



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. M. Malafaia

**Respondent:** Royal Mail Group Limited

**Heard at:** London South, Croydon

**On:** 27-8 June 2017

**Before:** Employment Judge Sage

**Members:** Ms. S. Murray  
Ms. Christofi

**Representation**

**Claimant:** In person

**Respondent:** Ms Porter Solicitor

## RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal is not well founded and is dismissed.
2. The Claimant's claim for direct discrimination because of disability is not well founded and is dismissed.
3. The Claimant's claim for direct discrimination because of race is dismissed on withdrawal.
4. The Claimant's claim for failure to make reasonable adjustments is not well founded and is dismissed.

## REASONS

### The complaint(s)

1. By a claim form presented on 9 December 2016, the Claimant brought complaints of unfair dismissal, race and disability discrimination. The Respondent defended the claims and put the Claimant to proof on the issue

of disability, however the issue of disability was conceded by the Respondent on the 10 April 2017 in respect of the conditions of the knee, wrist and Sudden Death Syndrome but it did not concede that his back problem was a disability within the meaning of the Equality Act.

### ***The issues***

#### ***2. Unfair dismissal claim***

- 2.1. What was the reason for the dismissal? The Respondent asserts that it was a reason related to conduct which is a potentially fair reason for section 98(2) Employment Rights Act 1996. It must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal.
- 2.2. Did the Respondent hold that belief in the Claimant's misconduct on reasonable grounds?
- 2.3. At the time that the Respondent had formed that belief had it carried out as much investigation as was reasonable in the circumstances?
- 2.4. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?
- 2.5. If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the misconduct alleged.
- 2.6. Does the Respondent prove that if it had adopted a fair procedure the Claimant would have been fairly dismissed in any event? And/or to what extent and when?

#### ***3. Disability***

- 3.1. Does the Claimant have a physical or mental impairment, the only issue that needs to be determined by the Tribunal is whether the Claimant's back problem is a disability within the meaning of the Equality Act?
- 3.2. If so, does the impairment have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?
- 3.3. If so, is that effect long term? In particular, when did it start and:
  - 3.3.1. has the impairment lasted for at least 12 months?
  - 3.3.2. is or was the impairment likely to last at least 12 months or the rest of the Claimant's life, if less than 12 months?

N.B. in assessing the likelihood of an effect lasting 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing

this likelihood. See the Guidance on the definition of disability (2011) paragraph C4.

3.4. Are any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities?

**4. Section 13: Direct discrimination on grounds of race and disability**

4.1. Has the Respondent subjected the Claimant to the following treatment falling within section 39 of the Equality Act 2010, namely:

4.1.1. *dismissing*

4.2. Has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies on hypothetical comparators.

4.3. If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

4.4. If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

**5. Reasonable adjustments: section 20 and section 21**

5.1. Did the Respondent apply the following provision, criteria and/or practice ('the provision') generally, namely:

5.1.1. To deliver all the mail on a walk and not to return with undelivered mail.

5.2. Did the application of any such provision put the Claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:

5.2.1. He could not do so as his condition(s) had deteriorated

5.3. Did the Respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the Claimant; however it is helpful to know the adjustments asserted as reasonably required and they are identified as follows:

5.3.1. To be placed on lighter duties and/or allowed to bring back undelivered mail

5.4. Did the Respondent not know, or could the Respondent not be reasonably expected to know that the Claimant had a disability or was likely to be placed at the disadvantage set out above?

**6. Remedies**

- 6.1. If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.
- 6.2. There may fall to be considered reinstatement, re-engagement, a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings and/or the award of interest.

7. **Witnesses**

The Claimant and for the Respondent we heard from:

Mr Pratt the dismissal manager

Ms Walsh the appeals manager

**Findings of Fact**

These were agreed or on the balance of probability we find to be as follows:

