



EMPLOYMENT TRIBUNALS

Claimant: Mr A Singh

Respondent: NFT Distribution Operations Ltd

Heard at: Bristol **On:** 30 & 31 August 2018

Before: Employment Judge Sutton QC

Ms Y. Ramsaran

Mrs P. Ray

Representation

Claimant: Mr R Johns, counsel

Respondent: Mr Bidnell-Edwards, counsel

JUDGMENT having been sent to the parties on 14 September 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

Introduction

1. These are the Tribunal's reasons in relation to a claim brought by Mr Amerjit Singh against NFT Distribution Ltd, his current employer, under the provisions of the Equality Act 2010.
2. The issues were significantly narrowed in the course of the hearing. Mr Singh complains of discrimination arising from disability under section 15 of the Equality Act 2010. That complaint originally had two limbs: one associated with the offer of cleaning and litter picking duties, and the pay that role would have attracted, and the other arising out of a decision to pay, during the interval between the cessation of the claimant's substantive role and the commencement of an adjusted role, statutory sick pay [SSP] rather than employer's sick pay [ESP].
3. As to the first of those limbs, Mr Singh's case was that the alternative duties offered to him in December 2017 would not have attracted his normal rate of pay. As the evidence unfolded it became clear that this assumption did not reflect the actual position and a realistic concession was made on his behalf that this element of the complaint would not be maintained. In its recast form, the case under section 15 advanced by Mr Singh was that the respondent had unlawfully applied its attendance management policy by preventing the claimant from receiving ESP, such as to amount to discrimination arising from disability.
4. There was a further complaint of failure to make reasonable adjustments. In the course of the second day of the hearing that complaint was withdrawn, again realistically in the view of the Tribunal.
5. A further area of dispute identified at the case management hearing was whether or not the claimant's health condition, and specifically coeliac disease, amounted to a disability for the purposes of the Equality Act 2010. In the course of the hearing it was sensibly conceded on behalf of the respondent that this impairment was one which at all material times satisfied the relevant statutory criteria. We proceeded therefore on the basis that the claimant at all material times was a disabled person for the purposes of the relevant statutory provisions.

Statutory Provisions and legal guidance

6. The Tribunal addressed itself to the relevant provisions of the Equality Act 2010 and also to the material passages contained in the Code. It gave due consideration to the guidance in the caselaw that had been helpfully highlighted in the course of the parties' submissions and sought to apply that guidance to its analysis of the facts as found.

Findings of Fact

7. The claimant commenced employment on 1 February 2006 as an LGV Driver. In late 2016 he received biopsy results which showed signs consistent with coeliac disease. Later that year, in or about late November or December, the claimant had a discussion with the Depot Manager, Mr John Old. In the course of that discussion, he informed Mr Old of his health issues and said he had a condition that was temporarily causing diarrhoea and asked whether it was possible to be assigned to warehouse duties. The request was declined at that stage. He claims that he was told to follow the diet which his medical advisers had recommended. The claimant says found Mr Old unsympathetic.
8. In the early part of 2017 the claimant submitted a sick note dated 6 February in which he was signed off sick with coeliac disease, exhaustion and stress for a period of three weeks.
9. He attended a Phase 1 attendance meeting on 5 April 2017 which had been triggered by a level of his sickness absence. In the course of that meeting the claimant again explained his coeliac disorder. He indicated that he was continuing to struggle with diarrhoea. Once again, he was advised to control his diet. He said that he was doing what he could to try and keep his diet under control. He was offered the facility of an Occupational Health referral at that time but did not take up that suggestion.
10. The claimant provided further sick notes in August 2017 certifying his absence with a variety of conditions being identified, including lower back pain and diarrhoea secondary to IBS or potentially coeliac disease. In September 2017 the claimant approached Mr Hargraves, his line manager, and renewed his request to work in the warehouse instead of performing LGV duties, as he was continuing to struggle with diarrhoea.
11. On 10 November 2017 a meeting took place under Phase 2 of the respondent's attendance procedure. At that juncture the claimant had been absent from work for 135 hours due to a combination of coeliac disease; stress problems and lower back disorder.
12. The meeting was conducted by Mr Paul Nutland, the site support manager. The claimant explained that he was seeking to adjust to his gluten free diet but that he occasionally needed to stop when his symptoms were bad. He maintained that he was fit to drive at that point in time. Mr Nutland was concerned about the advisability of the claimant continuing with his driving duties and advised him to see senior management and also to undertake an Occupational Health assessment.
13. That Occupational Health assessment was performed on the 21 November. The report indicated that the claimant was fit to work with adjustments but advised that the claimant should be redeployed to a temporary role for a period of around six months so that he could have access to toilet facilities. The symptoms should, in the view of Occupational Health, be capable of

