



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr H Barker

**Respondent:** European Metal Recycling Limited

## RECORD OF AN OPEN PRELIMINARY HEARING

**Heard at:** Manchester (in private; by CVP)

**On:** 21 February 2022

**Before:** Employment Judge Britton (sitting alone)

### Representatives

For the claimant: In attendance plus Ms Gemma Lawler, Friend

For the respondent: Mr J Latham, Solicitor

## JUDGMENTS

1. The claims relating to disability discrimination are dismissed upon withdrawal
2. The application to amend to include a claim for unfair dismissal is granted.
3. Thus the claims related to age discrimination and unfair dismissal proceed.
4. Directions are hereinafter set out.

### INTRODUCTION

1. The reasons why I am holding today's Preliminary Hearing were first set out by Employment Judge Allen at a case management hearing as long ago as 11 January 2021<sup>1</sup> Gemma Lawler appeared for the Claimant and Mr Latham for the Respondent. He ordered an open preliminary hearing (PH) to take place on the 14 June 2021. The first item on the agenda being to determine whether the Claimant is a disabled person viz inter alia his claim based upon disability discrimination. The Judge made directions which at this stage I do not need to rehearse. That PH was postponed. A further case management preliminary hearing<sup>2</sup> was heard on 16 December 2021 by Employment Judge Larkin. Gemma Lawler was not present having written in to see if it could be postponed as she was very ill The Claimant was also stated by Ms Lawler to be too unwell to attend. Mr Latham did attend.

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<sup>1</sup> See his published record which is before me and runs 10 15 pages.

<sup>2</sup> See bundle pages (Bp) 80-85 in the bundle prepared by the Respondent for today.

The Judge listed this open PH for the two days 21-22 February 2022 and made orders for directions. His record of that hearing including his Orders was only published very recently namely 1 February 2022. I have been able to deal with all the issues in one day.

## **ISSUES REQUIRING ADJUDICATION**

### **IS THE CLAIMANT A DISABLED PERSON AS TO THE HARASSMENT ISSUE?**

2. At issue is whether the Claimant was a disabled person pursuant to s6 and Schedule 1 of the Equality Act 2010 (the EqA) at the material time. Relied upon in terms of the claim (ET1) and the particularisation thereto is Osteo-arthritis. Before me at Bp 98-219 are the medical notes as previously ordered together with the Claimant's impact statement.

3. From the particularisation for the Claimant it is clear that the claim relating to this disability is confined to events in September 2019. It relates first to the alleged screwing up of a sick note by a line manager Mark Harrison. The sick note, says the Claimant, referred to his osteo arthritis and that he was therefore unfit to drive. He was employed as an HGV driver. The second incident was a few days later when another manager, Samantha Davies who is the partner of Mark, allegedly ordered him to drive his HGV vehicle despite the sick note. In that sense it is a limited claim. It does of course set the scene for the altercation between the Claimant and Samantha on 26 September 2019. and in that sense can be deployed in the factual scenario particularly centring upon whether he was unfairly dismissed on 20 November 2019 for misconduct arising out of that incident. But my analysis of the medical history is that it is clear that the Claimant had physical conditions relating a right ankle but was never diagnosed as far as I can see with Osteo Arthritis. The problem being that this is the alleged disability he relies on.

4. Suffice to say that after a lengthy discussion before me today the Claimant has decided not to proceed with that claim of disability discrimination but will rely upon the facts in relation thereto as part of showing that this was a bad employer and thus flowing through to the dismissal.

5. So, this claim of disability discrimination which had been defined by Judge Allen as harassment pursuant to Section 26 of the EqA is dismissed upon withdrawal.

### **THE APPLICATION TO AMEND TO INCLUDE A CLAIM OF UNFAIR DISMISSAL**

6. The claim (ET1) was presented to the Tribunal on 18 March 2020. This followed a period of ACAS early conciliation. It had been prepared by Gemma Lawler. This was because the Claimant was too ill. In fact as per the medical notes before me and in particular the psychiatric report he has serious long term mental health issues.<sup>3</sup> Ms Lawler only ticked the boxes in the ET1 denoting claims for age and

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<sup>3</sup> This material shows that the claimant has amongst other things long standing anger management issues. This includes reference to road rage. It also suggests that it is why to some extent the claimant overreacted on 26

disability discrimination albeit she put the word harassment in the box below. But in the narrative to the ET1, as to which I have now touched upon, the scenario set out appeared to suggest unfair dismissal which of course brings in the provision in particular at s98 of the Employment Judge Allen (see (2) (ii) he refers to:

