



# EMPLOYMENT TRIBUNALS

## Claimant

Mr Andrew Butler

v

## Respondents

Ford and Slater Limited

**Heard at:** Watford (CVP)

**On:** 18 November 2020

**Before:** Employment Judge S Moore

## Appearances

**For the Claimant:** In person

**For the Respondent:** Mr Lawrence, Counsel

## JUDGMENT ON PRELIMINARY ISSUES

The Claimant was not a disabled person within the meaning of section 6 of the Equality Act 2010 at the material time and the claim of disability discrimination is struck out.

## REASONS

### Introduction

1. This Preliminary Hearing was listed to determine whether the Claimant is disabled within the meaning of section 6 of the Equality Act 2010 and for this purpose I heard evidence from the Claimant was referred to a bundle of documents.
2. At the outset of the hearing the Claimant confirmed that the disability he relied upon was anxiety and/or depressive disorders.

### Evidence

3. The Respondent is a truck dealership and maintains and repairs trucks and other light vans. The Claimant commenced employment with the Respondent on 5 June 2017.
4. On 24 May 2019 he was signed off work with the side effects of migraine medication. His initial sick note signed him off for 18 weeks but a subsequent sick note stated he was fit with adjusted hours.
5. Between 3 June 2019 and 4 September 2019 the Claimant was at various times signed off as unfit for work due to neck pain, a suspected TIA, and sinusitis.
6. On 16 September 2019 the Claimant submitted a sick note for anxiety and did not return to work before his dismissal with effect from 29 November 2019. All further sick notes referred to anxiety/depressive disorders.
7. On 3 October 2019 the Respondent instigated a welfare meeting which took place at the Claimant's home. The Respondent states the purpose of the meeting was to gain further information about the Claimant's absence from work, any likely return date, and to discuss any possible adjustments to allow the Claimant to return to work. At the meeting the Claimant was asked to explain in more detail the reference to anxiety/depression in his fit note. The notes record the Claimant as stating that he had a lot going on in his personal life and that he was dealing with issues from when he was a child. He stated "I'm not a well person; everything is getting on top of me. I'm on medication for heart problems and blood pressure. I'm not on any medication for depression but I have an appointment to discuss that." The Claimant is also recorded as stating "...I was crying one day at work..." and "...I can't drive due to how I'm feeling.." and "...some days I can't even get out of bed and want to end it all...".
8. The Claimant said he was put on medication for anxiety/depression shortly after the welfare meeting.
9. On 10 October 2019 the Respondent wrote to the Claimant enclosing a form for the Claimant to consent to a referral to occupational health. The Claimant never signed and returned the form. He said he felt anxious and upset after the welfare meeting and considered the Respondent was trying to bring disciplinary proceedings against him and dismiss him because of his mental health.
10. On about 21 October 2019 the Respondent came across an advertisement for a vehicle repair business called AP Autos, which had the Claimant's address and telephone number. The Respondent sent a message to the Claimant's number to ask about a car service and how quickly this could be done. The Respondent received a reply within minutes with a quote and suggested date to carry out the work. The reply further stated that the work could be carried out in 4 days' time but not before because the sender of the message (the Claimant) was on holiday.

11. At the hearing today the Claimant said that AP Autos was a venture he had with friends. He was only the administrator and his friends were to undertake the actual repair jobs. He said he quoted for 5 or 6 jobs but they never in fact did any of them. He said he did the AP Autos venture because he had been advised it would be good for his mental health to do something. However he also said he had had the advertisement on Google since 2010. As regards the reply saying that he was on holiday, he said this was because he was too unwell to do the work but did not want to say so in the message. However when it was put to him, that he had said it was his friends who undertook the repair work, the Claimant said the friends were away and/or could not do the work until after the weekend.
12. As a result of the AP Autos matter, on 25 October 2019 the Respondent invited the Claimant to an investigatory meeting. On the same day the Claimant telephoned the Respondent and used offensive language about his line manager. On 30 October 2019 the Respondent informed the Claimant that it was also investigating the further allegation he had used offensive language towards his line manager.
13. The Claimant subsequently submitted a sick note signing him off work for 3 months.
14. Both the AP Autos matter and the matter of using offensive language about his line manager became the subject of disciplinary proceedings. The Claimant did not attend either the investigatory interview or the disciplinary hearing which took place on 25 November 2019. At that hearing the Claimant was dismissed for gross misconduct.
15. On 28 November 2019 the Claimant saw Ms Jane Hune, a mental health nurse. She wrote a letter of the same date, which the Claimant says he provided to the Respondent at the time. The letter states:

“I can confirm that Andrew has been attending regular meetings with me for the past few months. As you are aware, Andrew has been struggling with his mental health for some time now. Andrew has been commenced on medication and has been referred for counselling and Cognitive Behaviour Therapy – CBT.

I understand that as Andrew’s employer you have not been supportive with his mental health. I can confirm that Andrew has been struggling to leave the house; some appointments with me have been carried out over the phone, due to his mental health debilitating him.

...

Andrew has been signed off work until January. To be signed off for that amount of time should be taken into consideration when going through your disciplinary.”

