



Case Number: 3335546/2018 (V)

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## EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

Mr H Pope

and

**Respondent**

WFL (UK) Ltd t/a  
Watsons Fuels

**Held by CVP on 11 March 2021**

**Representation**

**Claimant:**

Mr D Frame, Solicitor

**Respondent:**

Mr S Wyeth, Counsel

**Employment Judge Kurrein**

**Statement on behalf of the Senior President of Tribunals**

This has been a remote hearing that has not been objected to by the parties. A face to face hearing was not held because it was not practicable and all issues could be determined in a telephone hearing. The documents that I was referred to are in a bundle of 210 pages, the contents of which I have recorded.

## JUDGMENT

- 1 The Claimant was not a disabled person at any relevant time.
- 2 The Claimant's claims alleging disability discrimination have no reasonable prospect of success and are struck out.

## REASONS

**Introduction**

- 1 These reasons should be read in conjunction with all earlier orders and reasons.
- 2 On 21 December 2018 the Claimant, having completed early conciliation, presented a claim to the tribunal alleging unfair dismissal and disability discrimination.
- 3 On 19 February 2019 the respondent presented a response in which it contested those claims including denying that the Claimant was a disabled person.
- 4 By a letter dated 17 March 2019 directions were given in the following terms:

1. The Claimant obtains a report from a qualified medical practitioner to deal with these issues. A copy of such report should be sent to both the Respondent and the Tribunal no later than 29 April 2019.

It is important that such report addresses the concepts of disability as used in the 2010 Act and to assist there is attached to this letter an outline set of instructions to the medical practitioner which can be adopted/adapted as seen fit.

2. No later than the same date the Claimant is to provide to the Respondent and the Tribunal office a statement that explains what effect the alleged disability has on the Claimant's ability to perform normal day to day activities.

- 5 On 5 November 2019 it was agreed that there should be an open preliminary hearing to determine the following matters, whether:

- 5.1 any of the Claimant's claims should be struck out on the grounds that they have no reasonable prospect of success or alternatively the Claimant should be required to pay a deposit before continuing with any of his claims if they are considered to have little reasonable prospect of success; and

- 5.2 the Claimant has a disability within the meaning of s6 of the Equality Act 2010 ("EqA") by reason of anxiety and depression.

- 6 This is that hearing.

### **The Evidence**

- 7 The Claimant made an impact statement and obtained a report. I have also heard his evidence on his own behalf and the evidence of his sister Ms Harrison, and a former work colleague, Mr Wilson, on his behalf. I read the documents in the bundle to which I was referred and read and heard the parties' skeleton arguments and submissions. I make the following findings of fact.

### **Findings of Fact**

- 8 The Claimant was born on 21 March 1981 and appears to have had a difficult childhood. He frequently got into trouble and fell out with his primary school. He served in the army for a few years and started his employment with the respondent on 26 October 2015. He was employed as a Class 2 driver making deliveries of fuel to premises in East Anglia. He had a clean disciplinary record until the events that give rise to this claim.

- 9 The following is a brief summary of what took place to give context to the claim. None of the facts I recount are to be taken as findings of fact for any purpose, but they are very largely taken from the claim.

- 9.1 The Claimant, who was married at the time, started an affair with a colleague who worked in the office, HG, in about December 2016. It was tempestuous.

- 9.2 The Claimant's wife moved out of the marital home, for the final time, in July 2017.

- 9.3 He and HG's relationship finally broke down on 20 April 2018.

