

EMPLOYMENT TRIBUNAL Service Glasgow.
PA / Case No. 1111/50/2010, 9th August 2010

ET 9th August 2010

PETER STILL v Tesco Store Ltd to
Bruce Belbenton
John Gilcrest
John Clearyman.
Guy Henderson.

13th August 2010, ET/EDINBURGH
ORDER BY TRIBUNAL JUDGE
TO FURNISH WRITTEN ANSWERS
TO QUESTIONS

IN REGARDS TO CLAIM OF DISABILITY
DISCRIMINATION, DDA 05 the Act
CLAIMANT'S RESPONSE
DATED 27/08/2010.

PETER STILL - ET/S/1111050 -
v tesco Stores Ltd.
+ 4 others

EMPLOYMENT JUDGE - SUSAN A CRAIG

ORDER - After PRE-HEARINGS REVIEW
Edinburgh - sent (12/4/2011)

that Peter Still (unfair DISMISSAL)
- DIRECT DISABILITY DISCRIMINATION
- Section 3(A)5, DDA95 - the Act

Peter Still - never put forward a claim
of DDA95 - Section 3(A)5,
either orally - or writing,
tesco Stores Ltd + 4 others, Respondents
legal rep, Squid Sanders, LLP.

From original etl - 9 August 2010.
continued - 12/4/2011, This sort of DDA95
Section 3(A)5 of DIRECT DISABILITY
DISCRIMINATION, contrary to the DDA95.

THAT THIS SORT OF DIRECT DISCRIMINATION
Section 3(A)5 CANNOT BE JUSTIFIED
THIS SORT OF DDA95 the Act, could never
succeed, SINCE

LONDON Borough of LEWISHAM.
appellant v MALCOLM - respondent 7
Equality And Human Rights Commission
intervene - (2008) UKHL 43

ARTICLE 6.1 OF THE HUMAN RIGHTS ACT 1998

THE RIGHT TO A FAIR TRIAL

Peter Steel = et claim - Ban to FAIC
S/111150/2010 - After employment Judge
Susan A Craig

error - 8/4/2011 - 12/4/2011.

By changing Peter Steel claim to
DIRECT DISABILITY DISCRIMINATION
contrary to Section 3(A)5

Her error was pointed out on 16 June
2011,

By Advocate Mr Kenneth McGuire
opening submission, which was then
not included, in registered judgment
S/111150/2010. Peter Steel v Tesco Stores Ltd
+ 4 others

(22/07/2011) signed by et judge
Susan A Craig.

ARTICLE 6 OF THE HUMAN RIGHTS ACT,
THE RIGHT TO A FAIR TRIAL., requires
the State to provide fair trials, for
criminal and civil legal proceedings.
A FAIR TRIAL should take place within
a reasonable time, be heard by a independent
and impartial Judge, or TRIBUNAL.

Human Rights Act 1998.

Article 6 Right to Fair Trial

Be in Public (although there are ~~circumstances~~ when the public can be excluded) and Lead to a Public Judgement OR DECISION,

ADMINISTRATIVE decisions, such as those made by the government or other public bodies, will not violate ARTICLE 6 if there is a right of review or appeal to a court or tribunal, can deal with the matter in a way that is compliant with (ARTICLE 6)

TO ARGUE FOR RIGHTS UNDER (ARTICLE 6) or any other Article, A PERSON MUST BE DIRECTLY AFFECTED

THIS IS KNOWN AS THE (VICTIM TEST)

IT MEANS THAT THE PERSON (PETER STICK) SEEKING TO RELY ON (ARTICLE 6), MUST BE IN A SITUATION WHERE A decision is being made about them personally).



Employment Tribunals Service Glasgow
PA/Case No: 11150/2010
13 AUG 2010
Code: wa ODA WA FD

Claim to an Employment Tribunal

This form is to be used if your claim relates only to events that happened on, or after, 6 April 2009. If the events you are complaining about happened before this date please contact the Employment Tribunals Public Enquiry Line on 0845 795 9775.

If you have not already done so, you are strongly advised to ring the **Acas Helpline on 08457 474747** for advice on how you might be able to resolve your complaint without having to make a claim. **You should remember, though, that in most cases the tribunal must receive your claim within three months. This three months begins with the date your employment ended or when the matter you are complaining about happened.**

If, after considering advice, you want to make a claim **please read the guidance notes** and the notes on this page before filling in the form.

Your claim must be on a form provided by the Tribunals Service and you must provide the information marked with * and the information marked ● if it is applicable.

Where there are tick boxes, please tick the one that applies.

Please write clearly in black ink using CAPITAL LETTERS.

You can submit your claim via the website at **www.employmenttribunals.gov.uk**. The website also provides the facility to submit a multiple claim if you are one of a number of claimants making a claim arising out of the same or similar circumstances. If you do not have access to the website you can give the names and addresses of additional claimants on a separate sheet or sheets of paper. Please make sure that all the information you give is as accurate as possible.

For claims made in England and Wales only, if someone is advising or representing you in relation to your claim, they must, unless they are a practising solicitor or barrister, be authorised to do so, wherever they are based (including Scotland, the Channel Islands and all of Europe). Trade union officials, Citizens' Advice Bureau advisors or a personal friend helping you present your claim may be exempted from these requirements. However, to check your representative's status, and for more information, phone 0845 450 6858 or go to www.claimsregulation.gov.uk.

If, having made your claim, you have any questions about employment tribunal procedures or practice, contact the Employment Tribunals Enquiry Line on 0845 795 9775.

1 Your details

- 1.1 Title: Mr Mrs Miss Ms Other
- 1.2* First name (or names): PETER THOMAS WILLIAM
- 1.3* Surname or family name: STILL
- 1.4 Date of birth (date/month/year): 13 06 1969 Are you: male? female?
- 1.5* Address: Number or Name 107
Street FALSIDE CRESCENT
+ Town/City BATHGATE
County WEST LoTHIAN
Postcode EH482DS
- 1.6 Phone number including area code (where we can contact you in the day time): 07836344848
Mobile number (if different):
- 1.7 How would you prefer us to communicate with you? (Please tick only one box)
E-mail Post
- E-mail address: @



2 Respondent's details

- 2.1* Give the name of your employer or the organisation you are claiming against. TESCO STORES LTD
TESCO DISTRIBUTION
- 2.2* Address: Number or Name
Street CARNegie ROAD
+ Town/City CARNegie ROAD
LIVINGSTON
County WEST LoTHIAN
Postcode EH548TB
- Phone number: 01506779300
- 2.3* If you worked at a different address from the one you have given at 2.2, please give the full address and postcode.
- Postcode
- Phone number:

If there are other respondents please complete **Section 11**.

3 Employment details

3.1 Please give the following information if possible.

When did your employment start?

29/11/2004

Is your employment continuing?

Yes No

If your employment has ceased, or you are in a period of notice, when did it, or will it, end?

13/05/2010

3.2 Please say what job you do or did.

WAREHOUSE OPERATIVE

4 Earnings and benefits

1 How many hours on average do, or did, you work each week? 35 hours each week

4.2 How much are, or were, you paid?

Pay before tax	£	,	.00	Hourly
Normal take-home pay (including overtime, commission, bonuses and so on)	£	,	.00	Weekly
				Monthly
				Yearly

4.3 If your employment has ended, did you work (or were you paid for) a period of notice? Yes No

If 'Yes', how many weeks' or months' notice did you work, or were you paid for? 5 weeks months

4.4 Were you in your employer's pension scheme? Yes No

Please answer 4.5 to 4.9 if your claim, or part of it, is about unfair or constructive dismissal.

4.5 If you received any other benefits, e.g. company car, medical insurance, etc, from your employer, please give details.

SHARES IN SUCCESS. % OF YOUR ANNUAL WAGE

4.6 Since leaving your employment have you got another job? Yes No
If 'No', please now go straight to section 4.9.

4.7 Please say when you started (or will start) work.

4.8 Please say how much you are now earning (or will earn). £ .00 each

4.9 Please tick the box to say what you want if your case is successful:

- a To get your old job back and compensation (reinstatement)
- b To get another job with the same employer and compensation (re-engagement)
- c Compensation only

5 Your claim

5.1* Please tick one or more of the boxes below. In the space provided, describe the event, or series of events, that have caused you to make this claim:

a I was unfairly dismissed (including constructive dismissal)

b I was discriminated against on the grounds of

Sex (including equal pay)

Race

Disability

Religion or belief

Sexual orientation

Age

c I am claiming a redundancy payment

d I am owed

notice pay

holiday pay

arrears of pay

other payments

e Other complaints

5.2* Please set out the background and details of your claim in the space below.

The details of your claim should include **the date when the event(s) you are complaining about happened**; for example, if your claim relates to discrimination give the dates of all the incidents you are complaining about, or at least the date of the last incident. If your complaint is about payments you are owed please give the dates of the period covered. Please use the blank sheet at the end of the form if needed.

FROM 21/10/2005 - 20/07/2008

TESCO STORES LTD BEING MY EMPLOYER.

SHIFT MANAGER JOHN GILCHRIST + TEAM MANAGER

BRUCE BALBERSTON, FOLLOWING ACT'S OFF.

DISCRIMINATION, UNDER DDA,

(4) FAILURE TO COMPLY WITH A DUTY TO MAKE A

REASONABLE. WHICH APPLIED TO THEM IN MY

CASE.

2. (b) HARASSMENT, BULLYING
(c) VICTIMISATION

OLD LIVINGSTON DC TRANSFER LIVINGSTON NEW D.C
OBTAINED DOCTOR'S LETTER REQUESTING LIGHTER DUTIES
DUE TO BACK PROBLEM, SAID LETTER TO MY TWIN
BRUCE BARBERSTON AFTER SPEAKING TO SHIFT-MG
WAS TOLD I WOULD GET LIGHTER DUTIES THIS WAS
21ST OCTOBER 2005, DIDNT RECEIVE LIGHTER DUTIES
RESULTED 3 DAYS ABSENT DUE TO BACK PAIN.

(RTWI) SHIFT MANAGER JOHN BILLCROFT REFERED ME TO
DISMISSAL OFFICER, 7TH NOVEMBER 2005.

STEVE MILLS DISMISSAL OFFICER, 11TH NOVEMBER
2005, DISMISSED ME ON CAPABILITY ISSUES
AFTER A LENGTHY APPEAL PROCESS JOANNA KATLAKE

- 5.3 If your claim consists of, or includes, a claim that you are making a protected disclosure under the Employment Rights Act 1996 (otherwise known as a 'whistleblowing' claim), please tick the box below if you wish a copy of this form, or information from it, to be forwarded on your behalf to a relevant regulator (known as a 'prescribed person' under the relevant legislation) by the Tribunals Service.

6 What compensation or remedy are you seeking?

- 6.1 Completion of this section is optional, but may help if you state what compensation or remedy you are seeking from your employer as a result of this complaint. If you specify an amount, please explain how you have calculated that figure.

7 Other information

- 7.1 Please do not send a covering letter with this form. You should add any extra information you want us to know here. Please use the blank sheet at the end of the form if needed.

8 Your representative

Please fill in this section only if you have appointed a representative. If you do fill in this section, we will in future only send correspondence to your representative and not to you.

8.1 Representative's name:

8.2 Name of the representative's organisation:

8.3 Address: Number or Name
 Street
 + Town/City
 County
 Postcode

8.4 Phone number (including area code):

Mobile number (if different):

8.5 Reference:

8.6 How would they prefer us to communicate with them? E-mail Post
(Please tick only one box)

E-mail address:

@

9 Disability

9.1 Please tick this box if you consider you have a disability Yes
Please say what this disability is and tell us what assistance, if any, you will need as your claim progresses through the system, including for any hearings that may need to be held at Tribunal Service premises.

SPONDYLITIS, BACK PAIN.

10 Multiple cases

10.1 To your knowledge, is your claim one of a number of claims against the same employer arising from the same, or similar, circumstances? Yes No

11 Details of Additional Respondents

Name of your employer
or the organisation you are
claiming against.

BRUCE BALBERSTON
TESCO STORES LTD

Address: Number or Name
Street
+ Town/City
County
Postcode

TESCO DISTRIBUTION
CARNEGIE ROAD
LIVINGSTON
WEST LOTHIAN
EH54 8TB

Phone number:

01506779300

Name of your employer
or the organisation you are
claiming against.

JOHN GILCRIEST
TESCO STORES LTD

Address: Number or Name
Street
+ Town/City
County
Postcode

TESCO DISTRIBUTION
CARNEGIE ROAD
LIVINGSTON
WEST LOTHIAN
EH54 8TB

Phone number:

01506779300

Name of your employer
or the organisation you are
claiming against.

JOHN CLENGHAN
GUY HENDERSON

Address: Number or Name
Street
+ Town/City
County
Postcode

TESCO DISTRIBUTION
CARNEGIE ROAD
LIVINGSTON
WEST LOTHIAN
EH54 8TB

Phone number:

01506779300

Please read the form and check you have entered all the relevant information.
Once you are satisfied, please tick this box.

Data Protection Act 1998. We will send a copy of this form to the respondent(s) and Acas. We will, if your claim consists of, or includes, a claim that you have made a protected disclosure under the Employment Rights Act 1996 (and you have given your consent that we should do so) send a copy of the form, or extracts from it, to the relevant regulator. We will put the information you give us on this form onto a computer. This helps us to monitor progress and produce statistics. Information provided on this form is passed to the Department for Business, Innovation and Skills to assist research into the use and effectiveness of employment tribunals.

REGIONAL PERSONNEL MANAGER, OVERTURNED MY DISMISSAL AFTER FAILURE TO ACT ON REQUEST MADE BY MYSELF - AND LETTER FROM MY DOCTOR I WAS ASKED TO SIGN AROUSANT FOR THE COMPANY TO OBTAIN A FULL MEDICAL CONCERNING MY BACK PROBLEM, WAS TOOK A RISK ASSESSMENT, A REFERENCE TO OCCUPATIONAL HEALTH, LOADINGS AND LIGHT DUTIES RETRAINED MANUAL HANDLING, THIS WAS AGREED 23rd FEBRUARY 2006. I RETURNED TO WORK NEXT DAY SAME SHIFT, SAME TEAM MANAGER BRUCE BALBERSTON AND JOHN EILCRIST SHIFT MANAGER SIGNED CONSENT FOR MEDICAL FROM MY DOCTOR BEFORE STARTING SHIFT. 24TH FEBRUARY 2006. UNTIL TRANSFER TO NIGHT-SHIFT NEW LIVINGSTON DC. I WAS GIVEN THE SAME WORK EVERY DAY FOR A TWO YEAR PERIOD (PICKING DUTIES) NO HELP WAS GIVEN DAILY THREATS OF DISCIPLINARY ACTION FOR PERFORMANCE FROM TEAM MANAGER BRUCE BALBERSTON. BEING SET TARGETS THAT I HAD NO CHANCE OF REACHING, BRUCE BALBERSTON TELLING ME I WOULDN'T BE PUT FORWARD FOR ANY OTHER DUTIES DUE TO ATTITUDE AND PERFORMANCE.

(A) DOCTOR'S LETTER DATED 28TH SEPTEMBER, ASKING FOR LIGHTER DUTIES. GIVEN TO TEAM MANAGER BRUCE BALBERSTON NEVER HAPPENED RESULTED 3 DAYS ABSENT SICK DUE TO BACK PAIN

(B) RETURN TO WORK MEETING 5TH NOVEMBER 2005 WHICH BRUCE BALBERSTON FILLED OUT ABSENCE DETAILS (I HAD HAD ONGOING BACK PROBLEM SINCE 1996 - CRUMBLING OF THE SPINE.

(C) RETURN TO WORK INVESTIGATION - 7TH NOVEMBER 2005 SHIFT MANAGER JOHN EILCRIST. IN THE NOTES HE ASKS (JE) IF WE ASKED FOR YOUR MEDICAL REPORT WOULD YOU BE OK WITH THAT.

