a condition are substantial is the most difficult. In its explanation of the requirement the EAT stated, inter alia, as follows:

"What the Act is concerned with is an impairment on the person's ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook, but only with the greatest difficulty. In order to constitute an adverse effect, it is not the doing of the act which is the focus of attention but rather the ability to do (or not to do) the acts. Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves."

8. When determining whether a person meets the definition of disability under the **EqA**, the Guidance emphasises that it is important to focus on what an individual cannot do or can only do with difficulty rather than on the things that he or she can do. As the EAT also pointed out in the **Goodwin** case, even though a Claimant may be able to perform a lot of activities, the impairment may still have a substantial adverse effect on other activities, with the result that a Claimant is quite probably to be regarded as meeting the statutory definition of disability. Equally, where a person can carry out an act, but only with great difficulty, that person's ability has been impaired.

9. The Goodwin case also gave tribunals guidance on the proper approach to

adopt when applying the provisions of the previous Act. This guidance remains equally relevant today in interpreting the meaning of S.6 **EqA**. The EAT said that the words used to define disability require a tribunal to look at the evidence by reference to four different questions as follows:

(a) Did the Claimant have a mental and / or physical impairment?

(b) Did the impairment affect the Claimant's ability to carry out normal day-to-day activities?

(c) Was the adverse condition substantial?

(d) *Was the adverse condition long term?*

These four questions should be posed sequentially.

10. This means that for current impairments that have not lasted 12 months the Tribunal will have to decide if the substantial adverse effects on the condition are likely to last for at least 12 months. The Guidance stipulates that an event is likely to happen if it "could well happen". This definition of the word likely reflects the House of Lords' decision in **SCA Packaging Ltd**. That case according to Baroness Hale, the word "likely" in each of the relevant provisions of the Disability Discrimination Act (now Equality Act) simply meant something that is a real possibility, in the sense that it "could well happen" rather than something that is probable or "more likely than not", it is important to note that the issue how long an impairment is likely to last should be determined at the date of the discriminatory act and not the date of the Tribunal Hearing. The Guidance stresses that anything that occurs after the date of the discriminatory act will not be relevant.

The Evidence

11. There was an agreed Bundle of Documents consisting of 192 pages **(Exhibit R1)**. The Employment Tribunal received oral evidence from the Claimant who had prepared a Disability Impact Statement **(Exhibit C1)**. The Employment Tribunal reserved its decision on the Preliminary Issue having received oral submissions from Mr Ludlow and Mr Bradbury, which in Mr Bradbury's case was supported by written submissions **(Exhibit C2)**.

12. The Respondent was required to set out its position in respect of the Claimant's alleged disability following receipt of the medical evidence he relied upon and his Impact Statement. This explanation was set out in a letter from its solicitors dated 17 August 2020. The relevant part of this letter states as follows:

"The Respondent's position is that the date upon which the Claimant was/became disabled for these purposes was 7 August 2019, the date of his MRI results which confirmed a degenerative disc disease. This date was when it became likely that his condition would last more than 12 months as before this date, there was no indication of this with all the medical evidence suggesting that the Claimant was expected to make a full recovery and the OH reports confirming that they did not consider the Claimant's condition to constitute a disability."

13. Mr Bradbury and Mr Ludlow each referred to the Guidance on the Definition of Disability (2011). They also referred the Employment Tribunal to a number of cases. Mr Bradbury referred to: **Donelin v Liberata UK Ltd [2018]IRLR535; Gallop v Newport City Council [2014]IRLR211; SCA Packaging Ltd [2009]UKHL(NI)37;** and **Nissa v Waverley Education Foundation Ltd EAT/0135/118/DA.** Mr Ludlow referred to: **Bourne v ECT Bus EAT 2009 0288/08**; **Stafford v Focus Hotels Management Ltd ET 1200256/10** and **O'Donnell v Ministry of Defence ET 3103421/97.**

14. The Employment Tribunal has made the following findings of fact after considering all the oral and documentary evidence referred to it and the closing submissions it received.

The Facts

15. The Claimant was based at the Respondent's Ealing Depot where he worked on late shifts driving Canter vans. On 11 April 2019 the van he was driving drove over a pothole which caused his seat to break. The Respondent completed a comprehensive Incident Report in respect of this accident. The Claimant suffered pain to his left hip and lower back. He was able to return to Ealing Depot and then drive home. He was able to report for work on the following day when he informed his manager that he had not attended on his GP. He confirmed that he had taken painkillers to address the discomfort he felt in his left hip and lower back following the accident.

16. The Claimant had undergone a surgical procedure in February related to a problem with his bowel. Shortly after the accident he obtained a Fit Note from his GP for "pain post surgery" for the period from 18 to 25 April. This Fit Note was unconnected to the injury and pain he had suffered on 11 April.

17. However, towards the end of April, the Claimant took two days' sick leave because of lower back pain which he attributed to the accident on 11 April. The Respondent arranged for an Occupational Health Assessment by telephone. This took place on 30 April. By then the Claimant had suffered a further incident when his van jumped out of gear when he was reversing which has caused further pain in his back. The Claimant informed Occupational Health that the pain in his neck and back was improving. However he did not consider that he was fit to return to work on that evening.