- 9.4 At that time the Claimant's then girlfriend was pregnant and urgently had to visit hospital in connection with her pregnancy on 23 April 2018. The Claimant was given the day off.
- 9.5 On his return to work on 24 April HG wished him and his girlfriend well.
- 9.6 An altercation took place involving C, HG and other managers and colleagues and the Claimant was suspended.
- 9.7 One of the terms of his suspension was that he should not contact any witnesses.
- 9.8 The Claimant was then signed off as unfit for work with anxiety.
- 9.9 On 13 June 2018 the Claimant sent explicit pictures of himself and HG to HG's fiancée.
- 9.10 The Claimant attended Disciplinary Hearings on 21 August regarding his conduct on 24 April and 13 June, following which he was summarily dismissed.
- 9.11 His appeal was heard on 6 September 2018 and was also dismissed.
- 10 The Claimant's impact statement purported to explain how his 'mental impairment' affected him on a daily basis. It recounted:-
- 10.1 He did not consider himself to be a "massively" social person. He struggled with groups of people whether known or unknown. He feels nervous and paranoid.
- 10.2 He also likes being around people he is close to, but tends to push them away. He likes to be left alone.
- 10.3 If he has to wait in the office or out on the road he takes a paper or his phone with him so that he can concentrate on that rather than interacting with others.
- 10.4 He is compulsive with tidiness and order. He cannot wear un-ironed clothes and the contents of his cupboards are organised into groups.
- 10.5 If demands are made of him or he thinks something is wrong he simply reacts. His family have remarked on this. They can see it happening but are unable to do anything once it reaches the point of no return.
- 10.6 He accepts that it is like a "red mist". He has difficulty in seeing things from another person's point of view. He struggles with rules, not so much legal requirements but social mores, like waiting in a queue. He accepts that he might be described as "impulsive" and cannot stop himself saying or doing things .
- 10.7 He cannot bear to be indoors for a long time, fidgets and gets claustrophobic. He enjoyed his time in the army, particularly the structure and routine. he felt he had a purpose, which is something that is important to him.
- 10.8 In recent years he thinks he has more insight into himself: if everything is going well he can cope, but any changes can throw him completely. He

believes he is losing control and then starts to panic. Sometimes he snaps and explodes in a fit of temper.

- 10.9 He has developed coping strategies which have helped him to a certain extent. These do not always work and the incident giving rise to these proceedings came about following his marriage break down, his grandmother passing away when he was living in a caravan and expecting a new baby.
- 11 The Claimant's further statement confirmed much of his impact statement and commented on some of the documents in the bundle. He expressly relies on an impairment of 'Depression and Anxiety', and has disclaimed reliance on ADHD.
- 12 The Claimant's evidence was corroborated by that of his sister. Mr Wilson's evidence went to the issue of the Respondent's knowledge, which I have not considered it appropriate to deal with today.
- 13 The Claimant's medical records disclose the following:

Date	Record
31/10/16	History: problems with temper - worse recently - 2 episodes of smashing up house, Wife has now moved out. ... "not depressed" ... Patient health questionnaire (PHQ-9) score 11 Generalised anxiety disorder 7 item score 17 ... Diagnosis: anxiety and anger Issues Prescribed Sertraline 50mg 28 days
6/12/16	reports has undertaken a 4 week course at UEA with well being feels mood improved admits has forgotten to take sertraline on some days Examination: PHQ now 2 GAD now 4 ... Prescribed Sertraline 50mg 28 days
5/7/17	History: Anger issues discussed in Oct and had several months of sertraline which seemed to help. Did engage with WBS unfortunately anger became a problem again 10 days ago - wife now moved out and looks unlikely to return. ... Keen to restart sertraline. ... Prescribed Sertraline 50mg 28 days
17/12/17	Seen by ambulance crew - Henry has been drinking tonight, called 999 and has smashed up his kitchen and living room. .... Whilst talking to Henry, he stated that he had recent relationship break down, a long history depression and suicidal thoughts
18/12/17	History: marriage break up, he has separated but is still living with wife. Previously history of binge drinking and violence with episode in prison. Previously treated with sertraline which definitely helped.

