EMPLOYMENT TRIBUNALS

Claimant: Mr M Colclough

Respondent: Quality Save Limited

HELD AT: Manchester **ON:** 16 and 17 January 2017

BEFORE: Employment Judge Howard
Ms D Doughty
Mrs S J Ensell

REPRESENTATION:

Claimant: In person
Respondent: Mr J MacDonald, Consultant

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim of unfair constructive dismissal pursuant to the provisions of Part X of the Employment Rights Act 1996 is well-founded.

2. The claimant's claim of disability discrimination pursuant to the provisions of section 6 and section 13 of the Equality Act 2010 is not well-founded and is dismissed.

3. The respondent is ordered to pay to the claimant the sum of £10,750.40.

4. The recoupment provisions apply to this award as follows:

Grant total	£10,750.40
Prescribed element	£6,905.00
Period of prescribed element:	27/5/2016 to 16/1/2017
Excess of grand total over prescribed element	£3,845.40

REASONS

1. The Tribunal heard evidence from the claimant, Matthew Colclough and, on behalf of the respondent, from John Coffey, Area Manager; Sandra Hooton, Area Manager; Brendan Murray, Area Manager; Mark Loseby, Retail Controller and Paul Rudkin, Director and the Tribunal was referred to an agreed bundle of documents during the course of the proceedings.

The Issues

2. At the outset of the hearing the Employment Judge clarified and agreed the issues to be determined with the parties in accordance with those laid out in the Case Management Order of Employment Judge Horne on 27 June 2016, and the claimant identified his comparator for the purposes of the direct disability discrimination claim as Gemma Wynn.

3. The claimant pursues claims of unfair dismissal and of direct disability discrimination.

4. The respondent concedes that the claimant was a disabled person by reason of having cancer.

Findings of Fact relevant to the Issues

5. The claimant was employed from 2010 by the respondent, initially in security and from November 2014 as a Store Manager in a sequence of Quality Save stores, becoming manager of the Prestwich store on 27 April 2010. There was a mobility clause in the claimant's contract which allowed the respondent to move managers between stores upon one week's notice.

6. It was agreed that the respondent had no concerns about the claimant's performance in the role; indeed all the respondent's witnesses described the claimant as a good manager and a valuable member of the management team.

7. On 13 Mach 2015, the claimant saw his GP and was referred for an urgent biopsy. The claimant spoke to his Area Manager, John Coffey, in late March and explained that he was awaiting the results from a biopsy for a lump on his kidney which could be a cyst or possibly cancerous. Mr Coffey responded by saying: "It won't be cancer, you are too tight to get cancer". The Employment Tribunal accepted Mr Coffey's explanation that his comment was not intended to hurt and was not borne out of malice or hostility but was an attempt at humour. Nevertheless it was clearly insensitive and caused the claimant hurt and offence.

8. The claimant's biopsy revealed that his tumour was cancerous and the claimant continued to manage the Prestwich store until his surgery in July when he commenced a period of sick leave from 13 July 2015. His Area Manager changed to Sandra Hooton.

9. During August and early September 2015, whilst the claimant was recovering from his surgery and postoperative complications, he was contacted by Ms Hooton

on three occasions on operational matters: twice relating to stock takes and on 9 September 2015 seeking his input on a supervisory appointment. It was clear from the emails and Ms Hooton's evidence that the purpose of her contact with the claimant was operational rather than welfare related and did not demonstrate much concern from the claimant's line manager for his health and wellbeing. However, the Tribunal also accepted that the enquiries were relatively infrequent, genuinely work related and that the respondent was aware from other sources, the Office Manager, as to the claimant's progress.

10. On 16 November 2015 the claimant and Ms Hooton had a telephone conversation in which the possibility of a phased return to work was first mentioned by the claimant. Ms Hooton asked the claimant whether he wished to return as a manager and the claimant confirmed that he did. On 17 December 2015 the claimant emailed Ms Hooton notifying her that he would be ready to return to work after Christmas, but that until he had his MRI scan which was due in the next two or three weeks, he could not do any heavy lifting. He proposed a four week phased return of 25 hours per week and attached proposed rotas of his hours during that period. In reply Ms Hooton suggested a meeting to make the necessary accommodations for the claimant's needs and to agree a suitable schedule. There was no indication that the claimant would not be allowed to return to Prestwich.