8. The Claimant was employed by the Respondent as a postman commencing on 3 June 2003; at the date of dismissal he was working in the Balham Delivery Office. It was not disputed that when he joined the company he signed the contract of employment and the terms and conditions of employment. The Claimant was specifically taken to page 74 of the bundle where it stated that it was an offence open or delay the mail without proper authority or reasonable excuse; he accepted that he signed this personal declaration when he joined. However, he told the Tribunal that when he signed this he spoke little English but he conceded that he knew it was important not to delay the mail.
9. The tribunal were also taken to page 36 of the bundle which was part of the Group Conduct Policy where it stated that “**intentional delay of the mail**” was an act of gross misconduct. The Code of Business Standards at page 45 of the bundle also emphasised the importance of “**timely reliable and secure performance of services worldwide**”. The National Conduct Procedure Agreement referred to at page 137 of the bundle referred to the offence of “unexcused delay” which included “**various actions can cause mail to be delayed, for example carelessness or negligence leading to loss or delay of customers’ mail, breach or disregard of a standard or guideline. Such instances are to be distinguished from intentional delay..although they may be treated as misconduct and dealt with under the Conduct policy, outcomes may range from an informal discussion to dismissal**”. The tribunal therefore find as a fact that the Respondent had made it clear in their communications with the Claimant via contractual terms policies and procedures and via their Business Standards that delay delivering the mail was a serious offence that could result in dismissal. Although the Claimant may not have had read and understood the contractual document he signed at the time he joined the Respondent, he accepted he was aware of the importance of not delaying the mail
10. It was not disputed that during his employment had a number of accidents. However, these were not relevant to the issues before the tribunal.
11. The Claimant was Portuguese and English was not his first language, although his claim form referred to race discrimination, he stated in answers to cross examination that he felt he had been treated less favourably than

British workers. He accepted that he had no evidence to support his claim and was not pursuing his claim for race discrimination. This was also not mentioned in his closing submission therefore in absence of any evidence to support the claim, it is dismissed upon withdrawal.

12. The first issue before the tribunal is whether the Claimant's back problem amounted to a disability under the Equality Act. The Claimant told the tribunal that he had identified that he had a back problem but as he was a health professional (physiotherapist), he was able to identify the problem and treat it himself. There was no evidence before the tribunal that the back problem had a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities; the tribunal heard no evidence that the measures being utilised by the Claimant were actions that were being taken in respect of the condition. We noted that the medical evidence in the bundle did not state that the Claimant's back problem amounted to a disability. The most recent medical report from his GP dated the 20 February 2017 recorded single incidents of back problems after lifting heavy weights (see page 264 of the bundle) which showed single incidents of musculoskeletal pain, this evidence gave no indication that the Claimant was suffering a long-term medical condition that are adversely impacted his every day life. The Tribunal was also taken to page 174 dated the 11 October 2011 which stated that from OHS point of view his back problem was "unlikely to be a disability". The tribunal therefore conclude that there was insufficient evidence to conclude that the back problem amounted to a disability.

13. The incident that led to the Claimant's dismissal occurred on 4 May 2016. The Claimant deals with the incident at paragraphs 31-36 of his witness statement. He recorded that on that day he went out on his delivery after what he described as a "**heavy dispute with Michael Higgins**", which related to the Claimant's claim that he should have received overtime payments for the delivery of election papers. Before he went out on his round, he informed Mr Higgins that he would not work extra time for "**reasons already known to him**". The Claimant stated that while on his round he felt unwell and experienced symptoms of Sudden Death Syndrome and hayfever, he stated that he was suffering from these conditions due to the stress that had been caused to him. He stated that he "**decided to stop at 15.10 and bring the rest of the mail back to the office, walking carefully in clear and lit pavements at a slow pace..**". He confirmed he did not call Mr Higgins to report that he would not complete his round because he had "**lost my mind for being too unwell to be able to think properly and in a point of collapsing**", he blamed the management for putting stress upon him, which had been caused by what he described as the misleading attitude from management. He confirmed that when he returned to the office, he left the mail in front of the manager's office and the tribunal noted that a significant amount of mail was returned (shown at page 125 of the bundle) which comprised of first class and tracked mail. The actions of the Claimant returning to the office, taking mail out of his bag and putting it into a coffin and then walking three miles home strongly suggested that he was not as ill as he suggested to the Tribunal. The tribunal felt that if he had feared an imminent episode of Sudden Death Syndrome, returning mail and walking home would not have been high on his priorities. He accepted that he did not phone an ambulance which again strongly suggested that he may not have been at the point of collapse.