	<p>....                  Prescribed Sertraline 50mg 28 days                  ...                  Diagnosis: depression</p>
2/1/18	<p>History: Long discussion. Feels calmer on sertraline, no thoughts of self harm. Says temper has got him into trouble from he was a child, says 'a nightmare', continues to quick to anger, impulsive, anxious, difficulty staying still, restless, can't cope with stress, anger often worse with alcohol - binge drinker, some drugs but none for 3 months. Positive about future - looking for somewhere to move to, good friend calling daily                  Diagnosis: Follow up                  Prescribed Sertraline 100mg 28 days</p>
17/1/18	<p>History: Signed off until today with depression.                  Feels ready to return to normal duties and hours.                  Examination: Chatty, good eye contact.                  Slightly restless - but ?ADHD.                  Plan: Feels happy to return to normal working.</p>
4/6/18	<p>History: Has been suspended at work after verbal outburst some weeks ago. Going through procedure. He thinks he is likely to get dismissed. Making him more anxious. Stopped Sertraline but does think he was a lot calmer on it,                  Letter to say he has been accepted for ADHD assessment                  Diagnosis: Feeling anxious                  Prescribed Sertraline 50 mg rising to 100mg 28 days                  ...                  New MED3 statement issued: Not fit for work - Valid from 04 Jun 2018 to 24 Jun 2018                  Diagnosis: Anxiety</p>
3/7/18	<p>Duplicate MED3 statement issued:- Not fit for work - Valid from 04 Jun 2018 to 24 Jun 2018                  Diagnosis: Anxiety</p>
21/8/18	<p>History: been for tribunal meeting today -awaits results -due next few days -thinks will lose his job.                  baby daughter 7 weeks old.                  ...                  Depression medication review                  Depression interim review                  Prescribed Sertraline 50mg 28 days</p>

- 14 The Claimant instructed Dr Kathryn Newns, Clinical Psychologist, to prepare an expert report on his impairment. In my view it is sufficient to record only her Summary of her conclusions,

'The Client has long standing difficulties with anger and impulsivity. He has not, in my opinion, experienced a mental health condition consistent with a DSM-5 diagnosis such as a depressive disorder or an anxiety disorder. However, whilst I have not fully assessed him for the presence of Attention Deficit Hyperactivity Disorder (ADHD), he has symptoms consistent with ADHD in adults (based on a screening tool, the Adult ADHD Self-Report Scale (ASRS-v1.1) Symptom Checklist and further investigation is warranted. He is on the waiting list for a psychiatric assessment of this condition.

He has had psychological symptoms of anger, based on his GP records and self-report, specifically presenting to his GP with this in 1992, 2006 and 2007. Depression and anxiety problems (in addition to his ongoing anger issues) began, secondary to relationship difficulties and financial stress, in October 2016. His anger problems worsened his relationship problems. By December 2017 his marriage had broken down, in significant part due to his anger and alcohol problems, and as a result he was depressed and anxious. His grandmother also died, which worsened his mood. This led to interpersonal problems at work. From this point onwards his anger, impulsivity, and secondary low mood continued through to his suspension in April 2018.

His anger and impulsivity difficulties cause significant problems with day to day activities (including but not limited to waiting in queues and interpersonal relationship problems) and work (including but not limited to coping with finer details of projects; coping with sitting still, for example in meetings; coping with stressful situations with a tendency to angry outbursts).

While he does not have a diagnosable mental health condition (although he should be assessed for ADHD) he does find it difficult to cope with periods of stress and is prone to impulsivity and anger reactions at these times.

### **Submissions**

- 15 I received long, detailed and helpful submission from each of the parties. It is neither necessary nor proportionate to set them out here.