11. Ms Hooton and the claimant met on 30 December 2015. Their recollections of their discussion differed and the Tribunal preferred the claimant's recollection as the more accurate of the two, being consistent with Ms Hooton's own note of their discussion. In essence the claimant was told that he could not return to the Prestwich store as he could not do the 40 hours required or heavy lifting, and that he was to go to the Droylsden store. Ms Hooton explained that this store was closer, smaller and quieter and therefore more suitable to the claimant's needs, and that his role would be to assist the management team in place there. He was told that he would be helping there and not running the store. It was made clear to the claimant that he would no longer be carrying out an operational store manager role. Contrary to what Ms Hooton stated in evidence, the claimant was not told that this was a temporary arrangement subject to review and a return to Prestwich all being well. Indeed as Mr Rudkin subsequently confirmed in the appeal outcome letter a successor to the claimant had been appointed to Prestwich by that stage; a point also made by Mr Murray during the grievance proceedings.

12. At the end of the meeting the claimant stated that he was not prepared to work at Droylsden and that he would not be returning to work until he had met with Paul and Rick Rudkin and he emailed Paul Rudkin asking to meet.

13. The claimant pointed out that the manager at Prestwich, Gemma Wynn, did 32 hours rather than 40. Ms Hooton accepted that this was the case, in evidence, but explained that this had arisen because as licensee for the Chorley Branch Ms Wynn was still required to attend there one a week and that this was an exceptional situation. The Tribunal accepted this explanation for Ms Wynn's hours.

14. Notwithstanding the claimant's position, Ms Hooton wrote to the claimant on 5 January 2016. The letter explained that he would report to Droylsden and that after a four week period his position would be reassessed. The letter bore little resemblance to what the claimant had been informed and was presented as if this course of action had been agreed between the parties, which it plainly had not.

15. Rick and Paul Rudkin did not meet with the claimant and his email was treated as a grievance and referred to the Retail Controller, Mark Loseby. The claimant then submitted a formal grievance in response objecting to Mr Loseby as he was involved in the matters giving rise to the grievance and another Area Manager, Brendan Murray, was appointed to hear it.

16. Due to a combination of leave, sickness and change of personnel there was a modest delay in hearing the grievance, which was held on 19 February 2016, outside the five day guideline laid out in the policy. However, the Tribunal accepted that there were legitimate reasons for this timescale. Mr Murphy did not uphold the grievance. The claimant appealed and Mr Rudkin heard and rejected the appeal by a letter to the claimant of 26 April 2016.

17. By a letter of 28 April 2016 and in response to this outcome the claimant resigned his employment.

The Law

18. The Tribunal reminded itself of the burden of proof provision found at S136; *(2) 'if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provision.'*

19. S13 Equality Act; Direct discrimination, provides; *'(1) A person (A) discriminates against another, (B), if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.'*

20. The circumstances in which an employee is dismissed are defined by Section 95. Section 95(1)(c) provides that an employee is dismissed by his employer if:

"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

21. When reaching its decision, the Tribunal applied sections 95 and 98 of the Employment Rights Act 1996 and the common law principles as laid out in *Western Excavating (ECC) Limited v Sharp* [1978] IRLR 27 and *Malik and Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606, helpfully summarised by the the Honourable Justice Langstaff in the case of *Frenkel Topping Limited v King* UKEAT/0106/15/LA in which he reminded Tribunals that, for there to be a breach of the implied term of trust and confidence, the conduct complained of must be really serious.

22. With regard to the application of and any limitations to express mobility clauses, the Tribunal reminded itself of the line of authorities, approved in *Mallone v BPB Industries plc* 2002 1045 CA, that an employers discretion in applying an express term must not be exercised 'irrationally or perversely' so as to breach the implied term of trust and confidence between employee and employer.

The Tribunal's Conclusions

20. Turning first to the comment of Mr Coffey; the effect of this comment was clearly detrimental to the claimant in that it caused him hurt and offence. The comment was about the claimant's disability i.e. his cancer, and made because of it. However, this was a 'one off' incident, unconnected to the allegations of discrimination that followed from August 2015. It did not form part of a continuing course of conduct with those later allegations and was not a matter that was raised by the claimant until 14 January 2016. The time limit in respect of that act ran from the date upon which the comment was made in March 2015 and consequently the claimant's claim was submitted significantly beyond the relevant time limit. The Tribunal accordingly did not have jurisdiction to determine that claim and it did not consider it would be just and equitable to extend time in the circumstances to allow that element of the claim to proceed and so it was dismissed.

