Case No. 2300920/2016

EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

MEMBERS **MRS J MUIR**
MR S KHAN

BETWEEN: **MR A SIDDIQUE** **CLAIMANT**

AND

LONDON UNITED BUSWAYS LIMITED **RESPONDENT**

ON: **27th and 28th April 2017**

Appearances

For the Claimant: **Mr G Enuezie, solicitor**
For the Respondent: **Mr E Nuttman, solicitor**

REASONS FOR THE TRIBUNAL'S JUDGMENT

Written reasons given at the request of the Claimant following oral Judgment and reasons delivered at the hearing and a written judgment sent to the parties on 3rd May 2017.

Claim and Issues

1. In this case the Claimant Mr Siddique worked as a bus driver and was dismissed on 11th December 2015. The Claimant claims unfair dismissal and disability discrimination (specifically failure to make reasonable adjustments direct discrimination and discrimination arising from disability). . With regard to the disability discrimination claims the Claimant relies on the condition of Transient

Ischemic Attack, which has the colloquial term of "mini stroke". (Claims for unpaid wages and holiday pay were withdrawn.)

2. The Respondent denies that the Claimant was, at the relevant time, a disabled person and says that the Claimant was fairly dismissed for capability when, following a mini stroke, his licence to drive a bus was revoked. Following an amendment to his claim the Claimant also pleads, in the alternative, that if he was not a disabled person, the Respondent directly discriminated against him because of a perceived disability when he was dismissed and when his appeal was dismissed.

3. In relation to the reasonable adjustments claim it is the Claimant's case that the Respondent applied a provision criterion or practice of (a) requiring him to return to work as a bus driver and (b) requiring him to be subjected to its long term absence procedure. This put him at a substantial disadvantage in comparison to non-disabled persons and the Respondent should have made reasonable adjustments in consequence. In particular the Respondent should have allowed him to remain employed until his bus driver's license was returned (with or without pay) and/or provide him with another suitable job and/or training and support for other vacant positions.

4. In respect of the section 15 claim (discrimination arising from disability) the Claimant says that he was unfavourably treated by the Respondent when he was dismissed and that this treatment was in consequence of something arising from his disability, namely his non attendance at work. The Respondent accepted that if the Claimant was disabled because of the TIA (which was denied) then he had been treated unfavourably because of his non attendance at work, which in turn was "something arising from his disability". However its case was that dismissal was a proportionate means of achieving a legitimate aim.

5. Finally the Claimant claims that the Respondent treated him less favourably because of his disability or his perceived disability when he was dismissed and when his appeal was dismissed.

Evidence

6. The Tribunal heard evidence from Mr Robertson, Operations manager, who took the decision to dismiss the Claimant, from Mr Harris who heard the Claimant's appeal against dismissal and from the Claimant himself. We had a bundle of documents.

The facts

7. The Claimant worked as a bus driver for the Respondent and had done so for 12 years. At the time of his dismissal he was working 3 days a week.

8. On 12th July 2015 the Claimant suffered a Transient Ischemic Attack (TIA). A TIA causes sudden symptoms similar to a stroke but the effects only last for a few hours and usually fully resolve within 24 hours. The Claimant was admitted to hospital on 12th July with a left sided facial droop, slightly slurred speech and weakness in his left hand.

9. The Claimant was reviewed on 13th July and by then his symptoms had resolved and he had a normal neurological examination. By then the Claimant's current functions as to power was 5/5 throughout all 4 limbs, his sensation was intact and there were no balance issues. The Claimant reported that he felt all symptoms had resolved. (154-156).

10. The Claimant was discharged on 14th July and prescribed with atorvastatin, clopidogrel, and lansoprazole (the latter for gastric protection). These medications were for secondary prevention to reduce the risk of recurrent TIA and stroke. He remained off work and was referred to Occupational Health.

11. DVLA requirements provide that group 2 bus and lorry drivers who have had a stroke or a TIA must notify the DVLA. The DVLA also prohibit such individuals from driving a bus for one year after a TIA. The licence is suspended and relicensing may be subject to a satisfactory medical report. (161) He also could not drive a car for one month.

12. The Claimant attended occupational health on 28th July. OH reported that a temporary diagnosis of a stroke of been made and he was waiting for confirmation following further investigations. OH reported the Claimant was unfit to drive a bus and that if this was the diagnosis, which seemed likely, then he would not be able to drive a bus for one year. OH reported that the Claimant was keen to work and asked management to look into what alternative duties.