*“... whether the claims identified by the claimant at the preliminary hearing and recorded in the attached list of issues<sup>4</sup> for unfair dismissal and/or breach of the duty to make reasonable adjustments are included in the claim form. If not, the Tribunal will need to determine whether the claimant should be given leave to amend his claim to include that or those claims (on the basis of an application made on 11 January 2021...”*

7. I understand from the parties before me that this was a lengthy hearing and it may well be that the above passage came out of the Judge enquiring of Gemma Lawler as to whether or not there was such a claim. I can see why he would so enquire given the scenario in this case and that the Claimant had been employed for a considerable number of years going back to December 2005. The dismissal which was with immediate effect for alleged gross misconduct, occurred on 20 November 2019. I factor in that after a period of ACAS early conciliation the claim was then submitted to the Tribunal on 18 March 2020 by Gemma Lawler as the claimant was too ill. It was presented in time in terms at least as to the dismissal whether it be age or disability related or per se unfair if that was meant to be claimed. Neither at least then appears to have had any knowledge of employment law.

8. In any event he listed the issue for adjudication at the PH which he listed to be heard on 14 June 2021.

9. This case has an unfortunate history in terms of hearings not taking place i.e. 11 June and the not dealing with issues by the Claimant arising out directions made for the purpose of the PH such there only being limited medical records produced or Gemma Lawlor requesting extensions of time or indeed dealing with her postponement request viz the 17 December 2021 hearing. I factor in that the Claimant clearly became mentally very poorly, if not before then certainly as at the end of 2019 as to which see the detailed report<sup>5</sup> from the Greater Manchester Mental Health NHS Foundation Trust, Manchester Psychology Therapy Service and which is dated 16 December 2019. Also Gemma Lawler has kidney failure requiring dialysis and she has been in and out of hospital. Indeed, she was recently back in. She has also received a further diagnosis relating to GPN which has to do with serious vascular issues. This obviously has to be factored in. Mr Barker is her longstanding partner. It is self evident that he cannot represent himself because of his mental health.

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September 2019. His problem in containing himself showed itself during this hearing. The point being as to whether if the Respondent had obtained this medical information in terms of mitigation as to the incident, the employment could have continued given the role the claimant performed namely as an HGV driver. Second in any event a Tribunal if it finds for the Claimant may therefore find that there was at least an element of contribution and may also find that the employment would not have lasted for long applying such as the Polkey principle. The parties may care to reflect upon this observation in terms of whether the case may be capable of settlement.

<sup>4</sup> These were prepared by the Judge as part of his record of the hearing and directions for the way forward .

<sup>5</sup> P 154-6.

10. So against that background I will now deal with the application to amend to include the claim of unfair dismissal.

11. In dealing with the matter I have taken myself to the seminal jurisprudence on the topic commencing with the judgment of Mr Justice Mummery as he then was in **Selkent Bus Company Limited -v- Moore 1996 ICR 836 EAT**. I have also considered the detailed commentary to be found commencing at p442 in Employment Tribunal Practice and Procedure, Employment Law Handbook May 2014 addition. In doing so, I have had regard to inter alia the judgment of their Lordships in **Ali -v- The Office of National Statistics 2005 IRLR 201 CA** and the judgment of Mr Justice Underhill as he then was in **TGWU -v- Safeway Stores Limited EAT 0092 07**.

12. I start by looking at the actual particulars to the ET1 as I have already said penned by Gemma Lawler. The factual scenario as set out therein can clearly be read as also portraying inter alia an alleged unfair dismissal, albeit the box wasn't ticked. As to why wasn't the box ticked Gemma Lawler told me that she completed the ET1 form online and thought she had included a claim for unfair dismissal. She only realised that she had not done through enquiry by Judge Allen at that first Case Management Preliminary Hearing, hence why he records there is an application to amend. I have no reason to disbelieve Ms Lawler who I found to be honest and compelling. I bear in mind that she had never previously completed an ET1.

13. Second the nature of the amendment. The Claimant is not making entirely new factual allegations. The narrative and the scenario remains essentially the same. The amendment seeks to add an additional label to facts already pleaded.

14. As to delays in dealing with Case Management Orders I have now dealt with that and I am wholly satisfied with the explanation provided by Gemma Lawler.

15. As to the out of time issue the fact that the claim may be out of time is not in itself fatal albeit it is an important fact to consider. As it is I accept the explanation for the lateness of the request to amend to include unfair dismissal as stated at paragraph 12 above. As to then the prosecution of the application well of course the matter got adjourned out in June, Gemma Lawler wasn't present at the Case Management Hearing that took place in December of last year and only recently got the Case Management Orders and had been in hospital until very recently.