(PS) YES, OK

(JE) AS WE HAVE A DUTY OF CARE TO YOU, WE NEED TO ENSURE FURTHER EXPOSURE IS NOT HARMING YOU) REFERRED TO DISMISSAL OF

- 1) STEVE MILES DISMISSED ME ON 11TH NOVEMBER 2005 DUE TO CAPABILITY ISSUES.
- 2) JOANNE RATCHFORD OVERTURNED THAT DECISION ON 23RD FEBRUARY 2006, TOLD I WOULD GET HELP, OCCUPATIONAL HEALTH, LIFTING DUTIES, LIFTING, RISK ASSESSMENT, MANUAL HANDLING NONE OF THESE EVER HAPPENED.
- 3) FIVE INFORMAL DISCUSSIONS THREATENING DISCIPLINARY ACTION FOR PERFORMANCE, FROM 16TH JULY 2006 CONT TO NEW D.C 4TH JANUARY 2008.
- 4) NOTES FROM MEETINGS BRUCE BALBERSON, ALISON LEITCH PERSONNEL. BRUCE TELLS ALISON LEITCH, 22ND MAY 2006 THAT I WOULDN'T BE PUT FORWARD FOR OTHER DUTIES AS MY PERFORMANCE 96% WASN'T GOOD ENOUGH AND I'D NEED TO GET 100%. HE ALSO TELLS TOM MCGRAHAM - 20TH AUGUST NOTES PERFORMANCE, NOT USED PERFORMANCE ATTITUDE TOLD HE WENT TO PERSONNEL WHO TOLD HIM THERE WAS NO HEALTH PROBLEM.
- 5) HEALTH REFERENCE REPORT) 28TH AUGUST 2008, FROM JENNY THOMSON, COMPANY'S OCCUPATIONAL HEALTH NURSE TO KARA MATHIESON, PERSONNEL MANAGER LIVINGSTON NEW D.C.
(HEALTH PROBLEM)
PETER HAS SUFFERED FROM A BACK CONDITION FOR SOME YEARS AND THE D.C WAS AWARE OF THIS, THEY HAD BEEN TOLD IN THE PAST FOLLOWING THE OVER TURNING OF A PREVIOUS DISMISSAL THAT THE CONDITION WAS LIKELY TO BE COVERED BY THE DDA
- 6) AFTER RETURNING 24TH FEB 2006, 124 DAYS ABSENT DUE TO BACK PROBLEM, 174 DAYS IN TOTAL FROM 24TH FEB 2006 UNTIL MY DISMISSAL AGAIN ON 13TH MAY 2010, WAS PROCESSED THROUGH SICKNESS AND ABSENCE PROCEDURE, AND PAID SSP,

(2)

● FROM 21/10/2005 TO 13/05/2010, TESCO STORES LTD, PERSONNEL DEPARTMENT, SHIFT MANAGERS OLD LUDWIGSTON D. AND NEW LUDWIGSTON D.C, AFTER BRINGING THE TREATMENT IN THE PAST ON NUMEROUS OCCASIONS, BY LETTER, RETURN TO WORK MEETINGS, ATTENDANCE REVIEW HEARINGS, AND NO ACTION TO INVESTIGATE WHAT I WAS SAYING, WHICH WAS ALLEGATIONS OF UNLAWFUL DISCRIMINATION BY MANAGEMENT BRUCE BALBERSTON AND JOHN GILCRIST, AND IN DOING THIS LET THIS CONTINUE; EACH TIME I RAISED THIS TO APPROPRIATE MANAGEMENT AND PERSONNEL. NOT ONCE WAS ANY INVESTIGATION CONDUCTED.

1) ATTENDANCE REVIEW MEETING) 12TH MARCH 2007,

(SHIFT MANAGER) BILL STEVENSON
PLACED ON STAGE 3 FOR 33 DAYS - BACK PAIN

2) ATTENDANCE REVIEW MEETING) 29TH JANUARY 2008.

(SHIFT MANAGER) GRACIE MILNE.
(TEAM MANAGER) DAVID MILLAR.
PLACED ON STAGE 3 - BACK PAIN.

3) GRIEVANCE MEETING) 14TH AUGUST 2008 - 20TH AUGUST 2008.

(SHIFT MANAGER) TOM MURPHY
(TEAM MANAGER) LEE EGGETT

4) LETTER DATED 21ST MARCH 2010, GRIEVANCE LETTER SENT TO PERSONNEL.

5) INFORMAL DISCUSSION 23RD MARCH 2010, WITH NIGHTS TEAM MANAGER ALISTAIR MCKENZIE

6) INVESTIGATOR HEARINGS NOTES 27TH APRIL 2010.

(SHIFT MANAGER) ALI McDONALD
PERSONNEL TEAM, 44) ISABEL COLLIE

7) DISCIPLINARY HEARINGS) 30TH APRIL 2010

(DISMISSAL OFFICER) GUY HENDERSON

INVESTIGATION HEARINGS NOTES) 6TH MAY 2010.
SHIFT MANAGER) ISABEL ARMSTRONG
TEAM MANAGER) DANIO MILLAR.

(3)

AFTER TWO SUBJECT ACCESS REQUESTS IN WRITING TO PERSONNEL, FOR COPY OF PERSONNEL FILE UNDER DATA PROTECTION ACT. FIRST ONE DATED 22ND MAY 2008, AND AGAIN A YEAR LATER ON 2ND MAY 2009. AFTER A 3RD REQUEST, FOR THIS INFORMATION, AFTER MY DISMISSAL ON 13TH MAY 2010, WHICH BROUGHT THE TREATMENT I HAD RECEIVED OVER THE PAST 4 YEARS WAS UNLAWFUL

(4)

(ATTENDANCE REVIEW MEETING) 26TH MARCH 2010, JOHN CLEGGAN SHIFT MANAGER. REFERRED MYSELF TO DISMISSAL OFFICER WHICH RESULTED IN MY DISMISSAL ON 13TH MAY 2010 BY PUY HEWSON. THE REASON FOR REFERRED TO DISMISSAL OFFICER (JOHN CLEGGAN.)

BEEN THROUGH EVERYTHING AGAIN I'M GOING TO REFER YOU TO THE DISMISSING OFFICER DUE TO THE HIGH LEVEL OF ABSENCE 42%, AND THE 2ND MEETING WITH JENNY SAYING THAT YOU AREN'T ORDERED BY THE DDA AND TO FOLLOW SYA 11
OFFICER IF NEXT STEPS IN PLACE.

2) JOHN CLEIGHAN CLAIMED COMPLAINS OCCUPATIONAL HEALTH NURSE JENNY THOMSON, SAYING I WASN COLLECTOR BY THE DDA) IN DOWN, SO LYING TO JUSTIFY PUTTING ME IN A POSITION, WHICH ENDED IN MY DISMISSAL, FOLLOWING HIS OWN TWISTED POLICYS AND PROCEDURES, TO SUIT WHATEVER ACTION HE THINKS,

(5)

DISCIPLINARY HEARINGS DISMISSAL OFFICER
Sgt HENRIKSON 30TH APRIL 2010 CONT
TO 13TH MAY 2010, DECISION TO DISMISS
ME DUE TO ABSENCE RELATED TO DISABILITY
FAILURE TO LOOK INTO MY ALLEGATIONS AGAINST
AGAINST BRUCE BAUBORSON AND JOHN ELLIOTT
FOR UNLAWFUL TREATMENT DISCRIMINATION.
INSTEAD INSISTED THAT IT WAS ALL MY OWN
DOWN, BEING IN THE POSITION I WAS IN, YOU
BY YOURSELF HERE, NOT A INVESTIGATION, NO
INTERVIEW OR NOTES JUST LIKE ALL THE OTHER
TIMES WITH ALL THE SAME RESULT, NOTHING
PEOPLE WHO COVER UP FOR THESE BULLYS ARE
JUST AS BAD BEING FULL AWARE OF THE
OUTCOME, IN MY CASE, I TOLD THIS BUT THIS
HAD RUINED, MY FAMILY LIFE, FINANCIAL AND
HEALTH JUST A WEEK BEFORE BECAUSE OF
BRUCE BAUBORSON AND JOHN ELLIOTT,

⑥

THE DECISION TO DISMISS ME WAS TAKEN BEFORE I COULD GET ACCESS TO MY PERSONNEL FILE, AND TO COVER UP THE WAY I WAS TREATED BY SHIFT MANAGER JOHN GILCHRIST AND TEAM MANAGER BRUCE BAUBERSTON AND TO MAKE THAT DECISION PERSONNEL, SHIFT MANAGERS SHOULD BE PAID TO COVER UP, ALL THIS INFORMATION WAS IN MY PERSONAL FILE ALL ALONG, NOTES AND INTERVIEWS ALL ON PAPER, NOTHING TO SAY COMPANY HELPED ME, ONLY IN SLOWLY DESTROYING ME, AND FOR WHAT REASON, NEVER BEEN TOLD AND WOULD LIKE TO FIND THIS OUT.

PETER STILL

Peter Still

5/08/2010.

⑦

WRONG CALCULATIONS ON WAGE ADJUSTMENT FROM 20/03/2009 UNTIL 20/5/2010. FOR COUNCIL TAX ARREARS. EACH TIME I COMPLAINED I WAS RED PAY REC IN INDIA SAYS IT WAS RIGHT I HAD NEARLY £4000 TAKEN OFF IN THIS TIME SOME TIMES THEY WERE TAKEN THE RIGHT AMOUNT. WEY OTHER TIMES. NOT,



11 August 2010
acas ref: 63239

Private and Confidential

Mr PTW Still
107 Falside Crescent
Bathgate
EH48 2DS

Scotland
151 West George Street
Glasgow
G2 2JJ
t 0141 242 1758
f 0141 242 1733
kalian@acas.org.uk

Dear Mr Still

EMPLOYMENT TRIBUNAL CLAIM

PTW Still v JOHN GILCHRIST C/O TESCO STORES LTD (Claim Number 111150/2010)

The Employment Tribunal has sent a copy of your claim to Acas, as our conciliators have a legal duty to try and help the parties in tribunal cases settle their differences without the need for a tribunal hearing. This service is confidential and free of charge. I enclose a leaflet which gives more detail and I am writing similarly to the other side.

I am the conciliator for this claim. I will be in touch in due course to discuss it, and to see if you are interested in exploring the possibility of a settlement.

If you decide to appoint a representative, please pass on this information to them and I will deal with them directly on this matter.

If you need the services of an interpreter, I can arrange this.

Yours sincerely

Kirstine Allan
Conciliator
encs.

APO

Jurisdictions: UDL DDA WA



11 August 2010
acas ref: 63239

Private and Confidential

Mr PTW Still
107 Falside Crescent
Bathgate
EH48 2DS

Scotland
151 West George Street
Glasgow
G2 2JJ
t 0141 242 1758
f 0141 242 1733
kallan@acas.org.uk

Dear Mr Still

EMPLOYMENT TRIBUNAL CLAIM

PTW Still v JOHN CLENGHAN (Claim Number 111150/2010)

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kallan@acas.org.uk

Dear Mr Still

EMPLOYMENT TRIBUNAL CLAIM

PTW Still v GUY HENDERSON (Claim Number 111150/2010)

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Kirstine Allan
Conciliator
encs.

APO

Jurisdictions: UDL DDA WA



11 August 2010
acas.ref: 63239

Private and Confidential

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107 Falside Crescent
Bathgate
EH48 2DS

Scotland
151 West George Street
Glasgow
G2 2JJ
t 0141 242 1758
f 0141 242 1733
kallan@acas.org.uk

Dear Mr Still

EMPLOYMENT TRIBUNAL CLAIM

PTW Still v TESCO STORES LTD / TESCO DISTRIBUTION (Claim Number 111150/2010)

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Yours sincerely

Kirstine Allan
Conciliator
encs.

APO

Jurisdictions: UDL DDA WA



EMPLOYMENT TRIBUNALS (SCOTLAND)

To Mr PT Still
107 Falside Crescent
Bathgate
West Lothian
EH48 2DS

Glasgow
Eagle Building
215 Bothwell Street
Glasgow
G2 7TS



Office: 0141 204 0730
Fax: 0141 204 0732
DX 580003 Glasgow 17
e-mail: GlasgowET@tribunals.gsi.gov.uk
www.employmenttribunals.gov.uk
President: Shona Simon

Your Ref:

09 August 2010

Case Number 111150/2010

Claimant
Mr PT Still

V

Respondent
Tesco Distribution Centre
& others

Dear Sir/Madam

ACKNOWLEDGEMENT OF CLAIM Employment Tribunals Rules of Procedure 2004

Your claim has been accepted at this office. You should quote the case number shown above on any future correspondence relating to your claim and send it to ETS, 54-56 Melville Street, Edinburgh EH3 7HF.

I have sent a copy of your claim to the respondent(s). Any response will be copied to you. A respondent has 28 days to respond. If a response is not received or not accepted, a default judgment will normally be issued.

We have also sent a copy of your claim to the Advisory Conciliation and Arbitration Service (Acas) whose services are confidential and free of charge. If you think it may be possible to settle the case through conciliation you should contact Acas and speak to a conciliation officer



EMPLOYMENT TRIBUNALS (SCOTLAND)

To: Mr PT Still
107 Falside Crescent
Bathgate
West Lothian
EH48 2DS

Edinburgh
54-56 Melville Street
Edinburgh
EH3 7HF



Office: 0131 226 5584
Fax: 0131 220 6847
DX ED147

e-mail: EdinburghET@ets.gsi.gov.uk
www.employmenttribunals.gov.uk

President: Shona Simon

Your Ref:

11 August 2010

Case Number 111150/2010

Claimant
Mr PT Still

V

Respondent
Tesco Distribution Centre
& others

Dear Sir

CASE MANAGEMENT ORDER **Employment Tribunals Rules of Procedure 2004**

Please find enclosed an Order issued by an Employment Tribunal Judge.

Yours faithfully

J Sadler
For the Secretary of Employment Tribunals

Cc Acas



Shona Simon
President

Employment Tribunals (Scotland)
Edinburgh
54-56 Melville Street
Edinburgh EH3 7HF
Telephone: 0131 226 5584
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EdinburghET@ets.gsi.gov.uk

ORDER TO FURNISH WRITTEN ANSWERS TO QUESTIONS

Case No: 111150/10
Claimant: Mr PT Still
Respondent: Tesco Distribution Centre & Ors

In exercise of the powers conferred on the Employment Tribunals by Rule 10(1) of the Rules of Procedure contained in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 you are hereby required to furnish in writing the answers to the questions specified in the annexed schedule.

The answers should be furnished within 14 days of the service of the order to the Secretary of the Tribunals at the address shown at the top of this Order with a copy to Tesco Distribution Centre, Tesco Stores Ltd, Carnegie Road, Livingston, West Lothian EH54 8TB

In terms of Rule 11(1) you may apply to the Tribunal to vary or set aside this Order. Any such application should be made in writing to the Secretary of the Tribunals immediately upon receipt of this Order and should set out the grounds for the application.

If the requirement under Rule 10(1) of the Regulations is not complied with, an Employment Judge or Tribunal, before or at the hearing, may strike out the whole or part of the claim or the response, as the case may be, without any further warning being given.

Employment Judge

Dated: 13/8/10

QUESTIONS ORDER SCHEDULE

1. Do you claim that you are a disabled person within the meaning of section 1 of and schedule 1 to the Disability Discrimination Act 1995?
2. If so, what physical or mental impairment do you consider affects you?
3. If so, please specify in what way this impairment has a substantial and long-term adverse effect on your ability to carry out normal day-to-day activities (stating particularly which of the activities listed in Article 4(1) of Schedule 1 to the Act are affected: ie

- (a) mobility;
- (b) manual dexterity;
- (c) physical co-ordination;
- (d) continence;
- (e) ability to lift, carry or otherwise move everyday objects;
- (f) speech, hearing or eyesight;
- (g) memory or ability to concentrate, learn or understand; or
- (h) perception of the risk of physical danger)?

4. Do you have medical evidence to suggest that you have a condition covered by the Disability Discrimination Act 1995. If so you are asked to supply the name(s) and address(es) of the doctor(s) who prepared the report(s) and the date(s) of the report(s)

Discrimination and Reasonable Adjustments

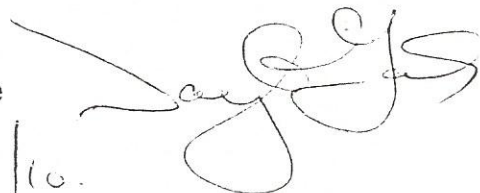
5. You are also directed to set out now all the instances of discrimination on which you rely. This must include:
6. Do you argue that you were directly discriminated against on the ground of your disability?
7. If so, in what way do you say that the respondents treated you less favourably than they treated or would treat a person not having your particular disability whose relevant circumstances, including abilities, are the same as, or not materially different from, yours?
8. Is the person with whom you compare your treatment real or hypothetical?
9. Do you argue that there was an unfulfilled duty on the part of the respondents to make reasonable adjustments?
10. If so what is the provision, criterion or practice applied by or on behalf of the respondents or what is the physical feature of premises occupied by the respondents that placed you at a substantial disadvantage in comparison with persons who are not disabled?
11. What are the steps which you argue it was reasonable for the respondents to take?
12. In what way would those steps have prevented the substantial disadvantage which you believe has arisen?

In responding to these directions you should have regard to the provisions of the Disability Discrimination Act 1995 ("DDA") and to the recent decision of the House of Lords in London Borough of Lewisham v Malcolm.

Employment Judge

Dated

13/8/10.



