Case No: 2600235/2017

EMPLOYMENT TRIBUNALS

Claimant: Mr D Watts

Respondent: Long Eaton Plant Hire Limited

FINAL HEARING

Heard at: Nottingham **On:** 30-31 October 2017

Before: Employment Judge Camp Members: Mr WJ Dawson
Mr A O'Dwyer

Appearances
For the claimant: Miss S Watts (claimant's daughter)
For the respondent: Dr M Ahmed, counsel

REASONS

1. This is the written version of the reasons given orally on 31 October 2017 for the judgment of that date, the written version of which judgment was signed by the Employment Judge on 1 November 2017.

2. By way of background, we refer to the written record of the Preliminary Hearing that took place on 15 May 2017, which we shall refer to as the "case management summary".

3. The claimant had been employed by the respondent for several years as a Plant Machine Driver when his employment ended, at some stage between 12 August and 1 November 2016. He had cognitive difficulties the respondent was aware of and had been off sick for some months. On 8 July 2016, he was diagnosed with early onset dementia and he has apparently subsequently been diagnosed with Alzheimer's. The respondent now accepts that he was a disabled person at all relevant times.

4. The claimant telephoned the respondent on or about 12 August 2016, but although it is agreed he informed the respondent of his diagnosis [during the call], there is a dispute as to whether or not he said something to the effect that he was resigning. There was no further communication between him and the respondent until the respondent sent him a letter on 31 October 2016, which he received on or about the following day.

5. The relevant parts of the letter state: "*I am writing to formally confirm that your voluntary resignation from your job at Long Eaton Plant Hire Limited has been*

accepted. As you are aware we chose in your circumstances to extend the period of your notice until the end of September. You will also be paid one week's statutory notice pay at your normal basic rate of pay rather than at SSP rate. This means that the effective date of termination of your employment will be recorded as Friday 30 September 2016."

6. After going through early conciliation from 11 November 2016 to 25 December 2016, the claimant's claim form was presented on 23 January 2017. He has two claims: unfair dismissal – so-called 'ordinary' unfair dismissal under the Employment Rights Act 1996 ("ERA") – and disability discrimination in the form of breach of the duty to make reasonable adjustments. The issues that arise are as set out in the case management summary. It was agreed at the start of the hearing that this part of the hearing would be devoted to issues of liability only.

7. In terms of the law, it is sufficient to refer to the relevant legislation: sections 94, 95 and 98 of the ERA; sections 6, 20, 21 and paragraph 20 of schedule 8 to the Equality Act 2010 ("EQA") and in terms of case law, to the whole of the well-known passage from the judgment of the EAT in Iceland Frozen Foods v Jones [1982] IRLR 439 at paragraph 24, which includes a reference to the "*band of reasonable responses*" test, and to Griffiths v Secretary of State for Work and Pensions [2015] EWCA Civ 1265, in particular paragraphs 15 to 21 and 58 to 65.

8. There is no relevant dispute on the facts up to 12 August 2016, nor, indeed (not really), after 12 August 2016. The claimant was off sick from late February (or 1 March at the latest) 2016. This was initially rather curious to our eyes, because his first 'fit note', which ran for 4 weeks from 26 February 2016, did not excuse his attendance from work. He was off with a vitamin B12 deficiency and the only adjustments the fit note required was for him to be able to leave work to attend appointments for vitamin B12 injections. There then appears to be a gap in the fit notes, because the next fit note runs from 14 April 2016, but neither side has made anything of this gap.

9. The claimant did not want to return to work at that stage. In his oral evidence he said something to the effect that he was concentrating on getting better. It is also clearly the case that the respondent was happy for him to take whatever time he felt he needed off work and to give him as much time as he needed to recover. The respondent was not going to press him to return to work, even though most of his fit notes suggested that he was capable of returning to work in some capacity.

10. Returning to the fit notes, the one from 14 April to 26 May 2016 is the only fit note that simply states that the claimant was not fit for work rather than fit for work with adjustments. The condition specified in that fit note is: "*cognitive difficulties under investigation*".