13. In September, the consultant at the stroke clinic, Dr Geraghty reported that the Claimant had made a full clinical recovery and he had had no episodes suggestive of recurrent TIA or stroke symptoms. His risk factors were well controlled. He was discharged from clinic (125).

14. The Claimant remained off work and attended long term sickness interviews on 18th August, 10th September, 25th September, 19th October, and 29th October. The first 4 of these interviews were held with the staff manager Ms Sylejmani. At all of those interviews the Claimant said that he was fine and his medical

condition did not affect his day-to-day life. He was very keen to be given alternative duties. Initially the Respondent's position was that they would need to wait for confirmation that he had had a stroke before seeking alternative duties.

15. The Claimant attended occupational health again on 8 October. (108) The Claimant said that he had been totally asymptomatic and was taking cholesterol-lowering medication aspirin and Omeprazole. He said he had been verbally told at the stroke clinic that all was well and that he could resume his duties.

16. However OH reported that they needed confirmation about whether he had had a stroke or not and the OH doctor had written to the consultant at the stroke clinic to obtain her opinion on the matter. In the meantime he should not drive a bus. The consultant wrote to the Claimant's GP (but not to OH) on 21st October 2015 (125) saying that he had presented with TIA symptoms but had made a full clinical recovery. She wrote again on 21st November to the GP confirming that he had presented with a TIA and that his ability to drive would be determined by the DVLA. (135)

17. The Claimant continued to have interviews with the Respondent under its long-term sickness procedure. At the meeting on the 19th October the Claimant was told that there were no light duties available but he was given a list of all the current vacancies and asked if he was interested in any of them. The outcome was that the Claimant was now asked to attend a meeting with a senior manager and advised that the outcome could be the termination of his employment.

18. The Claimant duly met with Mr Robertson on 29th October 2015. He told Mr Robertson he had suffered a TIA but not a stroke. (127) They discussed the list of vacancies. They went through each of the jobs on the list and discussed them in broad terms. The Claimant did not consider that any of the jobs were suitable. We accept that Mr Robertson did not indicate to the Claimant which jobs would have been suitable for him (as he was not aware what the Claimant's skill sets were). We also accept that had the Claimant had indicated a particular job in which he was interested Mr Robertson would have gone through the requirements/criteria in more detail.

19. A further absence meeting was arranged with Mr Robertson on 11th November but postponed to 24th November and then again to 4th December as the Respondent was still waiting to hear from the consultant. The Claimant met Mr Robertson on 4th December and told him that the consultant's letter had gone to the Claimant's GP and asked for a copy. The meeting of 4th December was

again adjourned and reconvened for 11th December. On 7th December OH wrote to say that the consultant had confirmed that the Claimant had had a TIA and that he could not drive a bus for at least a year from the date of the TIA and then he would need to be relicensed.

20. In the meantime the Claimant was sent the lists of current vacancies.

21. The Claimant met again with Mr Robertson on the 11th December 2015 to discuss his continuing employment. The Claimant reported that he felt fine and had no symptoms that there were no issues with his day-to-day activities. He was taking aspirin, cholesterol-lowering tablets and Omeprazole. He asked whether he could be suspended without pay for 7 months or so until his licence was returned. The Claimant was taken to the vacancy list but said that none of the vacancies were suitable. He accepted that he could not drive a bus but asked if he could drive a bus in the garage. However this also required a vocational licence. The Claimant suggested that he might be able to do pre-service checks or do a ramp job, but this was not an existing job, those duties being covered.

22. The Claimant now says that although he told Mr Robertson that none of the available jobs were suitable he only did so because the duties were not explained to him and because he was not told that he could be trained. We do not accept that. Many of the jobs on the list were plainly not suitable (being managerial or technical/engineering roles) and the Claimant was aware of the content of other roles and in particular the allocations supervisor role which he referred to in evidence. (This was a full-time role based in Shepherd's Bush involving shiftwork and use of a computer). Despite this the Claimant did not indicate an interest.

23. The outcome of the meeting on the 11th December was that Mr Robertson decided to dismiss the Claimant. There were no suitable vacancies and he took the view that the company could not cover his duties until he was able to get his licence back. He was paid 3 month's pay in lieu of notice.