16. That leads me onto where the balance of prejudice lies in terms of whether or not I grant the application to amend. I appreciate that the Respondent will now have to deal with a claim many months out of time so to speak but the factual scenario to that claim has always been present i.e. it is in the claim form and the Respondent has already in effect pleaded that if it was being alleged that this was an unfair dismissal then it wasn't and for reasons which it has made plain. Thus little extra time if any will be added to the main hearing by permitting the claim.

17. Conversely if I do not grant the application, the Claimant will be denied the ability to proceed with the claim.

## Conclusion

18. For the reasons I have now given I conclude that the balance of prejudice falls in favour of the Claimant. It is therefore in the interests of justice to grant the application. Thus the claim for unfair dismissal is permitted to proceed along with the existing claims.

19. The claimant has withdrawn an application to amend the disability based claims to add Osteo Arthritis as a disability. It does not mean the claimant cannot use the facts as alleged over for instance the alleged screwing up of the fit note or a requirement to work when certified as unfit as part of the chain of events that lead to the dismissal subject to the out of time point which I will deal with in due course.

## The Mental Health Disability

20. My having considered the medical health library, so to speak, and following discussion, Mr Latham's instructions are to concede that the claimant was at the material time disabled by reason of anxiety and depression.

## The claim based upon disability discrimination

21. Judge Allen as at paragraph 14 of his case summary as to the claims there also of course being a claim based upon age discrimination:

*"He also alleges he has depression and anxiety, which is a disability, and he alleges that the respondent breached its duty to make reasonable adjustments when it did not offer him a phased return to work and lighter duties as he says it was advised, but rather dismissed him following a disciplinary procedure."*

22. It is essential to point out that at paragraph 19 he also recorded:

*"...He also confirmed that he was not alleging that he was dismissed because of a disability"*.

23. This appeared to not be the understanding of the Claim via Gemma Lawler of what had been agreed at that hearing. To assist the Claimant I thus set out what then becomes the point and where it eventually resolved itself. Analysis of the occupational health report in the bundle before me shows that a referral was made to occupational health by the employer shortly before 24 October 2019 and because it wanted to know if the Claimant would be fit to attend a disciplinary process. For reasons clearly set out the occupational health specialist opined that he was fit to attend because it would be in his best interests to get it over with sooner rather than later, and because of the impact upon his anxiety condition, as long as reasonable adjustments were made to the process. These are spelt out at page two of the report. It was not pleaded in the claim or stated to be as such by Ms Lawler before Judge Allen. that there was a failure to make reasonable adjustments in that respect. As I have already said the emphasis in terms of the claim was on a failure to offer him a phased return to work and lighter duties. But as to that contention and reliance on the OH report, what the Claimant and Ms

Lawlor missed is the all important caveat in the report in that respect and because these proposed reasonable adjustments only applied if there was a return to work which of course would only engage if he was not dismissed. But of course he was dismissed. Upon reflection therefore the Claimant has withdrawn the claim based upon the failure to make reasonable adjustments. Thus there remains no disability discrimination based claim.

### Remaining claims

24. Left is as follows:-

25. An allegation of harassment pursuant to s26 of the Equality Act 2020. This was set out by Judge Allen at Paragraph 5.1 in the list of issues:

- i. the claimant alleges that the way in which he was spoken to by Ms Harrison on 26 September 2019 amounted to unlawful harassment on the grounds of age.*

26. A claim for direct age discrimination engaging Section 13 of the EqA as set out in the aforesaid list of issues at Paragraph 4 and as further clarified today namely: on the basis that the Respondent discriminated against the Claimant by preferring the evidence of the much younger Samantha, and it seems the other witnesses, as to what happened in relation to the altercation on 26 September including the mitigation flowing from the screwing up of the fit note and the requiring to drive whilst unfit, thus leading to his suspension and dismissal. And that this flowed from a pervading ageist culture against older workers such as he, and which is something he refers to in the narrative to the ET1.

27. Furthermore this renders the dismissal pursuant to s98 of the ERA 1996 unfair because fairly investigated the Claimant would have been exonerated because of the provocation.

28. The legal labelling is mine and mirrors that of Judge Allen as does my encapsulation of the remaining issues. The Claimant and Ms Lawler did not challenge the accuracy of Judge Allen's assessment and likewise do not before me.