11. The next fit note runs from 25 May to 26 July 2016. It again states that there are cognitive difficulties under investigation and it also states that the claimant may be fit for work if given "*duties with no skill tasks/no heavy machinery operation*".

12. The next fit note was a 12 week fit note which ran from 27 July to 19 October 2016 and it said the same thing as the previous fit note.

13. For reasons that remain a little unclear to us, on 12 August 2016 the claimant decided for the first time to communicate with the respondent about his sickness absence. His evidence was to the effect that he was just phoning to update the respondent about his condition and he agrees that he told Mr Denneny (his boss, and the respondent's director) that he had been diagnosed with early onset dementia and cognitive problems. He did not in his evidence explain why he called on 12 August and not before or afterwards. The only clear part of his oral evidence was that he did not say he would not be returning to work. He gave no evidence as to what else, if anything, he did say.

14. We do, however, have clear contemporaneous evidence as to what the conversation might have included. This is contained in an email from Mr Denneny, sent to his HR advisor on 12 August 2016, which included the following: "*One of our operators, Dave Watts, has been on sick leave since 1 March 2016. He has 6 weeks left on his sick note. I have received a call today from him and he says he will not be coming back as he has been diagnosed with early onset dementia and cognitive problems. Dave has been here for at least 10 years if not longer and I want to be right with him. What are our options please?*"

15. Mr Denneny's good faith was not challenged in cross-examination. It follows that, on the evidence before us, Mr Denneny must have genuinely believed that what he stated in his email was what he had been told by the claimant. And we have to ask ourselves, if that was not what Mr Denneny was told by the claimant, why would he think it was what the claimant had said? Moreover Mr Denneny's other evidence, contained in paragraph 7 of his witness statement, about the contents of the conversation was not substantially challenged in cross-examination either. On that basis, we think it is likely on the balance of probabilities that whatever he intended to say, the claimant did in fact say something like, "I am not coming back".

16. Now we pause to analyse that situation – to apply a legal framework to it – and we have come up with four possible analyses of it.

17. The first is that there was a resignation with immediate effect (or, conceivably, given that resigning without notice would be a breach of contract, effective one week later – we refer to the case of Sunrise Brokers LLP v Rodgers [2014] EWHC 2633). But it doesn't really matter whether it took effect immediately or a week later. In any event, the resignation in this scenario would take effect in August [2016]. In this scenario, the parties subsequent behaviour did not alter the effective date of termination.

18. This is the only scenario in which the respondent would win the unfair dismissal case. For example, the respondent's argument that the claimant resigned in August but that that resignation did not take effect until September or October is

invalid in our view. This is principally because, even on the respondent's case, the respondent unilaterally decided when the effective date of termination was. The respondent does not allege that anything was said in the conversation in August [2016] about giving notice, let alone about giving notice expiring at any particular date or on the happening of any particular event (for example when statutory sick pay ran out, which was what the respondent subsequently based its letter of 31 October 2016 on). There was, on neither party's version of events, any subsequent agreement between them about the effective date of termination.

19. The second possible scenario is similar to the first one, but in this scenario, by continuing to behave as if the contract of employment was continuing, in particular by the payment of and the uncomplaining receipt of statutory sick pay, a new contract of employment immediately came into being by implication, and continuity of employment under the ERA was not broken. In this scenario, the claimant was dismissed by the respondent writing to him on 31 October 2016 to inform him that his employment had come to an end with effect on 30 September 2016 and/or by sending him [as it did] his P45.

20. The third scenario is a slight variation of the second. This is that the resignation was not accepted and that the employment relationship continued, by implication, by consent, again ending by termination on receipt of the letter of 31 October [2016].

21. The final scenario – I should say this is the scenario we think is the one that best fits with the facts – is that, given in particular the ambiguity over whether the claimant was resigning with immediate effect or with notice and, generally, as to what the claimant was proposing as to the effective date of termination of employment, the claimant did not resign [during the telephone conversation on 12 August 2016] and instead he was effectively expressing an intention to resign with effect on some unspecified future date. As with the second and third scenarios, in this scenario he was dismissed with effect on or about 1 November 2016.

