EMPLOYMENT TRIBUNALS

Claimant: Mr R Simpson

Respondent: Secretary of State for Justice

HELD AT: Liverpool **ON:** 8, 9 and 10 May 2017

BEFORE: Employment Judge Robinson
Mrs C Try
Mr P C Northam

REPRESENTATION:

Claimant: Mr R Kohanzad of Counsel
Respondent: Mr J Hurd of Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claims of constructive unfair dismissal and breach of the duty to make reasonable adjustments contrary to the Equality Act 2010 fail and are dismissed.

2. The remedy hearing date arranged for 14 August 2017 is cancelled.

REASONS

The Issues

1. The issue before the Tribunal was whether Mr Simpson was disabled within the meaning of section 6 of the Equality Act 2010, and if so to go on to decide whether there had been a breach of the duty to make reasonable adjustments. In any event we had to decide whether there had been a constructive unfair dismissal.

2. We have heard from two witnesses: the claimant himself and Ms Jackie Neary, the claimant's manager whilst he was at work with the Secretary of State. We

accepted both the witnesses as honest witnesses, giving their evidence as they saw the facts, and consequently credibility was not an issue. There is however one issue described later where the claimant was being disingenuous (see paragraph 69). What we have done is to sort through the evidence given to us and where there were differing versions of events deciding which evidence we preferred on the basis of any other evidence, such as documents which supported one version or the other.

3. In considering whether the claimant is disabled or not we have considered the Guidance on the Definition of Disability 2011.

The Facts

4. We found that the claimant was disabled for the reasons given in his section 6 impact statement at pages 45(q)-45(v) of the bundle.

5. Although we accepted that the GP notes showed that there did not seem to be much evidence of the claimant having sleep or eating difficulties (indeed the GP notes tended to suggest the contrary), we did accept the claimant has had difficulties in sleeping, and that stress caused him to be anxious and that in turn caused him to be fatigued. He could not concentrate on simple tasks and he would pour , for example, milk into a glass instead of fruit juice, and vice versa.

6. We also accepted that the claimant sometimes spent an unnaturally long time in his bedroom shutting himself away. With regard to his personal relationships he lost composure and became quickly frustrated. An example was the workplace incident at the end of February 2016 when he had an argument with a colleague.

7. We also took into account the fact that the claimant required Cognitive Behavioural Therapy ("CBT") counselling. Taking into account the Guidance on Disability if a person with long-term depression is treated by counselling, and the effect of the treatment may be to enable the person to undertake normal day-to-day activities then it is likely that person is disabled because if that treatment is disregarded the person's impairment would have a substantial effect on the ability to carry out normal day-to-day activities (B14 of the Guidance). Similarly, the claimant was taking an antidepressant drug, namely sertraline, and we concluded that if he had not been taking that drug (and he had been taking it for some years) his condition would be worse and his condition would affect his day-to-day activities to a greater degree.

8. We concluded that the claimant therefore did suffer from an anxiety leading to depression. We decided that the condition may come and go, or on occasions be more intense than on other occasions, but the condition had existed since 2005 and was likely to continue through the claimant's working life when he was put under pressure at work.

9. Although the respondent had managed the claimant well since 2005, obtaining a stress risk assessment at that time, we accepted that one of the stressors was the heavy workload that the claimant and his colleagues had. In 2005 the claimant believed that his concerns were being addressed by his line manager and Human Resources and "looks forward to seeing some form of relief in the current workload".

10. There were a number of Occupational Health reports prepared over the years from April 2014, but at no time has Occupational Health ever concluded that the claimant was disabled within the meaning of section 6 of the Equality Act 2010.

11. However, we found that the respondent managers were put on notice that the claimant was likely to be disabled within the meaning of section 6 because of the way in which his condition presented itself especially considering the content of the Occupational Health report and the complaints the claimant had made to his managers over a period of years and months. The respondent also put in place reasonable adjustments. By doing that they were tacitly acknowledging he was disabled.

12. The claimant had the following reasonable adjustments put in place. Regular meetings with his managers, especially “keep in touch” meetings, when he returned to work after absences for stress and anxiety he was put on a phased return, he worked shorter hours, he did not have to do court work and his working week was reduced from five to four days in order to help him in January 2015.

13. The claimant did have long periods of absence between November 2013 and January 2014, and again in April 2015.

14. When the claimant returned to work in April 2015 on a phased return it was agreed that he would work as an enforcement officer, which meant that the main stressor (going into court) was taken out of his working day. The claimant says that that was a permanent move in a specially created role. Ms Neary says it was simply to help the phased return and was not permanent.

15. On balance we concluded that the claimant was right for the following reasons. The notes of Ms Neary at page 60 state that, “he is positive about the new breach – enforcement role he is, with others, setting up”.

