Case Number: 2405252/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Card**

Respondent: **Royal Mail Group Limited**

Heard at: **Bristol** **On:** **16 March 2018**

Before: **Employment Judge Livesey**
Mr H J Launder
Ms S Maidment

Representation
Claimant: Mr B Allen, Trade Union Representative
Respondent: Mr I Hartley, Solicitor

JUDGMENT having been sent to the parties on 22 March 2018 and written reasons having been requested in accordance with rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claim

1.1 By a claim form dated 19 September 2017, the Claimant brought one complaint of discrimination on the grounds of disability.

2. The evidence

2.1 We heard oral evidence from the Claimant and from Mr Lee on behalf of the Respondent.

2.2 We received a bundle of documents, R1.

3. The issues

3.1 The issues in this case had been discussed and agreed at a Case Management Preliminary Hearing which took place on 13 December 2017 which I had conducted by telephone. The issues for determination, relating to a complaint under sections 20 and 21 of the Equality Act, were then set out in the Summary that was produced following the hearing.

3.2 The Claimant claimed that the provision, criterion or practice that caused her a substantial disadvantage was the Respondent's Attendance Management Policy and procedure and the adjustment that she said would have avoided the substantial disadvantage that she suffered was discounting and/or ignoring her disability related absences when considering trigger points under the Attendance Policy (paragraph 5.3.1 of the Order). Specifically, she complained about a warning which had been issued on 12 July 2017 under the Policy.

3.3 The Claimant's disability, rheumatoid arthritis, had been admitted by the Respondent.

4. The facts

4.1 We made the following factual findings on the balance of probabilities. We attempted to restrict our findings to those matters which were relevant to a determination of the issues. Any references within these Reasons to page numbers are to pages within the bundle R1 and the citations have been provided in square brackets.

4.2 The Claimant is employed as a postal worker and has been since 2007. She is an Operational Postal Grade (OPG) employee and she continues to work at the Respondent's Swindon Mail Centre.

4.3 Her manager during the period material to this claim was Mr Lee, the Work Area Manager for the late shift.

4.4 The Claimant has particular knowledge and experience of working with franked or 'metered' post. Although it is not regarded as a specialist or skilled job within the definition contained within the Collective Agreement between management and the unions, her role is sufficiently skilled so that it was difficult for another OPG to cover for her during periods of absence.

4.5 The Claimant has rheumatoid arthritis. Her condition is subject to occasional flare ups and was described in a number of Occupational Health reports to which we were referred.

4.6 The Respondent has an Attendance Management Policy which has been the subject of a collective agreement with the Claimant's union, the CWU [26-9]. Under the Policy, a trigger point for management action is achieved if an employee has either four separate absences of any length or fourteen days of absence in total within any twelve month period. In such circumstances, an employee will ordinarily be issued with an Attendance Review 1, which is a warning which can be escalated in accordance with the Policy if absences continue. If absences cease, the employee is removed from the procedure and the warning lapses.

4.7 As to the counting of absences which occur for reasons related to an employee's disability, the Policy says that;

> "*Absences arising from disability will normally be discounted when deciding whether the standards have been met. Such absences will still be discussed at the welcome back meeting. In some circumstances where it is justifiable to do so, the manager may*

count the absence. Further details can be found in the Managing Absence and Disability Guide" [26].

4.8 The Guide which accompanies the Policy states that, when managers are deciding whether or not to count disability related absences, certain things should be borne in mind [24-5];

> "*Where the manager may be considering if the disability related absence should be considered as part of the formal attendance process, the manager should seek advice first from the HR advice centre. In deciding whether to count a disability related absence towards the formal attendance process, the manager should have:*
>
> - *Reviewed all relevant Occupational Health Service reports and considered whether it is appropriate to seek further advice from the Occupational Health Service.*
>
> *Having sought advice from Occupational Health Service and HR Advice Centre and where it is justified to do so e.g. an employee's disability related absences reach an unacceptable level, the manager should advise them in writing that any future absences may be counted. The employee should receive written notice in advance.*"

4.9 There were a number of occasions when the Claimant had triggered review meetings under the Absence Management process since the start of her employment in 2007.

