



EMPLOYMENT TRIBUNALS

Claimant:
Mrs M Patel

v

Respondent:
Royal Mail Group Ltd

Heard at: Reading

On: 22, 23, 24 and 25 January
2018

Before: Employment Judge Chudleigh
Members: Mr A Kapur and Mr DE Palmer

Appearances

For the Claimant: In person

For the Respondent: Mr I Hartley (Solicitor)

JUDGMENT having been sent to the parties on 9 February 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In a claim presented on 25 April 2016, the claimant complained of unfair dismissal and discrimination arising from her disability in relation to her dismissal by the respondent on 31 January 2016.
2. At a preliminary hearing on 21 April 2017, the issues for determination at the hearing were set out at paragraphs 4 to 9. The claimant withdrew her race discrimination claim on the first day of the hearing.
3. At the hearing, the tribunal heard from the claimant who gave evidence with the assistance of an interpreter. The tribunal also heard from Clive Hempston, a shift manager for the respondent and the individual who made the decision to dismiss and from Otto Bijleveld, who at the time was employed as early shift manager at the Jubilee Mail Centre and the person who determined the claimant's appeal.
4. The tribunal made the following findings of fact:-
 - 4.1 The claimant commenced employment for the respondent on a casual basis on 8 October 2007. She was taken on permanently on 27 October 2008. Her statement of terms and conditions of employment was signed by her on 15 December 2008. She was employed to work 18 hours a week. This was later varied with effect

from 26 June 2011 to 20.5 hours per week. The claimant's job title was "OPG Jubilee MC". OPG was short for Operational Postal Grade. Her contract provided that: "Details of your duties will be provided by Royal Mail. You will also be required to undertake such other duties as may be required from time to time which Royal Mail considers you capable and competent to perform". The particulars of employment indicated that her initial place of work was Jubilee Mail Centre, Godfrey Way, Hounslow, but that the needs of Royal Mail require mobility and that the claimant could be required to work at any other work location of Royal Mail Group Ltd.

- 4.2 In a variation letter dated 29 June 2011, the claimant's hours were increased to 20.5, it was indicated that she was employed the business unit in which the claimant was employed was "RM Letters". Mr Hempston clarified at the hearing that all OPGs employed at the Jubilee Mail Centre were employed in the same business unit.
- 4.3 Approximately 1,200 OPGs were employed at the Jubilee Mail Centre. It was a 24 hour day operation and a maximum of 300 OPGs would work at any particular time.
- 4.4 The Jubilee Centre was a mail sorting office. Mr Hempston explained that there were two groups of frames. On the primary frame, 12 people worked, sorting the mail and breaking it down into various sections. Those sections included local mail. The rest of the country was divided up - for example, there was a section for Scotland. There was then a secondary sorting area where the bigger sections such as Scotland were broken down into smaller areas. Five people worked on the secondary area. In addition, there were three porters who brought work to the primary area from other sections. The other sections included areas where, for example, metered mail was sorted. All of the individuals who undertook these activities were employed as OPGs.
- 4.5 The shifts operated were 6am-2pm, 2pm-10pm and 10pm-6pm. The aim each evening was for mail to be despatched from the mail centre at 9.45pm.
- 4.6 When the claimant was employed by the respondent, she disclosed that she had a pre-existing back condition which arose from TB. However, her back conditions did not impact upon her work until January 2013 when she was in a road traffic accident. Up until this point, the claimant had been assigned to working in the metered mail section of the respondent's operation at the Jubilee Mail Centre. On her return to work following the accident in February 2013, she was given a temporary role working on the primary letter sorting section as part of a phased return to work. The work in that section was lighter than in the metered mail section. It allowed her to sit down. Although stools were generally supplied for these working on this section, the claimant was supplied with a chair.
- 4.7 After a period of some weeks, the claimant was deployed to a

different section working on the CFC machine. She was examined by occupational health over the phone in March 2013 and an occupational health adviser supplied a report dated 22 March 2013 indicating that the claimant would benefit from working on primary letter sorting for four weeks to allow physiotherapy treatment to repair the injury to her neck following the accident.