16. We find the following facts regarding the role(s) the claimant was asked to do. The claimant’s role as a PSO was to look after lower risk offenders. A PSO is not a fully qualified probation officer. The PSO Band 3 role was a generic role. The respondents were entitled to post a PSO to any other role such as the role ultimately offered to the claimant in the Offender Management Unit (OMU). It was not a breach of contract to ask the claimant to move to OMU and the claimant never gave the role a chance. He resigned instead. By the autumn of 2015 the claimant had slid back into doing the same job as he previously had been in his grade as a PSO3 in Runcorn. Ms Neary accepted what the claimant told her that the commute to Runcorn from his home town of Warrington was partially the cause of stress to the claimant. There was no more complaint from the claimant despite Ms Neary having a word with him about the issue.

17. Matters came to a head at the end of February 2016 when the claimant had an altercation with a work colleague. He refused to fax some documents over to another court. He then made it clear that he did not want to go into court when in work by turning up in non-court outfit (whether it was jeans or corduroy trousers it matters not). The claimant had once more started doing court work but, at this point, made it clear to his managers that he was not going to continue to do it. That was insubordination which ultimately the managers had to deal with. He also walked out

of work and went off sick before certifying himself ill for seven days. He never returned to work.

18. There were a number of "keep in touch" meetings (KIT) which the claimant had with Ms Neary in the intervening period to 5 April 2016. Eventually on that date he did have a meeting with his manager and she said (and this is recorded in the only notes we have, although we understand some notes have been destroyed) that, "whilst this was the second long period of sickness for the same reason [i.e. stress and anxiety], a reasonable adjustment can be made and it was decided that Richard will not return to the courts in Halton when he is better. He will be offered a job as a Band 3 PSO in Warrington as an OMU". The rationale behind that decision by Ms Neary was that it negated the need to travel as the post was in his home town, which was one of the claimant's stressors. He could cycle to work. Furthermore as there was no actual role as an OMU at the time he could build up the work at his own pace. He was also to receive training and would not have to deal with high risk offenders.

19. That last point was important because the claimant complained that he did not want to go to OMU in Warrington and deal with high risk offenders because he felt that if he made a mistake the consequences could be dire. To counter those concerns he was assured by Ms Neary that that would not happen. She did not discount a phased return in the same way as previously. What she did discount was the claimant returning to his old role which had caused him so much difficulty.

20. We do not find that the claimant was put under pressure to make a decision. Indeed he was able to go home, discuss the matter with his wife and decide what he wanted to do. The claimant suggests that he should have been accompanied at that meeting. It was a KIT meeting so there was no need for him to have, or be offered, a companion. More importantly there was no disadvantage to the claimant in not having support. He was capable of putting his points forward.

21. Retirement had not been mentioned at the meeting but the claimant decided that he would retire the next day. His letter of 11 April 2016 confirmed that he was taking up retirement, and thanking Ms Neary for her help and wishing other members of staff all the best. Those are not the actions of a person who felt there was a fundamental breach of his contract. He suggested to us that he did not wish to "burn his bridges" and that is why he did not complain of his treatment. He could not answer, when cross examined, why he had not put in a grievance if he was so unhappy about the pressure being placed upon him. On balance we decided that that was because no such pressure was exerted upon him to retire by Ms Neary

22. It was not Ms Neary who suggested the claimant should retire. However, his decision to retire was accepted and we concluded that there was mutual consent between the parties with regard to retirement.

23. The notes of that meeting suggest that the claimant wanted to think before he agreed to move to Warrington, and Ms Neary also made it clear that he would not go back to working in the courts and that he would be placed in OMU.

24. The claimant was told, however, at that meeting that when he returned to work there would have to be some investigation in relation to his behaviour before he

left. We accepted that was done by Ms Neary with the best intentions and not, as the claimant suggests, to further pressurise him. She did not want the claimant surprised when he returned to work that he was to be investigated.

25. The claimant, during March 2016, had completed a form to get another job with the police. The claimant said, on two of occasions when Ms Neary asked him what he wanted to do, that he just wanted to work in a garden centre.

26. It therefore was more likely than not that the claimant was considering leaving the service in any event. The claimant did not want to go through an investigation of his previous behaviour in February.

27. Ms Neary was prepared to carry out the reasonable adjustments that were contained in the March Occupational Health report despite that report not suggesting the claimant was disabled. The claimant, of his own accord and without succumbing to any outside pressure, decided that he would leave the service. He knew that it was open to him to leave via the retirement route rather than simply resigning. That was his decision and those are the facts.