4.10 In September 2013, the process was triggered but no warning was issued because absences related to her disability were ignored. In April 2015, the same thing happened, but she was told then that future disability related absences may have been accounted for going forward [60]. In May 2015, an Absence Review 1 warning was in fact issued. Later that year, in September, an Absence Review 2 warning was issued following a further period of absence and she was reminded again then that any further disability related absences may have been accounted for [76]. It was noteworthy that the Claimant's absence record significantly improved for at least ten months at that point.

4.11 The Claimant's absences up until the period with which we were dealing were such that she triggered action under the Policy on several occasions but she was fortunate that action was not actually taken on every such occasion [36].

4.12 During this time, the Respondent obtained guidance from its Occupational Health provider, ATOS Healthcare. In 2013, for example, ATOS said the following about her condition [40]:

> "*The outlook is guarded. I hope that with medications, the condition will go into remission. However, flare up may still occur. Mrs Card is likely to have a higher rate of sickness absence compared with a co-worker of a same age, gender and job role but without her condition*".

Further reports were obtained in 2014 and 2015 ([56] and [78-9] for example) which were broadly consistent and similar in tone.

4.13 The Claimant then had the following further absences in 2016 into 2017 for the following reasons:

- Two days in October 2016 due to rheumatoid arthritis;
- Four days in January into February 2017 because of a chest infection;
- Four days in April 2017 because of rheumatoid arthritis;
- Two days in June 2017 because of a rib injury.

4.14 The absences were recorded as having been for one day more on each occasion [30] but it was accepted that, because the Claimant did not work Fridays, they had been for a day less in each instance.

4.15 Accordingly, the Claimant had had a total of twelve days of absence but on four separate occasions, six days of which had been specifically attributed to her disability on two occasions. At that point, after the June 2017 absence, the Claimant had had over 500 days of absence over the ten year period since the start of her employment.

4.16 On 10 July 2017, an absence review meeting took place. Mr Lee chaired it and the Claimant was accompanied by her CWU representative [93-8].

4.17 On 12 July 2017, Mr Lee issued an Attendance Review 1 warning [99-100]. Although the letter did not give a detailed rationale for the issuing of the warning, Mr Lee explained his reasoning in his witness statement; he took into account the total period of sickness absence that the Claimant had had, the fact that, on a significant number of occasions, her disability had been ignored, that, by 2015, she had been warned that her disability may have been accounted for in future and that she was already undertaking duties which had been adjusted (micro breaks, a reduced working week and the physical extent of her duties had been reduced). He had regard to the cost of the business, as set out within paragraphs 40 – 43 of his statement, and the evidence from ATOS; that she was fit to undertake adjusted duties subject to the possibility of flare ups in her condition. Critically, as he said in paragraph 44 of his statement, he took into account the impact of her continued absences upon the Respondent's business.

4.18 The Claimant rightly highlighted the point that Mr Lee's decision was taken before a further Occupational Health report had been obtained. It seemed odd to us that one was commissioned at or around the time of the meeting in July but the report did not come until after his decision was taken (the report of 1 August [101-2]). Nevertheless, it was broadly consistent with those which had gone before.

5. Legal test

5.1 We considered the provisions of ss. 20 and 21 of the 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.

(4) The second requirement is a requirement, where a physical feature 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.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

s. 21:

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise."

5.2 In doing so, we bore in mind the guidance in the case of *Environment Agency-v-Rowan* [2008] IRLR 20 in relation to the correct manner that we had to approach the sections.

5.3 When dealing with the effect of a policy, as we were in this case, it was often difficult to see how policies which caused all employees a disadvantage might legitimately be said to have founded claims under s. 20, since an adjustment to a policy in order to remove a substantial disadvantage would not ordinarily have been particular to a claimant (see *Salford NHS Primary Care Trust-v- Smith* [2011] Equality Law Reports 1119). The key to understanding whether a particular rule or policy created a provision, criterion or practice (a 'PCP') which had a discriminatory effect under s. 20 however, was the correct formulation of the PCP itself. If the PCP was considered to have been the requirement to have been at work so as to have avoided triggers under the Policy, a disabled employee might have been less likely to have been able to comply with it and would therefore have been more likely to have been exposed to sanctions under

the Policy (see Elias LJ in paragraph 47 of the decision in *Griffiths-v-Secretary of State for Work and Pensions* [2015] EWCA Civ 1265).

5.4 Finally, we also considered the statutory Code of Practice and, specifically, paragraph 6 relating to the duties under ss. 20 and 21.

