Case Number: 3302627/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr B Morina	**v**	DHL Services Limited

Heard at: Bury St Edmunds (by CVP) **On:** 02 July 2021

Before: Employment Judge M Warren

Appearances

For the Claimant: Mr G Lee (Solicitor).

For the Respondent: Ms I Egan (Counsel).

RESERVED JUDGMENT AT AN OPEN PRELIMINARY HEARING

1. The claimant was a disabled person as defined in the Equality Act 2010 at the material time.

2. The Respondent's application for costs is refused.

REASONS

Background

1. Mr Morina was employed by the respondent as a Warehouse Operative between 23 December 2002 and 20 November 2019. In these proceedings he claims unfair dismissal, disability discrimination and notice pay. He was dismissed after, says the respondent, refusing to take an alcohol and drug test following what it says was a mistake by him. The details are unimportant at this stage.

2. The case was listed for an Open Preliminary Hearing to determine the issue of disability on 9 March 2021. The matter came before Employment Judge King. For reasons that I will not go into at this stage, (see the costs application referred to below) EJ King was unable to hear the issue then and postponed the matter to today. EJ King expressly stated that the issue to be determined today is, "Whether the claimant is disabled within the meaning of s.6 of the Equality Act 2010". It follows that must be, "at the material time" i.e. at the time of the alleged acts of discrimination, (from 7 November 2019 when he was asked to take a drugs test to 26 November 2019 when he was dismissed).

3. What is not before me today is any question of the respondent's knowledge either of the disability or of any disadvantage arising from the disability, nor whether the impairment relied upon was an excuse or a reason for the alleged conduct, either that which the claimant was accused of which led to his being asked to provide an alcohol and drugs sample or his refusing to comply with that request.

Papers before me today

4. This hearing was conducted remotely and I did not have the tribunal file.

5. I had a bundle provided in two parts by Mr Lee. I mentioned at the outset the inconveniences arising from the bundle which I should be grateful if Mr Lee would bear in mind for the future: there is no need for the bundle to be in two parts, parties should use the Employment Tribunal Document Upload facility; the paper pagination and electronic pagination should match, (so either prepare the index separately or take the page numbers of the index into account) and lastly, where possible documents should have optical character recognition as this facilitates highlighting, a crucial tool for Employment Judges and Members.

6. I had been unaware until the start of the hearing that the matter had come before EJ King at all. The hearing summary did not appear in the bundle. I was provided with a copy by Ms Egan.

7. Within the bundle were three versions of an Impact Statement from Mr Morina. The first version was the original relied upon at the hearing on 9 March 2021. It was patently inadequate, in that it did not deal with the impact of the alleged impairment on Mr Morina's day to day activities.

8. It was explained to me that a difficulty at the preliminary hearing before EJ King was that medical records had been provided at the last minute and had been redacted by Mr Morina's GP. The respondent objected to the redaction and neither Mr Morina nor Mr Lee were able to help the respondent or the Tribunal with what had been redacted. EJ King therefore gave directions that before this hearing, the redaction was to be removed and Mr Morina was to prepare a revised Impact Statement which contained cross references to page numbers of the documents in the

bundle, including the medical records. She directed that a copy of the revised Impact Statement showing tracked changes should also be supplied. That is why in the bundle I found a second more expansive Impact Statement and then a third copy of that, with tracked changes.

Respondent's objection to the revised Impact Statement

9. Ms Egan submitted that Mr Morina should not be allowed to rely upon the revised Impact Statement, because it went further than EJ King had directed. It added considerable narrative relating to the alleged impact of Mr Morina's anxiety and depression.

10. The respondent does not deny that Mr Morina has anxiety and depression, but says that impairment did have not a substantial adverse impact on his ability to undertake day to day activities and further, that the impact on day to day activities that he refers to were caused not by anxiety and depression, but by alcohol use, drug use, gambling addiction and alopecia.

11. I decided to allow Mr Morina to rely upon his second Impact Statement. The difficulty with his first Impact Statement was that it was patently inadequate and did not provide me with the information I needed in order to make a just decision today as to whether or not he was a disabled person. One had to ask oneself, what would have happened on the 9 March had the case proceeded, or indeed what might happen today if it were to proceed but Mr Morina were only allowed to rely on his original Impact Statement? The answer to that is the Employment Judge, needing to know what the impact of the admitted impairment was on Mr Morina's day to day activities, would be bound to ask him, if justice was to be done.