### **The Law**

- 16 I consider it appropriate to deal with the issue of disability first. I was referred to and am familiar with the relevant provisions of the Equality Act 2010, the Guidance and Code of Practice. I am also familiar with the provisions of the Employment Rights Act 1996 and the law of unfair dismissal.
- 17 The Claimant referred me to the following authorities:-
- Ridout v TC Group [1998] IRLR 628
  - Goodwin v Patent Office [1999] IRLR 4 (EAT)
  - Kapadia v Lambeth London Borough Council [2000] IRLR 14
  - Kapadia v London Borough of Lambeth [2000] IRLR 699 (CA)
  - Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19
  - Cruickshank v VAW Motorcast Ltd [2002] IRLR 24
  - ED & F Mann Liquid Products Ltd v Patel [2002] EWCA Civ 1550
  - Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684
  - Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330
  - Boyle v SCA Packaging Ltd [2009] UKHL 37
  - J v DLA Piper UK LLP UKEAT/0263/09
  - Rayner v Turning Point and others UKEAT/0397/10
  - Royal Bank of Scotland plc v Morris UKEAT/0436/10
  - J v DLA Piper UK LLP [2010] ICR 1052

Balls v Downham Market High School & College UKEAT/0343/10  
Secretary of State for Work and Pensions v Alam [2010] ICR 665.  
Walker v Sita Information Networking Computing Ltd UKEAT/0097/12  
Tayside Public Transport Company Ltd (t/a Travel Dundee) v Reilly [2012] RLR 755 (CS)  
Ring v Dansk Almennyttigt Boligselskab C-335/11: [2013] IRLR 571; [2014] ICR 851  
Aderemi v London and South Eastern Railway Ltd [2013] ICR 591.  
J in Donelien 16 December 2014, para 31  
Taylor v Ladbrokes Betting and Gaming Ltd UKEAT/0353/15, [2017] IRLR 312  
Pnaiser v NHS England [2016] IRLR 170, para 69  
Mechkarov v Citibank NA [2016] ICR 1121  
Herry v Dudley Metropolitan Borough Council [2017] ICR 610  
York City Council v Grosset [2018] ICR 1492, para 39  
Donelien v Liberata UK Ltd [2018] IRLR 535  
A Ltd v Z [2020] ICR 199

The Respondent referred me to some of the above authorities and to.

Wigginton v Cowie and ors t/a Baxter International(A Partnership) UKEAT0322/2009  
Morgan Stanley International v Posavec UKEAT0209/2013  
Appleby v Governing Body of Colburn Community Primary School and anor UKEAT0334/2015  
Paterson v Commissioner of Police of the Metropolis [2007] ICR 1522, EAT  
Patel v Oldham Metropolitan Borough Council and anor [2010] ICR 603, EAT  
Swift v Chief Constable of Wiltshire Constabulary [2004] ICR 909  
Sullivan v Bury Street Capital Ltd UKEAT0317/19  
Anyanwu and anor v South Bank Student Union and anor [2001] ICR 391  
Shestak v Royal College of Nursing and ors UKEAT0270/2008  
Ahir v British Airways plc [2017] EWCA Civ 1392, CA  
ET Marler Ltd v Robertson [1974] ICR 72, NIRC  
Attorney General v Barker [2000] 1 FLR 759, QBD (DivCt)  
Hemdan v Ishmail and anor [2017] ICR 486

### **Further Findings and Conclusions**

- 18 In light of the above evidence, and the decision in J v DLA Piper UK LLP [2010] IRLR 936, I take the view that I should first consider the issue whether the Claimant's ability to carry out normal day-to-day activities has been substantially adversely effected.

**Adverse effects etc**

19 I concluded that the evidence adduced by and on behalf of the Claimant on these issues to be unsatisfactory.

20 The difficulty I faced was that while the Claimant gave a great deal of evidence about how some events had made him feel, he gave effectively no evidence as to how, if at all, those feelings impacted on his ability to perform normal day to day activities.