24. The Claimant appealed and his appeal was heard by Mr Harris and Mr Whalley (a manager from another depot) on 30th December. By then the Claimant was working as a tyre fitter. At the appeal hearing the Claimant was given a list of current vacancies across the company and asked if he was interested. The Claimant said that none were suitable as the roles either required driving or an engineering qualification. He did not have the qualifications for any of the roles and he wanted something for 6 months so that he could go back to driving afterwards.

25. By letter of the same date the Claimant was informed that his appeal had been dismissed but Mr Harris asked the Claimant to consider reapplying to the Respondent once his licence was returned.

The relevant law

Disability

26. The definition of a disabled person is set out in section 6 of the Equality Act 2010 which provides that "a person (P) has a disability if he has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities"

27. This definition is supplemented by the provisions of Schedule 1 and the "Guidance on matters to be taken into account in determining questions relating to the definition of disability" issued by in April 2011 (the Guidance). The time at which to assess whether a person has a disability is the date of the alleged discriminatory act.

28. Paragraph 2 of Schedule 1 to the Act provides that

> "(1) The effect of an impairment is long-term if—
>
> (a) it has lasted at least 12 months;
>
> (b) the period for which it lasts is likely to be at 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."

In considering whether an effect is likely to recur for the purpose of paragraph 2(2) the House of Lords has determined that likely means "could well happen" rather than "more likely than not" *SCA Packaging Ltd v Boyle* [2009] IRLR 746.

29. The word 'substantial' has been defined in the Guidance has been "more than minor or trivial" reflecting "the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people."

30. Paragraph 6 of Schedule 1 provides that in considering whether or not an impairment had a substantial adverse effect on the ability of a person to carry out normal day to day activities, the effects of medical treatment should be ignored, and it is necessary to consider the normal day to day activities which the individual will not be able to undertake without the medical treatment, see also *Goodwin v Patent Office, [1999] ICR 302.*

Unfair dismissal

31. Section 94 of the ERA sets out the well-known right not to be unfairly dismissed. It is for the Respondent to show that the reason for the Claimant's dismissal is a potentially fair reason for dismissal within the terms of section 98(1). Capability is reason which may be found to be a potentially fair reason for dismissal.

32. If the Respondent can establish that the principal reason for the Claimant's dismissal was a genuine belief that the Claimant's was not capable of performing her job then the Tribunal will go on to consider whether the dismissal was fair or unfair within the terms of section 98(4). The answer to this question "depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and shall be determined in accordance with equity and the substantial merits of the case."

33. In a case of dismissal for long term absence or inability to do his job the question for the employer is whether it should have waited longer for the employee to return. (Spencer v Paragon Wallpapers Ltd 1976 IRLR 373). In considering this all the relevant circumstances should be considered including the nature of the illness, the likely length of the absence, the cost of continuing to employ against those considerations, the size of the employer and the unsatisfactory situation of having an employee on very lengthy sick leave.

34. A fair procedure is also essential, requiring consultation with the employee, medical investigation to establish the nature of the illness and the prognosis and the consideration of other options including alternative jobs within the employer.

Submissions and conclusions.

35. The first issue for the tribunal was whether the Claimant was, as at the date of his dismissal a disabled person as defined in the Equality Act. We are satisfied that the Claimant did not at that time have a physical impairment which had a substantial long-term effect on his day-to-day activities. The discharge notification which he received from hospital stated that his function had returned to normal in all aspects, his ECG showed that there were no significant valvular abnormalities and that his biventricular size and systolic function were normal. The Claimant was permitted to, and did, drive an ordinary car from the 12th

August. In his interviews with the Respondent the Claimant said at all times that he was fine. There was no adverse effect on his day to day activities other than that he was not permitted to drive a bus. That is not a normal day to day activity.

36. In considering whether the Claimant was a disabled person at the material time the tribunal is required to have regard to the deduced effect i.e. the effect of any impairment if the Claimant was not taking medication. In this case however, the medication which the Claimant was taking was preventative only. We do not accept that had the Claimant not been on the medication which he had been prescribed there would have been a substantial adverse effect on normal day-to-day activities. The fact is that a significant proportion of the general public in the Claimant's age range take similar medication to reduce the risk of stroke.

37. Mr Eneuezie submits that the Claimant had an impairment which was substantial and long term because it was likely to recur. He submits that the medical evidence makes it clear that there was a real risk (more than likely to happen) of the substantial adverse effects that the Claimant suffered on 12th July 2015 recurring without preventative medication. Para 2(2) of Schedule 1 to the Act provides that if an impairment ceases to have a substantial effect on a person's ability to carry out day to day activities but that effect is likely to recur, it is to be treated as continuing to have that effect.