14. On 6 May 2016 the Claimant was suspended pending investigation that he wilfully delayed the mail. The Claimant was invited to an investigation meeting by Mr Higgans on 12 May 2016; he was reminded in this letter that he was entitled to be accompanied by a union representative. The Claimant was also referred to the support services who were able to provide support and assistance during his suspension. The minutes of the investigatory meeting were at pages 82 to 86 of the bundle; and the Claimant was accompanied by Mr Murphy the union representative. The meeting was chaired by Mr Higgans.
15. The Claimant told the meeting that he was unable to complete his round because he did not have enough time, he stated that this has happened several times before and he would usually phone but he stated that **“I didn’t on this day as I thought you would talk me into extending/staying out to complete. On the day. I also suffered an episode of hayfever.”** The Tribunal noted Claimant made no reference suffering from an episode of Sudden Death episode. The Claimant was asked in the meeting why he failed to contact management to inform them he would not be able to complete his round and he stated **“because, in my mind, I thought you would give me the same answer (“please try and complete/extend and I will pay you protracted”)**. The Claimant was then asked whether because of a previous incident the weekend before around delivery of election material that he decided not to follow the procedure, he replied **“it wasn’t really that because I would have still have informed you. When I told you I wouldn’t do any more over time as a result of not paying my two hours the week before, I’d say this was more the reason to bring the work back”** (page 83).
16. The Claimant was then asked specifically why he didn’t telephone the manager so they could have prevented the delay to the mail and he replied **“because of the way I was, I was hurting (my knee and wrist), and my hayfever situation was a bad one. In my mind, if I contacted you, you would have said ‘please extend if you can’ and you are a very persuasive manager and I was concerned you would have persuaded me to extend”** (page 84). He also conceded in cross examination that he did not tell Mr Higgans about his Sudden Death Syndrome for a number of reasons firstly that he had previously laughed at him and he wouldn’t understand, secondly that he would probably know and lastly that he was sure Mr Higgans was aware of “everything”, although there was no evidence that this was the case.
17. The Claimant signed the notes of the investigation as being correct but in cross examination and he stated that although he signed the notes he did not read them as his mind was elsewhere (due to family reasons). The Claimant conceded in cross examination that he agreed in the meeting that he was supposed to call Mr Higgans if he could not complete his round. The Claimant was asked in cross examination whether he had agreed during the investigation that he knew he had to contact his manager and his answer was **“yes I said that but I didn’t think it was an obligation”**. The tribunal find as a fact that the Claimant was aware that he knew he had to telephone a manager if he was unable to complete a round and the reason he did not do so was because he did not wish to do overtime and did not wish to be persuaded to finish his round as this was his reply on three occasions as referred to above at paragraph 15.

18. As a result of the investigation, the Claimant remained on suspension and was called to a disciplinary hearing on 15 June 2016 by an undated letter in the bundle at page 90 to 91. The letter attached the fact finding notes, memos of conversations with Mr Higgans, photographs of the returned mail and a copy of the business standards. The Claimant was warned that the charge was considered to be an act of gross misconduct for inexcusable delay of the mail and for contravening the Royal Mail's Code of Business Standards. He was informed that one outcome could be dismissal without notice.
19. Mr Pratt then convened the disciplinary hearing. The Claimant stated that he was "best friends" with his line manager Mr Higgans, but Mr Pratt denied this was the case in answers to cross examination and the Claimant and his union representative made no objections to him chairing the hearing. The minutes were at pages 93-99 of the bundle and showed that the Claimant was assisted in this hearing by his CWU rep. It was put to Mr Pratt in cross examination that the reason he was dismissed was due to the fact that Royal Mail was "struggling" and he denied this was the case and there was no evidence before the Tribunal that this was the case. The minutes of the hearing were sent to the Claimant for approval and he made some amendments to the minutes (see page 102 of the bundle) although the Claimant questioned the accuracy of the minutes the Tribunal did not find his evidence to be credible. It was put to the Claimant in cross examination that did not mention Sudden Death Syndrome in the hearing and he replied "**it was enough to say I was not well, he knew the problem my wrist**", the Tribunal therefore conclude that by his reply he accepted that he did not mention it.
20. In cross examination and in Mr Pratt's statement he confirmed that during the hearing the Claimant only referred to his wrist and knee problems and his hayfever (pages 97 and 98). After the disciplinary hearing, Mr Pratt interviewed Mr Higgans (pages 103-5 of the bundle) on the 21 June 2016, it was confirmed in this meeting that the Claimant had never previously failed to complete a round and not report it (page 104 of the bundle).
21. The issue of reasonable adjustments were discussed and Mr Higgans told Mr Pratt that he had a number of OHS reports referring to a number of reasonable adjustments to assist the Claimant following his wrist injury and stated that the adjustments made were "**permitting him to advance prep his walk to alleviate workload issues and allow for reduced capabilities**". Mr Pratt confirmed to the Tribunal that although the walk carried out by the Claimant was lengthy and generated quite a volume of mail, it had minimal steps to accommodate the Claimant's knee disability. The Claimant told the Tribunal that he had to lift heavy boxes all the time and therefore denied that the Respondent had made the necessary reasonable adjustments. The Claimant did not mention the failure to make reasonable adjustments in the disciplinary hearing or that the failure to put them in place resulted in his predicament on the 5 May.
22. The dismissal letter was at page 114 of the bundle and confirmed that the Claimant had been summarily dismissed for gross misconduct for "**unexcused delay of mail and contravening points within the Royal Mail**