Explanatory Notes Order to Furnish Written Answers to Questions

The purpose of this Order is to find out more details about your claim under the Disability Discrimination Act 1995 ("DDA 1995"). The additional information which you have been asked to provide will give the Employment Tribunal more information about your case and give the other party or parties in the case (the respondents) fair notice of the claim that they have to answer.

The information below is intended to provide a background to the reasons why these particular questions are asked in the Order. It is not intended to provide legal advice and should not be relied upon for that purpose. The Disability Rights Commission Code of Practice provides further explanation of the types of discrimination protected by the DDA 1995. It can be found on the internet on the Equality and Human Rights' Commission website.

Questions Order

Questions 1-4

The question of whether or not you were a disabled person at the time of the actions about which you are complaining is an issue which is often challenged by respondents. The purpose of these questions is therefore to find out more about your condition. To this end question 1 asks whether you consider yourself to be a disabled person within the meaning of section 1 of and schedule 2 to the DDA 1995. The DDA is available on the internet on the Equality and Human Rights' Commission website.

Question 2 states: "If so, what physical or mental impairment do you consider affects you?" A physical impairment is a condition affecting the body, perhaps through sight or hearing loss, a mobility difficulty or a health condition. A mental impairment is a condition affecting "mental functioning", for example a learning disability or mental health condition such as manic depression. (Please note it is not possible to list all the impairments which may be relevant when bringing a claim under the DDA. We have only provided examples for your assistance.)

Question 3 refers to the terms "substantial" and "long-term". So far as the law is concerned "substantial" means more than "minor" or "trivial". Legally, "long-term" means that an effect of the impairment has lasted, or is likely to last, 12 months or more from the onset or for the rest of your life.

Question 4 asks you to disclose any medical evidence you may have which demonstrates that you have a condition covered by the DDA 1995.

Questions 5-7

These questions are designed to find out from you whether or not you are bringing a claim of direct discrimination against the respondents. Direct discrimination occurs when a disabled person is treated less favourably than someone else who has similar circumstances and abilities. Direct discrimination cannot be justified by the respondents.

Question 8

In proving a case of direct discrimination your treatment by the respondents has to be compared with the treatment of a comparator. The comparator must be someone who does not have the same disability. It could be a non-disabled person or a person with other disabilities. There is no

need to find a comparator whose circumstances are the same as yours in every respect; what matters is that the comparator's relevant circumstances (including his or her abilities) are the same as, or not materially different from yours.

It may not be possible to identify an actual comparator. In such cases you can use what the law refers to as "a hypothetical comparator". Evidence which helps to establish how a hypothetical comparator would have been treated by the respondents is likely to include details of how the hypothetical comparator would be treated in circumstances which were broadly similar to your own.

Questions 9-11

Employers have a duty to make reasonable adjustments where a provision, criterion or practice, or any physical feature of premises occupied by them, places a disabled person at a substantial disadvantage compared with people who are not disabled. Employers must take reasonable steps to prevent that disadvantage. It isn't possible for employers to justify not making adjustments that are reasonable.

The DDA 1995 gives some examples of reasonable adjustments that an employer may need to make in order to comply with the duty to make reasonable adjustments. These include making adjustments to their premises; allocating some of your duties to another person; transferring you to fill an existing vacancy; altering your hours of working or training; assigning you to a different place of work or training; allowing you to be absent during working or training hours for rehabilitation, assessment or treatment; giving or arranging for training or mentoring; acquiring or modifying equipment; modifying instructions or reference manuals; modifying procedures for testing or assessment; providing a reader or interpreter or providing supervision or other support for you.

Question 12

The DDA 1995 provides that only substantial disadvantages give rise to the duty to make reasonable adjustments. Substantial disadvantages are those which are not minor or trivial. What matters is not that the provision, criterion or practice or physical feature is capable of causing a substantial disadvantage to you in question but that it actually has had this effect on you.

You can apply to have the Order varied (changed in some way) or revoked (withdrawn). If you wish to do so you should apply in writing to the Secretary of the Tribunals immediately upon receipt of the Order and set out the grounds for your application.

Disability Discrimination Act claims can be legally complex; you may wish to consider taking advice from a solicitor or advice organization such as the CAB if you have not already done so.

CASE NUMBER) 111150/10
CLAIMANT, MR P STILL)

27/08/2010



- ① Yes
 - ② LUMBAR SPONDYLOSIS, LOWER BACK,
 - ③ MOBILITY, PROGRESSIVE PHYSICAL IMPAIRMENT
LONG TERM LIKELY TO LAST REST OF LIFE
- (A) X-RAY, SCAN, 1996 ST JOHN'S HOSPITAL
LIVINGSTON, SEEN CONSULTANT, NEED TO
GET NAME, DATE FROM MY G.P. DR J-THOMAS
BATHGATE PRIMARY CARE CENTRE, WHITBURN
ROAD, BATHGATE, EH48 2SS
- (B) LETTER WHICH I'VE INCLUDED, WHICH WAS PIN
TO MY TEAM MANAGER BRUCE BAUBERSTON
TESCO STORES LTD, OCTOBER 2005
- (C) SIGNED MEDICAL REQUEST CONSENT FORM
FOR TESCO STORES, LTD. TO OBTAIN REPORT
FROM MY G.P. IN REACTION TO BACK PROBLEMS
(SPONDYLOSIS) 23/02/2006. REQUESTED BY
TESCO STORES REGIONAL PERSONNEL MANAGER
JOAN RATCHIFFE, AFTER OVERTURNING DECISION
BY STEVE MILES TO DISMISS ME, 11/11/2005.
FOR CAPACITY ISSUES.

4) MEDICAL REPORT A.I.H. - ~~UNASSUMED~~ TESCO STORES LTD. BY DOCTOR JULIE THOMSON SIMPSON MEDICAL GROUP, BATHYATG.

(E) CONSENT FOR MEDICAL REPORT FOR TESCO STORES LTD TO OBTAIN FULL MEDICAL FROM MY DOCTOR, 20/07/2008.

(F) 14/08/2008 HEALTH REFERRAL, BY BEN M(LEAD, P, T, E, LIVINGSTON D.C TO COMPLAINTS O, H, A.

(G) HEALTH REFERRAL REPORT FROM COMPLAINTS O, H, A, JENNY THOMSON, TO KARA MATHESON, PERSONNEL MGR LIVINGSTON D. ON 28/08/2008.

(H) HEALTH REFERRAL REPORT, O, H, A, J THOMSON TO PERSONNEL MGR KARA MATHESON, LIVINGSTON D.C, 11/11/2008 INFORMATION BASED ON DOCTORS REPORT, 31/10/2008.

(I) HEALTH REFERRAL REPORT, O, H, A, J THOMSON TO PERSONNEL MGR, KARA MATHESON LIVINGSTON D.C, 1/02/2010 BASED ON DR SMITH'S REPORT DATED 28/01/2010.

DISCRIMINATION, REASONABLE ADJ

(5) FAILURE TO MAKE REASONABLE ADJUSTMENT VICTIMISATION, HARASSMENT, UNFAIR DISMISS

6 NO
7 NOT CLAIMING DIRECT DISCRIMINATION

8 N/A.

9 YES.

10 IN DUTIES GIVEN, DISCIPLINARY ACTION TAKEN, FOR PERFORMANCE, SICKNESS ABSENCE DUE TO DISABILITY, FAILURE TO PAY SICK PAY.

11 AS TOLD, 22/02/2006 BY JOYDA RINTAHR REGIONAL P. M.E., FULL MEDICAL, COMPANY O.H.A., RISK ASSESSMENT, RETRAINED MANUAL HANDLING, LIGHTER DUTIES DUTIES TO BE SPLIT, HALF LOADING, HALF PICKING, LIGHTER AND NONE OF THIS HAPPENED

12 DISMISSED ON 11/11/2005, AGAIN ON 13/05/2010 PROBLEMS CONCERNING HEALTH, MADE WORSE, FINANCIAL, PERSONAL/FAMILY PROBLEMS, WHICH HAD MADE LIFE VERY DIFFICULT - FOR ME TO CONTINUE TO DO SO.

Peter Still

27/08/2010

PETER STILL



EMPLOYMENT TRIBUNALS
(SCOTLAND)
02 SEP 2010
EDINBURGH

Hammonds

Fax

Our ref	MAP4/TES.019-1109	Your ref	111150/2010
Date	2 September 2010	Time	
Attention	The Regional Secretary	Company	Employment Tribunal
Fax	0131 220 6847	Telephone	0131 226 5584
From	Andrew Parascandolo	No of pages (including this sheet)	
Subject	Mr Gill v Tesco Stores Limited		

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Dear Sirs,

We are instructed by all the Respondents in this matter.

We attach the Respondents' ET3 and Grounds of Resistance in this matter for filing

Yours faithfully

Hammonds LLP

Hammonds LLP



Hammonds LLP
2 Park Lane Leeds LS3 1ES DX 26441 Leeds
Telephone +44 (0)113 284 7000 Direct line +44 (0)113 284 7566 Fax +44 (0)113 284 7001
Email andrew.parascandolo@hammonds.com

Website www.hammonds.com

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1 Claimant's name

1.1 Claimant's name:

PETER THOMAS WILLIAM STILL

2 Respondent's details2.1* Name of Individual,
Company or Organisation

TESCO STORES LIMITED

Contact name:

LESLEY SCRIVEN

2.2* Address: Number or Name

2ND FLOOR, PILLAR H

Street

CIRRUS A BUILDING

+ Town/City

SHIRE PARK

County

WELWYN GARDEN CITY

Postcode

AL7 1GA

2.3 Phone number including area code
(where we can contact you in the day time):

Mobile number (if different):

2.4 How would you prefer us to
communicate with you?
(Please tick only one box)

E-mail

Post

E-mail address:

2.5 What does this organisation mainly make or do?

RETAIL SERVICES

2.6 How many people does this organisation employ in Great Britain?

360000

2.7 Does this organisation have more than one site in Great Britain?

Yes

No

2.8 If 'Yes', how many people are employed at the place where the claimant worked?

3 Employment details3.1 Are the dates of employment given by the claimant correct?
If 'Yes', please now go straight to section 3.3.Yes

No

3.2 If 'No', please give dates and say why you disagree with the dates given by the claimant.

When their employment started

29-11-2004

When their employment ended or will end

13-05-2010

3 Employment details (continued)

Is their employment continuing? Yes No

I disagree with the dates for the following reasons.

3.3 Is the claimant's description of their job or job title correct? Yes No

If 'Yes', please now go straight to section 4

3.4 If 'No', please give the details you believe to be correct below.

4 Earnings and benefits

4.1 Are the claimant's hours of work correct? Yes *TBC* No

If 'No', please enter the details you believe to be correct. hours each week

4.2 Are the earnings details given by the claimant correct? Yes No

If 'Yes', please now go straight to section 4.3

If 'No', please give the details you believe to be correct below.

Pay before tax	£ <input type="text"/> .00	Hourly
		Weekly
Normal take-home pay (including overtime, commission, bonuses and so on)	£ <input type="text"/> .00	Monthly
		Yearly

4.3 Is the information given by the claimant correct about being paid for, or working, a period of notice? Yes *TBC* No

If 'Yes', please now go straight to section 4.4

If 'No', please give the details you believe to be correct below. If you gave them no notice or didn't pay them instead of letting them work their notice, please explain what happened and why.

4.4 Are the details about pension and other benefits, e.g. company car, medical insurance, etc, given by the claimant correct? Yes *TBC* No

If 'Yes', please now go straight to section 5.

If 'No', please give the details you believe to be correct below.



5 Response

5.1* Do you resist the claim?
If 'No', please now go straight to section 6.

Yes No

5.2 If 'Yes', please set out in full the grounds on which you resist the claim.

PLEASE SEE ATTACHED GROUNDS OF RESISTANCE.



6 Other information

6.1 Please do not send a covering letter with this form. You should add any extra information you want us to know here.

7 Your representative If you have a representative, please fill in the following.

7.1 Representative's name: ANDREW PARASCANDOLO

7.2 Name of the representative's organisation: HAMMONDS LLP

7.3 Address: Number or Name 2
 Street PARK LANE
 + Town/City LEEDS
 County WEST YORKSHIRE
 Postcode LS3 1ES

7.4 Phone number: 0113 284 7568

7.5 Reference: MAP4/TES.019-1109

7.6 How would you prefer us to communicate with them?
(Please tick only one box) E-mail Post

E-mail address: andrew.parascandolo@hammonds.com

Please read the form and check you have entered all the relevant information.
Once you are satisfied, please tick this box.

Data Protection Act 1998. We will send a copy of this form to the claimant and Acas. We will put the information you give us on this form onto a computer. This helps us to monitor progress and produce statistics. Information provided on this form is passed to the Department for Business, Enterprise and Regulatory Reform to assist research into the use and effectiveness of employment tribunals. (URN 05/874)

Mr Peter Thomas William Still v Tesco Stores Limited & Others

Case No: 111150/2010

Grounds of Resistance

- 1 The correct name of the Respondent is Tesco Stores Limited. We also confirm that we represent all the Respondents in this matter and ask the Tribunal to remove all the parties to this claim other than Tesco Stores Limited who will be vicariously liable for any acts of its employees.
- 2 The Respondent is involved in the retail industry and operates under a number of formats including Tesco Express, Tesco Metro, Tesco Superstore and Tesco Extra. The Respondent also operates a network of Distribution Centres throughout the UK mainland.
- 3 The Claimant was employed by the Respondent from 29 November 2004 until his dismissal by reason of incapability on 13 May 2010. At the time of his dismissal, he was employed as a Warehouse Operative at the Livingston Distribution Centre.

Attendance Policy

- 4 The Respondent operates an attendance procedure which applies to all of its employees, referred to as Supporting Your Attendance ("SYA"). The aims of the SYA are:
 - (a) To encourage managers and staff to be more flexible around problems that can stop people coming to work.
 - (b) To ensure that the Respondent is fair but firm with unacceptable absence that puts pressure on everyone else.
 - (c) To ensure the Respondent recognises full attendance.
- 5 Under this policy, if an employee's absence percentage is more than 3% of contracted hours or consists of 3 absences in a rolling 26 week period then they are invited to attend a meeting to discuss their absence.
- 6 Following an attendance review meeting, there are potentially 3 outcomes:
 - (i) No further action;
 - (ii) Next steps to address the problem; or
 - (iii) Referral to a disciplinary meeting (which may lead to a warning or, depending on the stage reached under the procedure, to dismissal).
- 7 During his time working for the Respondent the Claimant has consistently had excessive time off work for various reasons such as: his wife was ill or his

children were ill. He has also been off with occasions of back trouble and with his wife was having problems with her pregnancy. Throughout the time with the Respondent the Claimant has persistently had bad attendance and has systematically gone through the 3 stages of the SYA process.

- 8 As a result of the Claimant's continued poor attendance he was invited to attend a disciplinary hearing on 30 April 2010 with Guy Henderson and the Claimant was represented by Peter Deavy and Robbie Patterson was at the meeting to take notes. During the disciplinary meeting the Claimant raised a number of issues with regards to when he worked at the old Livingston Distribution Centre and stated that reasonable adjustments had not been carried out back then.
- 9 In the disciplinary meeting the Claimant accepted that he had been put onto a night shift in January 2008 at the new Livingston Distribution Centre to accommodate his condition and that since that date he was no longer expected to comply with the demanding picking targets.
- 10 He confirmed that he got a reduced pick rate and that after seeing the Occupational Health Advisor on 20 January 2010, he got an adjustment to stay on the loading department and got a reduced pick rate. He also confirmed that he was used on loading a lot over at the new site but not at the old site. At the end of the meeting Mr Henderson confirmed that he would take away the points raised by the Claimant and the meeting would be reconvened at a date in the future.
- 11 On 13 February 2010, after having interviewed all the people concerning the issues raised in the previous meeting by the Claimant, Mr Henderson held a further meeting with the Claimant on 13 May 2010. The Claimant confirmed that he did not want a representative so would just hear the meeting in his absence. It was made abundantly clear to the Claimant that the meeting was being reconvened from 30 April 2010 and that it could still result in the Claimant's dismissal.
- 12 During the disciplinary meeting the Claimant confirmed that he may have lied about his health on the health questionnaire during his initial interview and he also confirmed that he was not currently attending physiotherapy, or seeing a doctor or a specialist and had not been taking any medication.
- 13 At the end of the meeting after giving the Claimant an opportunity to put forward his version of events Mr Henderson confirmed that he was satisfied that the company had supported him over the years in his job and based on that and the Claimant's SYA record which was presently at 54% over 23 absences for 10 different reasons, coupled to the fact that the Claimant was not taking medication and had not been referred to a specialist and was not getting physiotherapy so was not helping himself, he decided to dismiss the Claimant through the SYA process. He then read out the dismissal form and got the Claimant to sign it.
- 14 The Claimant subsequently appealed the decision to dismiss him and an appeal hearing was heard by John Clark, General Manager, on 09 June 2010. The Claimant was represented by Ian Fraser, USDAW Area Organiser. Kara Mathieson was in attendance as note taker. During the appeal the Claimant was given an opportunity to put forward his version of events as was his representative, which they took.