- 4.8 Accordingly, the claimant was returned to the letter sorting section. She continued to work in that section until her dismissal.
- 4.9 The respondent in October 2014 wrote to the claimant stating that it wished to interview her regarding her designated work area and explore the reason why she was unable to work within that area. The letter stated that the reason for the interview was a decrease in letter volume and the fact that the respondent was unable to accommodate her within the letter area. In referring to her designated work area, the manager in question, David Elliman, was referring to the metered letter section.
- 4.10 The claimant was examined by occupational health in November 2014 at which time it was advised that she could return to the metered post section if a chair could be provided. This was eventually discounted as an option because following an assessment with an occupational therapist, a report was produced on 22 February 2015 which indicated that work in the metered post section was not suitable for the claimant because of the extended reaching and pushing requirement of the role. Accordingly, the provision of the chair would not have assisted as it would not have eliminated those aspects of the job. A meeting then took place on 15 April 2015 at which time there was a discussion about options for the claimant and it was indicated by Mr Elliman that a scoping exercise would be conducted in order to see whether suitable roles could be identified for her.
- 4.11 The occupational health advice in September 2015 was that the claimant's restrictions were permanent. Those restrictions were that she should avoid prolonged standing for over 10 minutes, avoid prolonged walking over 20 minutes, avoid prolonged driving, be allowed to sit and stand as required, avoid lifting and carrying over 3kg, avoid pushing and pulling over an empty yolk and to avoid extended forward reaching.
- 4.12 The role of OPG did involve manual handling. It could include pushing loaded yorks (trolleys of mail) which weighed up to 50kgs, segregating and tipping out mail bags weighing up to 11kgs, and the carrying and manoeuvring of mail trays weighing up to 10kgs. This type of manual handling was unsuitable for the claimant.
- 4.13 In the role that the claimant was fulfilling within the letter sorting department, she was not required to undertake any of this type of manual handling. It did require some modification of the post in question as employees from the second sorting area were required to fetch the mail trays for the claimant to avoid the claimant having

to carry those trays to them. In the two years and 10 months or so that the claimant was employed following her accident, she predominantly worked in the mail sorting section and there was never any indication that there were any operational difficulties with the claimant undertaking the role in a modified format, that is relying on co-workers to undertake the minor manual handling aspects of the role, freeing up the claimant to sit at a chair sorting mail.

- 4.14 A scoping exercise conducted by the respondent did not throw up any suitable alternative employment for the claimant. In the circumstances, on 18 November 2015, Mr Hempston wrote to the claimant to advise her that serious consideration was being given to her retirement on ill health grounds. The claimant was then off work with stress for a period and on 15 January 2016 a meeting took place at which the claimant and Mr Hempston at which the claimant was accompanied by her union representative, Steve Wyatt. At that meeting, Mr Hempston said to the claimant: *"Your duty is in the meter area where you will have to stand all of your shift, lift trays and push yorks. Your ATOS report states that you would be unable to do this. Is that not correct?"*. The claimant responded: *"Yes, it is but I have been working in the letter area and I am coping very well with that and I think I am a good worker"*.
- 4.15 Mr Hempston pointed out that the claimant had been in the letter area for a long time and there was no sign of her being able to move out. The claimant said: *"Yes I have been on the letters for nearly three years and some people who have not got letter duties are there as well and some people that came after me have now been given duties on the letters"*.
- 4.16 Steve Wyatt, the union representative, then said: *"Manisha – What we are saying is that you have to be able to perform a full range of duties, if you [are] not able to perform a full range, then it is up to the business to decide if it is able to find a special duty for you"*. He also said to Mr Hempston: *"Clive – If there are people on letters that should not be there then we need to look at that"*. Following the meeting, Mr Hempston conducted a further scoping exercise looking for work for the claimant in alternative locations. He was not able to identify anything. In the circumstances, he decided to dismiss the claimant and did so by letter dated 26 January 2016. The claimant was given pay in lieu of notice and a lump sum ill health retirement payment. The last day of her service was 31 January 2016.
- 4.17 Before dismissing the claimant, Mr Hempston did not take any steps to investigate whether there were other people doing letters that should not be there as Mr Wyatt suggested at the meeting on 15 January 2016. Nor did Mr Hempston take any steps to investigate whether there was any OPG working on letters who could be swapped to work in another area including the metered post section where the claimant had worked up until January 2013. Mr Hempston did not do this because although he agreed that in theory it was possible, he considered that it was likely that the union

would be upset. The work in the letter sorting area is regarded as the easiest at the mail sorting centre and there are a number of long-serving employees working in that department who, Mr Hempston thought, would not take kindly to being moved.