21 By way of example,

21.1 At paragraph 2 of his impact statement he says,

‘I am not a massively social person. I struggle in groups of people, whether I know them or not, it doesn’t really make a difference. I feel uncomfortable - nervous if you like. I become paranoid and I feel like people are looking at me, scrutinising me and judging me. It is a horrible feeling. I tend to fidget and I feel like I have to get away. I don’t like making eye-contact, it makes me feel funny, struggle to describe it but it is a really unpleasant feeling. I am distrustful and one of the first things that flashes across my mind when somebody shows an interest in me or tries to start a conversation with me is ‘what do they want, why are they talking to me?’ I think this stems from an overall lack of self-confidence.’

However, he gives no evidence of how this effects his life. Does it stop him socialising completely, or from visiting pubs or clubs, or attending family or other social gatherings?

21.2 At paragraph 5 he says,

‘I am compulsive about being tidy and my living space has to be ordered. I can’t wear clothes that I have not ironed, everything in my cupboards is organised into groups, I need to vacuum a couple of times each day, everything must be in it’s place, all my papers must be in the correct file. If something is misfiled, I have to pull everything out and start again. If something is wrong in the cupboard I have to reorganise it until it is right. It is a compulsion, I worry about it and I am unable to rest or focus until things are as they should be. If something isn’t right then it will play on my mind.’

But he does not say what the consequence of this behaviour is on his lifestyle. Does it make him late for appointments, does it upset his partners, does it take so much time he fails to do other things?

21.3 His evidence at paragraph 7 is,

‘From my point of view it is that red mist. It comes down and there is nothing I can do about it. At that moment, I have no feeling or thought for the other person - I just say stuff and people will say to me afterwards “Henry, you can’t say stuff like that”. I don’t always understand what they mean or why I can’t say it. Sometimes I feel bad afterwards — if I can see that someone is really upset but other times I don’t feel anything. I find it really hard to see things from someone else’s point of view. I think this is also why driving suits me, I don’t need much empathy.’



But there is no commentary on the effect his behaviour has on others or himself. There is no suggestion he does not have or make friends, that friends or family avoid him.

21.4 At paragraph 8 he says,

‘I struggle with rules, generally. I know what they are and I know there will be consequences if I break them but it is like my brain can’t connect this with what I actually do and I have no feeling about what the consequences of my actions will be — the consequences pale into insignificance because the compulsion to act or react just takes over. I don’t want to break rules and I try hard not to. When I say rules, I don’t just mean legal rules like wearing a seatbelt but I mean social rules too like waiting in a queue.’

Once again, despite evidence of persistent rule-breaking, the outcome of that behaviour is not particularised in any way.

22 This is the problem with the entirety of his evidence. It is long on his feelings and attitudes, but wholly bereft of particulars of how, if at all, those feelings or attitudes have or might cause him any difficulties in performing normal day to day activities.

23 Worse than that, the lack of such evidence makes it quite impossible for me to judge whether or not any such difficulties have been substantial.

24 Sadly that lack of detail is compounded by a failure to give particulars of the time span over which any such difficulties as he might have had have taken place.

25 In all the above circumstances I have concluded that the Claimant’s evidence on the issue of whether any impairment he may have has had a substantial long term adverse effect on his ability to perform normal day to day activities is so nebulous that he has failed to discharge the burden on him of showing that was the case at any material time.

26 On this basis alone the Claimant’s claim must be struck out as having no reasonable prospect of success. However, there are other issues that also cause me concern that it is appropriate I deal with this time.

### **Impairment**

27 The onus is on the Claimant to establish, on the balance of probabilities, that he has an impairment. I accept, again on the basis of the decision in Jay, that the existence of such an impairment may be inferred from the nature and extent of the effects it has on a person’s ability to perform normal day to day activities but that is not the case here.

28 The Claimant has advanced depression and anxiety as the impairment he relies on. I accept that his GP has referred to anxiety and depression on a number of different occasions. However, it is equally clear from the expert report of Dr Newns that she does not consider the Claimant to have ever had depression or anxiety at a level that would justify diagnosis in accordance with international standards.

