



EMPLOYMENT TRIBUNALS

Claimant: Mr J Berry

Respondent: Royal Mail Group Ltd

HELD AT: Manchester

ON: 6 October 2017

BEFORE: Employment Judge Slater

REPRESENTATION:

Claimant: In person

Respondent: Miss L Rogers, legal executive

CASE MANAGEMENT ORDER

PRELIMINARY HEARING

Employment Tribunals Rules of Procedure 2013

Rule 53(1)(a)

The following orders are the result of a preliminary hearing held to conduct a preliminary consideration of the claim with the parties and to make Case Management Orders (including orders relating to the conduct of the final hearing).

1. The name of the respondent is amended by consent to Royal Mail Group Ltd.
2. The final hearing is listed for 5-9 February 2018 at **Alexandra House, 14-22 The Parsonage, Manchester M3 2JA** before an Employment Judge sitting with non-legal members beginning at 10 a.m. on the first day or as soon thereafter as the tribunal can hear it. The time estimate of 5 days is to include dealing with remedy, if appropriate.
3. By 20 October 2017, the respondent, having considered the information provided by the claimant at this preliminary hearing and having searched for, and considered, information in its own records, shall write to the tribunal and the claimant stating whether the respondent concedes that the claimant was disabled at relevant times (being 2012 onwards) by reason of his leg condition and, if not, why not.

4. By 20 October 2017, the claimant shall write to the tribunal and the respondent stating whether he intends to argue that he was disabled at the time of the incident giving rise to his dismissal by reason of a mental impairment and, if he does, he shall, also by 20 October 2017, provide the tribunal and the respondent with a written witness statement setting out the adverse effect he says that the mental impairment had on his ability to carry out normal day to day activities, when that effect started, when it finished, or if it is continuing and, if it varied in any material way at different times, giving details of the variations.

5. If the claimant has written to say that he does intend to argue that he was disabled by reason of a mental impairment, then, by 3 November 2017, the respondent shall write to the tribunal and the claimant stating whether they concede the claimant was disabled by reason of a mental impairment at the time of the incident giving rise to his dismissal and, if not, why not.

6. By 3 November 2017, the respondent shall present an amended response in the light of the complaints as clarified (the judge has varied the date for presentation of the amended response since the preliminary hearing on her own initiative).

7. By 10 November 2017, the respondent shall complete disclosure of relevant documents by sending the claimant a list and copies of relevant documents.

8. By 24 November 2017, the claimant shall complete disclosure of relevant documents by sending the respondent a list and copies of any relevant documents additional to those disclosed by the respondent.

9. By 8 December 2017, the parties shall agree the contents of the joint bundle of documents to be used at the final hearing. The respondent shall produce the bundle and provide the claimant with a copy by 15 December 2017. The bundle should include any documents whose admissibility may be in dispute. It should be indexed in logical sequence, with all pages numbered consecutively. The documents should be fastened together so as to open flat. Four copies must be provided to the Tribunal at the hearing.

10. By 23 January 2018, the parties shall send their witness statements to each other in relation to the final hearing. They shall prepare the **full and complete** statements of all witnesses (including parties). No additional evidence will be allowed at the hearing without permission of the Tribunal. The witness statements shall have numbered paragraphs. They shall be sent to the other parties (not necessarily at the same time). The parties must bring four copies of each of their statements to the hearing for the use of the Tribunal.

11. The claims and issues to be considered at the final hearing will be as set out in the Annex to these notes or in such updated list of issues as may be agreed by the parties, subject to the approval of the tribunal.

SUMMARY OF DISCUSSION

Summary of complaints

1. The claimant claims unfair dismissal and disability discrimination. The claimant had also ticked the box on the claim form to indicate that he was bringing a claim in relation to "other payments". He clarified at this preliminary hearing that he meant by this compensation for the complaints of unfair dismissal and disability discrimination rather than a separate claim about payments not made to him. I have dismissed the complaint in respect of "other payments" on withdrawal by the claimant in a separate judgment. This does not affect his complaints of unfair dismissal and disability discrimination.