The Law

28. When dealing with the question of disability we had to decide whether the claimant had a physical or mental impairment, and that impairment has to have a substantial adverse effect and a long-term adverse effect on the claimant's ability to carry out normal day-to-day activities.

29. In determining whether a person is disabled an Employment Tribunal must take into account the statutory guidance on the meaning of disability as it thinks relevant. The definition of a substantial adverse effect is one that is more than minor or trivial. A long-term effect is one that has lasted for at least 12 months or is likely to last for at least 12 months, or is likely to last for the rest of the life of the claimant.

30. An impairment is treated as having a substantial adverse effect on the ability on the person concerned to carry out normal day-to-day activities if measures have been taken to treat or correct, and but for that it would be likely to have that effect.

31. Paragraph B12 of the Guidance on the Definition of Disability (2011) also states that the provision with regard to the effects of treatment applies even if the measures result in the effects being completely under control or not at all apparent.

32. Each of the questions that have to be asked, for example has the claimant a mental or physical impairment; did the impairment affect the claimant's ability to carry out normal day-to-day activities; was the adverse condition substantial; was the adverse condition long-term, should be asked sequentially and not together. In other words there should be a step approach.

33. In order for the employer to be answerable for alleged disability discrimination they must have known or be in a position where they should have known that the employee is disabled.

34. Consequently employers are required to be mindful of the possibility that an employee, for example who is on sick leave or is having difficulty participating in

work, may be disabled, and consequently not to discriminate or be mindful that reasonable adjustments may need to be put in place.

35. As the EHRC Code of Practice explains:-

> "The employer must do all they can reasonably be expected to do to find out whether this is the case (if an employee is disabled). What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

36. In other words, the respondent must be aware of the impairment and its consequence.

37. Dealing now with the question of the breach of the duty to make reasonable adjustments, we have to consider firstly the burden of proof.

38. If there are facts from which the Tribunal could decide in the absence of any other explanation that the employer contravened the provision, criterion or practice, the Tribunal must hold that the contravention has occurred unless the employer shows that they did no contravene the provision. It is for the claimant to establish the detrimental action relied upon. In this case it is a constructive unfair dismissal.

39. The employer discriminates against the employee if the employer fails to comply with a duty to make reasonable adjustments. There are three requirements. Firstly, that the employer must apply a provision, criterion or practice ("PCP") that has put a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with a non disabled person. The employer is required to take such steps as is reasonable to have to take to avoid that disadvantage.

40. The employer is not subject to a duty to make reasonable adjustments if they did not know or could not reasonably be expected to know that the claimant was disabled.

41. Although it is good practice to consult with a disabled person over what adjustments might be suitable, the duty to make reasonable adjustments is on the employer and the fact that a disabled employee or his or her medical adviser or Occupational Health cannot postulate a potential adjustment will not, without more, discharge that duty.

42. However, the EAT has made it clear that it is insufficient for a claimant simply to point to a substantial disadvantage caused by a PCP and then place the onus on the employer to think of what possible adjustments could be put in place to ameliorate the disadvantage.

43. The claimant therefore must not only establish that the duty has arisen but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached.

44. With regard to constructive unfair dismissal, section 95(1)(c) of the Employment Rights Act 1996 provides that there is a dismissal when the employee

terminates the contract with or without notice in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

45. In order to claim constructive unfair dismissal the employee must establish that there was a fundamental breach of contract on the part of the employer, not just a breach of contract; the employer's breach has caused the employee to resign and the employee did not delay too long before resigning thus affirming the contract and losing the right to claim constructive unfair dismissal.

46. Once it has been established that the employer has committed a repudiatory breach of contract the employee must then go on to show that he or she accepted the repudiation, which means that the employee must terminate the contract by resigning either with or without notice.

47. An employee will be regarded as having accepted the employer's repudiation only if his or her resignation has been caused by the breach of contract in issue. This means that if there is an underlying or ulterior reason for the employee's resignation such that he or she would have left anyway irrespective of the employer's conduct then there has not been a constructive unfair dismissal.

Conclusions

48. We accepted that the claimant's Occupational Health reports did not suggest that the claimant was disabled, but there were a number of Occupational Health reports prepared and from April 2014 we felt that the respondent managers were put on notice that the claimant was likely to be disabled within the meaning of section 6.

49. On top of that, the claimant was taking medication and had CBT during his long periods of absence from November 2013 right through to April 2015.

50. We found that the claimant's condition existed for over a year. We accepted it fluctuated in intensity but we also accepted that the claimant did have difficulty with the day to day activities set out in his impact statement.