21. As regards the claimant's relocation to Droylsden; the respondent moved the claimant to Droylsden because of his request for a phased return and the temporary restrictions upon his ability to lift. The claimant relied upon Gemma Wynn as his comparator to his claim of direct discrimination as she was a manager who was allowed to work less than 40 hours per week. However, the Tribunal accepted the respondent's explanation for why Ms Wynn worked those hours. Whilst there was evidence from which the Tribunal could conclude direct discrimination, the Tribunal accepted the respondent's explanation for the difference in treatment of Ms Wynn and found that the claimant's treatment was not because of his disability as required for a claim of direct discrimination to succeed.

22. The Tribunal reminded itself that the claimant had limited his disability discrimination claim to direct discrimination only and that this had been a matter explored with him at the case management discussion and confirmed at the outset of the Employment Tribunal hearing. Whilst the respondent's reason for transferring the claimant clearly arose from his disability i.e. his request for a phased return and the temporary restrictions on his ability to lift, that reason was not because the claimant had cancer as required to succeed with a claim pursuant to S13 of Equality Act 2010.

23. The Tribunal found that there was no evidence before it from which it could conclude in the absence of an explanation from the respondent that the delay in the conduct of the grievance and appeal procedure was because of the claimant's disability. Even if such evidence was before the Tribunal it accepted the respondent's explanation for the delay as being unconnected with the claimant's disability.

24. Accordingly, for these reasons the claimant's claim of direct discrimination is not well-founded and is dismissed.

25. Turning to the claim of unfair constructive dismissal; with respect to the comment by Mr Coffey; to the extent that this amounted to a fundamental breach of the implied term of trust and confidence, the claimant had affirmed the breach by not resigning in response to it and only raising it as an issue some nine months later.

26. For the reasons described above, Ms Hooton's contact with the claimant whilst on sick leave did not amount to a fundamental breach of the implied term of trust and confidence upon which the claimant could rely in bringing his employment to an end.

27. Turning to the transfer to Droylsden; the claimant was informed that he would no longer carry out an operational management role with no time limit placed on that restriction, and the Tribunal were satisfied that that amounted to a de facto demotion in the sense that the claimant's role and responsibilities were diminished. The Tribunal were satisfied that this conduct amounted to a fundamental breach of the implied term of trust and confidence and that the respondent's reasons for moving the claimant amounted to an irrational application of the mobility clause, in the sense that no reasonable employer would have exercised its discretion that way.

28. Further, the respondent went beyond the application of a mobility clause by diminishing the claimant's role in so doing. The claimant was seeking small adjustments to his hours and duties for a very short, four week period, and in response, the respondent simply moved the claimant to another store and diminished his role without taking any steps to consult with him, obtain any appropriate medical evidence and put any appropriate adjustments in place to enable him to continue to carry out his management role at Prestwich.

29. The Tribunal were satisfied that the respondent's conduct in so doing amounted to a fundamental breach of the implied term of trust and confidence upon which the claimant relied in bringing his employment to an end, and accordingly the termination of the claimant's employment amounted to a dismissal falling within section 95(1)(c) of the Employment Rights Act 1996.

30. The respondent did not advance or establish that the claimant had been dismissed for a potentially fair reason falling within section 98(1) or (2) of the Employment Rights Act 1996 and accordingly his dismissal was unfair.

Remedy

31. The parties confirmed that they wished to proceed immediately to determine remedy and the Employment Judge explained the recoupment regulations to the claimant. The Tribunal heard evidence from the claimant as to his losses and he was cross examined by the respondent on the steps he has taken to find work.

32. Having heard the evidence of the claimant and submissions of the parties the Tribunal was satisfied that the claimant had taken reasonable steps to mitigate his loss and remedy was awarded as follows:

(1)	Basic award	£2,115.40
(2)	Compensatory Award – 33 weeks	
	(a) 17 weeks @ net pay of £345 per week	
	(b) 16 weeks x £65	
	Total	£6,905.00
(3)	Loss of right to long notice	£690.00
(4)	Future loss	
	16 weeks @ £65 per week	£1,040.00

No award was given for pension loss

Total **£10,750.40**

Employment Judge Howard

9th February 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

14 February 2017

FOR THE TRIBUNAL OFFICE

[AF]

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): 2401081/2016

Name of case(s): Mr M Colclough v Quality Save Limited

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 14 February 2017

"the calculation day" is: **15 February 2017**

"the stipulated rate of interest" is: 8%

MISS L HUNTER
For the Employment Tribunal Office