Background to claim

2. The claimant had worked for Royal Mail for nearly 26 years before he was dismissed following an incident where a police officer found him to be using his mobile phone while driving on Royal Mail business and the claimant was reported to have been abusive to the officer. The claimant accepts that he was guilty of misconduct and that the respondent dismissed him for this reason. However, he says he was under considerable stress at the time of the incident and was in continual pain with his leg condition. The claimant says his conduct was out of character. He had worked for 24 years without any conduct issues. The claimant says that he was under stress because the respondent had failed to make reasonable adjustments for his disability (a leg condition) since 2012 and he was having to do duties which caused him pain and stress.

3. The claimant says he went to see his GP after his section manager decided to dismiss him, but before the appeal and he gave the appeal officer a letter from his GP dated 16 March 2017 about his stressful situation, but the appeal officer confirmed his dismissal.

4. The claimant had a very serious road traffic accident in 2009. He says he was off work for 15 months and returned to work rather than taking up an offer of retirement on grounds of ill health. He says that the respondent sent him for an assessment with ATOS, who concluded that he could perform driving duties. Until some time in 2012, he worked on driving duties only, without difficulty. He says the respondent then required him, without any further occupational health assessment and in breach of previous recommendations, to perform duties including walking deliveries. He says these duties were not suitable for him and caused him pain and stress. He says the pain and stress contributed to his out of character behaviour with the police and, therefore, his dismissal.

Disability discrimination

5. The claimant claims that the respondent failed to make reasonable adjustments in the period from 2012 onwards. The claimant was suspended from work on 14 March 2017. If the tribunal decides that any failure to make reasonable adjustments ended on his suspension, since he was not at work again prior to his

dismissal, the complaint of failure to make reasonable adjustments will be out of time. The claimant will argue, if this is the case, that it would be just and equitable to extend time. The claimant put in a claim after his dismissal. He says the respondent's dismissal procedure was protracted.

6. The claimant relies on his leg condition as the relevant disability for the complaint of failure to make reasonable adjustments. As at the date of this preliminary hearing, the respondent has been saying it requires medical evidence before it can consider whether to concede disability in relation to the leg condition. However, it appears, from what the claimant has told me, that the respondent may already be in possession of relevant documents, dating back to the period around the claimant's return to work after the accident, but have not provided these to their instructing solicitors. The claimant gave to Miss Rogers copies of documents relating to his leg condition at this preliminary hearing. It seemed to me unreasonable that the claimant should be put to the expense of obtaining further medical evidence before the respondent has conducted a search for relevant documents which they already hold and considered on the basis of those documents, and those provided by the claimant, whether they have enough material to enable them to concede disability in relation to the leg condition. If, after consideration of this material, the respondent considers more information is required before they can decide whether to concede disability, they must identify what aspects of the test of disability they remain to be satisfied about. A judge can then consider what further information, if any, the claimant should be ordered to produce.

7. The claimant also complains that his dismissal was discrimination arising from disability. The "something arising" in consequence of disability is his behaviour with the police officer. The claimant argues that this was in consequence of his leg condition because of the pain this caused him and the stress he was under because of the respondent's failure to make reasonable adjustments for this disability. The claimant, therefore, argues that the dismissal was discrimination arising from the leg condition disability.

8. The claimant was unsure whether he also wished to argue that, at the time of the incident with the police officer, he was suffering from a mental impairment which constituted a disability within the definition of the Equality Act 2010. I have given the claimant time to consider this.

Unfair dismissal

9. The claimant complains that his dismissal was unfair. Whilst he accepts his conduct was wrong, he considers the respondent acted unreasonably in dismissing him for this reason, in particular because they did not take proper account of the stress he was under and the reasons for this.