6. Conclusions

6.1 First, a PCP which substantially disadvantaged the Claimant needed to have been identified. In our judgment, the Attendance Management Policy was not it, although that had been Mr Allen's contention at the Case Management Preliminary Hearing. That was because the Policy specifically enabled the Claimant's managers to ignore disability related absences. It did not therefore need to have been adjusted so as to have avoided the substantial disadvantage. What the Claimant really complained of was the exercise of Mr Lee's discretion *not* to have ignored those absences. That might have been a complaint brought under s. 15.

6.2 We could therefore have dismissed the complaint under s. 20 on that basis, but we nevertheless considered the claim in accordance with an alternative PCP, as postulated in line with paragraph 47 of the decision in *Griffiths*; that employees were required to have maintained a certain level of attendance at work in order to avoid sanctions under the Policy. The question then was whether that PCP caused the Claimant a substantial disadvantage because of her disability? In our judgment it did because her disability rendered her more likely to have been absent which, of course, she was.

6.3 The second question was whether there had been a reasonable adjustment which the Respondent ought to have made to the PCP so as to have avoided the disadvantage. That was the key question in the case. It invited us to consider the reasonableness of the discretion exercised by Mr Lee.

6.4 Although the Equality Act required an employer to take steps to enable those with disabilities to be properly accommodated and integrated into a productive workforce, there were limits. The limitations were enshrined within the Act, within the justification defences within ss. 15 and 19 and within the need for adjustments to working practices and/or an employee's physical environment to have been reasonable within ss. 20 and 21.

6.5 Here, the Respondent's Policy allowed for it to account for the Claimant's disability related absences in circumstances where they had reached what it regarded to have been an unacceptable level. It sought to strike a balance. The question for us was whether it was reasonable not to have issued a warning as an adjustment to the general PCP that the Respondent required the Claimant to maintain good and consistent attendance.

6.6 It was not an easy case. On the one hand, the Respondent had a business to run and the loss of the Claimant's particular skill set in respect of metered post had been difficult to cover, particularly when one considered the length of time involved (500 days over 10 years). On the other hand, the Claimant was known to have been disabled and the Respondent owed her the s. 20 duty. Her absences in 2016 and 2017 had not been excessive and had only fallen foul of one of the Respondent's two alternative trigger points because she had been absent on four separate occasions.

6.7 There were two further matters which we considered to have been important.

6.8 The first was the pattern of absences. The Claimant had had a poor record up until 2015. In September of that year, she was issued with a level 2 Attendance Review warning which then appeared to bring about a significant improvement in her attendance as she only had two days of absence in the whole of the following year before things began to slip again in 2016 and 2017.

6.9 The Claimant argued that her attendance had improved in 2015 because her condition settled following surgery and that it had not been because of the level 2 warning that had been issued. That was not obvious from the documentation and the Claimant's improved attendance could reasonably have led an employer to believe that sanctions under its Policy served to have the desired effect.

6.10 Secondly, we considered that it was important to have regard to the level of the warning with which we were concerned. We were dealing with the issuing of an Absence Review 1 warning, the first level in a three-stage process. What may or may not have been a reasonable adjustment by way of the exercise of discretion at level 3 or at the stage of dismissal was not necessarily the same as that which might have been expected at level 1. Far less was at stake.

6.11 The Respondent could not escape criticism in some respects; we considered that it ought to have contacted HR before taking the decision in strict compliance with its Policy, it ought to have waited for the Occupational Health report which was received in August which would have given Mr Lee the best possible evidence before taking the decision and it ought to have explained the rationale for the warning in full at the time. Ultimately, however, we did not consider that it would have been a reasonable adjustment for the Respondent not to have issued a warning at level 1 in the circumstances which prevailed at the time because of its need to maintain reasonable levels of attendance, the nature of the Claimant's role and her skills, the extent of her previous history of absences, the lenience shown to her in the past and the effect of the warning that she had had two years' earlier. We did not therefore consider it unreasonable for her disability related absences to have been accounted for at that point. Accordingly, the claim was dismissed.

6.12 Finally, we noted that the warning that was issued in July 2017 which was had since been extinguished. A new Absence Review 1 was issued following further absences in January 1, which restarted the process.

_____

Employment Judge Livesey

_____

Date 16 April 2018

REASONS SENT TO THE PARTIES ON

.....

.....

FOR THE TRIBUNAL OFFICE