22. Accordingly, we have concluded that the claimant was dismissed on the basis of the fourth scenario, which, as we say, most accurately reflects the facts as we have found them to be. The first scenario is not something the respondent has even suggested was the case in submissions. It was certainly not what the respondent thought had happened at the time. At the time, everyone seems to have thought that the employment relationship continued at least until 30 September 2016. If it continued after August, it seems to us the claimant must have been dismissed as there is no sensible way of construing any resignation as being one taking effect after August 2016. If we are wrong about the fourth scenario being the correct one, then we much prefer the second and the third scenarios – which in practice amount to the same thing – to the first.

23. So the claimant was dismissed. Although it was not conceded as such, no positive arguments were put forward to the effect that if there was a dismissal it was a fair one and we can see no good arguments to that effect anyway.

24. Even if we were generous to the respondent and accepted that the dismissal was for a potentially fair reason, for example "*some other substantial reason*" under ERA section 98(1)(b), there were obvious profound procedural failings and dismissal in these circumstances cannot have been within the band of reasonable responses in any event. It follows that the claimant was unfairly dismissed.

25. We turn to disability discrimination. The first issue that arises in relation to discrimination is knowledge. The respondent knew what was in the fit notes, in particular the last two fit notes – that of 27 May and that of 27 July 2016. By the time of the second of these fit notes, the situation had moved from something being under investigation to some kind of provisional diagnosis and that accords with the evidence we heard from Mr Denneny, with which the claimant agreed, to the effect that the claimant had told him on 12 August that he had a diagnosis of dementia.

26. The respondent has accepted that the claimant was at all relevant times a disabled person, i.e. that at all relevant times his mental impairment caused substantial adverse effects on his ability to carry out day to day activities. We think that following receipt of the fit note of 27 May 2016, and certainly on receipt of that of 27 July 2016, the respondent, if acting reasonably, would have sought out more information about the claimant's condition with a view to finding out what the future might hold for his relationship with the respondent, for example: what was the prognosis?; when would he return to work?; precisely what duties could he do?; what was meant by "*skilled tasks*" in the fit notes in practice?; and so on. Had the respondent made those reasonable enquiries, it would have discovered the claimant was a disabled person at that time.

27. We think the respondent had constructive knowledge – that it ought to have known the claimant was a disabled person – from 1 August 2016. This is on the basis that although the respondent should have made enquiries from around June 2016, it would not have got a clear answer from the relevant healthcare professionals before 27 July [2016] because before 27 July, the healthcare professionals didn't have a clear answer to give. It was on 27 July that the claimant was given the provisional diagnosis of early onset dementia, which he passed on to Mr Denneny on 12 August. So, in summary, had the respondent been asking the questions it should have been asking, it would have been told that the claimant's condition and the substantial adverse effects it was producing could well last at least 12 months shortly after that consultation; and we take shortly after that consultation to be 1 August. It follows that the respondent was under a duty to make reasonable adjustments under the EQA from 1 August 2016 onwards.

28. The reasonable adjustments claim was defined in the case management summary, which all parties accepted accurately reflected the claim, as beginning with a provision, criterion or practice (that is, a "PCP") of requiring or expecting the claimant to carry out his job driving heavy plant machinery; and that this caused him substantial disadvantage as a disabled person because his condition meant he could or should no longer do this; and that to avoid the substantial

disadvantage, the respondent should have offered the claimant alternative work; and finally that had it done so he would not have been dismissed.

29. The issues needing to be addressed, taken in order, are: first, did the respondent have that PCP? Well there is no real dispute that it did. It was the claimant's job to drive heavy plant machinery and clearly the respondent's expectation was that the claimant would carry out his job.

30. The second issue is: did any such PCP put the claimant as a disabled person at a substantial disadvantage in comparison with persons who are not disabled in accordance with EQA section 21 between 12 August 2016 and the end of his employment? Again, our answer is: yes it did. There is no dispute that the claimant could not – or ought not to on medical advice – carry out his job driving heavy plant machinery.