- 15 At the end of the meeting Mr Clark confirmed that he would go away and investigate the issues raised by the Claimant, and would reconvene the meeting on another date.
- 16 The reconvened appeal hearing was heard on 24 June 2010 again by Mr Clark and Mr Fraser attended as the Claimant's representative. In the meeting Mr Clark confirmed that he had looked at the facts again and had a discussion with Occupational Health Advisor and was happy that the Respondent had made reasonable adjustments for the Claimant. He also confirmed that he had discussed a number of other options with Jenny Thompson the Occupational Health Advisor and she confirmed that the retail roles which still involved bending and lifting would not be appropriate for the Claimant and there were no other jobs available locally.
- 17 Mr Clark went on to confirm that at the level of absence of over 50% that the Claimant had in the last few months, he was of the opinion that the reason for dismissal was fair and did not think that the Respondent could support that level of absence even having made those adjustments. Therefore, as a result, he made the decision to uphold the decision to dismiss the Claimant and offered the Claimant the right to appeal to the second stage.

Unfair Dismissal

- 18 It is denied that the Claimant was dismissed unfairly as alleged or at all. The Respondent will contend that there was a fair reason for the dismissal namely capability pursuant to Section 98(2)(a) of the Employment Rights Act 1996.
- 19 The Respondent will contend that in all the circumstances of the case (including the size and administrative resources of the Respondent's undertaking), it acted fairly and reasonably in treating the Claimant's gross misconduct as sufficient to dismiss him. In particular, the Respondent acted in accordance with a thorough and fair procedure having considered the balance between the interests of the business and the interests of the Claimant.
- 20 From the Respondent's investigation they had no other alternative but to dismiss the Claimant due to his unacceptable absence.
- 21 If, which is denied, the Claimant is found to have been unfairly dismissed, the Respondent will aver that any compensation should be reduced to nil by way of contribution.

Disability Discrimination

- 22 The Claimant's allegation that he had a disability for the purposes of the Disability Discrimination Act 1995 ("the Act") is not admitted and the Claimant is put to strict proof.
- 23 In the event that the Tribunal find that the Claimant has a disability for the purposes of the Act, the Respondent contends as follows:
- (a) The Respondent denies that it has discriminated against the Claimant for a reason, which relates to any disability. Further, if, which is denied, the

Respondent has discriminated against the Claimant on the basis of any such disability, such discrimination was justified;

- (b) Whilst not expressly pleaded by the Claimant, for the avoidance of doubt, the Respondent denies any allegation by the Claimant that it has failed to make reasonable adjustments;
 - (c) The Respondent denies any allegation by the Claimant that it has failed to make reasonable adjustments within Section 6 of the Act.
- 24 The Respondent denies that it has discriminated against the Claimant (whether directly, indirectly, by victimisation and/or harassment) contrary to the Disability Discrimination Act 1995, as alleged or at all.
- 25 The Claimant raises a number of issues which date back to 2005, 2006, 2007, and 2008. The Respondent avers that these claims are out of time and should be struck out. The Claimant is also asked to particularise his claim as the present Claim Form indicates a number of old claims but does not specify what the claimant's claim actually is.
- 26 Save as is expressly pleaded above, all other allegations are denied and the Claimant is put to strict proof.



EMPLOYMENT TRIBUNALS (SCOTLAND)

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www.employmenttribunals.gov.uk
President: Shona Simon

24 September 2010

Case Number 111150/2010

Claimant

Mr PT Still

V

Respondent

**Bruce Balberston C/o Tesco Stores
Limited
& others**

NOTICE OF HEARING – CASE MANAGEMENT DISCUSSION **Employment Tribunals Rules of Procedure 2004**

Employment Judge S Craig has ordered that there should be a Case Management Discussion.

The Case Management Discussion will be held by an Employment Judge in private at OET Scotland, 54-56 Melville Street, Edinburgh, EH3 7HF on Monday, 1 November 2010 at 10:00 am or as soon as possible after this time as the Employment Judge can hear it.

We have set aside 2 hours for the Case Management Discussion. If you feel that this is not enough time, you must inform us in writing immediately and explain why you think that more time is required.

Please let the tribunal office dealing with your case know if you, or anyone coming to the tribunal with you, has a disability which affects access to the service we provide. We will make reasonable adjustments to the way in which we deliver our service, to meet any needs identified.

A copy of the booklet 'The hearing' and expenses leaflet can be found on our website at www.employmenttribunals.gov.uk/Publications/publications.htm



EMPLOYMENT TRIBUNALS (SCOTLAND)

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www.employmenttribunals.gov.uk

President: Shona Simon

03 November 2010



Case Number 111150/2010

Claimant
Mr PT Still

V

Respondent
Tesco Distribution Centre
& others

NOTICE OF HEARING - PRE-HEARING REVIEW (PRELIMINARY ISSUE) **Employment Tribunals Rules of Procedure 2004**

1. An Employment Judge has directed that on the application of the respondent a pre-hearing review is to be held. The specific preliminary issue to be considered at the hearing is as outlined in the case management note of 1 November 2010.
2. **The pre-hearing review will be heard by an Employment Judge at OET Scotland, 54-56 Melville Street, Edinburgh, EH3 7HF on Wednesday, 12 January 2011 at 10:00 am or as soon after that time as the Employment Judge can hear it.**
3. 1 day has been set aside for the hearing of the case. If you feel that this is not enough time, please let us know us in writing within five days of the date of this letter.
4. You are responsible for making sure that any witnesses you want to call can attend the hearing and know the place, date and time of the hearing. Please note you only need to ensure that those witnesses who can give evidence relevant to the preliminary issue identified above attend on this date.
5. If you are a representative you must inform those you represent of the place, date, time and duration of the hearing.

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No. S/111150/2010 Case Management Discussion Held at Edinburgh on 1st
November 2010

Employment Judge: S A Craig

Mr P T Still

Claimant

Tesco Stores Ltd

First Respondent

Bruce Balberston

Second Respondent

John Gilcrist

Third Respondent

John Clenghan

Fourth Respondent

Guy Henderson

Fifth Respondent

NOTE FOLLOWING CASE MANAGEMENT DISCUSSION

1 A Case Management Discussion took place at which the claimant appeared in person. Mr Gibson, Advocate, appeared for all the respondents.

2 The following matters were discussed and agreed.

3 This is a claim in which the claimant argues, inter alia, that he is a disabled person within the meaning of the Disability Discrimination Act 1995 ('DDA'). The respondents do not concede that that is so and, said Mr Gibson put the claimant to his strict proof about the matter.

ETZ4(WR)

4 Following discussion I directed that there should be a Pre-Hearing Review
to determine the issue of whether or not the claimant is a disabled person
as defined. It was agreed that this will take place on 12th January 2011 and
5 a Notice of Hearing will now be issued.

5 There was discussion about the extent to which the respondents had
knowledge of the alleged disability.

10 6 The claimant explained that he had attended occupational health
examinations and that the reports had been sent to the respondents.
Further, he said, a report had been sent to them by his GP albeit that
apparently he had not had sight of that report. If that report is within his own
medical records then he should be able to access a copy via his GP without
15 the need for any directions from me.

7 I directed that the claimant is to produce copies of all and any documents
that he intended to rely upon at the PHR to prove that he is a disabled
person, including all such reports, within 14 days of the date of the CMD i.e.
20 by 15th October. These should be properly numbered and indexed with
copies sent to the respondents as well as to the Tribunal.

8 For the time being the PHR will be confined to the determination of the
question of whether or not the claimant was a disabled person. However
25 that is a matter that will be kept under review. In the pleadings the claimant
refers to incidents that took place between 2005 and 2009. Mr Gibson
sought clarification of the extent to which the claimant was relying those
incidents as acts of discrimination or whether they were pled by way of
background only.

30 9 As the claimant explained that these incidents did form part of his case and
that he was relying upon them, that raised the issue of time bar. However
rather than include that issue in the PHR at this stage I directed that the

claimant is to provide Further and Better Particulars ("FBP") in relation to each and every reasonable adjustment he claimed, with dates, and with details of the way in which the adjustment argued for would have had the effect of removing or reducing the disadvantage that resulted from the disability claimed.

5

10 Those FBP are to be produced to the Tribunal and copied to the respondent's solicitors by 30th November and a view will be taken at that stage about whether or not the PHR should be extended to cover time bar.

10

11 I was also advised that the internal appeals procedure is not yet complete albeit that the final stage appeal Hearing has been scheduled for 12th November.

15

12 The claimant explained that he had been in contact with the Equality and Human Rights Commission and had been advised to go back to them for support once the internal proceedings were completed. He intended to do so and hoped that they would represent him.

20

13 Mr Gibson sought clarification of the basis on which the claimant sought to continue with his claims against the individual respondents standing the first respondents acceptance of vicarious liability. While I attempted to explore that matter with the claimant he indicated that he wished to seek advice on the matter.

25

14 The claimant was therefore directed to provide Further and Better Particulars of the basis on which he argues that the individual respondents should remain parties to the present proceeding, and is to do so by 30th November.

30

15 The claimant asked that I note a change of address. He explained that he had recently been made homeless and would be, on a temporary basis, staying at care of 51 Marina Avenue, Boghall, Bathgate, EH48 1TF. He was

reminded that if there was any change to that address that he should advise the Tribunal immediately.

5

SACraig
Employment Judge

Date: 1st November 2010



EMPLOYMENT TRIBUNALS (SCOTLAND)

To: Mr PT Still
51 Marina Avenue
Bathgate
West Lothian
EH48 1TF

Edinburgh
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Office: 0131 226 5584
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DX ED147

e-mail: EdinburghET@ets.gsi.gov.uk
www.employmenttribunals.gov.uk

President: Shona Simon

Your Ref: 111150

16 November 2010

Case Number 111150/2010

Claimant
Mr PT Still

V

Respondent
Tesco Distribution Centre
& others

Dear Sir

CASE MANAGEMENT ORDER **Employment Tribunals Rules of Procedure 2004**

Please find enclosed copy of an Order issued by an Employment Tribunal Judge.

Yours faithfully

A Kosiorek
For the Secretary of Employment Tribunals



EMPLOYMENT TRIBUNALS (SCOTLAND)

To: Mr A Parascandolo
Hammonds LLP
2 Park Lane
Leeds
West Yorkshire
LS3 1ES

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54-56 Melville Street
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www.employmenttribunals.gov.uk

President: Shona Simon

Your Ref: 111150

09 December 2010

Case Number 111150/2010

Claimant
Mr PT Still

V

Respondent
**Tesco Distribution Centre
& others**

NOTICE OF CASE MANAGEMENT DISCUSSION (attendance required)

Employment Judge Craig has directed that a case management discussion (CMD) is to take place in the above case. The CMD will be held in private.

The CMD will take place during January 2011 / February 2011 at the Employment Tribunal office in Edinburgh. The Employment Judge has indicated that the CMD will take 1 hour. **You are required to advise this office no later than 17 December 2010 of your availability in that period between the hours of 9.30 am and 4.30 pm each day on the tear off at the bottom of this letter.** Only the parties or their representatives need attend although represented parties are welcome to attend if they wish to do so. You will be advised of the date and time of the CMD in due course.

Dates for the Hearing will be set during the course of the CMD. Parties/representatives **must** come to the CMD with up to date information on their availability, and that of their witnesses, during the period February 2011. If you fail to do so dates will be set without consulting you further.



EMPLOYMENT TRIBUNALS (SCOTLAND)

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President: Shona Simon

09 December 2010

Case Number 111150/2010

Claimant
Mr PT Still

V

Respondent
Tesco Distribution Centre
& others

POSTPONEMENT OF PRE- HEARING REVIEW Employment Tribunals Rules of Procedure 2004

On the application of the Respondent's representative to the proceedings described above, a postponement has been granted, on the grounds that the Respondent is prepare to concede that the Claimant is disabled within meaning of the Disability Discrimination Act 1995..

The hearing arranged for 12th January 2011 has therefore been cancelled.





EMPLOYMENT TRIBUNALS (SCOTLAND)

Mr PT Still
Flat 157
Blackburn Homeless Unit
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Blackburn
West Lothian
EH47 7NZ

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Tel : 0131 226 5584
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President: Colin M Milne CBE

Your Ref: 111150

01 March 2011

Case Number 111150/2010

Claimant
Mr PT Still

V

Respondent
Tesco Distribution Centre
& others

Dear Sir

NOTE FOLLOWING A CASE MANAGEMENT DISCUSSION **Employment Tribunals Rules of Procedure 2004**

Please find enclosed a copy of a note following the Case Management Discussion held on 28th February 2011.

Yours faithfully

A Kosiorek
for Secretary of the Tribunals

EMPLOYMENT TRIBUNALS (SCOTLAND)

Cases Nos. S/111150/2010 and S/100758/11 Case Management Discussion Held
at Edinburgh on 28th February 2011

Employment Judge: S A Craig

10 Case S/111150/2010

Mr P T Still

Claimant

Tesco Stores Ltd

First Respondent

Bruce Balberston

Second Respondent

John Gilcrist

Third Respondent

20 John Clenghan

Fourth Respondent

Guy Henderson

Fifth Respondent



25 Case S/100758/11

Mr P T Still

Claimant

Tesco Stores Ltd

First Respondent

30 John Clark

Second Respondent

Mark Window

Third Respondent

35 Kara Mathieson

Fourth Respondent

Ian Fraser

Fifth Respondent

40

NOTE FOLLOWING CASE MANAGEMENT DISCUSSION

45 1 The claimant has presented two claims. The first claim - S/111150/2010 – is one of unfair dismissal, disability discrimination and unpaid wages.

9 I ordered that the claimant formally confirm that withdrawal in writing within
7 days of the date of the CMD i.e. by 7th March 2011 after which the
respondents may enroll for dismissal in the usual way.

5

10 I note Mr Forsyth's position that the fifth respondent would not be seeking
expenses if the claim was withdrawn at the CMD but that such expenses
would have been sought if that claim had proceeded.

10

11 In relation to the first claim, following discussion the claimant confirmed that
he was not seeking to amend that claim to include a PID claim and was
content for the matter to proceed under the existing jurisdictions.

15

12 There then followed discussion about the issues raised in that claim, in
particular the question of whether or not aspects of the claim were time
barred.

20

13 The claimant confirmed that following his reinstatement in 2006 it was not
until March 2009 that the respondents carried out the adjustment he sought
– that of taking him off picking duties and putting him on loading duties. He
explained that he accepted – and had always accepted - that that was a
reasonable adjustment.

25

14 In December 2009 the claimant was told that he was to be reassessed by
occupational health and signed a medical consent form on 20th January
2010. He went off sick on 28th January. He did not return to any duties,
either the adjusted duty of loading or the previous duty of picking.

30

15 It was Mr McGuire's position that that did not constitute allegations of an on
going failure on the part of the respondents such as to entitle the claimant to
lead evidence about any alleged failures that occurred more than three
months prior to the presentation of the ET1. The claimant agreed that a
reasonable adjustment had been made in March 2009 and that therefore

had the effect of crystallising any complaints about failures prior to that date. Any such complaints were out of time said Mr McGuire.

5 16 Standing the claimant's acceptance that at least part of his case concerned complaints he had about the alleged failure to carry out adjustments prior to March 2009 any allegations about matters prior to that date would be out of time. An out of time claim can however be allowed to proceed under the DDA if a Tribunal is satisfied that it is just and equitable to do so.

10 17 That is an issue that can not be determined at a CMD. Given that the pre March 2009 allegations do not amount to allegations of an on going failure (the adjustment having in fact been carried out albeit as the claimant alleged some three years late) this is not a matter that should be held over for determination at a full Hearing. Instead I directed that a PHR should be
15 fixed to determine whether the Tribunal should exercise its discretion to allow that part of the claim to proceed though late. Date listing stencils will now be issued. It was agreed that the PHR should be listed for a full day.

20 18 It is likely that a further CMD will be required after the PHR to determine, amongst other matters, the precise nature of the claimant's allegations in relation to discrimination in the decision to dismiss. That can be fixed once the judgment in the PHR has been issued.

25

S A Craig
Employment Judge

Date: 28th February 2010

30

Kara Mathieson
Tesco Stores Ltd
Tesco Distribution Ltd
Carnegie Road
LIVINGSTON
West Lothian
EH54 8TB



JUDGMENT

The claim is dismissed under Rule 25(4) of the Rules contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (the Employment Tribunal Rules of Procedure 2004).