12. Having regard to the overriding objective, in the interests of justice and balancing the relative prejudice to parties, I decided that Mr Morina should be permitted to rely upon the amended statement in the bundle.

13. I heard evidence from Mr Morina under oath. He was cross-examined extensively by Ms Egan.

Today's hearing

14. Given the break which I had to take to read the preliminary hearing summary from EJ King, also the written costs application from the respondent, Mr Lee's response to that and after hearing submissions on the admissibility of the amended Impact Statement, we were already short of time on the 3 hour time allocation.

15. Ms Egan cross examined Mr Morina closely and in detail, no criticism intended there. We then found ourselves at 12.25. I had another hearing in the afternoon which I had not yet read into and I was not therefore able to indulge the parties by sitting any longer than the allocated 3 hours. I

limited the representatives to 15 minutes each in closing submissions. As events unfolded they both took approximately 20 minutes and the hearing concluded at 1.15.

16. A further unsatisfactory aspect to closing submissions is that Mr Morina had prepared written submissions which neither I nor Ms Egan received, via the clerk, until whilst he was making his oral submissions. I was unable to read them in the time remaining, Ms Egan had to read them whilst also listening to Mr Lee's oral submissions.

17. I allowed Ms Egan to respond to Mr Lee's submissions and comment on his written submissions, which she was able to do, in particular drawing to my attention that Mr Lee appeared to be attempting to give evidence at paragraph 33 of his written submissions.

The Law

18. For the purposes of the Equality Act 2010 (EqA) a person is said, at section 6, to have a disability if they meet the following definition:

"A person (P) has a disability if –

(a) P has a physical or mental impairment, and
(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

19. The burden of proof lies with the Claimant to prove that he is a disabled person in accordance with that definition.

20. The expression 'substantial' is defined at Section 212 as, *'more than minor or trivial'*.

21. Further assistance is provided at Schedule 1, which explains at paragraph 2:

"(1) The effect of an impairment is long-term if –

(a) it has lasted for at least 12 months,
(b) it is likely to last for least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.

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

22. As to the effect of medical treatment, paragraph 5 provides:

"(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day

activities if –

(a) measures are being taken to treat or correct it, and
(b) but for that, it would be likely to have that effect.

(2) 'Measures' includes, in particular medical treatment …"

23. Paragraph 12 of Schedule 1 provides that a Tribunal must take into account such guidance as it thinks is relevant in determining whether a person is disabled. Such guidance which is relevant is that which is produced by the government's office for disability issues entitled, 'Guidance on Matters to be Taken into Account in Determining Questions Relating to the Definition of Disability'. Although I acknowledge that the guidance is not to be taken too literally and used as a check list, (Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19) much of what is there is reflected in the authorities, (or vice versa).

24. As Sections A3 through to A6 of that guide make clear, in assessing whether a particular condition is an "impairment" one does not have to establish that the impairment is as a result of an illness, one must look at the effect that impairment has on a person's ability to carry out normal day-to-day activities. A disability can arise from impairments which include mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, unshared perceptions, eating disorders, bipolar affective disorders, obsessive compulsive disorders, personality disorders, post traumatic stress disorder, (see A5) and can also include mental illnesses such as depression. It is not necessary and will often not be possible to categorise a condition as a particular physical or mental impairment.

25. As to the meaning of 'substantial adverse effects', paragraph B1 assists as follows:

> *"The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences and ability which may exist amongst people. A substantial effect is one that is more than a minor or trivial effect".*

26. The Guidance at B4 and B5 points out that one should have regard to the cumulative effect of an impairment. There may not be a substantial adverse effect in respect of one particular activity in isolation, but when taken together with the effect on other activities, (which might also not be, "substantial") they may together amount to an overall substantial adverse effect.

27. A substantial effect is treated as continuing if it is likely to recur, this is explained at paragraphs C5 and C6 by cross reference to Schedule 1, paragraph 2(2) quoted above. However, it is the substantial adverse effect on the ability to carry out day to day activities that must recur, not merely a re-manifestation of the impairment after a period or remission, but to a

lesser degree, (Swift v Chief Constable of Wiltshire Constabulary [2004] ICR 909 EAT).

28. Similarly, on the question of whether an impairment has lasted or is likely to last more than 12 months, it is the substantial adverse effect which must have so lasted.