- 4.18 At the hearing, Mr Hempston told the tribunal that on his shift there were 12 employees engaged in the letter sorting area. Four had disabilities. There was one with cancer, another with a heart condition, and two with bad backs. Of the remaining eight, one was the claimant and seven were not suffering with any form of identified ill health.
- 4.19 The claimant appealed the decision to dismiss. As part of that process, a further report was provided by an occupational health expert. The indication was that the claimant's restrictions remained more or less the same. The report concluded that if an adjusted duty within the claimant's restricted capabilities could be located, then she would continue to meet the criteria for ill health retirement.
- 4.20 Mr Bijlefeld conducted a scoping exercise to ascertain whether suitable alternative roles could be identified for the claimant. He also investigated whether there had been vacancies at the time that she was dismissed. He could not find any suitable alternative position.
- 4.21 The claimant filled in a redeployment considerations document to assist with a further scoping exercise. In that document, the claimant indicated that she was willing to do between 15 and 20.5 hours weekly and although she preferred late shifts, she would consider a job on an early shift, Tuesday to Friday. Mr Bijlefeld conducted a further scoping exercise without success. In the circumstances, he dismissed the appeal.
- 4.22 Mr Bijlefeld considered that it was not appropriate to retain the claimant in the letter sorting department because she was an extra employee and surplus to requirements. He said that it would not be possible to swap another employee out of that department. He indicated that there was an agreement with the union that this could not be done but he did not refer to this in his witness statement, a copy of the agreement (which he said was in writing) was not produced and the tribunal concluded that Mr Bijlefeld was not telling the truth about this point. Had there been a union agreement requiring OPGs to stick to their own individual areas, that is a document that would have been produced on disclosure and included in the bundle.

Submissions of the parties

5. Mr Hartley on behalf of the respondent submitted that the reason for the dismissal was capability and that the respondent acted fairly in deciding to dismiss the claimant. He pointed out that the claimant was restricted in the work that she could do and she could not collect post, move trays or move and push yorks. It was submitted that the claimant was not in a templated

job. She was supernumerary and that swapping jobs was not on the table. Further, she was permanently restricted and it was no reasonable for the respondent to continue to employ her in a modified role. Although the claimant was 58 years old at the date of the dismissal and the respondent's pension age was 65, there was no indication that the claimant would not decide to work on beyond the age of 65.

6. It was also submitted on behalf of the respondent that the scoping exercise was reasonable and that there were no suitable alternative jobs for the claimant to undertake. Mr Hartley pointed out that the evidence was that the respondent budgets for a 7% decline in mail year on year and that it was reasonable for it to take this into account when deciding whether or not it could sustain a job for the claimant in manual mail sorting in the future.
7. Mr Hartley accepted that if the respondent had failed to make reasonable adjustments, then the dismissal could not be fair.
8. In relation to the claimant's complaint regarding discrimination arising, it was admitted by the respondent that the dismissal was a consequence of something arising from the claimant's disability and that the only issue for the tribunal was whether or not the respondent could make out its defence. It was argued that the claimant's restrictions meant that Royal Mail was paying for somebody they did not need and that there came a point where it was reasonable to terminate her employment. Even though the respondent was an organisation with large resources, it was argued that it was entitled to run its business efficiently.
9. Insofar as the complaint about the failure to make reasonable adjustments was concerned, it was submitted that the PCP was not quite that which was pleaded in the list of issues because the claimant was dismissed not just because she could not do the role of OPG but because it was not possible to find an alternative position for her. However, it was fairly conceded that either way, the claimant was placed at a disadvantage and that the issue for the tribunal was the question of what was reasonable. It was submitted that the crux of the question was whether it was reasonable to continue employing the claimant in the modified role that she had done for nearly three years. It was argued that it was not because it would involve the creation of an extra job, the cost of an extra job, and that the claimant was not able to do all the duties required of an OPG in a mail sorting role. It was submitted that swapping was problematic because although the contract looked flexible, in reality there was a low degree of flexibility.
10. On behalf of the claimant, Mr Patel submitted that the claimant had been unfairly dismissed and that she was an easy scapegoat. He argued that it would have been possible for the claimant to swap duties but that she was pigeon-holed as a worker in the metered area unfairly.