REASONS

1. The claim was withdrawn by the claimant.
2. The Secretary notified the respondents of the withdrawal.
3. The respondents applied in writing to the Employment Tribunal Office to have the claim dismissed.
4. In terms of Rule 25(4) of the Employment Tribunals Rules of Procedure 2004, the respondent's application is granted and the claim is dismissed.

Jane M Porter

Employment Judge

27/3/11

Date of Judgment

29 MAR 2011

Entered in register
and copied to parties



EMPLOYMENT TRIBUNALS (SCOTLAND)

To: Mr PT Still
Flat 173
Blackburn Homeless Unit
151 Rowan Drive
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www.employmenttribunals.gov.uk

President: Shona Simon

23 March 2011

Case Number 111150/2010

Claimant
Mr PT Still

V

Respondent
Tesco Distribution Centre
& others

NOTICE OF HEARING - PRE-HEARING REVIEW (PRELIMINARY ISSUE) Employment Tribunals Rules of Procedure 2004

1. An Employment Judge has directed that a pre-hearing review is to be held. The specific preliminary issue to be considered at the hearing is as follows:
 - a. Time bar.
2. **The pre-hearing review will be heard by an Employment Judge at OET Scotland, 54-56 Melville Street, Edinburgh, EH3 7HF on Friday, 8 April 2011 at 10:00 am** or as soon after that time as the Employment Judge can hear it.
3. 1 day has been set aside for the hearing of the case. If you feel that this is not enough time, please let us know us in writing within five days of the date of this letter.
4. You are responsible for making sure that any witnesses you want to call can attend the hearing and know the place, date and time of the hearing. Please note you only need to ensure that those witnesses who can give evidence relevant to the preliminary issue identified above attend on this date.
5. If you are a representative you must inform those you represent of the place, date, time and duration of the hearing.



EMPLOYMENT TRIBUNALS (SCOTLAND)

To: Mr PT Still
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www.employmenttribunals.gov.uk

President: Shona Simon

12 April 2011

Case Number 111150/2010

Claimant
Mr PT Still

V

Respondent
Tesco Distribution Centre
& others

Dear Sir

LISTING OF CASE FOR HEARING **Employment Tribunals Rules Of Procedure 2004**

1. It is proposed to list this case for a Hearing to deal with the case on its merits. If you are aware of any reason why such a hearing should be delayed (for example, there are criminal proceedings pending which relate to the issues raised by this case) you should notify this office of that reason in writing immediately. Otherwise, in order that a date(s) can be fixed which is convenient to both parties and their witnesses the **Employment Judge requires you to complete the attached form in full and return it to this office by 19 April 2011.**

If you are able to agree hearing dates with the other party/parties in the case, within the period specified or in the month immediately following, then please do so and notify the Tribunal office of these preferred dates. Every effort will be made to accommodate this request.

IF IT IS NOT POSSIBLE TO IDENTIFY DATES SUITABLE TO BOTH PARTIES WITHIN THE PERIOD SPECIFIED, A HEARING WILL BE FIXED IN THE PERIOD FOLLOWING IMMEDIATELY THEREAFTER WITHOUT FURTHER CONSULTATION NO FURTHER DATE LETTER WILL BE ISSUED.



EMPLOYMENT TRIBUNALS (SCOTLAND)

To: Mr PT Still
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President: Shona Simon

12 April 2011

Case Number 111150/2010

Claimant
Mr PT Still

V

Respondent
Tesco Distribution Centre
& others

Dear Sir

EMPLOYMENT TRIBUNAL JUDGMENT **Employment Tribunals Rules of Procedure 2004**

A copy of the judgment and reasons of the Employment Tribunal is enclosed

Your attention is drawn to the booklet 'The Judgment' which contains important information and can be found on our website at www.employmenttribunals.gov.uk/Publications/publications.htm.

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

Yours faithfully

A Kosiorek
For the Secretary of Employment Tribunals

ccAcas

EMPLOYMENT TRIBUNALS (SCOTLAND)

5 Case No. S/111150/2010 Pre Hearing Review Held at Edinburgh on 8th April 2011

Employment Judge: Ms S A Craig

10

Mr P T Still
Flat 173b
151 Rowan Drive
15 Blackburn Homeless Unit
Blackburn
West Lothian
EH47 7NZ

Claimant
In Person

20 Tesco Stores Ltd
Carnegie Road
Livingston
West Lothian
EH54 8TB

First Respondent
Represented by:
Mr A Parascandlo
Solicitor

25 Bruce Balberston
C/o Tesco Stores Ltd
Carnegie Road
Livingston
30 West Lothian
EH54 8TB

Second Respondent
Represented by:
Mr A Parascandlo
Solicitor

35 John Gilcrist
C/o Tesco Stores Ltd
Carnegie Road
Livingston
West Lothian
EH54 8TB

Third Respondent
Represented by:
Mr A Parascandlo
Solicitor

40 John Clenghan
C/o Tesco Stores Ltd
Carnegie Road
Livingston
West Lothian
45 EH54 8TB

Fourth Respondent
Represented by:
Mr A Parascandlo
Solicitor

Guy Henderson
C/o Tesco Stores Ltd
Carnegie Road
ETZA(WR)

Fifth Respondent
Represented by:
Mr A Parascandlo

Livingston
West Lothian
EH54 8TB

Solicitor

5

ORDER OF THE EMPLOYMENT TRIBUNAL

10

Whereas the claimant has withdrawn:

15

(First) his claim of unlawful discrimination contrary to the Disability Discrimination Act 1995 in relation to all and any matters that arose prior to March 2009; and

(Second) his claim of unauthorised deductions from wages

Orders that those claims are dismissed.

20

Orders that the matter shall proceed to a full Hearing on the merits and remedy to be confined to the claims of:

25

(First) unfair dismissal contrary to sections 94 and 98 of the Employment Rights Act 1996 in relation to the dismissal on ^{31st}~~30th~~ May 2010; and

(Second) direct discrimination contrary to section 3A(5) of the Disability Discrimination Act 1995 in relation to the dismissal on ^{31st}~~30th~~ May 2010

30

REASONS

35

1. This matter had been listed for a Pre Hearing Review to determine whether or not it was just and equitable to allow parts of the claimant's claim – which it was accepted were out of time – be allowed to proceed. That concerned allegations of disability discrimination about matters prior to March 2009, the date on which it was agreed a reasonable adjustment had been made.

2. The claimant appeared in person and the respondent was represented by Mr Parascandlo.

3. At the outset of the PHR the claimant explained that he wanted to withdraw that claim and instead proceed only with the claims of unfair dismissal and of direct disability discrimination arising out of that dismissal.

4. That being so the claim that was the subject of the PHR - of unlawful discrimination contrary to the Disability Discrimination Act 1995 in relation to all and any matters that arose prior to March 2009 - is dismissed.

5. Following further submissions the claimant also withdrew his claim of unauthorised deductions contrary to section 13 of the Employment Rights Act 1996 ("ERA"). That claim is also dismissed.

6. The claims are now confined to the following.

7. First, a claim of unfair dismissal contrary to sections 94 and 98 of ERA. The claimant challenges the fairness of the decision to dismiss him as well as the process followed by the respondent.

8. Second, the claim that the decision to dismiss was direct disability discrimination contrary to section 3A(5) of the DDA. The specific allegation is that the respondent included days when the claimant was absent from work because of his impairment. These should not have been included, submits the claimant, and had they not been he would have not have had sufficient service to trigger the respondent's absence management process to the point of dismissal.

9. It was agreed that the matter should be listed for a 4 day Hearing and date listing stencils will now be issued for June, July and August 2011.

10. The respondent will lead at the Hearing, and is likely to call four witnesses. The claimant may lead evidence from the representative who accompanied

him to the meeting that led up to, but did not include, the meeting at which he was dismissed. He is to speak to that witness shortly.

11. Witness statements are not to be used.

5

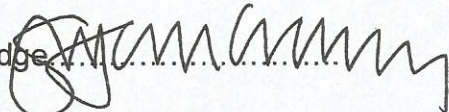
12. I directed that there should be a Joint Bundle of Documents lodged for which the respondent is ordered to take responsibility. Once the Notice of Hearing is issued the respondent will have 14 days to draft the Index for the Joint Bundle. The claimant will have a further 14 days thereafter to identify any additional documents that he wishes to found on and that are relevant to the issues to be determined at the Hearing. The Joint Bundle to be lodged with the Tribunal no later than 14 days prior to the Hearing itself.

10

13. The claimant was reminded that it falls to him to produce evidence of loss and that he has been taking steps to mitigate that loss. He is ordered to prepare a Schedule of Loss to be produced with the Tribunal (and copied to the respondent) within 14 days of the issuing of the Notice of Hearing.

15

20

Employment Judge 

Date 8th April 2011

12 APR 2011

25 Entered in Register/Copied to Parties.....



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 111150/2010
Claimant: Mr PT Still
Respondent: Tesco Distribution Centre

CERTIFICATE OF CORRECTION Employment Tribunals Rules of Procedure 2004

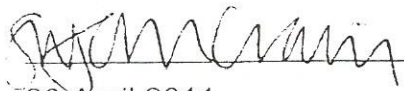
Under the provisions of Rule 37(1) of the Employment Tribunal Rules of Procedure 2004, I hereby correct the clerical mistake or error in the Order of the Employment Tribunal sent to the parties on 12 April 2011, by deleting:

"31 May 2010" and substituting therefore "13 May 2010"

An amended version of the Judgment is attached.

Important note to parties:

Any dates for the filing of appeals or reviews are not changed by this certificate of correction and amended Judgment or Order. These time limits still run from the date of the original Judgment or Order, or original Judgment with reasons when appealing.

Signed  Employment Judge of the Tribunal
Date 20 April 2011
Sent to parties 21 APR 2011



Claim



EMPLOYMENT TRIBUNALS (SCOTLAND)

To: Mr PT Still
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e-mail: EdinburghET@ets.gsi.gov.uk

President: Shona Simon

Your Ref: 111150

27 April 2011

Case Number 111150/2010

Claimant
Mr PT Still

v

Respondent
Tesco Distribution Centre
& others

Dear Sir

CHANGE OF ADDRESS FOR CORRESPONDENCE **Employment Tribunals Rules of Procedure 2004**

I refer to your email of 26 April 2011.

Your letter has been treated as a change of address for correspondence. All future communications will be addressed to you. This will also apply to letters from the other party.

Yours faithfully

A Kosiorek
For the Secretary of Employment Tribunals



EMPLOYMENT TRIBUNALS (SCOTLAND)

To: Mr PT Still
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151 Rowan Drive
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President: Shona Simon

12 April 2011

Case Number 111150/2010

Claimant
Mr PT Still

V

Respondent
Tesco Distribution Centre
& others

Dear Sir

LISTING OF CASE FOR HEARING Employment Tribunals Rules Of Procedure 2004

1. It is proposed to list this case for a Hearing to deal with the case on its merits. If you are aware of any reason why such a hearing should be delayed (for example, there are criminal proceedings pending which relate to the issues raised by this case) you should notify this office of that reason in writing immediately. Otherwise, in order that a date(s) can be fixed which is convenient to both parties and their witnesses the **Employment Judge requires you to complete the attached form in full and return it to this office by 19 April 2011.**

If you are able to agree hearing dates with the other party/parties in the case, within the period specified or in the month immediately following, then please do so and notify the Tribunal office of these preferred dates. Every effort will be made to accommodate this request.

IF IT IS NOT POSSIBLE TO IDENTIFY DATES SUITABLE TO BOTH PARTIES WITHIN THE PERIOD SPECIFIED, A HEARING WILL BE FIXED IN THE PERIOD FOLLOWING IMMEDIATELY THEREAFTER WITHOUT FURTHER CONSULTATION NO FURTHER DATE LETTER WILL BE ISSUED.

EMPLOYMENT TRIBUNALS (SCOTLAND)

5 Case No. S/111150/2010 Pre Hearing Review Held at Edinburgh on 8th April 2011

Employment Judge: Ms S A Craig

10

Mr P T Still
Flat 173b
151 Rowan Drive
15 Blackburn Homeless Unit
Blackburn
West Lothian
EH47 7NZ

Claimant
In Person

20 Tesco Stores Ltd
Carnegie Road
Livingston
West Lothian
EH54 8TB

First Respondent
Represented by:
Mr A Parascandlo
Solicitor

25

Bruce Balberston
C/o Tesco Stores Ltd
Carnegie Road
Livingston
30 West Lothian
EH54 8TB

Second Respondent
Represented by:
Mr A Parascandlo
Solicitor

35

John Gilcrist
C/o Tesco Stores Ltd
Carnegie Road
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Third Respondent
Represented by:
Mr A Parascandlo
Solicitor

40

John Clenghan
C/o Tesco Stores Ltd
Carnegie Road
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West Lothian
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Fourth Respondent
Represented by:
Mr A Parascandlo
Solicitor

45

Guy Henderson
C/o Tesco Stores Ltd
Carnegie Road
ETZA(WR)

Fifth Respondent
Represented by:
Mr A Parascandlo

Livingston
West Lothian
EH54 8TB

Solicitor

5

ORDER OF THE EMPLOYMENT TRIBUNAL

10

Whereas the claimant has withdrawn:

(First) his claim of unlawful discrimination contrary to the Disability
Discrimination Act 1995 in relation to all and any matters that arose prior to
15 March 2009; and

(Second) his claim of unauthorised deductions from wages

Orders that those claims are dismissed.

20

Orders that the matter shall proceed to a full Hearing on the merits and remedy to
be confined to the claims of:

25

(First) unfair dismissal contrary to sections 94 and 98 of the Employment
Rights Act 1996 in relation to the dismissal on ^{31st}~~30th~~ May 2010; and

(Second) direct discrimination contrary to section 3A(5) of the Disability
Discrimination Act 1995 in relation to the dismissal on ^{31st}~~30th~~ May 2010

30

REASONS

35

1. This matter had been listed for a Pre Hearing Review to determine whether
or not it was just and equitable to allow parts of the claimant's claim – which
it was accepted were out of time – be allowed to proceed. That concerned
allegations of disability discrimination about matters prior to March 2009, the
date on which it was agreed a reasonable adjustment had been made.

2. The claimant appeared in person and the respondent was represented by Mr Parascandlo.

5 3. At the outset of the PHR the claimant explained that he wanted to withdraw that claim and instead proceed only with the claims of unfair dismissal and of direct disability discrimination arising out of that dismissal.

10 4. That being so the claim that was the subject of the PHR - of unlawful discrimination contrary to the Disability Discrimination Act 1995 in relation to all and any matters that arose prior to March 2009 – is dismissed.

15 5. Following further submissions the claimant also withdrew his claim of unauthorised deductions contrary to section 13 of the Employment Rights Act 1996 ("ERA"). That claim is also dismissed.

6. The claims are now confined to the following.

20 7. First, a claim of unfair dismissal contrary to sections 94 and 98 of ERA. The claimant challenges the fairness of the decision to dismiss him as well as the process followed by the respondent.

25 8. Second, the claim that the decision to dismiss was direct disability discrimination contrary to section 3A(5) of the DDA. The specific allegation is that the respondent included days when the claimant was absent from work because of his impairment. These should not have been included, submits the claimant, and had they not been he would have not have had sufficient service to trigger the respondent's absence management process to the point of dismissal.

30 9. It was agreed that the matter should be listed for a 4 day hearing and date listing stencils will now be issued for June, July and August 2011.

10. The respondent will lead at the Hearing, and is likely to call four witnesses. The claimant may lead evidence from the representative who accompanied

him to the meeting that led up to, but did not include, the meeting at which he was dismissed. He is to speak to that witness shortly.

11. Witness statements are not to be used.

5

12. I directed that there should be a Joint Bundle of Documents lodged for which the respondent is ordered to take responsibility. Once the Notice of Hearing is issued the respondent will have 14 days to draft the Index for the Joint Bundle. The claimant will have a further 14 days thereafter to identify any additional documents that he wishes to found on and that are relevant to the issues to be determined at the Hearing. The Joint Bundle to be lodged with the Tribunal no later than 14 days prior to the Hearing itself.

10

13. The claimant was reminded that it falls to him to produce evidence of loss and that he has been taking steps to mitigate that loss. He is ordered to prepare a Schedule of Loss to be produced with the Tribunal (and copied to the respondent) within 14 days of the issuing of the Notice of Hearing.

15

20

Employment Judge 

Date... 8th April 2011

12 APR 2011

25 Entered in Register/Copied to Parties.....



EMPLOYMENT TRIBUNALS (SCOTLAND)

To: Mr PT Still
113 Glebe Road
Whitburn
West Lothian
EH47 0AX

Edinburgh
54-56 Melville Street
Edinburgh
EH3 7HF

Office: 0131 226 5584

Fax: 0131 220 6847

DX ED147

e-mail: EdinburghET@ets.gsi.gov.uk
www.employmenttribunals.gov.uk

President: Shona Simon

Your Ref: 111150

27 April 2011

Case Number 111150/2010

Claimant
Mr PT Still

V

Respondent
Tesco Distribution Centre
& others

Dear Sir

I refer to the above proceedings.