29. Amongst the examples given at C6 is the following:

> *"A woman has two discreet episodes of depression within a ten month period. In month 1 she loses her job and has a period of depression lasting six weeks. In month 9 she experiences bereavement and has a further episode of depression lasting eight weeks. Even though she has experienced two episodes of depression she will not be covered by the Act. This is because, as at this stage, the effects of her impairment have not yet lasted more than twelve months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression which is likely to recur beyond the twelve month period.*
>
> *However, if there was evidence to show that the two episodes did arise from an underlying condition of depression, the effects of which are likely to recur beyond a twelve month period, she would satisfy the long term requirement".*

30. As for what amounts to normal day-to-day activities, the guidance explains that these are the sort of things that people do on a regular or daily basis including, for example, things like shopping, reading, writing, holding conversations, using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, taking part in social activities, (paragraph D3). The expression should be given its ordinary and natural meaning, (paragraph D4).

31. As to what amounts to a 'substantial effect', the guidance is careful not to give prescriptive examples but sets out in the Appendix a list of examples that might be regarded as a substantial effect on day-to-day activities as compared to what might not be regarded as such. For example, *'difficulty going out of doors unaccompanied…"* or *"difficulty waiting or queuing, for example, because of a lack of understanding of the concept…"* or *"difficulty entering or staying in environments that the person perceives as strange or frightening, because the person has a phobia.."* which would be regarded as substantial effects, as compared to, *'inability to speak in front of an audience simply as a result of nervousness;"* or *"some shyness and timidity"* which would not be so regarded.

32. The word, "likely" in the context of the definition of disability in the Equality Act 2010, means, "could well happen", or something that is a real possibility. See SCA Packaging Ltd v Boyle [2009] ICR 1056 HL and the

Guidance at paragraph C3. This is because we are not concerned here with weighing conflicting evidence and making findings of fact, but are in the realm of medical opinion and assessing risk or likelihood in that sense.

33. A claimant must meet the definition of disability as at the date of the alleged discrimination. That means for example, if the impairment has not lasted 12 months as at the date of the alleged discrimination, it must be expected to last 12 months as at that time, (not the date of the hearing). The same applies in assessing the likelihood of reoccurrence. (See Richmond Adult Community College v McDougall [2008] ICR 431 CA, Tesco Stores Ltd v Tennant UKEAT0167/19).

34. In Goodwin v Patent Office [1999] ICR 302 the EAT identified that there were four questions to ask in determining whether a person was disabled:

    34.1 Did the Claimant have a mental and/or physical impairment?

    34.2 Did the impairment effect the Claimant's ability to carry out normal day-to-day activities?

    34.3 Was the adverse condition substantial? And

    34.4 Was the adverse condition long term?

35. In J v DLA Piper UK LLP [2010] IRLR 936 Mr Justice Underhill, President of the EAT at the time, observed that it is good practice to state conclusions separately on the one hand on questions of impairment and adverse effect and on the other hand on findings on substantiality and long term effect. However, Tribunals should not feel compelled to proceed by rigid consecutive stages; in cases where the existence of an impairment is disputed, it makes sense to start by making findings about whether the claimant's ability to carry out normal day-to-day activities is adversely effected on a long term basis and then consider the question of impairment in light of those findings. It is not always essential for a Tribunal to identify a specific 'impairment' if the existence of one can be established from the evidence of an adverse effect on the claimant's abilities. That is not to say that impairments should be ignored, the question of impairment can be considered in light of findings on day-to-day activities.

36. On the question of recurrence, a point which concerns me in this case, Mr Justice Underhill recited some illustrative examples rather similar to examples that appear in the Guidance. He compared a person who had suffered depressive illness in her early twenties which lasted for over a year and had a serious impact on her ability to carry out normal day-to-day activities. However, she made a complete recovery and was symptom free for thirty years, after which time she suffered a second period of depressive illness. Statistically, the fact that she had an earlier illness meant that she was more likely than a person without such a history, to suffer a further episode of depression. It does not, however, follow that for

that reason alone she could be said during the intervening thirty years to have been suffering from a mental impairment characterised perhaps as 'vulnerability to depression' but rather as a model of someone who has suffered two distinct illnesses, or impairments, at different points in her life. The second example he gave was of a person who over a five year period suffered several short episodes of depression which had a substantial adverse impact on that person's ability to carry out normal day-to-day activities, but between episodes was symptom free and did not require treatment. He suggested that in such a case it may be appropriate, subject to medical evidence, to regard that person as suffering from a mental impairment throughout the period in question, including in between episodes and not as a model of a number of discreet illnesses, but of a single condition producing recurrent symptomatic episodes. He said:

> *"In the former case, the issue of whether the second illness amounted to a disability would fall to be answered simply by reference to the degree and duration of the adverse effects of that illness but in the latter, the woman could, if the medical evidence supported the diagnosis of a condition producing recurrent symptomatic episodes, properly claim to be disabled throughout the period: even if such individual episode were too short for its adverse effects (including 'deduced effects') to be regarded as 'long term'. She could invoke paragraph (2) of Schedule (1) provided that she could show that the effects were 'likely' to recur".*

The Facts

37. In October 2006 Mr Morina was referred by his GP for counselling. His GP referred to Mr Morina as suffering from various stress associated problems, his relationship was in difficulty, there was much shouting and swearing in the household, he referred to social anxiety and his blushing profusely (page 178).

38. On 17 January 2007 a Doctor Julian Lane diagnosed Mr Morina with depressive disorder (page 59).

39. On 26 February 2007 Mr Morina was again referred for counselling. It was said that he was finding it difficult to work because of stress and that he was not tolerating anti-depressants very well.

40. In a referral for psychological therapy on 13 May 2010, Mr Morina was said to present with problems of social anxiety, which had led to depression and avoidance. He was said to have a gambling addiction and low mood as a result. He was said to have had suicidal thoughts and thoughts of worthlessness, but had said that he would never plan or attempt self-harm. At that time he was taking Fluoxetine but had to stop because of side effects. He had also taken Citalopram, but stopped because it did not help.

41. On 29 May 2014, (page 77) Doctor Lane referred Mr Morina for counselling again. In his letter of referral he wrote:

> *"Mr Morina is describing a 3-4 month history of increasing isolation, tiredness, lethargy, loss of confidence, anxiety, poor mood, poor sleep and some irrational thoughts in his head."*

42. In evidence, Mr Morina told me that, "irrational thoughts" was a reference to suicidal thoughts and feelings that life was not good. He explained, "loss of confidence" meant that he did not like socialising with groups of people, especially at meetings. He said he found it difficult to make proper conversation, that he mumbled and he was withdrawn. As for lethargy and tiredness, he said he found it difficult to sleep, he slept very poorly, he would be awake at 2 or 3 in the morning and not be able to sleep and then go to work feeling very tired and exhausted, so he could not do his job properly. When not at work, he said he had no energy, low motivation and felt worthless. He felt isolated because he just wanted to be away from people.

43. Mr Morina could not be described as a reliable witness but that it not to say that everything that he said to me was not the truth. Where what he says is corroborated by contemporaneous documentary evidence, as in this instance, I accept what he says. Some examples of why it is that I have to say that Mr Morina was not a reliable witness include the following:

    43.1 In his witness statement at paragraph 23, he said that he took Mirtazapine from December 2018 through to December 2019. He confirmed that in cross examination. The medical records show that he was not prescribed Mirtazapine between April and December 2019. When that was pointed out to him, he insisted nonetheless, that he was taking Mirtazapine throughout.

    43.2 He said in cross examination that he always attended his appointments. Ms Egan took Mr Morina to a number of examples in the documents where over the years he has not attended appointments. It is not an important point in terms of the decision which I have to reach, but it is illustrative of the unreliable nature of Mr Morina's evidence.

    43.3 He insisted that he was unwell between April and December 2019 and attended doctor's appointments. The medical records show that he did not consult his doctor during that period. The last entry for a visit to his GP between April and December 2019 is for a visit on 3 April when the doctor records that he was feeling a bit better and sleeping ok.

    43.4 He said that his gambling addiction was not a big deal, yet he confirmed that he had consulted his doctor about it.

44. It is clear from the medical records that Mr Morina consulted his doctor on many occasions over the years with regard to his mental health for example:

44.1 11 September 2015 when he said he was feeling depressed and described being under some work stress with references to alopecia making him feel more anxious.

44.2 16 September 2015 when he is said to be feeling low, very stressed at work, miscommunications at work, having problems with anger management, anti-depressants said to be making him feel drowsy.

44.3 17 November 2015 when he is said to be suffering from stress at work and feeling low, being irritable and having low energy.

44.4 21 December 2015 when is said to be suffering from stress at home and at work, and that his alopecia also depresses him and he is now drinking more alcohol.