38. On the other hand Mr Nuttman submits there was no impairment or an underlying medical condition which, while symptom-free for a while, was likely to recur. He submits that the Claimant was permitted to drive a car after only one month.

39. We found this difficult. In some ways the very fact that the DVLA prohibited the Claimant from driving a bus might indicate that the effect might be likely to recur in the Boyle sense that it could well happen. On the other hand there was no medical evidence that this was the case and he was permitted to drive a car. We find that there was no evidence of an underlying medical condition that was continuing. Even if there was, the risk of recurrence did not appear to be any greater than that of many other individuals in the general population who may have raised blood pressure or other indications of risk.

40. We conclude that the Claimant was not a disabled person at the time of dismissal and the Claimant disability discrimination therefore fails. We have not for that reason considered the Claimant's claims of failure to make reasonable adjustments, discrimination arising from disability or direct disability discrimination.

41. The Claimant also pleads, in the alternative, that he was dismissed because the Respondent perceived him to be disabled. However, we do not accept that the

Respondent perceived the Claimant to be disabled. They had all the relevant medical evidence from which was clear to them that he had recovered from his TIA within a short period of time. Moreover it is also clear that the reason that the Claimant was dismissed was because he was unable to drive a bus and not because of any perception of disability or otherwise.

Unfair dismissal

42. It was not disputed that the Claimant was dismissed for capability namely that he was no longer able to perform the principal function of his job - driving a bus. That is a potentially fair reason for dismissal and the issue for the tribunal was whether the Respondent acted reasonably in treating that reason as a sufficient reason for dismissal.

43. The starting point in a case of dismissal for long-term capability is Spencer v Paragon Wallpapers Ltd (above). The basic question which has to be determined is whether it, in all the circumstances, the employer can be expected to wait any longer for the employee to return and if so how much longer? In determining that question all the circumstances are relevant including the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do, the cost of continuing to employ the employee and the size and resources of the employer. The commercial needs of the employer needs to be balanced against the hardship to the employee.

44. In this case we accept that the Respondent consulted the Claimant about his condition and obtained the relevant medical evidence. The Claimant complains that, although he was given a list of vacancies, Mr Robertson did not discuss the jobs with him or explain the job duties or skill requirements were. The Claimant also complains that Mr Robertson did not tell him that he would be provided training for any of the jobs even if he was not qualified and did not have the skills. He says that he could in fact have done the “Allocations Supervisor” job.

45. Mr Robertson says that it was for the Claimant to indicate an interest in a role. He knew what the Allocations Supervisor role entailed as he would have had daily interactions with the person covering the role. The advertised role was full time, involved using computers and based at Shepherd’s Bush. While he would have known about some roles it was for the Claimant to say if he was interested in a particular role as he was unaware what other skills the Claimant had beyond driving, thought they had discussed the extent of the claimant’ computer skills.

46. On balance we find that the Respondent acted reasonably in identifying the available vacancies for the Claimant. The Claimant said that none of the proposed available vacancies were suitable and the Respondent was entitled to take him at his word. We do not accept that the Claimant said that none of them were suitable only because he did not understand what those jobs entailed. Even were that to be the case then it was up to the Claimant to make that known to the Respondent by asking for further information.

47. The issue was really whether the Respondent should have kept the Claimant on its books until his licence was returned. This would have involved a wait of not less than 7 months. We accept that it can take some time after the year has elapsed for the relicensing process to be completed.

48. Mr Robertson and Mr Harris both gave evidence that the Respondent's only income is a fixed sum from Tfl and that it operates with tight margins. Even if the Claimant had been placed on unpaid leave, in the absence of a permanent replacement, his route could not be covered without the payment of overtime to existing workers. They encouraged him to reapply once he had his license back when and if there were driving vacancies.

49. It is now trite law that in determining whether a dismissal is reasonable it is not for the tribunal to say what it would have done in the circumstances. The issue is whether the decision to dismiss fell within the band of reasonable responses for a reasonable employer to take given the circumstances.

50. While it was undoubtedly very hard on the Claimant to have been dismissed following a TIA, we cannot say that the decision to dismiss by the Respondent was outside the band of reasonable responses.

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Employment Judge F Spencer
1st September 2017