He told Occupational Health that he did intend to return to work on 3 May. He duly did so.

18. The Occupational Health Report which was prepared after the telephone assessment states, inter alia, as follows:

"Mr Lidbetter has no known prior musculoskeletal issues or underlying back conditions, therefore it is expected that he will make a full recovery as he is not reporting any red flag symptoms; however I have advised him that if his pain is not improving or getting worse he should see his GP initially and also ask to be referred back to Occupational Health for Physiotherapy referral."

19. The Report made a number of recommendations. These were the provision of adequate and secure seating in his van; flexible mobility; regular micro breaks (couple of minutes each hour); regular meetings with his manager; and that the Claimant should undertake manual handling refresher training.

20. Three weeks later on 23 May the Claimant's GP issued a Fit Note for lower back pain. This indicated that the Claimant might be fit for work and made recommendations for him to work reduced hours on his late shift and micro breaks during shifts. His GP issued further Fit Notes with the same recommendations for the periods from 1 to 15 June, 13 to 27 June (recording ongoing lower back pain running down his left leg, but no pins and needles); 27 June to 4 July; 8 to 23 July (after the Claimant had been hit on his hip by a car when directing traffic); and on 25 July for a further six weeks. On 8 July his GP made arrangements for the Claimant to undertake an MRI lumbar scan because of his continuing lower back pain.

21. After a meeting with held with the Claimant on 31 May the Respondent referred him to an in person Occupational Health consultation. This took place on 10 July following which a report was issued by Occupational Health on 19 July 2019. This explains that the Claimant is currently at work, has been restricted to an eight hour shift and continues to struggle with aspects of his job because of his ongoing symptoms. The report also records that the physical examination revealed evidence of lower back muscle spasm which was more prominent on his right side; muscle spasms were also noted between his left shoulder and his neck; and the Claimant found it more uncomfortable to turn his neck to the right.

22. The Report states, inter alia, as follows:

"I reviewed Mr Lidbetter's duties with him. He is currently struggling with lifting and handling of the ramps on trucks. I would therefore recommend the management to provide him with a truck that has a remote control for the ramp, as well as air suspension, which would hopefully assist his comfort levels and allow him to remain at work while his symptoms are prominent.

The MRI scan results will clearly need to be awaited and following this physiotherapy can be arranged if appropriate. In the meantime, I recommend for his working hours to be maintained to no more than eight per day, at least until he is reviewed again through a further Occupational Health assessment in a month's time . . .

With regards to the diagnosis, as noted above, he is noted to be suffering with significant muscle spasm in his upper and lower back. However, the MRI scan will identify whether any spinal issues are also involved.

In the meantime, therefore, Mr Lidbetter is fit for work subject to the adjustments made above. The outlook is likely to be favourable at this point. However the MRI scan will determine the nature and scope of any further treatment which may be required. Mr Lidbetter's response to this treatment will determine the outlook over the coming weeks and months, including his ability to render regular and efficient service in the future.

In my opinion the Equality Act 2010 is currently likely to apply with regards Mr Lidbetter's background diabetes. However it is unlikely to apply at this point to his musculoskeletal problems as they have been present for less than 12 months."

23. The Claimant wanted to keep working and to keep moving as much as possible. The Respondent made adjustments to working hours as recommended by his GP and the Claimant told the Tribunal the Respondent had also provided him with support from other employees when this was needed to assist him in moving and collecting vehicles.

24. The Claimant gave no evidence to the Tribunal about the meetings he attended with the Respondent in this period. However, the Agreed Bundle contains the Respondent's minutes of the meetings which its managers held with him following his accident on 11 April. The Tribunal briefly summarises below the Respondent's records of what was discussed at those meetings and the outcome of them.

25. At a Step 1 Absence meeting held with the Claimant and his Trade Union representative on 31 May it was agreed that the Respondent should investigate the potential benefits of transferring the Claimant to a vacancy on a late shift at its Heathrow site where it was anticipated that he would be able to drive a Prestige, rather than Canter, van / truck. Unfortunately, the Respondent's enquiries confirmed that the vacancy had already been filled and that, in any event, the job would have involved the Claimant in driving Canter trucks from time to time, which he wanted to avoid. After this meeting the Respondent made arrangements for the Claimant to attend an Occupational Health meeting in person on 10 July for further assessment of his injury the report from which has been referred to above.

26. A further meeting was held with the Claimant and his Trade Union representative on 24 July after receipt of this report. At this meeting the Claimant advised the Respondent that he did not consider he was fit to drive a Canter vehicle. Mr Hale, who chaired this meeting then tabled four options for the Claimant one of which was for the Claimant to transfer to the Respondent's Wimbledon site where he would be able to work in a different vehicle. The Claimant indicated that he was not prepared to transfer to Wimbledon for two reasons: firstly the length of the journey from his home to that site; and, secondly, because he did not get on with the Performance Leader who would be managing him there. Mr Hale agreed to give the Claimant 48 hours to consider his position in respect of the options presented to him. Subsequently, the Claimant submitted a grievance making allegations of bullying.