31. The third issue is: if so, did the respondent not know and it could it not reasonably have been expected to know the claimant was likely to be placed at any such disadvantage? Once again, this doesn't in practice seem to be disputed and there is no discernable basis for disputing it. The fact that the claimant could not do his job driving heavy plant machinery because of his condition was stated almost in terms in his fit notes.

32. The next issue is: if so, were there steps that could have been taken to avoid any such disadvantage? Our answer to the question posed in this issue is: yes there were. The practical disadvantage caused to the claimant was not being able to do his job. To avoid that disadvantage, the obvious answer was to find another job for him to do. The respondent has not suggested that there were no other jobs the claimant could do. The claimant asserts that there were and his assertions in this respect were not substantially challenged. The respondent's lack of evidence on this point speaks volumes. In fact, the respondent's evidence on this point, such as it was, only assists the claimant. In his oral evidence, Mr Denneny was at pains to emphasise that he was always willing to consider alternative roles for people in situations like the claimant's and he recalled arranging alternative employment for a driver who had developed Parkinson's.

33. We remind ourselves that what we are assessing is whether something could have been done that could well have alleviated the claimant's situation. That is how "*to avoid the disadvantage*" in EQA section 20 is to be interpreted. The steps that it was reasonable for the respondent to have to take would have been to have a dialogue with the claimant about his future. Such a dialogue should reasonably have taken place in any event, but would certainly, in our view, have been triggered by the respondent responding to the telephone call of 12 August as it ought to have done.

34. What it ought to have done was to write to the claimant asking him to clarify his intentions. Even if the respondent had simply written to the claimant to say, "*this is to confirm that you have resigned*", and we think the respondent ought reasonably

to have gone rather further than that, we think this would have led to just the kind of dialogue that we have in mind. We also think that had such a dialogue taken place, this would, or at least could well, have led to the claimant being in an alternative role, probably on a lower wage but still, by the end of August 2016.

35. The final issue on liability in relation to the reasonable adjustments claim is: if so, would it have been reasonable for the respondent to have to take those steps? Our answer to the question posed in this issue is: yes, for the reasons we have just given. The respondent could and should, after the conversation on 12 August 2016 if not before, have discussed employment options with the claimant, leading to the claimant being in alternative employment by the end of that month. Accordingly, the respondent was in breach of the duty to make reasonable adjustments from August 2016 onwards.

[After giving judgment on liability, the parties were unable to reach agreement on remedy and, after hearing further evidence and submissions, and the claimant having sought compensation only, we gave the following remedy decision.]

36. We start with the reasonable adjustments complaint and injury to feelings. We assess the appropriate award for injury to feelings at £5,000. Although the whole experience was clearly very upsetting for the claimant, we have to try to separate out the injury to feelings caused by the discrimination and the injury to feelings caused by other things. The disability discrimination here was a failure, an omission in other words, to have discussions with the claimant. The claimant did not complain about that at the time and was not even, it seems to us, conscious of it at the time. Indeed, had the claimant not been dismissed, it is questionable whether he would ever have raised the subject of his own volition. We do, however, take into account that this failure to make reasonable adjustments resulted, albeit indirectly, in the claimant not having a job. Taking everything into account, we think an award above the middle but not at the top of the lower band is appropriate, hence the figure of £5,000.

37. We then turn to lost earnings caused by discrimination. The reason we start with lost earnings caused by discrimination rather than with lost earnings in relation to unfair dismissal is that the lost earnings caused by discrimination potentially start from 1 September: well before dismissal. In accordance with our decision [on liability], had the duty to make reasonable adjustments been complied with, the claimant could well have obtained alternative employment from 1 September. We emphasise that what we have found was that the claimant could well have obtained alternative employment, albeit possibly at a lower wage with the respondent, from around 1 September. We did not find that he definitely or even probably would have found such alternative employment.