**Code of Business Standards due to mail which was proper to your delivery being undelivered on the 5 May 2016**". Attached to the letter was the dismissal manager's report at pages 117-120 which stated **"on balance I find evidence to support conduct notification one and that Mr Malafaia did make a conscious decision not to inform his manager he would not be completing his delivery thus directly leading to a failure of the mail"**. With regard to conduct notification two he concluded that the Claimant had **"made a choice not to inform his manager he may fail to complete his delivery damaging the service to our customers. His previous actions do not reflect the lack of understanding he claims regarding his responsibilities"**. It was concluded that the Claimant's actions damaged the service given to customers.

23. Mr Pratt did not find the Claimant's evidence that he did not receive a copy of the Business Standards credible. He also concluded that the Claimant knew it was mandatory for him to report to a manager if he was not going to complete his delivery as it had been confirmed by Mr Higgans that he had never failed to report this before and there had been no instances where staff had not completed their rounds or had not reported to the manager in the Balham office. Mr Pratt concluded that the Claimant's evidence about his failure to report workload issues lacked integrity and honesty as he had previously reported workload issues but this time he chose not to. He concluded that in this situation summary dismissal was appropriate because both conduct allegations had been found to be proven and combined with what he described as the breakdown of trust and confidence concluded that summary dismissal was the only option.
24. The Claimant appealed stating he believed the decision to dismiss was unfair (page 116).
25. The appeal was head by Ms Walsh who was an experienced appeals manager. The appeal was heard on the 10 October 2016 and the minutes were on pages 134-144. The Claimant was represented by his union. The representations made in the hearing on behalf of the Claimant that the sanction was unduly harsh and that his disabilities (knee and wrist) and his wife's cancer diagnosis (pages 137-8) should be taken into account; these were the reasons the Claimant was "less than able" on the day. It was also submitted on the Claimant's behalf that there had been a breakdown in communications with Mr Higgans and there was no clear process at Balham office. It was also submitted that the manager had failed to obtain an OHS reports.
26. It was put to Ms Walsh in cross examination that when he was on his walk he was "completely unwell" and she replied **"the first I read of Sudden Death Syndrome was in your statement you did not mention it in the appeal you only told me about wrist, knee and hayfever and your wife's unfortunate situation"**. She confirmed to the Tribunal that she would not have missed a reference to Sudden Death Syndrome and her notes were correct. He asked her in cross examination why she did not consider the stress he was under and she replied that **"I would have considered it had you made the phone call to say you were not feeling well I can't complete the round and I will be bringing it back"**. The Claimant then put to Ms Walsh that he put the mail safely outside Mr Higgans office and his



priority was to get home to take his medication and he asked why it was accepted that there was a confrontation and she replied **“you said at the time you were suffering from hayfever, you bring the mail back and take it out of the trolley and put it in a coffin. I felt this might have been quite confrontational”**. It was put to her there was no confrontation however she disagreed and said **“I would expect you to call or send a text, the onus would then move to the manager, it was not your decision to make”**. It was Ms Walsh’s view that the Claimant had not accepted responsibility for his actions and she was not confident that he would not do it again.

27. The Claimant stated in cross examination that he did not tell Ms Walsh about his Sudden Death Syndrome in the appeal because she would not understand and accepted that he did not mention this condition in his ET1; he mentioned it for the first time in his statement because he felt that **“they wouldn’t understand”**

28. The appeal notes were sent to the Claimant and he approved them. The decision of Ms Walsh was that the Claimant had been treated fairly and reasonably and the decision to dismiss was upheld. (page 160 of the bundle), the detailed decision was set out at pages 161-172. This decision was not challenged in cross examination.