The law

11. A failure to comply with the requirement to make reasonable adjustments amounts to discrimination - s.21 Equality Act 2010 (EqA).
12. The duty to make reasonable adjustments is set out in s. 20 EqA. Where a provision, criterion or practice (PCP) has been applied by the employer that puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled the employer falls under a duty to take such steps as it is reasonable to take to avoid the disadvantage in question.
13. In Chief Constable of South Yorkshire Police v Jelic [2010] IRLR 744 the employment tribunal found that the force had failed to make reasonable adjustments for a police officer who started to suffer from chronic anxiety syndrome. He was assigned work involving minimal face-to-face contact with the public but a few years later the force decided to medically retire him. The tribunal found that it would have been a reasonable adjustment for to have swapped the officer's job with that of another officer or to have offered him medical retirement and immediate re-employment as a civilian in a police staff post which was being advertised at the time. The EAT endorsed this approach.
14. Discrimination arising from disability occurs when (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
15. In a complaint of ordinary unfair dismissal it is for the employer to establish that the reason for the dismissal was potentially fair within the meaning of s. 98 of the Employment Rights Act 1992 and then for the tribunal to consider the question of reasonableness if the employer has done so.

Conclusions

16. The tribunal addressed the complaint about a failure to make reasonable adjustments first. The PCP relied upon was "requiring the claimant to carry out the standard duties and role of an OPG". The tribunal agreed that this was the PCP that was applied. Because the claimant was not able to undertake all the aspects of the job, she was dismissed. This was the clear evidence of Mr Hempston. The respondent admitted that the application of such a PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who were not disabled in that the claimant was unable to carry out all the duties of an OPG.
17. Accordingly, the question for the tribunal was whether the respondent took such steps as it was reasonable to have taken to avoid the disadvantage. The tribunal concluded that the respondent had not.
18. The claimant was able to work as an OPG in the letter sorting department with some modifications to the role. Those modifications were such that the claimant required co-workers to assist with the manual handling aspects of the job. Those aspects of the role were not significant and it

was reasonable for those tasks to be performed by other employees. In the areas where the claimant had been working for 3 years the requirements of the jobholder were predominantly letter sorting which she was able to do. For most of the time following the claimant's return to work after her accident in 2013 the claimant worked in such a role without concerns being raised about her operational effectiveness.

19. It was clear therefore that the claimant was able to work effectively in the modified position. The role that she had worked in during most of her employment from 2008 onwards was in the metered post section. The respondent argued that she was contracted to that position although during the course of the hearing the respondent's position was modified such that it agreed that the claimant was contracted only as an OPG and in common with other OPGs the contractual position was such that she could be required to work anywhere in the mail sorting centre.
20. Because the claimant had worked effectively in this position for over three years, it indicated to the tribunal that it would not be problematic for her to continue in the same manner. The respondent argued that she was supernumerary or in excess of requirements. The tribunal did not accept this. The evidence before it was that a complement of 12 OPGs was required during the evening shift. The evidence also was that during the time when the claimant worked in the mail sorting department, there were never more than 12 employees. Accordingly, the tribunal rejected the respondent's contention that the claimant was supernumerary.
21. The decision to explore an ill health retirement route with the claimant and another disabled employee, Mrs Gill, was made at a time when there was a reduction in letter traffic. Mr Hempston was asked in evidence about the respondent's response to the reduction and he said that its response was to pursue ill health retirement with Mrs Gill and the claimant.
22. This suggested to the tribunal that the dismissal of the claimant may have been a substitute for a proper redundancy process at a time of a downturn in letter traffic. This was unreasonable. No-one else was considered for redundancy at that time. Indeed, the respondent did not make any compulsory redundancies at any time although in about October 2015, it Mr Hempston, they did undertake a trawl for voluntary redundancies.
23. Accordingly, the tribunal's view was that it would have been reasonable for the respondent to have continued to employ the claimant in the modified role that she had been working in most of the time since January 2013.
24. Moreover, there were other options which appeared to the tribunal to have been reasonable. Firstly, the respondent could have explored with its 40 OPGs who worked in letter sorting what their circumstances were. This was something that Steve Wyatt, the union representative, suggested should happen on 15 January 2016. If the respondent was truly concerned about over-resourcing its letter sourcing area rather than dismiss a disabled individual it would have been reasonable for the respondent to have explored with those other employees whether any were planning to leave or indeed whether anyone was willing to swap to another area of work. The respondent's failure to do so was unreasonable.