51. We accepted that the claimant's behaviour at the end of February 2016 was behaviour which any employer would need to investigate at some point. The employer never found the claimant guilty of wrongdoing but they were right to tell the claimant of the probability of an investigation taking place. Who knows what might have happened if the claimant had gone through a disciplinary process if he had returned to work? The respondent managers could have been sympathetic towards the claimant and understood that his medical condition made him prone to outbursts of anger etc. The respondent managers understood that they could not deal with the investigation whilst the claimant was off sick. So even if they did not recognise he was disabled the way they treated him took into account his condition.

52. The provisions, criteria or practices (PCPs) that were in place were the requirement for the claimant to work his contractual hours, the requirement for the claimant to start work at 9.00am and finish at 5.00pm, the requirement for the claimant to work four days a week and the requirement for the claimant to undertake court duties.

53. Up to February 2016 the respondent, although not accepting that the claimant was disabled, actually put in place a host of reasonable adjustments to allow the claimant to continue to work and to ameliorate the effects of those PCPs. He was not placed at a disadvantage.

54. At the very end of his employment in February and March 2016 the claimant and Ms Neary discussed with the claimant the stress risk assessment and agreed that that should be completed.

55. Although the claimant did mention to Ms Neary that he was contemplating reducing his hours from four days to three days, he never filled in the requisite form to apply for reduced hours. We find that the claimant did know and was aware of the process by which he could have asked to work fewer hours. We have no reason to suspect that, if possible, the claimant would have been allowed to reduce his hours further.

56. On 5 April 2016 a "keeping in touch" meeting took place between the claimant and Ms Neary. Some of the notes of the meeting are lost, but we did consider page 177 of the bundle, and in particular the notes contained therein which state that:

> "Given this is the second period of sickness for the same reason no more reasonable adjustments can be made, decided and informed Richard that he will not return to the courts in Halton when he is better. He will be offered (only possibility) a job as a Band 3 PSO in Warrington. This negates the need to travel and as PSO has control (sic). As no job for him at this time it could be built up appropriately and with allowance to transferable skills."

57. The stress risk assessment form was completed with the claimant at that meeting. The claimant was told at the end of the meeting by Ms Neary, however, that when he came back there would need to be a disciplinary investigation regarding his behaviour in February and his refusal to fax results to another office some weeks prior to his sickness absence.

58. Ms Neary understood the claimant's position that if he was put back into court work he would become ill again and therefore she had to do something about it. However we find that there was no vacancy in Victims Liaison Office which Ms Neary knew of. One may actually have been available.

59. We do not accept that the respondent was acting unreasonably or discriminatorily towards the claimant at that point. They were prepared to take him through a stress risk assessment.

60. The claimant resigned a few days later on 11 April 2016. There was no suggestion in that resignation document that he was raising a grievance about his treatment at the hands of Ms Neary or anyone else.

61. The claimant is not someone who would hold back from complaining about treatment of him. If important to him he would have raised an issue if he thought he was being dealt with inappropriately and forced into a corner.

62. The claimant had become increasingly reticent about not going into court and had caused his managers some considerable difficulty over the issue. He made it

clear that if he was asked to go to Chester Magistrates Court, for example for a day, he would refuse to do so even if he received a direct management order.

63. The claimant was not put under pressure at the 5 April meeting to make a decision. It was the thought of the disciplinary investigation that tipped the balance for the claimant to take the decision to resign. He felt that the best option open to him was to retire.

64. Consequently we find that there was no breach of his contract nor a dismissal, never mind a constructive unfair dismissal. The termination of employment came to an end by mutual consent.

65. The claimant now describes being put under pressure, that he was stressed and had to make a snap decision. We believe that the claimant was thinking about leaving his employment in any event. He was about to be investigated in relation to a disciplinary process.

66. Returning to our views set out at the head of this decision about credibility we did not accept the claimant's evidence on one point. He suggested that applying for the job with the police on 6 March 2016 was simply practicing for applying for jobs. That was a disingenuous comment by the claimant.

67. The claimant had been dissatisfied with the changes to the job role for some time. He did not like targets and he had not liked the previous split between the public and the private part of the role which he felt added to his workload. His unhappiness came to the surface and bubbled over into insubordination towards his manager in February 2016.

68. Consequently, whatever reasonable adjustments had been put in place the claimant would still have resigned. It was the claimant's own decision made in discussions with his wife that he would go.

69. Mr Simpson is not a man who would be pushed around . The respondent had not breached his contract and his managers had put in place the requisite reasonable adjustments. Put simply this was a case where an employee knew it was likely that when he returned to work he would be investigated for improper conduct, retirement was open to him and he took the easy way out.

70. His claims for breach of the duty to make reasonable adjustments and constructive unfair dismissal fail and are dismissed.

22-06-17

Employment Judge Robinson

JUDGMENT AND REASONS SENT TO THE PARTIES ON

29 June 2017

FOR THE TRIBUNAL OFFICE