## 29. **Submissions**

30. Submissions on behalf of **the Respondent** were in writing and given orally. In outline those submissions are as follows:

31. The Claimant was dismissed under the Respondent’s conduct code and conduct is a potentially fair reason for dismissal. The Claimant’s race and disabilities were not the reason for dismissal and the Respondent did not apply the PCP (see above at paragraph 5.1.1) therefore the duty to make reasonable adjustments is not engaged. In any event reasonable adjustments were made for the Claimant’s disabilities.

32. The Respondent had a reasonable belief in the conduct as there was no question that the Claimant failed to deliver the mail and did not contact his line manager, the reason he gave was that he did not wish to be persuaded by his manager to complete his delivery therefore he did not contact him. Both the dismissal and the appeals manager held a reasonable belief that the Claimant was aware that he should have contacted his manager and he was aware of the correct process to follow but chose not to do so. They both believed that he had committed an act of misconduct. The Respondent came to the belief that the Claimant knew he had to inform his manager and despite this he returned to the office to return undelivered mail, in so doing he caused the mail to be delayed. The charge of unexcused delay was therefore made out. The primary conclusion reached was not the fact that he had failed to deliver the mail but he had failed to take reasonable steps to alert his manager without good reason and therefore denied the Respondent of an opportunity to take steps to avoid the mail being delayed.

33. Before dismissing, the Respondent carried out a reasonable investigation, including carrying out a fact finding interview, a conduct interview and an appeal. At each stage the Claimant was represented by his trade union. He

had the opportunity to consider and sign the notes of interview. The appeal was a full rehearing (any deficiencies being corrected on appeal).

34. The Respondent submitted that the dismissal was within the band of reasonable responses. This was an employer whose primary obligation was the provision of a public service with high public expectations. The Respondent's license from the Regulator sets obligations and if it fails to meet those obligations it could face fines or ultimately lose its license. The delivery of the mail has a direct impact on the operation of the business. The mail that was delayed was first class, the customer had paid for the service and the service was not provided. The Respondent's conduct code made it clear that unexcused delay of the mail could lead to dismissal. The Respondent had gone to great lengths to convey this to all staff and the Claimant confirmed he was aware of this obligation. The Respondent referred to the cases referred to below and submitted that dismissal fell within the range of reasonable responses and the Respondent had lost all trust and confidence in the Claimant. They will submit that the dismissal was fair.
35. The **Claimant's submissions** were written and partly oral and those submissions were in outline as follows:
36. The Claimant asked to be reinstated into his job, he stated that he did not deliberately cause wilful delay to the mail. He stated that he returned the mail due to excessive workload and because they had failed to make reasonable adjustments. He stated that he had been very unwell and unable to perform the rest of his duties; this also prevented him from taking the right action of calling an ambulance and properly informing his manager. The Claimant stated that he had raised concerns several times to Mr Higgans to accommodate reasonable adjustments and he denied that adjustments had been made for him as he was on an extra walk. He was told by management that if he wanted to keep his job this is what he had to do [to do extra duties] and he was also told by his manager that the dismissal manager was the DOM of Putney and would "within a finger click" terminate his contract with a summary dismissal. He stated that all his issues were discarded and he had no one to turn to about his health.
37. He stated that due to his disability he had not been treated fairly. He stated that he was now no use to the Respondent and they used this as an excuse to make a small profit and dismiss him.
38. The Claimant had a plan from OHS that he was not to do heavy lifting, take stairs and was given extra time to perform his duties but he stated that the extra time to perform was broken. His wish to be redeployed in a indoor position did not fit in with what Mr Higgans wanted as he wanted staff to work. This was grossly unfair.
39. The Claimant stated that he had a lot of stress in his personal life and he needed this job to survive financially and emotionally. He stated that he should not have been placed on that particular walk as it was very demanding and unsuitable to his needs. His back condition was caused by two accidents at work and there had been a continuous deterioration. He stated that from an acute injury they are now a chronic condition in the upper and lower back (T4-5 and L4-5). He stated that the back conditions resulted from accidents at work and as a result of an excessive workload and will affect his everyday life

until the end of his life. He stated that the symptoms on the day could also be partly as a result directly and indirectly of his chronic back condition.