44.5 21 December 2015 after 4 weeks of paternity leave he is said to not feel able to face going back to work, feeling depressed and his alopecia contributing to that. Poor appetite, sleep not good concentration poor, increased alcohol intake in the last 2 weeks.

44.6 16 January 2016 he is reported to be finding the alopecia very distressing, he has increased anxiety and low mood, poor sleep and poor motivation. Alcohol consumption reported at 15-20 units per week.

44.7 2 February 2016, some improvement, reduced alcohol, main issues said to be reduced energy and poor sleep.

44.8 15 February 2016 still depressed, feeling anxious and not well enough to go to work.

44.9 18 January 2017 reported recurring symptoms of low mood for 2 months, stress at work and issues with poor relationship at home, alopecia affecting confidence and he does not want to go out, decrease in appetite.

44.10 15 February 2017 comments include difficulty sleeping, depressive disorder, symptoms moderate, depression, light drinker, fatigue and low motivation.

44.11 20 December 2018 a diagnosis of mixed anxiety and depressive disorder. Symptoms described as anxiety, not sleeping and poor appetite.

44.12 10 January 2019 described as being much the same and, “alopecia remains bit part of anxiety cause”.

44.13 3 April 2019 he is said to be feeling a bit better and sleeping ok.

44.14 4 October 2019 he was reported not to have attended a mental health appointment.

44.15 12 November 2019 he was reported as not attending an appointment.

44.16 6 December 2019 he was said to be very stressed with work, having been suspended, feeling very down and depressed. I note a specific reference is made to his having been on Mirtazapine earlier in the year and having stopped taking it because he was feeling better, (see above).

45. The respondent obtained an Occupational Health report from a Doctor Haroon on 26 February 2016, who referred to Mr Morina as suffering from mixed anxiety and depression, to have been known to be suffering from depression in the past and having required counselling. It refers to his having had severe symptoms of poor concentration, poor memory, lack of motivation and problems controlling his mood.

46. Mr Morina has produced a letter from his doctor dated 29 May 2020. The author is a Doctor Harsh Kak. It is apparent from the medical records that this is not one of the doctors that Mr Morina consulted on a regular basis. He wrote in response to a letter from Mr Morina's solicitors. The doctor states that they are unaware of any long term adverse effects on Mr Morina's ability to carryout normal day to day activities. The letter confirms that Mr Morina was diagnosed with depression in 2006, that he has consulted his GPs on and off over the years with regard to anxiety and depression, that over the years he has tried different anti-depressants, cognitive behavioural therapy and counselling.

47. The doctor was asked to complete a questionnaire. This is along the lines of a typical questionnaire submitted to GPs in disability discrimination cases. The handwritten answers are at page 56 of the bundle and they are notable for their unhelpfulness. The symptoms of the diagnosed condition are said to be low mood and anxiety. In answer to the question about the effect on day to day activities, the question setting out the usual list of examples of day to day activities one used to use with the Disability Discrimination Act 1995, the GP has simply written, "could effect memory and concentration when severely anxious or depressed". Asked whether such effect has lasted, is likely to last for more than 12 months or for the rest of the claimant's life, the GP has simply written, "impossible to say". In answer to the question to what extent the GP was relying upon what he has been told by the claimant, the GP replies, "Fully. Clinically has been anxious and low in mood when seen or spoken to."

48. It is to some extent of course the case that in most cases of mental ill health, a medical professional is relying to some degree upon what the

patient tells them. However, I note that the GP does acknowledge that, "clinically" Mr Morina was anxious and in low mood.

49. In his Impact Statement:

49.1 At paragraph 10, Mr Morina describes his depression and anxiety as being exacerbated by natural shyness and alopecia. He refers to himself as socially isolating from people and having poor sleeping habits.

49.2 At paragraph 15 he describes his anxiety as having a substantial adverse effect on concentration, memory, motivation and mood.

49.3 At paragraph 16 he sets out a list, of what he describes as substantial recurring adverse effects including low mood, feelings of guilt, poor motivation, difficulty sleeping, poor concentration, worrying, fatigue, sweating when talking to people, poor appetite, agitated depression.

49.4 At paragraph 17 he describes becoming very agitated and irritable when under pressure or short tempered, particularly when people do not understand him or make assumptions about him. He says he can also become shy and withdrawn.

50. Simply stating that an effect is substantial, does not make it so. There is an absence of explanation in the statement of what that effect is.