16. The Claimant appealed his dismissal but told the Respondent that he was unable to attend the appeal hearing on the dates they proposed.
17. By letter of 15 January 2020 the Respondent informed the Claimant that it had closed the appeal.
18. On 14 February 2020 the Claimant was sent a letter from the DWP in respect of a claim the Claimant had made for universal credit. It stated it had been decided the Claimant had “limited capability for work and work-related activity” and he “may get extra money because of his disability or health condition”. The Claimant said he was not permitted to have a copy of the medical assessment that had formed the basis of the decision.
19. On 4 July 2020 the Claimant sent the Respondent’s legal adviser an email stating ‘I have MS to confirm this with you. I also have anxiety and depressive disorder made worse [by the Respondent] for the way they reacted and treated me with my disabilities. I have since been given PIP at the enhanced rate for daily living and for mobility component. I also can confirm that I have the limited capability for work and work related activities on universal credit too.’

## Conclusions

### *Disability*

20. Section 6 of the Equality Act (“EqA”) says that:
  - (1) A person (P) has a disability if-
    - (a) P has a physical or mental impairment, and
    - (b) the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.”
21. As to section 6(1)(a) the Claimant relies on the mental impairment of anxiety and/or depressive disorders.
22. Section 6(1)(b) EqA provides that a mental or physical impairment amounts to a disability if it has both a substantial and a long-term adverse effect on a person’s ability to carry out normal day-to-day activities.
23. As to the meaning of substantial, section 212(1) EqA and paragraph B1 of the Guidance on matters to be taken into account in determining questions relating to the definition of disability 2011 (“the Guidance”) state that a substantial effect is one that is more than a minor or trivial effect.
24. As to the meaning of long-term, paragraph 2 of schedule 1 EqA says:
  - “(1) The effect of an impairment is long-term, if-
    - (a) it has lasted for at least 12 months,
    - (b) it is likely to last for 12 months, or

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

(2) If an impairment ceases to have a substantial effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur."

25. The question is whether, having regard to this statutory definition, the Claimant was a disabled person at the time of the alleged discriminatory acts (or failures to act), and the acts (or failures to act) which cover the period 3 October 2019 (the date of the welfare meeting) to 15 January 2020 (the date the Respondent the closed the appeal).
26. As at 3 October 2019 the Claimant had been signed off work with situational work-related stress from 16 September 2019, but was not on any medication for anxiety and/or depression at this time. It appears he began to receive medication for anxiety and/or depression shortly after that meeting and it is clear he was in receipt of medication by the date of his meeting with Ms Hunt on 28 November 2019. Ms Hunt's letter further records that by that date the Claimant had been referred to counselling and CBT. She also states that the Claimant had been struggling to leave the house and some appointments had been carried out over the phone.
27. On the basis of the notes of the welfare meeting of 3 October 2019 referred to above at paragraph 7 and Ms Hunt's letter of 28 November 2019, I am satisfied (for the purpose of today's hearing) that at some point during October and/or November 2019 the Claimant's anxiety and/or depression began to have a substantial adverse effect on his ability to carry out normal day to day activities. I record, however, that I was troubled by the Claimant's evidence in respect of the AP Autos matter, which I found to be confusing and contradictory and raised questions of credibility.
28. The next question is whether the substantial adverse effect of the Claimant's anxiety was, at the relevant time, long-term. In order to satisfy that definition, the Claimant must show that at the material time – namely the dates of the alleged discriminatory treatment – the substantial adverse effect on his ability to carry out normal day-to-day activities had already lasted 12 months, or was likely to do so or recur (**Tesco Stores Ltd v Tennant** UKEAT/0167/19/00 at [5]).
29. At no time between October 2019 and January 2020 had the substantial adverse effect lasted for 12 months. I therefore have to consider whether at any time during this period the evidence shows that the substantial adverse effect was likely to last for at least 12 months (paragraph 2(1)(b) of schedule 1) or was likely to recur (paragraph 2(2)). Likely means, "could well happen" (Guidance at paragraph C3).

30. The only medical evidence before me is the letter from Ms Hunt which does not address the question of the Claimant's prognosis at all, other than to say that he had been signed off work until January 2020. This falls considerably short of evidence that (at that time) the Claimant was likely to continue to suffer from anxiety which would have substantial adverse effect on his ability to carry out normal day to day activities until October 2021.
31. The Claimant relies on the fact that he still takes medication and also the decision of the DWP dated 14 February 2020 in respect of his Universal Credit claim. However, quite apart from the fact that this letter does not address the question of the Claimant's prognosis at the time he was employed by the Respondent, the letter does not in fact refer to the reasons for its decision. It simply refers to the Claimant's "disability or health condition" which might be anxiety and/or depression but might be some other matter. In this respect it is notable that in his email of 20 July 2020 the Claimant also refers to having "MS", and has also previously referred to having heart problems and being on medication for blood pressure. There is also no evidence of the Claimant having previously suffered from anxiety and/or depression, which might have suggested that the anxiety and depression from which he began to suffer in September 2019 was likely to last for at least 12 months or to recur.
32. Accordingly I am not satisfied the Claimant has shown that at any time between October 2019 and January 2020 the substantial adverse effect of his anxiety and/or depression was likely to last at least twelve months or to recur.
33. It follows that I find the Claimant was not a disabled person within the meaning of section 6 EqA at the dates of the alleged discriminatory acts. Accordingly his claim for disability discrimination has no reasonable prospect of success and I strike it out.

## **CASE MANAGEMENT ORDERS**

1. The name of the Respondent is amended to Ford Slater Limited
2. The matter is to be set down for a Preliminary Hearing by telephone to identify the issues in respect of the remaining claims of unfair dismissal, and for unlawful deduction of wages and/or holiday pay, and to make appropriate Case Management Orders.

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Employment Judge S Moore

Date: ...18<sup>th</sup> Nov 2020.....

Sent to the parties on: .4<sup>th</sup> Dec 2020..

.....T Henry-Yeo.....  
For the Tribunal Office