40. He questioned whether Ms Walsh could have misunderstood when he referred to his paroxysmal atrial fibrillation episodes. He stated that he had to go on the IPS to prepare another vacant walk and during this time he was not allowed to do his own work because Mr Higgins told him that it would affect other employees' systems. He had not been put on a lighter walk but on the second heaviest walk (known as "the Beast") with no fewer than 300-400 steps.
41. Sudden Death Syndrome occurs suddenly without warning and a person would collapse before they could physically recognise it. He did not believe the Respondent understood or would have understood his explanations for the failure to complete his round.
42. He stated that none of his concerns were treated fairly and in accordance with OH Assist. He stated that he believed that Ms Walsh omitted or did not understand about his Sudden Death Syndrome.
43. He stated he had been prevented from bringing work back and received threats of summary dismissal. He stated that he had always worked in compliance with every request made by management. He stated that in the hearing with Mr Pratt he said that he had not been provided with the Code of Business Standards sent to all employees as he was off sick at the time.

## **The Law**

### **Section 98 Employment Rights Act 1996**

(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--

- (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.

(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,
- (b) relates to the conduct of the employee,

(3) In subsection (2)(a)--

- (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
- (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case.

**Section 13 Direct discrimination Equality Act 2010**

- (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.

**Section 20 Duty to make adjustments Equality Act 2010**

- (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
- (2) The duty comprises the following three requirements.
- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

**44. Cases relied upon by the Respondent**

British Homes Stores v Burchell [1978] IRLR 379  
Iceland Frozen Food v Jones [1982] IRLR 439  
Meyer Dunmore International Limited v Rogers [1978] IRLR 167  
The Distillers Company (Bottling Services Limited) v Gardner [1982] IRLR 48  
Scottish Midland Co-Operative Society Limited v Cullion [1991] IRLR 261  
Royal Mail v Adam and Stephen UK/EAT/0056/06

**Decision**

The unanimous decision of the Tribunal is as follows:

- 45. The tribunal will first deal with the issue of unfair dismissal. We accept the consistent evidence of the Respondent that they dismissed for conduct which was a potentially fair reason. We also accept that the Respondent had before them sufficient evidence to justify a genuine belief that the misconduct had occurred. The investigation found that the Claimant had failed to report to his manager that he would be unable to complete his walk. This resulted in the mail being delayed. There was consistent evidence that the Claimant had previously reported these matters to his line manager but on this occasion, chose not to do so. He conceded in cross examination that he was aware he should report this to his line manager but did not feel it was compulsory, he could provide no explanation for this view and it appeared to be inconsistent with the evidence before the Tribunal that he had always on previous occasions reported this to a line manager. We also conclude that the reason he failed to report that he could not complete his walk on this occasion was due to a heated exchange he had with his manager about overtime and he did not want to be persuaded to complete his walk. This was the evidence he gave to the investigation meeting. The Tribunal conclude therefore that the Respondent was entitled to conclude that the Claimant, by his actions, delayed the mail and this was considered to be an act of misconduct.

46. Turing to the investigation, the tribunal conclude that the Respondent carried out as much investigation as was reasonable in all the circumstances. The Claimant attended an investigatory hearing and was accompanied; when he attended this hearing, he was aware of the matter being investigated. When the Respondent decided to refer the matter to a disciplinary hearing, it was before an independent manager; we do not accept the Claimant's evidence that Mr Pratt and Mr Higgans were best friends and no complaint was made by his union representative about any potential bias at the time. The Claimant was aware of the charges he had to face at the hearing and at the time he attended he had copies of all the evidence against him and the notes from the investigation and of those from the interview with Mr Higgans. The Claimant was able to challenge this evidence and to make any submissions he wished to make either personally or through his representative. He was given the opportunity to amend the minutes of the hearing and he did so. The Claimant's evidence that the notes "missed things out" was not considered to be credible as no complaints were made at the time and the Claimant took the opportunity to amend the notes. The tribunal noted that at all times he had the assistance of his union and no complaints were made at the time that the notes were inaccurate. The decision was not finalised until the amended notes had been received therefore the Respondent took into account any changes made by the Claimant.
47. The Claimant had the benefit of an appeal which we concluded was thorough and was by way of re-hearing, it was not simply a review. The Claimant's union representative could present the Claimant's case and did so in detail. There were no flaws in the process itself and the Claimant has not identified any ways in which the procedure followed was unfair save for the managers involved in the process being "friends" but as this was denied and there was no evidence that this was the case. We conclude that the process followed was procedurally fair.
48. The next issue for the tribunal is whether the decision to dismiss was substantively fair and we conclude that it was. The tribunal saw that the Claimant signed a declaration when he joined which emphasised the importance of not delaying the mail and this was a fundamental term in the contract and failure to abide by this term was considered to be serious in terms of the possible consequences for the Respondent (including facing fines or even a loss of their license). This was a matter that was viewed with the utmost seriousness and was potentially an act of gross misconduct as confirmed in their Conduct Policy which confirmed that delaying the mail can amount to an act of gross misconduct (page 36 of the bundle) and the Code of Conduct emphasised the "**timely and reliable performance of services**" (page 45 of the bundle). The National Procedures also provided that "**unexcused delay**" may be treated as gross misconduct (page 137 of the bundle). The Claimant was therefore on notice that this matter was treated seriously by the Respondent and he conceded that he was aware of the seriousness of delaying the mail.
49. We conclude that the dismissal fell squarely within the band of reasonable responses. There was considerable evidence to show that the Claimant was aware of the process to be followed and he failed to follow that procedure (by contacting his line manager) and as a result first class and tracked mail was delayed. The Claimant's evidence on why he failed to follow this procedure was unconvincing, his view that it was not mandatory was at odds with the