27. A third meeting was held with the Claimant on 5 August. This was chaired by Mr Masoero. The Claimant was informed that this was a capability meeting which the Claimant attended with his Trade Union representative. Mr Masoero also considered the Claimant's grievance at this meeting and after discussing the grievance with the Claimant rejected the allegations of bullying which he had made. The Claimant's current medical condition was then discussed. The Claimant told Mr Masoero that he was in some pain. He said he was "in a bad way" and was awaiting an MRI scan following which he would be attending a further meeting with Occupational Health.

28. Mr Masoero advised the Claimant he could be transferred to Wimbledon where he would be provided with a truck with a seat supported by air suspension, equipped with remote control of the lifting ramp as the Claimant had requested. Mr Masoero also confirmed that the Respondent would allow him to continue working reduced hours on the basis that his position would be reviewed by Occupational Health after six weeks in accordance with the his GP's last Fit Note which had been extended for a six week period.

29. The Claimant rejected the proposed transfer to Wimbledon for the same reasons as he had given to Mr Hale. Mr Masoero them made the same offer to the Claimant on the basis that he would be managed by another Performance Leader which the Claimant also rejected. The eventual outcome of this discussion was an impasse as a result of which the Claimant was dismissed by reason of capability.

30. Two days after his dismissal the Claimant attended on a consultant radiologist to discuss the results of the MRI scan which had been arranged by his GP. He was informed that this scan confirmed no vertebral fractures could be seen. However it did disclose degenerative disc disease. The note states as follows:

"Findings: No vertebral fractures seen. There is degenerative disc disease with marked disc height reduction and minor posterior disc bulging at L3 – 4.

No significant root entrapment or spinal stenosis seen at L3 – 4.

At L4 – 5 there is mild disc degeneration with minor posterior disc bulge causing mild indentation on the anterior theca. The disc height is maintained. No significant root entrapment or spinal stenosis seen.

31. *At L5 – S1 there is a defect in the pars interarticularis of L5. There is spondylolsisthesis of 25 – 30% with marked disc height reduction. The combination of the changes causes moderately severe narrowing of the root canals bilaterally. The central spinal canal at this level remains adequate. Mild soft tissue swelling due to stress response is seen in the soft tissue surrounding the L5 – S1 facet joint."*

Consideration and Conclusions

32. The Claimant had no previous history of lower back pain before the accident on 11 April. He was able to continue working with the adjustments that had been recommended by his GP, which were endorsed by Occupational Health. His impact statement, the Occupational Health Reports and the oral evidence which he gave to the Tribunal established that he was experiencing some restricted movement and discomfort when driving at the material time. He confirmed that he had been able to work shifts of eight hours and attributed the discomfort when driving at this time to the seating in the Canter van. The particular difficulty at this time which he described to the Tribunal was lifting and using ramps when collecting vehicles. He did not describe other difficulties in undertaking day to day activities during the material time.

33. The Respondent arranged for two assessments to be undertaken by its Occupational Health advisers. The first report indicated that the Claimant was expected to make a full recovery. Their second report concluded that he was not disabled because his musculoskeletal problems had been present for less than 12 months. The report also explained that the exploratory MRI scan arranged by his GP would determine whether any spinal issues were involved and the extent and nature of further treatment he required. The notes of the results of the scan provide no prognosis, or recommendations for treatment, of the degenerative disc disease it found and describes.

34. The Claimant's Impact Statement describes how his condition has worsened since the scan and the physiotherapy provided to him following it. He describes pain from three hours driving as very bad indeed and explains that walking can be painful, with pain increasing with distance, and waking during the night. Sadly, it also appears from his statement that he is no longer able to undertake a driving job.

35. Obviously, such unfortunate developments had not been predicted by either his GP or Occupational Health, and could not have been known, during the

material time. Furthermore, the evidence before the Tribunal is that the impact of the physical impairments caused by the accident suffered by the Claimant were limited to the aspects of his job which he has described. The physical impairments and their impact as described by the Claimant did not have a substantial adverse affect on his day to day activities.

36. The Tribunal, having made this finding, does not have to go any further to determine the preliminary issue before it. However, it is clear that neither his GP nor Occupational Health had formed a view that the exploratory MR scan would disclose a degenerative disc disease, or that there were grounds for a prognosis of a substantial and continuing deterioration in the Claimant's previously unknown medical condition that by reason of recent accidents were likely to result in a long term adverse condition that would be a disability within the terms of the **EqA.**

37. It is for these reasons that the Tribunal has found that the Claimant was not disabled within the terms of the **EqA** during the material time. This means that the Claimant's claims of disability discrimination must be dismissed.

Employment Judge Craft

Date: 14 April 2021

Judgment sent to the parties: 15 April 2021

FOR THE TRIBUNAL OFFICE