I have been instructed by Employment Judge Craig to write to you and advise that a 4 day hearing will be listed. In the event that the matter concludes in less than 4 days your comment will be taken into account in relation to any issue of cost that might arise.

Yours faithfully

A Kosiorek
For the Secretary of Employment Tribunals





EMPLOYMENT TRIBUNALS (SCOTLAND)

To: Mr PT Still
113 Glebe Road
Whitburn
West Lothian
EH47 0AX

Edinburgh
54-56 Melville Street
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EH3 7HF

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e-mail: EdinburghET@ets.gsi.gov.uk
www.employmenttribunals.gov.uk
President : Shona Simon

17 May 2011

Case Number: 111150/2010

Claimant

Mr PT Still

v

Respondent

Tesco Distribution Centre
& others

NOTICE OF HEARING Employment Tribunals Rules of Procedure 2004

1. The claim will be heard by an Employment Tribunal at **OET Scotland, 54-56 Melville Street, Edinburgh, EH3 7HF** on **Tuesday, 14 June 2011, Wednesday, 15 June 2011, Thursday, 16 June 2011, Friday, 17 June 2011** at **10:00 am** or as soon thereafter on that day as the Tribunal can hear it.
2. We have set aside 4 days for its full disposal, including remedy if appropriate. If you consider that the hearing is likely to last more than 4 days you must inform the tribunal office within 7 days, telling us how long you think will be required.
3. You are responsible for making sure that all the witnesses you want to call can attend the hearing and know the place, date and time of the hearing.
4. Unless there are wholly exceptional circumstances, no application for postponement due to non-availability of witnesses or for other reasons will be granted. If you do apply for a postponement you must do so in writing and state the full grounds and any other dates when you are unavailable in the six weeks following the above hearing date for hearings of up to one day. For hearings of two days or more, please provide unavailable dates for the three months following the above hearing dates. If at all possible parties should seek to agree dates for the re-listing of the case and advise the Tribunal as soon as possible of those dates. Every effort will be made to accommodate the request.

Parascandolo, Andrew

From: Parascandolo, Andrew
Sent: 18 May 2011 11:11
To: edinburghet@ets.gsi.gov.uk
Cc: peter still; Parascandolo, Andrew
Subject: Still v Tesco Stores Limited (Case Number 111150/2010)

PLEASE PUT BEFORE AN EMPLOYMENT JUDGE AS A MATTER OF URGENCY

Dear Sirs,

It is with some regret that we are forced to write to you regarding the Claimant's conduct. Despite informing the Claimant on many occasions that we are instructed on behalf of Tesco and that all correspondence must be sent to us at Squire Sanders Hammonds, the Claimant is refusing to cooperate and is continually sending correspondence directly to Tesco.

The Tribunal will see below that Mr Still has contacted Jennifer Barker, the Respondent's Protector Line and the Respondent's Legal services about this matter and the Tribunal will see that Mr Still refuses to have anymore contact with me. In fact Mr Still confirms in one email below that he has informed the Tribunal that he refuses to have any contact with me.

You will see that in his email to Angela Travers, Mr Still alleges that Tesco are paying Squire Sanders Hammonds to try and conceal their unlawful acts. We take an allegation of this nature very seriously and respectfully ask the Tribunal to inform the Claimant to refrain from making such ridiculous and unfounded allegations and to concentrate on preparing for his case which has today been listed for 14th - 17th June 2011.

We also respectfully ask the Tribunal to tell the Claimant to refrain from contacting the Respondent's directly and to ensure that all future correspondence is sent to me only. The Claimant's continual emails to the Respondents is unnecessarily increasing the Respondent's costs as all emails are ultimately sent to me to consider.

The Respondent have instructed us to deal with this matter and all correspondence must be sent to us.

We note from the emails below that Mr Still is considering applying for witness orders for JOHN CLARKE, KARA MATHIESON, JENNIFER BARKER, MARK WINDOW and JENNY THOMSON Occupational Health Officer. However we informed the Tribunal and the Claimant at the Pre Hearing Review and in our subsequent listing stencil that we intend to call all these witness except Jennifer Barker and Jenny Thompson who played no part in the Claimant's dismissal and would not be able to assist the Tribunal in making a decision on this matter.

We are also concerned that Messrs Balberston, Gilchrist and Clenghan are still named parties in this matter, given that they were not involved in the dismissal but were allegedly involved in disability discrimination against the Claimant prior to 2009, which does not form part of this case. Therefore, we ask that these parties be removed from these proceedings.

As the Respondent will be vacariously liable for Mr Henderson in any event, we invite the Tribunal to removed from these proceedings also.

The Tribunal will see from the Claimant's emails that he still insists about referring to events that happened prior to 2009 despite having been told by the Tribunal that the only claims that remain are one of Unfair Dismissal and the other of direct disability discrimination the incident being that the respondent should not have included impairment related absences.

The Tribunal's directions of 12th April 2011 state that the parties will have 28 days in which to prepare the bundle. This is no longer possible given the proximity to the hearing. Whilst we will use all best endeavours to forward the bundle to the Claimant today there can be no guarantees that the Claimant will return the index promptly so no guarantees that the parties will be ready for a hearing on 14th June 2011.

We have complied with rule 11(4) when making this application and look forward to hearing from you as a matter of urgency

Regards

Andrew Parascandolo
Associate
andrew.parascandolo@ssd.com

ir +44 (0)113 284 7568
ax: +44 (0)113.284.7001
ersonal Fax: +44 (0)870 460 2864

quire, Sanders & Dempsey (UK) LLP
Park Lane
eeds
.S3 1ES
ngland

Ranked number one national firm in UK Legal Week's 2010 Client Satisfaction Report of Best Legal Advisers

**Squire Sanders Hammonds | Legal Counsel Worldwide
36 Offices in 16 Countries**

www.ssd.com

From: peter still [<mailto:peterstill1969@hotmail.co.uk>]
Sent: 16 May 2011 18:44
To: Travers, Angela
Subject: RE: Undeliverable: WITNESS REQUEST TO ATTEND TRIBUNAL HEARING , PETER STILL V TESCO STORES LT =4 OTHERS CASE 111150/2010, BY CLAIMANT

i will have no more contact with andrew parascandolo about this case , i will be sending these dpcuments to tesco head office , tommorow along with the replys i have receivred from you and highlight your living the values , especially the conceal of any kind of acts of discrimination especially when when the companys not had inveatagefated it through there own policy or procedure this is something that will be ,made public , i will contact your media press office by phone and tell them i am sending this to them recorded delivery , i dont think the no longer an employee part will wash with those higher up the chain of command within tesco , as ive stated everything the company stands for regarding there values is been made a mockery of to cover for those named , especially to pay legal team to try to conceal there unlawful acts its sad that you continue to carry on the cover up for these people regards peter still

From: peter still [<mailto:peterstill1969@hotmail.co.uk>]
Sent: 14 May 2011 20:38
To: Line, Protector
Subject: FW: Undeliverable: WITNESS REQUEST TO ATTEND TRIBUNAL HEARING , PETER STILL V TESCO STORES LT =4 OTHERS CASE 111150/2010, BY CLAIMANT

From: peter still [<mailto:peterstill1969@hotmail.co.uk>]
Sent: 03 May 2011 13:28
To: LegalServices
Subject: LISTED 4 DAY EMPLOYMENT TRIBUNAL HEARING , MY CLAIM AGAINST TESCO STORES LTD , AND 4 MANAGERS AS RESPONDENTS DIRECT DISABILITY DISCRIMINATION ;

i have a claim that has been listed for a full hearing in the employment tribunal in edinburgh , scotland , in may 2010 i was dismissed for a third time while being employed as a warehouse operative at tesco distribution centres in livingston , my claim is against tesco stores ltd , shift manager JOHN GILCRIEST , JOHN CLENGHAN AND GUY HENDERSON also a team manager BRUCE BALBERSTON all are named as respondents along with the company , my claim was accepted 09/08/2010 in relation to disability discrimination contrary to DDA95, all named respondents have the same legal

representation , MR ANDREW PARASCANDOLO , ASSOCIATE SQUIRE SANDERS , 2 PARK LANE ,
LEWIS , i have had only advice and guidance and have had to represent myself and
continue to do so , i have informed the tribunal i am not willing to have any kind of
correspondence with mr parascandolo , unless through tribunal before hand , i have
written request for higher level of management that were involved in the companys
internal appeal procedures stages one and two , who are not being called by mr
parascandolo only those 4 named as respondents , ive contacted tribunal and informed
to send a written request for them to attend if they are not willing then i will ask
for the tribunal to consider a order for them to attend the hearing , the management i
will be requesting to attend are stage one appeal GENERAL MANAGER LIVINGSTON DC , JOHN
CLARKE, ALSO HEAD OF PERSONNEL KARA MATHIESON , stage two appeal , REGIONAL PERSONNEL
MANAGER , DISTRIBUTION JENNIFER BARKER , ALSO GENERAL MANAGER MARK WINDOW , and tesco
regional occupational health advisor JENNY THOMSON , i would be much obliged if you
could send an email with a postal address to send these requests for the 5 named to
attend , i will send this by recorded delivery to that address , my claim number is
111150/2010 PETER STILL V TESCO STORES LTD AND 4 OTHERS , the hearings listed for 4
days in june, july or august 2011, in edinburgh employment tribunal, all the evidence
in relation to these claims is factual evidence from subject access request of my
personnel file held by tesco stores ltd , i have followed what action to take in
relation to companys CODE OF BUISNESS CONDUCT with the same result no action at all
ive lost my job 3 times in total also family seperation from my partner who i have 2
young daughters finacal debt that in october 2010 resulted in repossession of my home
by morgage lender and homeless until this 19/04/2011 where just accepted an offer of
housing by local council , my treatment by two of named respondents after returning
then overturning of 1st dismissal which they were involved in , which continued from
2006 until my dismissal may 2010 , both aware that i had health issues disability as
this was reason regional personnel manager at that time JOANNE RATCLIFFE overturned
dismissal in february 2006 no attempt has ever been made to contact her in relation to
these matters , my contact details are email peterstill1969@hotmail.co.uk and my
mobile number is 07836344848 to call if there is any issues or information regarding
this , kind regards peter still

Peter

I acknowledge receipt of your email and would be obliged if you would conduct any
further communication through Andrew Parascandolo at Hammonds.

Kind regards

Jennifer

From: peter still [peterstill1969@hotmail.co.uk]
Sent: 04 May 2011 07:34
To: Barker, Jennifer
Subject: REQUEST TO ATTEND TRIBUNAL HEARING /

dear jennifer , as already stated i will have no dealings in any form in relation to
my tribunal hearing , i contacted the tribunal last week concerning this and it was
the what i was told i could do this , as i have 5 written requests for 4 managenent
involved in stage one and two appeal hearings and jenny thomson companys occupational
health advisor as the other witness , i have no intention what so ever to consider
settlement , i would be obliged if you would let your legal representative aware of
this much obliged peter still



FOR INFO

EMPLOYMENT TRIBUNALS (SCOTLAND)

To: Mr A Parascandalo
Squire Sanders & Dempsey
(UK) LLP
2 Park Lane
Leeds
LS3 1ES

Edinburgh
54-56 Melville Street
Edinburgh
EH3 7HF

Office: 0131 226 5584
Fax: 0131 220 6847
DX ED147

e-mail: EdinburghET@ets.gsi.gov.uk
www.employmenttribunals.gov.uk

President: Shona Simon

Your Ref: 111150

20 May 2011



Case Number 111150/2010

Claimant
Mr PT Still

V

Respondent
Tesco Distribution Centre
& others

Dear Sir

I refer to the above proceedings.

I have been instructed by Employment Judge Craig to write to you and inform that if you seek dismissal of claims against any Respondents then you must make a proper application accordance with the Rules.

In the meantime you should produce your own bundle in the absence of a joint Bundle.

Yours faithfully

A Kosiorek
For the Secretary of Employment Tribunals



EMPLOYMENT TRIBUNALS (SCOTLAND)

To: Mr PT Still
113 Glebe Road
Whitburn
West Lothian
EH47 0AX

Edinburgh
54-56 Melville Street
Edinburgh
EH3 7HF

Office: 0131 226 5584

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e-mail: EdinburghET@ets.gsi.gov.uk
www.employmenttribunals.gov.uk



President: Shona Simon

Your Ref: 111150

20 May 2011

Case Number 111150/2010

Claimant
Mr PT Still

V

Respondent
Tesco Distribution Centre
& others

Dear Sir

I refer to the above proceedings and your email dated 18 May 2011.

I have been instructed by Employment Judge Craig to write to you and inform that the respondent is legally represented. All correspondence in which the Claimant has concerning his claim should be send to the solicitor not to the respondent direct. It is a matter for the Respondents to choose who is to represent them. They have chosen this representative so the Claimant must now refrain from contacting the Respondent direct.

The Employment Judge has already issued directions requiring that the parties cooperate in the production of a joint bundle. Failure to comply with those directions could lead to sanctions being imposed.

Yours faithfully

A Kosiorek
For the Secretary of Employment Tribunals



EMPLOYMENT TRIBUNALS (SCOTLAND)

To: Mr PT Still
113 Glebe Road
Whitburn
West Lothian
EH47 0AX

Edinburgh
54-56 Melville Street
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www.employmenttribunals.gov.uk

President: Shona Simon

17 June 2011

Case Number 100758/2011

Claimant
Mr PT Still

V

Respondent
Tesco Stores Ltd
& others

Dear Sir

EMPLOYMENT TRIBUNAL JUDGMENT **Employment Tribunals Rules of Procedure 2004**

A copy of the judgment and reasons of the Employment Tribunal is enclosed

Your attention is drawn to the booklet 'The Judgment' which contains important information and can be found on our website at www.employmenttribunals.gov.uk/Publications/publications.htm.

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim

Yours faithfully

R WALKER
For the Secretary of Employment Tribunals

West Lothian
EH54 8TB

5

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

10 The unanimous judgment of the Employment Tribunal is:

(First) that the claims against the second, third, fourth and fifth respondent having been withdrawn by the claimant, the claims against them are dismissed;

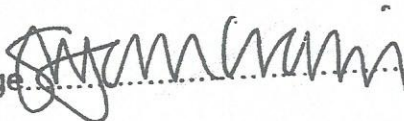
15 (Second) that the claim of unfair dismissal against the first respondent fails, and is dismissed; and

(Third) that the claim of disability discrimination against the first respondent fails, and is dismissed.

20

Oral reasons for that judgment were delivered to parties at the Hearing.

Employment Judge.....



25

Date.....

17 June 2011

30

Entered in Register/Copied to Parties.....

17 JUN 2011

The Chairman,
Employment Tribunals (Scotland),
DX ED147,
EDINBURGH

Please quote this reference

RMP/FRASER/F11G0270

24 March 2011

Dear Sirs

**MR PT STILL -V- IAN FRASER AND OTHERS
APPLICATION TO DISMISS THE CLAIM
CLAIM NUMBER: 100758/2010**

We write with reference to the above matter in which we are instructed by Mr Ian Fraser. Following notification that the Claimant has decided to withdraw his claim, the Respondent makes an application under Rule 25 4 to have the proceedings against him dismissed.

We would be grateful if you could provide me with confirm when a decision as to dismissal has been made. In compliance with Rule 11 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, a copy of this correspondence has been sent to the Claimant's representative together with notification of any objection to this application must be sent to the Tribunal office within 7 days of receipt of the application and copied to ourselves. It is therefore confirmed that Rule 11 has been complied with.

Yours faithfully

David Martyn
THOMPSONS
DAM/DMM

Cc Mr PT Still, Flat 173b Blackburn Homeless Unit, 151 Rowan Drive, Blackburn, West Lothian, EH47 7NZ

IN THE EDINBURGH EMPLOYMENT TRIBUNAL

5/11/10/2010

BETWEEN

9/08/2010

Mr Peter Thomas William Still

Claimant

AND

Tesco Stores Limited

+ 4 OTHERS

Respondent s

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↙

⑩ ARLM

⑪ ARLM

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45	Handwritten notes of grievance meeting with Claimant	23/03/10	249-250
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ALM (13)
ALM (14)

ARMIS notes
ALM (15)

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110	Justification to send to dismissing officer	22/01/10	441

Stage 2 Appeal

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—
—

Ian Fraser
USDAW
342 Albert Drive
5 Glasgow
G41 5PG

Fifth Respondent

10 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The claim against the fifth respondent is dismissed under Rule 25(4) of the
15 Employment Tribunal Rules of Procedure 2004.