List of claims and issues

10. I have set out in the Annex to these notes a list of the claims and issues as they will be if the claimant relies on a mental impairment as a relevant disability as well as the leg condition. This list will need to be amended if the claimant decides not to rely on a mental impairment as well as the leg condition. The list will also need to

be amended if the respondent concedes disability in relation to one or both possible alleged disabilities.

The final hearing

11. The hearing has been listed for 5 days on the basis that the claimant will not be calling any witnesses other than himself and the respondent is likely to call 3 or 4 witnesses. The amount of documentation is not expected to be substantial. The indicative timetable is as follows:

Reading – 0.5 day

Claimant's evidence – up to 1 day

Respondent's evidence – up to 2 days

Parties' arguments: up to 0.5 day

Tribunal deliberations, judgment and remedy, if appropriate: 1 day.

Employment Judge Slater

Date: 9 October 2017

ORDER SENT TO THE PARTIES ON
13 October 2017

FOR THE TRIBUNAL OFFICE

(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.

ANNEX

Claims and Issues

Unfair dismissal

1. Has the respondent shown a potentially fair reason for dismissal? The respondent says it dismissed the claimant for misconduct: using his mobile phone while driving on company business and his subsequent behaviour when challenged by a police officer. The claimant does not dispute that he was dismissed because of his conduct.
2. If the respondent has shown a potentially fair reason for dismissal, did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for dismissal in all the circumstances (including the size and administrative resources of the employer's undertaking)?
3. The tribunal will consider whether procedure followed and the penalty of dismissal were within the band of reasonable responses.

Disability discrimination

4. Was the claimant disabled at relevant times within the meaning in the Equality Act 2010 by reason of a leg condition; and/or a mental impairment?
 - 4.1. Did the impairment have an adverse effect on ability to carry out normal day to day activities?
 - 4.2. Was the adverse effect substantial in the sense of more than minor or trivial?
 - 4.3. Was the adverse effect long term in that it had lasted at least 12 months or was likely to last at least 12 months or rest of life of person affected?

Discrimination arising from disability

5. Was the claimant's dismissal unfavourable treatment because of something arising in consequence of his disability?
6. If so, can the respondent show that the treatment was a proportionate means of achieving a legitimate aim?
7. Did the respondent know or could they reasonably be expected to know that the claimant had the disability?

Failure to make reasonable adjustments

8. Did a provision, criterion or practice (PCP) of the respondent's, being a requirement to perform duties including walking deliveries, put the claimant at a substantial disadvantage in comparison with persons who are not disabled?

9. Could the respondent reasonably be expected to know that the claimant had a disability and was likely to be placed at the disadvantage?

10. If so, did the respondent fail to take such steps as it would have been reasonable to take to avoid that disadvantage? The claimant says it would have been a reasonable adjustment to take him off walking deliveries and put him on driving duties only.

Remedy

11. If the claimant succeeds in some or all of his claims, what should the remedy be?

Unfair dismissal

12. The claimant does not seek reinstatement or re-engagement if he succeeds in his complaint of unfair dismissal.

Basic award – calculated according to a statutory formula based on age, length of service and weekly pay.

12.1. Would it be just and equitable to reduce the basic award because of the claimant's conduct before dismissal?

Compensatory award – What financial loss has been suffered in consequence of the unfair dismissal? What amount should be awarded for loss of statutory rights?

12.2. Should any reduction be made to the compensatory award?

12.2.1. In a case where such an assessment may be made, what are the chances the claimant would have been fairly dismissed, had a fair procedure been followed? ("Polkey" type reduction).

12.2.2. Has the claimant contributed to the dismissal by his conduct?

Disability discrimination

13. What compensation should be awarded for injury to feelings suffered as a result of the act(s) of discrimination?

14. What compensation should be awarded for any financial loss suffered as a result of the act(s) of discrimination?

15. Should interest be awarded on the compensation for discrimination?