38. The respondent sought to adduce evidence from Mr Denneny [after we had given our decision on liability] to the effect that there was no alternative employment available. Before Mr Denneny gave evidence, we had a discussion about the extent to which we would take such evidence into account. *[Before we gave our*

decision on liability, we had highlighted the fact that in order to decide whether there was a breach fo the duty to make reasonable adjustments, we would have to deal with matters relevant to remedy to some extent.] We highlighted the difficulty with evidence from Mr Denneny about the availability of alternative employment. The difficulty was that what we couldn't do, and what we couldn't consider evidence about, was something that contradicted our findings on liability. It seems to us that the evidence that Mr Denneny gave did contradict our findings on liability and that we should not consider that evidence on the basis that had it been adduced in relation to liability it might have altered our decision on that. Moreover, it's difficult to see how we could accept the evidence that Mr Denneny gave without this undermining our decision on liability. Therefore we have – we think of necessity – disregarded it; at least disregarded that part of Mr Denneny's evidence.

39. However, putting anything Mr Denneny said to one side, there are a number of uncertainties in this. We have to speculate about what would have happened had there been no discrimination and similarly – turning to unfair dismissal compensation, which overlaps with the compensation for lost earnings for discrimination – we have to speculate about what would have happened had there been no dismissal. So we are going to consider those two things [what would have happened had there been no discrimination and what would have happened had there been no dismissal] together to an extent.

40. [In relation to these matters, we applied the law as set out in: Chagger v Abbey National Plc & Anor [2009] EWCA Civ 1202; Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604.]

41. The uncertainties that there are include:

    41.1 whether or not, in fact, the claimant would have secured alternative employment with the respondent. It's not one hundred per cent; it's not nought per cent; it's somewhere in between. We have to say roughly where it is in between;

    41.2 secondly, if the claimant did secure alternative employment, what would he have been paid? Would it have been the same? Would it have been less? Where should we put it on the pay scale?;

    41.3 thirdly, if he did secure alternative employment, would that alternative employment have worked out? And in any event how long would it have lasted?

42. Clearly, mathematical precision in this area is impossible. We can't say there is definitely an *x* per cent chance of something happening or anything like that, so it's a bit of a rough and ready process. To an extent, we are pulling figures out of the air, but we have to do that; this is an exercise in speculation; there is no other way

of doing it. Doing the best we can, we assessed the chance of Mr Watts securing an alternative job with the respondent at 50/50 and that means that we award losses on the basis of a 50 percent discount – 50 percent of what he would have earned.

43. So, what would he have earned? There are a number of possible permutations, but we think a realistic alternative job with the respondent for him to have obtained would have been one involving working full time – 39 hours a week – but at the national minimum wage, which was £7.20 up to 31 March 2017 and it was £7.50 from 1 April 2017, so that's £280.80 per week rising to £292.50. (We note that Mr Denneny did tell us that there were no part-timers and that part of his evidence didn't contradict anything that we have found on liability). SSP has to be deducted from the first figure – from the £280.80 – up to the end of September. That's one of the bits of arithmetic we have not done that has to be done. *[The arithmetic was carried out by the Tribunal after these reasons were given.]*

44. The third factor is how long would such a job have lasted, bearing in mind that the claimant might have decided at some point to retire, or focus on getting better as he told us he was [focussing on], and we also have to take into account the state of his health and the respondent's reasonable concerns about health and safety, bearing in mind the nature of its business. Again [there are] no certainties, but weighing everything up. we think, that just and equitable compensation would be a sum equivalent to 50 percent (50 percent coming from the decision we have already made) of lost earnings for a year from 1 September 2016, subject to mitigation.

45. In relation to mitigation, although we agree with respondent's counsel that it was unreasonable for the claimant to fail to apply – on his own evidence – for any paid employment since his dismissal, we are not satisfied that had he made a reasonable number of job applications he would actually have secured employment. This is taking into account, in particular, that the only job he had ever done was one he was no longer able to do. We take into account his age. We take into account his mental and physical health conditions. Accordingly we make no reduction to compensation for failure to mitigate.