✓
REASONS

- 20 1. The claimant withdrew his claims against all respondents.
- 2. The Secretary notified the respondents of that withdrawal and applications were made in writing for dismissal of those claims.
- 25 3. By judgment dated 28 and promulgated on 29 March 2011 the claims against the first to fourth respondents was dismissed but, as a result of an administrative oversight, the fifth respondent was not included in that judgment but ought to have been.
- 30 4. The claim against the fifth respondent is dismissed.

Employment Judge.....

35 Date.....17 June 2011.....

17 JUN 2011

Entered in Register/Copied to Parties.....

S/111150/10 Oral Judgment

- 2 -

West Lothian
EH54 8TB

5

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

10

The unanimous judgment of the Employment Tribunal is:

(First) that the claims against the second, third, fourth and fifth respondent having been withdrawn by the claimant, the claims against them are dismissed;

15 (Second) that the claim of unfair dismissal against the first respondent fails, and is dismissed; and

(Third) that the claim of disability discrimination against the first respondent fails, and is dismissed.

20 Oral reasons for that judgment were delivered to parties at the Hearing.

Employment Judge: 

Date: 17th June 2011

17 JUN 2011

30 Entered in Register/Copied to Parties.....

F646/187

EMPLOYMENT TRIBUNALS (SCOTLAND)

5 Case No: S/111150/10 Held in Edinburgh on 14, 15, 16 & 17 June 2011

Employment Judge S Craig
Members K Cowan
J Terry

10 Mr P T Still
113 Glebe Road
Whitburn
EH47 0AY
15
Tesco Stores Ltd
Tesco Distribution Centre
Carnegie Road
Livingstone
West Lothian
EH54 8TB

Claimant
In Person

20
25
30
35
First Respondent
Represented by:
Mr K McGuire
Advocate

25 Bruce Balberston
C/o Tesco Distribution Centre
Carnegie Road
Livingstone
West Lothian
EH54 8TB

Second Respondent

30 John Gilcrist
C/o Tesco Distribution Centre
Carnegie Road
Livingstone
West Lothian
EH54 8TB

Third Respondent

35
EH54 8TB

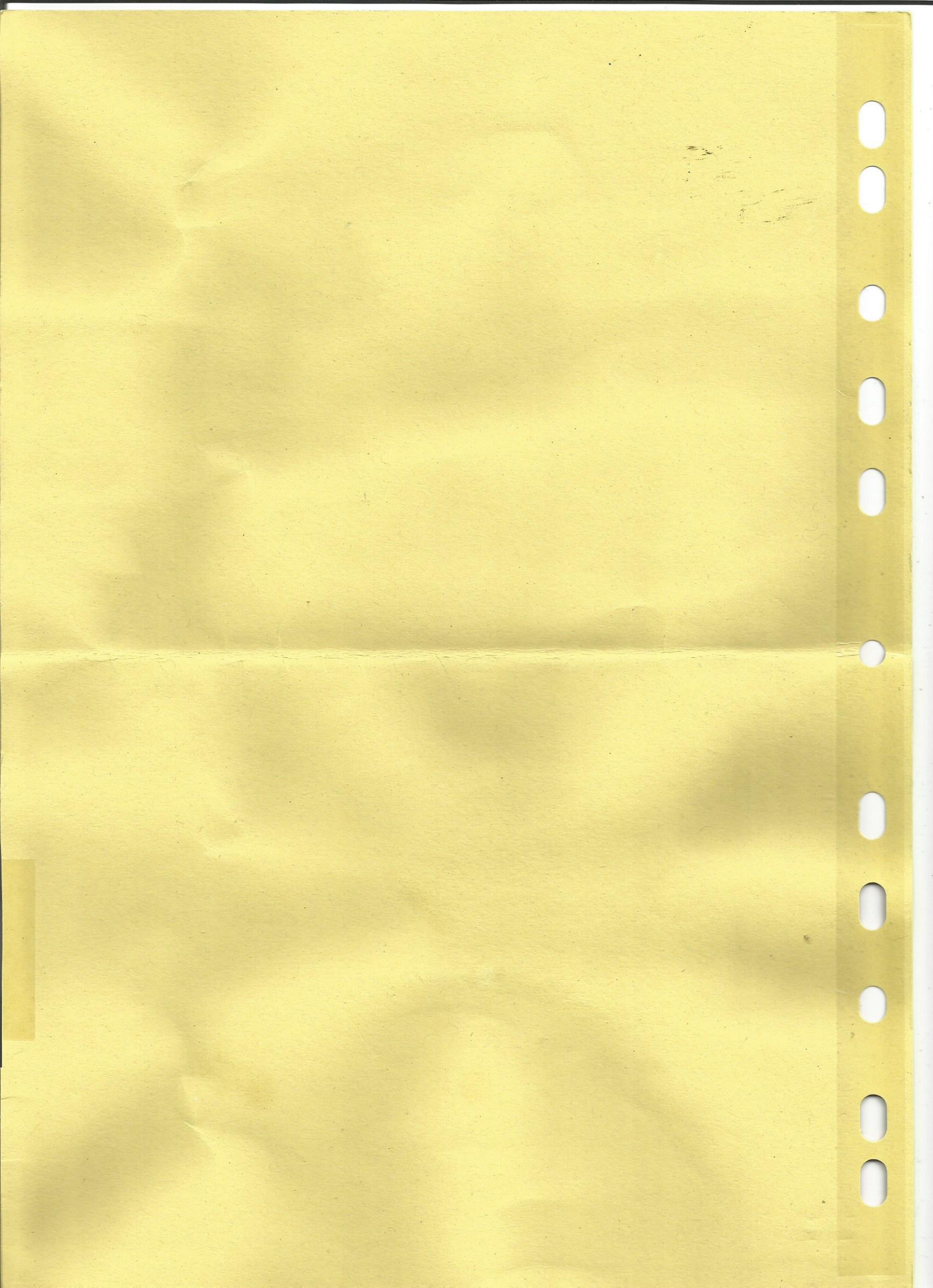
Fourth Respondent

40 John Clenghan
C/o Tesco Distribution Centre
Carnegie Road
Livingstone
West Lothian
EH54 8TB

45

Guy Henderson
C/o Tesco Distribution Centre
Carnegie Road
Livingstone
BT24(WR)

Fifth Respondent



02020 (H)

LONDON BOROUGH OF LEWISHAM (appellant) v. MALCOLM (respondent) and EQUALITY AND HUMAN RIGHTS COMMISSION (intervener)

[2008] UKHL 43

- 1800 Disability discrimination
- 1811.1 Disability-related discrimination – reason related to disability
- 1811.2 Disability-related discrimination – others to whom reason does not apply
- 1855 Discrimination by others than employers – providers of goods, facilities, services or premises

Disability Discrimination Act 1995: ss.22, 24

The facts:

Courtney Malcolm suffered from schizophrenia. His condition was controlled through medication. He rented a flat from the London Borough of Lewisham on a secure tenancy. He sublet his flat on an assured shorthold tenancy for a period of six months. That was a breach of the express terms of his tenancy agreement, which provided that subletting had the automatic effect that the tenancy was no longer a secure tenancy and could never subsequently become one. At the time that he had sublet the flat, Mr Malcolm had stopped taking his medication.

When the council discovered that Mr Malcolm had sublet the flat, it gave him notice to quit. At that time, the council was unaware that Mr Malcolm suffered from schizophrenia. When he did not vacate the flat, the council commenced possession proceedings in the county court. By that time, the council had been informed of his mental health problems.

In his defence to the possession proceedings, Mr Malcolm argued that the council's attempt to gain possession of the flat constituted unlawful disability discrimination contrary to s.22 of the Disability Discrimination Act 1995. He contended that he suffered from a disability for the purposes of the Act; that the reason why the council was seeking possession was because of his disability; and that unless the council could show justification the court was precluded from making a possession order against him. He claimed that he had only sublet the flat because he had not been taking his medication at the time, and this had led to his irresponsible behaviour. The judge in the county court rejected the complaint of disability discrimination and granted the possession order. The Court of Appeal reversed that decision. The council appealed to the House of Lords. The Equality and Human Rights Commission took part in the proceedings as intervener.

Two issues, amongst others, fell to be determined. Firstly, the correct comparators for the purposes of s.24(1) of the Act fell to be identified. There were three options: (a) secure tenants of the council without a mental disability who had sublet; (b) secure tenants of the council who had not sublet; and (c) some other unspecified comparator group. According to the Court of Appeal in *Clark v Novacold Ltd* the correct comparator was (b), but the council submitted that that case was wrongly decided and that the correct comparator was (a). On that basis, Mr Malcolm's discrimination claim would fail, since it was not disputed that the council would have issued a notice to quit and pursued possession proceedings against any secure tenant without a mental disability who had sublet his flat.

Secondly, it fell to be determined whether knowledge of the disability on the part of the discriminator at the time of the alleged discriminatory act was necessary in order to establish that the "reason" for the treatment related to the disability for the purposes of s.24(1). The council argued that it was necessary that the discriminator knew or ought to have known of the disability at the time of the alleged discriminatory act in order to satisfy s.24(1) and establish unlawful discrimination.

Although the issues related to disability discrimination in the field of housing, it was common ground that the same approach would apply to disability discrimination in the employment field.

Section 22 of the Act, so far as material, provides:
“(3) It is unlawful for a person managing any premises to discriminate against a disabled person occupying those premises (a) in the way he permits the disabled person to make use of benefits or facilities; (b) by refusing or deliberately omitting to permit the disabled person to make use of any benefits or facilities; or (c) by evicting the disabled person, or subjecting him to any other detriment.”

Section 24 of the Act, so far as material, provides:
“(1) ... a person ('A') discriminates against a disabled person – (a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply ...”

The House of Lords (Lord Bingham of Cornhill, Lord Scott of Foscote, Baroness Hale of Richmond (dissenting in part as to the reasoning), Lord Brown of Eaton-under-Heywood and Lord Neuberger of Abbotsbury) 25 June 2008 allowed the appeal and restored the decision of the judge in the county court.

The House of Lords held:
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The Court of Appeal had erred in holding that the council's conduct in seeking possession of the flat constituted unlawful disability discrimination.

(1) The correct comparator for the purposes of s.24(1)(a) is a secure tenant of the council with a mental disability who has sublet his property, a not a secure tenant who has not sublet his property. In that regard, the Court of Appeal decision *Clark v Novacold Ltd* was wrongly decided.

There is no point in asking whether a person has been treated "less favourably than others" if the reason why the disabled person was subjected to the allegedly less favourable treatment cannot apply to those "others". If a person has been dismissed because he is incapable of doing his job, there is no point in making the lawfulness of his dismissal depend on whether those who are capable of doing their job would have been dismissed. If a person has been dismissed because he will be absent from work for a year, there is no point in making the lawfulness of his dismissal depend on whether those who will not be absent from work will be dismissed. If a tenant has been given notice terminating his tenancy because he has sublet in breach of the tenancy agreement, there is no point in making the lawfulness of the action taken by the landlord dependant on whether notice to quit would have been served on tenants who had not sublet. Parliament must surely have intended a meaningful comparison in order to distinguish between treatment that was discriminatory and treatment that was not.

(2) In order for the alleged discriminator's "reason" to "relate to" the disability for the purposes of s.24(1)(a), it is necessary that the discriminator knows of, or ought to know of, the disability, at the time of the alleged discriminatory act. Unless the discriminator has knowledge or imputed knowledge of the disability, he cannot be guilty of unlawful discrimination under the Act.

That interpretation is supported by the fact that s.25(1) provides that a claim based on unlawful disability discrimination may be made the subject of civil proceedings in the same way as any other claim in tort, damages being recoverable. This points towards a requirement of knowledge. Moreover, the grounds of justification specified in s.24 of the Act assume that the discriminator has knowledge of the disability. It would be anomalous if a discriminator needs to know of the disability if



EMPLOYMENT TRIBUNALS (SCOTLAND)

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President: Shona Simon

22 July 2011

Case Number 111150/2010

Claimant
Mr PT Still

V

Respondent
Tesco Distribution Centre
& others

Dear Sir

REASONS FOR JUDGMENT OF EMPLOYMENT TRIBUNAL **Employment Tribunals Rules of Procedure 2004**

A copy of the employment tribunal's reasons is enclosed.

Yours faithfully

A Kosiorek
For the Secretary of Employment Tribunals

cc Acas

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/111150/10 Held in Edinburgh on 14, 15, 16 & 17 June 2011

5

Employment Judge S Craig
Members K Cowan
J Terry

10

Mr P T Still
113 Glebe Road
Whitburn
EH47 0AY

Claimant
In Person

15

Tesco Stores Ltd
Tesco Distribution Centre
Carnegie Road
Livingstone
West Lothian
EH54 8TB

First Respondent
Represented by:
Mr K McGuire
Advocate

20

Bruce Balberston
C/o Tesco Distribution Centre
Carnegie Road
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EH54 8TB

Second Respondent

25

John Gilcrist
C/o Tesco Distribution Centre
Carnegie Road
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Third Respondent

35

John Clenghan
C/o Tesco Distribution Centre
Carnegie Road
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Fourth Respondent

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Guy Henderson
C/o Tesco Distribution Centre
Carnegie Road
Livingstone
West Lothian
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Fifth Respondent

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REASONS

Introduction

5

1. On 17 June 2011 a judgment was promulgated in the following terms:

"The unanimous judgment of the Employment Tribunal is:

10

(First) that the claims against the second, third, fourth and fifth respondent having been withdrawn by the claimant, the claims against them are dismissed;

15

(Second) that the claim of unfair dismissal against the first respondent fails, and is dismissed; and

(Third) that the claim of disability discrimination against the first respondent fails, and is dismissed.

20

Oral reasons for that judgment were delivered to parties at the Hearing."

2. On 23 June 2011 the claimant made a request for those reasons be issued in writing. These are those reasons.

25

The claims

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3. This is a claim of unfair dismissal in terms of section 98 of the Employment Rights Act 1996 ("ERA") and of direct disability discrimination contrary to section 3A(5) of the Disability Discrimination Act 1995 ("DDA").

4. There had initially been a claim for unpaid wages but the sums sought had been paid well in advance of the Hearing so that claim had been withdrawn.

35

5. The claim was brought against the first respondent, the claimant's employer, and also against a number of individuals, all employees of the first respondent.
- 5 6. At the outset of the Hearing the claimant withdrew his claims against the individual respondents and the claims against them were dismissed. Hereafter the first respondent is referred to as "the respondent".

The issues

- 10 7. It was a matter of agreement that the claimant was dismissed, and that the reason for dismissal was capability – the claimant had been absent from work on a number of occasions and was, for the third time, on the third stage of the respondent's absence management procedure.
- 15 8. There was no substantial challenge to that procedure; the challenge was to whether it was fair to dismiss the claimant given the reasons for his absences, a substantial number of which were related to his back condition – spondulitis.
- 20 9. By the time of the Hearing it was also not in dispute that the claimant was a disabled person within the meaning of the DDA albeit that it was a source of some frustration to the claimant - perhaps understandably given the extensive medical information available to the respondent - that that concession was not made at an earlier stage.
- 25 10. The issues for determination by the Tribunal were whether or not the dismissal was fair or unfair and, if that dismissal was on the ground of his disability, whether the claimant was treated less favourably than a person not having that particular disability but whose relevant circumstances were
- 30 the same as, or not materially different from, his?

The evidence

11. The Tribunal heard evidence from a number of witnesses:

- The claimant
- 5 • Guy Henderson, who took the decision to dismiss
- John Clarke, who heard the first stage appeal
- 10 • Mark Window, who heard the second stage appeal
- Kara Mathieson, the Human Resources Manager who advised Mr
 Clarke at the first stage of the appeal

12. The Tribunal was referred to a Joint Bundle of Documents to which various
15 documents were added in the course of the Hearing.

13. There was very little factual dispute between the parties. The Tribunal
found all of the witnesses to be honest, truthful and reliable albeit that it
had some reservations about the approach adopted by Mr Henderson, for
20 reasons explained hereunder.

14. Based on the evidence which it heard and the documents to which it was
referred the Tribunal found the following to be the facts material to the
issues before it which were either established or agreed.

25 Material facts

15. The claimant was first employed by the respondent on 29 November 2004.
Earlier in his employment the claimant had been dismissed but then
30 reinstated on appeal.