51. In oral evidence, Mr Morina referred to having trouble in concentrating, in having irrational thoughts and suicidal thoughts. He described a lack of confidence, difficulty in socialising with groups of people, not being able to make conversation, mumbling and withdrawing, sometimes losing control, having lethargy and tiredness, having difficulties in sleeping, waking at 2 or 3 o'clock in the morning and not being able to get back to sleep and then feeling tired and exhausted during the day and being unable to work. He described having no energy, low motivation and feeling worthless. He said that his lack of confidence meant that he wanted to be away from people.

52. Although I have described Mr Morina as an unreliable witness, I accept his evidence about the way that his anxiety and depression has affected him. I do so because it is supported by corroborative contemporaneous notes amongst his medical records as recited above and accords with one's general understanding of how anxiety and depression affects people.

Conclusions

53. There is no evidence before me of the effect of medication or counselling in ameliorating symptoms. I therefore ignore that possibility and assess the impact of the impairment on Mr Morina's day to day activities as they

occurred, rather than as they may have been had he not taken medication or attended counselling.

54. The medical evidence is not, as the Respondent seems to suggest, that Mr Morina is an alcoholic. The evidence does not suggest that the impairments he refers to are caused by excessive use of alcohol, nor of an addiction to gambling, but rather that drinking and gambling were a symptom of his anxiety and depression

55. The references to Alopecia suggest that on occasion, it has exacerbated his anxiety and depression. It is the impact of Mr Morina's anxiety and depression that I am concerned with.

56. The effect of Mr Morina's anxiety and depression as set out at paragraph 51 above, goes beyond what one could describe as minor or trivial. It is beyond the general understanding of the normal differences which may exist amongst people who are not mentally ill.

57. Despite the unhelpful answers from Doctor Kak, it is perfectly obvious from the medical records that this impairment and its effect on day to day activities has prevailed over many years since 2006, well beyond 12 months. Its frequent occurrence is evidence of its likely reoccurrence, (it is clear that at all times, given his history, "it could well reoccur").

58. The situation of Mr Morina is akin to that described by Mr Justice Underhill, (as he then was) in J v DLA Piper UK LLP [2010] IRLR 936 referred to above, that is the example of a person who over a 5 year period suffered several short episodes of depression which had a substantial adverse impact on that person's ability to carry out normal day to day activities but in between was symptom free. That person may be regarded as suffering from the mental impairment throughout the period in question. That might be said of Mr Morina, since 2006.

59. Mr Morina has a mental impairment. It effects his normal day to day activities in the way described above. That effect is substantial and is long term.

60. I find that Mr Morina was at the material time a disabled person as defined in the Equality Act 2010.

61. Having regard to the content of his medical records I am frankly surprised that the respondent did not concede as such. It seems to me, perfectly obvious. In fairness to the Respondent, Mr Morina's GP's letter was unhelpful.

Application for Costs

The Application

62. The respondent by letter dated 18 March 2021 applied for an order for costs against Mr Morina, occasioned by the adjournment of the preliminary hearing before EJ King on 9 March 2021.

63. That preliminary hearing had been listed on 5 September 2020, 6 months earlier. It would appear that unfortunately, no case management orders were made as to preparation for that hearing, such as the requirement for disclosure of medical records and an Impact Statement. I am sure if there had been such an order, the respondent would have referred me to it.

64. Mr Lee for Mr Morina, served an Impact Statement one week before the preliminary hearing, on 2 March 2021. The Impact Statement is hopelessly inadequate. It did not deal with, in any adequate way, how Mr Morina's then alleged impairments impacted on his day to day activities. The statement focussed in large part on the events which led to Mr Morina's dismissal, which are irrelevant for present purposes. It also refers to his mental health since the dismissal, which is also irrelevant.

65. On 4 March 2021, the respondent provided Mr Lee with a draft bundle for agreement. In response, Mr Lee served the respondent with heavily redacted medical records. The respondent asked for unredacted copies. None were provided.

66. EJ King expressed her concern that the medical records were redacted. It transpired that the redaction had been undertaken by Mr Morina's GP, so that Mr Lee himself had not seen what it is that had been redacted. Consequently, there was no unredacted version of the records for the Employment Judge to review, (as one would have expected). EJ King therefore postponed the Open Preliminary Hearing to today, giving directions that unredacted medical records be provided and that the Impact Statement be amended so as to provide cross reference to the relevant page numbers in the revised bundle of the relevant documents and entries in the medical records.