- 29 Having taken account of all the evidence before me I have concluded that the Claimant has failed to discharge the burden of establishing that he had a relevant impairment at any relevant time.

**Long term**

- 30 In my view, there are also issues with whether or not any effect on the Claimant's abilities to perform normal day to day activities has been "long term". I accepted the submissions made on behalf of the respondent that each of the periods for which the Claimant was diagnosed with anxiety or depression was directly related to a particular life event and resulted from the Claimant's issues with anger management. They were not of a continuous nature.

**Viability**

- 31 I also take this opportunity to voice my concern at the viability of the Claimant's claims alleging disability discrimination. Those concerns would apply even if the Claimant had established that he was a disabled person. They are as follows:
- 31.1 The Claimant's conduct on 24 March was , as he admitted, unacceptable. It was witnessed by four of the Respondent's staff, including two managers. They thought the conduct was aggressive, and it was for that reason he was suspended the same day.
- 31.2 The Claimant's conduct on 13 June was even less acceptable from any point of view.
- 32 To the extent the Claimant asserts that his conduct on these dates arose from his disability I consider it highly unlikely to succeed. The issue of causation appears to me to be a formidable barrier.
- 33 More than that, even if the Claimant can succeed with the causation issue, is that the Respondent has what seems to me to be an overwhelming case of justification. No reasonable employer can be expected to accept conduct of the nature admitted by the Claimant: even if it did arise from a disability, dismissal would be an entirely reasonable and proportionate sanction.
- 34 Similarly, the Claimant's case asserting a failure to take steps to make reasonable adjustments is, in my view, doomed from the start. I think the chance of a tribunal finding that an adjustment that might have avoided the Claimant's dismissal would be reasonable is vanishingly thin.

**Unfair Dismissal**

- 35 This aspect of the Claimant's claim is pleaded over no less than 16 sub-paragraphs with a further 7 sub-sub-paragraphs. In my view it is over pleaded to an extent that is, fortunately, rare. It takes any and every point that occurred to the pleader regardless of merit. In particular:
- 35.1 Is alleges the first investigation was not conducted reasonably despite the fact that the matters in question that took place on 24 April are admitted in the claim itself.

- 35.2 It seeks to assert that the Claimant was not suspended on terms on 13 June on the basis that he had by then been signed off sick. It also seeks to rely on intoxication as an excuse for that conduct.
- 35.3 it seeks to raise the wholly irrelevant issue of the causation of the Claimant's conduct on 24 April when it was the conduct that was in issue not the causation.
- 35.4 It seeks to raise the issue of how common swearing was on the premises when the issue was the conduct not the use of swear words.
- 35.5 It alleges a failure to take account of the Claimant's mental health issues coma when the real issue was his misconduct.
- 36 Similar points can be taken in respect of every sub paragraph pleaded on behalf of the Claimant. in reality the Claimant's representatives are seeking to make bricks without a single straw. Worse than that, the Claimant calls into question the Respondent's compliance with their own procedures and with the ACAS Code of Practise without giving a single particular of any such failure.
- 37 Having regard to all the information before me I have come to the conclusion that the Claimant's claim of unfair dismissal has little reasonable prospect of success. I have concluded that it is appropriate in all the circumstances of the case to make a deposit order in the sum of £1,000.00. That is the subject of a separate Order.
- 38 That sum reflects not only the severe faults with the Claimant's claim but also the likely costs and expenses that may be incurred by the Respondent in light of the prolix manner in which the claim has been presented.
- 39 I am satisfied that the Claimant is well able to afford the payment of a deposit of that sum in light of the fact that he has some £2,500.00 pounds in savings and his net income from a steady job exceeds his outgoings by approximately £1000 a month.

Employment Judge Kurrein

11 March 2021

Sent to the parties and  
entered in the Register on  
31 March 2021

.....  
For the Tribunal

**Case Number: 3335546/2018 (V)**

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