clear policies before us and with the financial and regulatory requirements imposed on the Respondent. This was potentially an act of gross misconduct and the Respondent was entitled to conclude that the Claimant's evidence as to why he chose not to follow the correct procedure was unconvincing and that it amounted to an act of gross misconduct. As a result we conclude that dismissal was within the band of reasonable responses.

50. Although the Claimant made much of his Sudden Death Syndrome, there was no evidence to conclude that he raised this with any of the managers involved in the disciplinary process. He gave various reasons for not telling them but the consistent evidence before us was that he did not mention it and his evidence that the notes were incorrect was not credible. Although the decision to dismiss was harsh, we must remind ourselves that we are not allowed to substitute our view for that of the Respondent. We accept the Respondent's view that the misconduct on that day was so serious as it could result in serious reputational and financial repercussions. The evidence of Ms Walsh was that she could not be confident that the Claimant would not repeat this offence and her view was again consistent with the evidence we had before us as the Claimant did not seem to appreciate that the obligation was on him to warn his manager of a potential delay in delivering the mail in order for measures to be taken to avoid this; the Claimant failed to do so and an avoidable delay occurred. The dismissal is therefore fair and within the band of reasonable responses.

51. Turning to the Claimant's claim that his dismissal was an act of direct discrimination; we have seen no evidence to suggest this was the case. The Claimant was dismissed for misconduct and there was no evidence to suggest that the dismissal was because of his disabilities. This point was not pursued by the Claimant in the disciplinary or appeals process and no questions were put to the Respondent's witnesses in cross examination on this point. The only reference to the Claimant's claim for discrimination in his statement was in paragraph 39 where he stated that because of having returned work due to being unwell and "**close to a sudden death episode**" he was dismissed. However, the Tribunal have concluded that he was not dismissed for returning to work with undelivered mail; he was dismissed for failing to inform his manager that he would be unable to complete his walk. This claim on its facts must fail. The Tribunal also have found as a fact that he failed to inform the Respondent at any time before the Tribunal hearing that he was suffering a Sudden Death Syndrome episode (or close to an episode) and also could not explain why this would have prevented him making a phone call when he able to walk back to the office and then walk three miles home. As there is no evidence to suggest that dismissal was an act of direct discrimination we conclude that this claim is not well founded and is dismissed.

52. Turning to the claim for failure to make reasonable adjustments, it has been agreed at the previous preliminary hearing before me that the PCP is "to deliver all the mail on a walk and not to return with undelivered mail" (see above at paragraph 5.1.1). The tribunal are satisfied on all the evidence that this PCP was not applied to the Claimant. There was no policy or procedure that required employees to deliver all the mail; there was an agreed procedure to adopt if the mail on a walk could not be delivered on time on any occasion. The process put in place to report to the office manager if the walk

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could not be completed. The consistent evidence before the Tribunal as given by Ms Walsh was that the onus on the Claimant was to inform his manager and he chose not to do so. As this PCP has not been applied by the Respondent the claim for failing to make adjustments must fail

Employment Judge Sage

Date 5 July 2017