67. The respondent says that the conduct of Mr Morina and his representative in serving an Impact Statement one week before the hearing and serving redacted medical records one day before the preliminary hearing, is unreasonable conduct. They seek their costs in the sum of £780, being the brief fee of Counsel attending on that occasion.

68. Mr Lee wrote a response to the costs application in an email to the Tribunal dated 19 March 2021, which Ms Egan copied to me via the clerk. He said that the Covid 19 pandemic had substantially restricted the provision of services during unprecedented times. He reveals that the request for GP records was made to the GP on 12 February 2021. I have

to say that was remarkably and over optimistically, late. He says that the medical records were disclosed within 30 minutes of receipt from the GP. He describes the costs application as frivolous and the respondent's conduct as intimidatory.

The Law

69. Rule 76 of the Employment Tribunal's 2013 Rules of Procedure provide that a costs or time preparation order may be made and a tribunal shall consider whether to do so, where it considers that:

> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or*
> *(b) any claim or response had no reasonable prospect of success.*

70. Rule 84 provides that we may have regard to the paying party's ability to pay, it is put as follows:

> *"In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay."*

71. In Millan v Capsticks Solicitors LLP & Others UKEAT/0093/14/RN the then President of the EAT, Langstaff J, described the exercise to be undertaken by the Tribunal as a 3 stage exercise, which I would paraphrase as follows:

71.1 Has the putative paying party behaved in the manner proscribed by the rules?

71.2 If so, it must then exercise its discretion as to whether or not it is appropriate to make a costs order, (it may take into account ability to pay in making that decision).

71.3 If it decides that a costs order should be made, it must decide what amount should be paid or whether the matter should be referred for assessment, (again the Tribunal may take into account the paying party's ability to pay).

72. I have explained that the Tribunal has a discretion, not an obligation, to take into account means to pay. This was considered in the case of Jilling –v- Birmingham Solihull Mental Health NHS Trust EAT 0584/06. If I decide not to take into account the party's means to pay, I should explain why, and if I decide to do so, I should set out my findings about the ability

to pay and what impact that has had on my decision whether to award costs.

Claimant's financial circumstances

73. Mr Morina confirmed to me in evidence that he is not working, he is reliant upon Universal Credit, he has no dependant's at home, he has no savings nor does he have any significant debts other than small amounts to friends. He has no credit cards and no bank loans.

Discussion and Conclusions

74. It is unreasonable of Mr Lee to have left it one month before the preliminary hearing to request copy medical records from the GP. It would be obvious to anybody practicing in employment law that more time would be required than that for the GP to comply and to have time to give the respondent a reasonable opportunity to review those records when they become available. It was also unreasonable conduct of Mr Lee to have served the claimant's witness statement just one week before the preliminary hearing. Although Mr Lee refers to the Coronavirus crisis, I do not accept that there is any reason, (I have not been told of any good reason) why these matters could not have been attended to sooner.

75. The one thing that can be said for Mr Lee in his defence, is that no case management orders appear to have been made setting out a timetable by which these steps should have been taken, which is unfortunate. However, one would expect an employment lawyer to appreciate that an impact statement and copy medical records, if not a medical report, would be prudent.

76. The Impact Statement is poor. But as I said during the hearing, had the Tribunal been in a position to proceed, very likely the Employment Judge would have made enquiry of Mr Morina as to the effect of his alleged impairments on his day to day activities. After all, there had been no order that he provide an Impact Statement at all.

77. Providing redacted medical records is not unusual. A respondent is only entitled to see that part of medical records that are relevant to the alleged disability. That said, where the respondent is suspicious something inappropriate has been redacted, the unredacted document should be available for inspection by the Employment Judge. That was not what happened here. In fairness to Mr Lee, the redaction was done by the GP. However, if the medical records had been requested in good time, this difficulty could have been overcome before the preliminary hearing.

78. It seems to me therefore that there was unreasonable conduct on the part of Mr Lee and Mr Morina in the preparation of this case for the first preliminary hearing. That threshold has been crossed. However, having regard to Mr Morina's financial circumstances, I choose not to exercise my discretion to make an order for costs. Any such order would place him in

financial difficulties and have a disproportionate effect on his life compared to the unreasonable conduct I am being invited to sanction. I decline to make such an order.

Employment Judge M Warren

Date: 14 July 2021

Sent to the parties on: ...26 July 2021...
THY
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For the Tribunal Office