### Out of time issue

29. Mr Latham submits that as to events prior to circa October 2019 the claim is out of time, essentially because there is not a continuing act. The core point there he raises is why did the Claimant not go to ACAS earlier. The ACAS period of conciliation being 20 January to 20 February 2020. Gemma Lawler for the Claimant counters that this is because having put in the appeal they were wanting to see the outcome first in the hope that the Claimant would prevail and be reinstated.

30. I remind the parties of the seminal dicta of Mummery LJ in **Hendricks v Commissioner of Police for the Metropolis (2003) IRLR 96 CA**. Summarised is there an act extending over a period as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed:

*“ The focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs...”*

31. Prima facie if that is alleged, and in a context where for example the time span is relatively short, then the issue of determining what is or not in time should be left to the Tribunal at the main hearing and in terms of its findings of fact.

32. Thus in this case encapsulated the altercation with Samantha on 26 September 2019 comes only days after Mr Harrison allegedly screwed up the Claimant's sick note and thence the Claimant being told he must attend for work and drive despite that sick note. Then on 26 September at issue is did Samantha wrongly phone the Claimant when he was driving the HGV and as to then what took place in that conversation or not. That then leads to whether the Claimant should have been suspended and then the process ending in his dismissal. On the face of it there is a chain of causation. Thus prima facie a continuing act. Therefore the age-related claim is prima facie not out of time and the matter should be left to the main hearing.

### **Mainstream Directions**

33. These need to be restarted as none have actually been followed through to date other than Ms Lawler says the schedule of loss was sent some time ago. However it is not in my papers and the Respondent says it did not receive it. In any event it needs to be updated and also include a claim for basic award vis the unfair dismissal. I have explained to Ms Lawler how to calculate it. Also, the list of issues needs to be updated to reflect today.

34. The main hearing is scheduled to take place on **Tuesday – Friday, 24 - 27 May 2022** inclusive at **Manchester**.

## **ORDERS**

(pursuant to the Tribunal's 2013 Rules of Procedure)

1. by Friday 4 March 2021 the Claimant will serve the updated schedule of loss upon the Respondent and the Tribunal.
2. By the same deadline the Respondent will prepare and serve the updated list of issues upon the Claimant and the Tribunal.
3. By **Friday 11 March 2022** the Respondent by way of first stage discovery will send the Claimant a proposed double-spaced chronological trial bundle index.
4. The Claimant will then consider if there are other documents relevant and necessary for determination of the issues not listed in that index that need to be in the trial bundle. If so he will at the appropriate space in the index complete an entry by way of brief description for the relevant document and then send the completed trial bundle index back to the Respondent with copies of those documents. If the Claimant does not have the relevant document but believes the Respondent has, he will make that made clear and that it needs to be in the trial bundle. The Claimant must comply with this order by **Friday 25 March 2022**. Given the history to up to some extent of

non-compliance with directions by the Claimant **this is an Unless Order** which means for the avoidance of all doubt that if it is not complied with by that deadline the claim will be struck out. What it means is that if the Claimant or Gemma Lawler for any reason cannot comply i.e. if Gemma has further health setbacks, they **must** have informed the Tribunal before that deadline otherwise it will be too late.

5. The Respondent will complete the trial bundle and serve the same upon the claimant by **Friday 8 April 2022**.

6. Witness statements will be exchanged on **Friday 29 April 2022**. I have explained to Gemma Lawler and the Claimant what is required. As to compliance with this order by the Claimant this is also an **Unless Order**.

5. The first morning of the first day of the main hearing will be a **reading in period for the Tribunal only. The live hearing will start at 2 pm**. The parties must be in attendance prior thereto in order that there can be a prompt start.

6. For the purposes of the reading in **not later than two working days** before the commencement of the hearing the Respondent's solicitors will have delivered to the Tribunal four copies of the trial bundle; and a combined indexed witness statement bundle. Given the limited time span of events and the narrowed issues a chronology and a cast list won't be required.

7. Gemma Lawler needs to undertake Dialysis at hospital on the Wednesday and Friday of each week. It follows that the Tribunal will not be able to use as was planned the Wednesday and Friday which currently leaves only two days for the hearing. Therefore the hearing is revised so that it is **Tuesday 24, Thursday 26, Monday 30 and Tuesday 31 May 2022**.

Employment Judge Britton  
3 March 2022

JUDGMENT SENT TO THE PARTIES ON  
14 March 2022

FOR THE TRIBUNAL OFFICE

**(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.**

**(2) Under rule 6, if this Order 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 rules 74-84.**

**(3) may apply under rule 29 for this Order to be varied, suspended or set aside.**