46. Finally, we turn to the other specific things raised by counsel that it was suggested should cause us to limit compensation. It seemed to us there were three main ones.

47. The first focuses on what is said to be some sort of contribution. Even if we agreed with the respondent that the claimant had acted unreasonably by not contacting the respondent to demand it complied with its duty to make reasonable adjustments – and we don't agree with the respondent on that – having found in the claimant's favour on liability, we know of no proper basis in law for reducing compensation for disability discrimination for contributory negligence or anything of that kind.

48. The second thing is an offer of reinstatement. [This is a reference to post-termination correspondence to the claimant alleged by the respondent to constitute an offer of reinstatement.] We should say, "supposed offer of reinstatement". It is a red herring. It's not actually, on analysis, an offer of any kind. It reads like a piece of perfectly legitimate, but nonetheless positional, skirmishing in the context of anticipated litigation. The only definitive thing it says is that the claimant would not be reinstated. Putting it at its highest, it is a demand – an unreasonable one – that the claimant's representative should jump through a number of hoops before the respondent would even begin discussing the possibility of reinstatement. We are not satisfied that that offer, to the extent that it was an offer at all, presented a significant chance of the claimant being reinstated, and we make no reduction for compensation in relation to it.

49. The final thing relied on by the respondent, through counsel, is the fact that the claimant's fit note changed in January 2017 from being time-limited – that is, stating that it was valid for *x* weeks or months – to being an indefinite fit note. I am afraid we think that is a further red herring. There was no relevant change of circumstances. The possible job with the respondent which we have envisaged in our decision was a job that complied with the adjustments that the fit note of 18 January 2017 suggested should be made and those adjustments were exactly the same adjustments as had been recommended consistently since May 2016.

50. In short, none of the things mentioned in submissions on the respondent's behalf make it appropriate for us to make any further reduction to compensation.

51. Another thing forming part of compensation – it actually makes no difference whether it goes into compensation for unfair dismissal or compensation for discrimination – is a claim for pension loss [in the form of lost persion contributions], which is 1 percent of lost earnings. We haven't [yet] got a final figure for lost earnings, but that will be an additional 1 percent.

52. As to loss of statutory rights, we award the sum of £300.

53. Finally, there is the basic award, agreed in the sum of £3,951.68.

54. As was discussed during the course of the hearing, there is no holiday pay claim before us.

55. Although it may be that the document wasn't disclosed until very recently, it appears that at the time when proceedings were issued there was an up to date statement of terms and conditions in existence and therefore there is no scope for making an award under section 38 of the Employment Act 2002.

56. Interest: we will make the standard interest award. Again we haven't had time to do the arithmetic but we will do that on the normal basis on which interest awards are made.

57. We think that is everything that we have been asked to decide in relation to remedy unless either party thinks that we have missed anything out. *[Neither party suggested we had.]*

[Respondent's counsel raised an issue to do with an entry on Facebook made by the claimant which suggested he had retired. This intervention caused the Employment Judge to add the following, orally, to the decision.]

58. Counsel has raised the issue of the Facebook entry, which was made in September [2016] and the extent to which that formed part of our deliberations on remedy. We have, as we have already said, taken into account the possibility that the claimant might have decided to retire at some point. But when that Facebook entry was made, the claimant was still employed by the respondent, so we couldn't possibly find that he would have retired at that date. One of the things we have taken into account in deciding that there was a 50 percent chance of him obtaining alternative employment is the possibility that nothing satisfactory to him would have been obtained. And, as I say, we have already also considered the possibility that he might have retired at some point. All of that has been factored-in, but with specific reference to that Facebook entry, it doesn't take matters very much further, other than as part of our general consideration [of, amongst other things, the if and when the claimant might have retired], bearing in mind that at the time that Facebook entry was made the claimant was still employed.

EMPLOYMENT JUDGE CAMP

1 DECEMBER 2017

SENT TO THE PARTIES ON

06 December 2017

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FOR THE TRIBUNAL OFFICE