16. The effective date of termination of employment was 13 May 2010.

17. The claimant was paid five weeks pay in lieu of notice.
18. The claimant was dismissed for reason of his capability.
- 5 19. The claimant was a disabled person throughout his employment with the respondent.
20. The claimant had spondulitis.
- 10 21. The respondent operates an absence management procedure which is triggered where an employee is absent for more than 3% of contracted hours in a rolling period of 26 weeks or, alternatively, has three separate periods of absence in that rolling period.
- 15 22. There are three stages within the procedure. An employee may move up or down the stages depending on whether their level of absence increases or decreases. Each stage lasts 26 weeks from the date of the trigger absence.
- 20 23. The terms of the respondent's procedure make it clear that should an employee reach Stage 3 a single further absence within the period of 26 weeks of the Stage 3 is likely to result in dismissal.
- 25 24. Where an employee on Stage 3 has a further absence that employee's line manager may refer the employee to human relations. They will consider the referral and, if appropriate, will then refer the employee to managers specifically appointed to consider whether or not such employees should be dismissed. Those managers are known as "the dismissing officer".
- 30 25. Essentially the terms of the respondent's procedure give a dismissing officer only two options – dismiss or not dismiss. There is very little room for manoeuvre within those two options.

26. Guy Henderson was a dismissing officer within the warehouse where the claimant was employed.

5 27. An employee that has been through the procedure on two separate occasions which escalated as far as Stage 3 on both occasions who then has a third occasion of absence is automatically fast tracked to Stage 3, skipping Stages 1 and 2.

10 28. An employee placed on any Stage has the right to appeal that decision.

15 29. Over the course of his employment the claimant had a number of periods of absence for a variety of reasons, some, though not all, related to his spondulitis. He had been subject to the absence procedure on a number of occasions, and had twice reached Stage 3. On both occasions there was no further absence during the currency of the Stage 3.

30. The claimant had not appealed any of the decisions to place him on any of the stages of the procedure.

20 31. On 23 September 2009 the claimant returned to work following a 34 day period of absence for anxiety and stress.

32. There was no suggestion that that was not a genuine absence.

25 33. That absence triggered a fast track onto Stage 3.

34. There were four further periods of absence during that Stage 3.

30 35. The respondent did not take any action in relation to one of those absences – which was for two days - and were satisfied with the explanation given by the claimant.

36. The other three absences totalled 55 days between 20 January and 22 April 2010.

5 37. The respondent took action in relation to those absences, and the matter was referred to Guy Henderson.

38. Correspondence was sent to the claimant inviting him to attend a meeting with Mr Henderson. That explained the reason for the meeting, and that it might result in dismissal.

10 39. The claimant was given, but declined, the opportunity to be accompanied to the meeting.

40. The meeting with Mr Henderson took place over two separate days.

15 41. The claimant was given ample opportunity to explain the reason for his absences. He focused instead only on issues that had arisen several years previously, relating to the earlier dismissal and appeal, and which had culminated in an adjustment being carried out to his working practices in
20 early 2009. Those issues were unconnected with the absences that caused the claimant to be placed on the Stage 3 in late 2009.

42. The claimant did not suggest to Mr Henderson that he was a disabled person.

25 43. The claimant did not suggest that he had not been off nor did he challenge the procedure leading up to and including the meeting with Mr Henderson.

30 44. Mr Henderson decided to dismiss the claimant. That was a decision that was open to him in terms of the procedure because of the level of the claimant's absences.

45. Mr Henderson did not know that the claimant was a disabled person.

46. The claimant appealed - unsuccessfully - through the respondent's two stages of the appeal.

5 47. The claimant applied for and received State Benefits throughout the majority of the time following his dismissal, albeit that he encountered a problem in relation to one signing on period which is in the process of being appealed.

10 48. The claimant is now being medically examined to assess his fitness for work.

49. The claimant has taken reasonable steps to mitigate his losses.

Submissions

15 50. It was the claimant's submission that the respondent knew full well that he was covered by the DDA and that he could not understand why it took them so long to acknowledge that fact to the Tribunal. He did not believe he should have been subjected to the absence management process and that it was unfair that he was.

20

25 51. Referring the Tribunal to London Borough of Lewisham - v - Malcolm [2008] IRLR 700 Mr McGuire for the respondent submitted that the claim of direct discrimination must fail. In any event, he argued, the formulation of the claimant's claim could never succeed as it could did not amount to an allegation of direct discrimination. That claim was, said Mr McGuire, wholly misconceived.

30 52. The claimant had not led evidence about comparators or that any comparator would be treated more favourably than the claimant. Further, said Mr McGuire, the claimant had not put to the witnesses that the dismissal was on the ground of his disability. Given that Mr Henderson did

not know that the claimant was disabled he could not have dismissed him on that ground.

5 53. In relation to the unfair dismissal claim Mr McGuire submitted that the Tribunal must not substitute its views for those of the respondent. While the claimant had had money issues, those predated the dismissal.

10 54. The respondent had led evidence of a potentially fair reason for dismissal – capability – said Mr McGuire, and the decision to dismiss for that reason was fair. The claimant did not argue that there was any unfairness in the procedures followed by the respondent and he had every opportunity to raise any issues during that process. The only issues he raised were by then historical and unrelated to the issue of the current level of absence.

15 55. If the dismissal was found to be unfair, argued Mr McGuire, any award ought to be reduced in accordance with Polkey -v- AE Dayton Services Ltd 1988] ICR 142.

20 The law

56. Whether or not a dismissal is fair or unfair is determined in accordance with section 98 of ERA. That provides:

25 “98(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show -

30 (a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

35 (2) A reason falls within this subsection if it –

.....

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

5

.....

(4) Where the employer has fulfilled the requirements of sub section (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) –

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(a) depends on whether in the circumstances (including the size and administrative resources of the employers undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and

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(b) shall be determined in accordance with the equity and substantial merits of the case.”

20

57. The claimant's claim of direct disability discrimination arises under section 3A(5) of the DDA which provides:

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“3A(5) A person directly discriminates against a disabled person if, on the ground of the disabled person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person.”

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Discussion and decision

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58. Turning to the issues before the Tribunal, first in relation to the unfair dismissal claim the first matter to determine is whether the respondent had satisfied the onus on it to establish the reason for dismissal and that it was a potentially fair reason for dismissal.

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59. On the evidence the Tribunal was satisfied that that was established and that the reason for dismissal was capability. There was no substantive challenge to that reason by the claimant.

60. The second question is whether or not that decision was fair or unfair having regard to the reason given by the respondent. In that matter the onus is neutral, with no burden on either party.

5 61. In considering that issue the Tribunal reminded itself that it must not substitute its view for that of the respondent. Instead it must consider what the respondent in fact did in order to decide if it acted fairly and reasonably. In other words, the Tribunal is not deciding whether it would have taken the same decision in similar circumstances but instead whether or not the
10 decision taken by this employer was one that was open to it.

62. On the evidence the Tribunal was satisfied that it was. It was satisfied that the decision was fair.

15 63. It was not a matter of dispute that the level of the claimant's absences was sufficient in terms of the policy to entitle Mr Henderson to dismiss. The procedure was properly followed and the claimant was given ample opportunity to say why he should not be dismissed. All of his submissions to Mr Henderson concentrated on issues that he had had with various
20 managers over a period of some years previously, but none of which had any relevance to the question of whether or not, as a fact, he had had the level of absences that he had.

25 64. The correspondence relating to the various stages was clear about the consequences of there being further absences. It was clear that the claimant was offered an opportunity to appeal each of the placings onto the various stages but did not do so on any occasion. Accordingly by the time the matter came before Mr Henderson it was the third occasion on which the claimant had been at Stage 3, and was there without any challenge by
30 the claimant to that fact.

65. The claimant's submissions to Mr Henderson, and indeed to both appeal officers, all harked back to the much earlier dispute that had resulted in a

dismissal, and then a reinstatement, and then, some time later again, an adjustment to the claimant's working practices. That all that had occurred did not seem to be in any serious doubt, but none of it had any relevance at all to the issue that was facing the respondent i.e. that the claimant had been through their absence management procedure on two earlier occasions, both times reaching Stage 3 and that, during the currency of the present Stage 3, the claimant had had a further 55 days absence between January and April 2010.

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66. That Mr Henderson seemed perplexed by the claimant's constant reference back to the earlier matters was understandable. Mr Clarke and Mr Window were similarly baffled. The Tribunal accepted that the claimant appeared to have an honestly held belief that he had been poorly treated on earlier occasions but there was no evidence that any of that earlier treatment in any way infected or affected the decision to dismiss.

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67. For the purposes of determination of the unfair dismissal claim whether or not the 55 days of absences arising during the currency of the Stage 3 were related to the claimant's disability was not an issue in itself. The issue was whether the employer is entitled to form the view that the claimant was not capable of carrying out his employment. That was a decision that was open to the respondent on the facts and was a fair decision.

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68. In relation to the claim of direct disability discrimination the Tribunal determined, as a fact, that Mr Henderson did not know that the claimant was a disabled person. However it was persuaded that he ought to have known. There was more than sufficient information within the claimant's HR file, including medical reports and assessments from occupational health that should have alerted Mr Henderson to that fact.

69. While the Tribunal was satisfied that, subjectively, Mr Henderson did not know that the claimant was a disabled person it considered his approach to someone who was in fact disabled – and who he ought to have known was

disabled - was rather ill-informed and ill-considered. That was particularly so in his questioning of the claimant about his back condition. Some of the questioning suggested that his point of view was that there was something that the claimant could do about his painful back; that the claimant was in some way culpable for not taking those steps.

70. The Tribunal considered that Mr Henderson's approach was rather insensitive given the claimant's well documented medical conditions.

71. Nevertheless that did not amount to direct discrimination of the claimant on the ground of his disability. The claimant led no evidence about a comparator. As such the only comparator would have to be hypothetical, albeit that there was no direct evidence about such a comparator either. However what was plain from the evidence before the Tribunal was that a hypothetical comparator - one whose relevant circumstances i.e. level of absence were the same as, or not materially different from, those of the claimant's - would also be dismissed.

72. That being so there was no evidence at all of there being any less favourable treatment of the claimant on the ground of his disability, and the claim of direct discrimination must fail.

73. In any event, argued Mr McGuire, the claim as formulated was ill-conceived in that what the claimant sought could not amount to a claim of direct disability discrimination. While the Tribunal agrees, that claim is in any event dismissed for the reasons given.

74. Further, and in any event, while the Tribunal was not unsympathetic to the predicament in which the claimant found himself given the number of absences that he had, it was not persuaded that even if the respondent had left out of account the absences that were related to his back that there would have been a different result. The level of non-back related

absences were in any effect sufficiently high so that the claimant would have found himself subject to the absence procedure anyway.

5 75. That being so the Tribunal was satisfied that both claims fail and are dismissed.

10

Employment Judge.....*[Signature]*

Date.....*21 July 2011*

15 Entered in Register/Copied to Parties.....**22 JUL 2011**

0202011

LONDON BOROUGH OF LEWISHAM (appellant) v. MALCOLM (respondent) and EQUALITY AND HUMAN RIGHTS COMMISSION (intervener)

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Courtney Malcolm suffered from schizophrenia. His condition was controlled through medication. He rented a flat from the London Borough of Lewisham on a secure tenancy. He sublet his flat on an assured shorthold tenancy for a period of six months. That was a breach of the express terms of his tenancy agreement, which provided that subletting had the automatic effect that the tenancy was no longer a secure tenancy and could never subsequently become one. At the time that he had sublet the flat, Mr Malcolm had stopped taking his medication.

When the council discovered that Mr Malcolm had sublet the flat, it gave him notice to quit. At that time, the council was unaware that Mr Malcolm suffered from schizophrenia. When he did not vacate the flat, the council commenced possession proceedings in the county court. By that time, the council had been informed of his mental health problems.

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When the council discovered that Mr Malcolm had sublet the flat, it gave him notice to quit. At that time, the council was unaware that Mr Malcolm suffered from schizophrenia. When he did not vacate the flat, the council commenced possession proceedings in the county court. By that time, the council had been informed of his mental health problems.

In his defence to the possession proceedings, Mr Malcolm argued that the council's attempt to gain possession of the flat constituted unlawful disability discrimination contrary to s.22 of the Disability Discrimination Act 1995. He contended that he suffered from a disability for the purposes of the Act; that the reason why the council was seeking possession was because of his disability; and that unless the council could show justification the court was precluded from making a possession order against him. He claimed that he had only sublet the flat because he had not been taking his medication at the time, and this had led to his irresponsible behaviour. The judge in the county court rejected the complaint of disability discrimination and granted the possession order. The Court of Appeal reversed that decision. The council appealed to the House of Lords. The Equality and Human Rights Commission took part in the proceedings as intervener.

Two issues, amongst others, fell to be determined. Firstly, the correct comparators for the purposes of s.24(1) of the Act fell to be identified. There were three options: (a) secure tenants of the council without a mental disability who had sublet; (b) secure tenants of the council who had not sublet; and (c) some other unspecified comparator group. According to the Court of Appeal in *Clark v Novacold Ltd* the correct comparator was (b), but the council submitted that that case was wrongly decided and that the correct comparator was (a). On that basis, Mr Malcolm's discrimination claim would fail, since it was not disputed that the council would have issued a notice to quit and pursued possession proceedings against any secure tenant without a mental disability who had sublet his flat.

Secondly, it fell to be determined whether knowledge of the disability on the part of the discriminator at the time of the alleged discriminatory act was necessary in order to establish that the "reason" for the treatment related to the disability for the purposes of s.24(1). The council argued that it was necessary that the discriminator knew or ought to have known of the disability at the time of the alleged discriminatory act in order to satisfy s.24(1) and establish unlawful discrimination.

Although the issues related to disability discrimination in the field of housing, it was common ground that the same approach would apply to disability discrimination in the employment field.

Section 22 of the Act, so far as material, provides:
“(3) It is unlawful for a person managing any premises to discriminate against a disabled person occupying those premises (a) in the way he permits the disabled person to make use of benefits or facilities; (b) by refusing or deliberately omitting to permit the disabled person to make use of any benefits or facilities; or (c) by evicting the disabled person, or subjecting him to any other detriment.”

Section 24 of the Act, so far as material, provides:
“(1) ... a person ('A') discriminates against a disabled person – (a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply ...”

The House of Lords (Lord Bingham of Cornhill, Lord Scott of Foscote, Baroness Hale of Richmond (dissenting in part as to the reasoning), Lord Brown of Eaton-under-Heywood and Lord Neuberger of Abbotsbury) 25 June 2008 allowed the appeal and restored the decision of the judge in the county court.

The House of Lords held:

1811.1, 1811.2

The Court of Appeal had erred in holding that the council's conduct in seeking possession of the flat constituted unlawful disability discrimination.

(1) The correct comparator for the purposes of s.24(1)(a) is a secure tenant of the council with a mental disability who has sublet his property, a not a secure tenant who has not sublet his property. In that regard, the Court of Appeal decision *Clark v Novacold Ltd* was wrongly decided.

There is no point in asking whether a person has been treated "less favourably than others" if the reason why the disabled person was subjected to the allegedly less favourable treatment cannot apply to those "others". If a person has been dismissed because he is incapable of doing his job there is no point in making the lawfulness of his dismissal depend on whether those who are capable of doing their job would have been dismissed if a person has been dismissed because he will be absent from work for a year, there is no point in making the lawfulness of his dismissal depend on whether those who will not be absent from work will be dismissed. If a tenant has been given notice terminating his tenancy because he has sublet in breach of the tenancy agreement, there is no point in making the lawfulness of the action taken by the landlord dependant on whether notice to quit would have been served on tenants who had not sublet. Parliament must surely have intended a meaningful comparison in order to distinguish between treatment that was discriminatory and treatment that was not.

(2) In order for the alleged discriminator's "reason" to "relate to" the disability for the purposes of s.24(1)(a), it is necessary that the discriminator knows of, or ought to know of, the disability, at the time of the alleged discriminatory act. Unless the discriminator has knowledge or imputed knowledge of the disability, he cannot be guilty of unlawful discrimination under the Act.

That interpretation is supported by the fact that s.25(1) provides that a claim based on unlawful disability discrimination may be made the subject of civil proceedings in the same way as any other claim in tort, damages being recoverable. This points towards a requirement of knowledge. Moreover, the grounds of justification specified in s.24 of the Act assume that the discriminator has knowledge of the disability. It would be anomalous if a discriminator needs to know of the disability if

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LONDON BOROUGH OF LEWISHAM (appellant) v. MALCOLM (respondent) and EQUALITY AND HUMAN RIGHTS COMMISSION (intervener)

[2008] UKHL 43

- 1800 Disability discrimination
- 1811.1 Disability-related discrimination – reason related to disability
- 1811.2 Disability-related discrimination – others to whom reason does not apply
- 1855 Discrimination by others than employers – providers of goods, facilities, services or premises

Disability Discrimination Act 1995: ss.22, 24

The facts:

Courtney Malcolm suffered from schizophrenia. His condition was controlled through medication. He rented a flat from the London Borough of Lewisham on a secure tenancy. He sublet his flat on an assured shorthold tenancy for a period of six months. That was a breach of the express terms of his tenancy agreement, which provided that subletting had the automatic effect that the tenancy was no longer a secure tenancy and could never subsequently become one. At the time that he had sublet the flat, Mr Malcolm had stopped taking his medication.

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