25. Furthermore, the tribunal considered that in the circumstances of this case it was unreasonable for the respondent not to forcibly swap an employee from the letter sorting section with the claimant in terms of duties (although this was artificial as the claimant had not been on the metered post section for three years). The contracts of employment permitted the respondent to require its OPGs to work in any area of the letter sorting function. It was unreasonable to dismiss a disabled employee without having explored the swapping option. However, as indicated above, the tribunal's view was that swapping was not required because the Claimant was not in fact supernumerary.
26. In addition the tribunal also noted that the claimant indicated on 15 January 2016 that some people that came in after her had been given duties on letters. That is something which ought properly to have been explored but was not.
27. Accordingly, the tribunal considered that the respondent was in breach of its duty to make reasonable adjustments.
28. In so far as the complaint regarding discrimination arising from a disability was concerned, it was admitted by the respondent that the claimant was treated unfavourably because of something arising in consequence of her disability. She was dismissed because she could not undertake all the functions of an OPG. The respondent's case was that the aim of the dismissal was the efficient and effective running of the business and in particular the Jubilee Mail Centre. Its case was that the means in question, dismissal, was a proportionate means of achieving that aim.
29. The tribunal agreed that the efficient and effective running of the business and in particular the Jubilee Mail Centre was a legitimate aim. However, the tribunal did not accept that the claimant's dismissal was a proportionate means of achieving that aim. It was not proportionate to dismiss a disabled employee when there were steps that could be taken to retain her in work with the use of reasonable adjustments.
30. Further, and in any event, the tribunal concluded that because the claimant had delivered a satisfactory service in a modified role in the mail sorting department for nearly three years, it was not proportionate to dismiss her. The tribunal rejected the respondent's case that it was a "non-job" and that the claimant was being paid to do something that was not required. The claimant was delivering a service each time she showed up for work – sorting mail. Indeed, the tribunal found that the claimant (and possibly her co-worker, Mrs Gill) were targeted for dismissal in the guise of ill health retirement because of a decline in the volume of postal traffic. To target individuals in this manner without going through a proper redundancy process was not a proportionate or legitimate means of achieving the aim sought to be achieved by the respondent.
31. Turning next to unfair dismissal, the tribunal did accept that the reason for dismissal was capability in that the claimant was dismissed because she was not capable of performing the full range of duties required of an OPG. However, as Mr Hartley conceded, in the face of a finding that the

dismissal was unlawful for breach of sections 21 and 15 of the Equality Act, it cannot possibly be argued that the dismissal was fair within the meaning of section 98(4) of the Employment Rights Act 1996. In making this decision, the tribunal accepted that the scoping exercise, or attempt to find alternative employment, was within the range of reasonable responses open to the employer. However, it was unreasonable not to continue to retain the claimant in the modified role that she had been working in for nearly three years at the date of dismissal. In the circumstances, the claimant was unfairly dismissed. Moreover, it was profoundly unfair to target the claimant for dismissal as she was disabled, rather than conduct a proper redundancy exercise.

- 32. The claimant did not contribute to the dismissal, nor was "Polkey" a consideration in this case - it things had been done properly the claimant would have retained her role.

Employment Judge Chudleigh

Date: 17 May 2018

Reasons sent to the parties on

.....

.....

For the Tribunal office