being resolved after a few months adhering to a gluten free diet. Given that the symptoms had persisted notwithstanding the claimant's efforts to adjust his diet, it was recognised by the Occupational Health adviser that some alternative diagnosis might be appropriate.

14. Mr Hargraves sought clarification from Occupational Health on 24 November 2017 as to whether or not the claimant had reported finding it difficult to adhere strictly to his diet. There that was a concern on Mr Hargreaves' part, shared by Mr Nutland, that the claimant's symptoms might have been aggravated by his failure to follow his recommended diet.
15. The claimant attended his GP on 29 November 2017 and notified his employer, following that consultation, that he was unable to start his duties at 2.00 on that day. At 4.30 on 29 November the claimant had a discussion with Mr Hargraves at which he informed him that he had coeliac disease, had been advised to follow a gluten free diet.
16. There is an issue as to whether or not the claimant explained that his adherence to his gluten free diet had been inconsistent. Mr Hargraves maintained that the claimant conceded in the course of the meeting that he still ate sandwiches from time to time and stopped at McDonalds. The claimant for his part said that he did not admit any departure from his prescribed diet and that when he visited McDonalds restaurants on long journeys it was not to consume anything that was inconsistent with his dietary recommendations.
17. The Tribunal considered that both witnesses were essentially credible and were seeking to provide their best recollection of what that discussion entailed. The claimant was seeking to convey that adherence to the diet was very difficult while he was on the road and particularly finding meals that would meet the strict requirements of his gluten free diet.
18. A medical note was provided by the claimant's GP on 29 November indicating the claimant was fit for work on the basis of adjusted duties.
19. On 1 December 2017 a telephone discussion took place between Mr Hargraves and the claimant, in the course of which the latter outlined the intended arrangements for the claimant to undertake a warehouse role. The role would require some health and safety training to be undertaken and that couldn't be undertaken immediately. It was only feasible for that training to be provided halfway through the month and it was proposed that for a number of days when the claimant would undertake litter cleaning duties.
20. Mr Hargraves indicated that if those alternative duties were not accepted the option would be for the claimant to be placed on sick leave with SSP being paid on the basis that the claimant would be taken to have declined an appropriate alternative role.

21. A further meeting took place at around noon on 4 December 2017 between Mr Hargraves and the claimant. The claimant indicated in the course of that meeting that he was content with the proposals that Mr Hargraves had come up with and that he was expecting to start his duties the following day at 7.00am.
22. There is no suggestion that Mr Hargraves was unable to offer continuous employment during the bridging period which before the claimant could undertake training for the warehouse role. Neither was there any suggestion on the part of Mr Hargraves that the claimant would be paid other than his ordinary pay for that period. There was no threat in reduction pay for the period when the claimant was actually undertaking those envisaged duties.
23. Soon after that meeting, a payslip was provided to the claimant on the afternoon of 4 December 2017 which showed him being remunerated for one day's paid work performed Tuesday night through to Wednesday morning of the previous night shift; one day paid at SSP rate but otherwise no payment for the previous week when the claimant had effectively been sent home, save for the one day when he was capable of being rostered onto duties on the Tuesday night. From 29 November onwards, the date when he had been certified as unfit for work save in an adjusted role, the claimant had not been remunerated at ESP rate.
24. Mr Hargraves accepts in retrospect that the payslip reflected an error in his appreciation of the pay which the claimant was properly entitled to. We reject the suggestion that Mr Hargraves error was influenced by any animosity towards the claimant or any scepticism about the legitimacy of his concerns about his state of health: it was simply a failure to appreciate the operation of the policy in circumstances where, given his seniority within management, Mr Hargraves had not previously been required to implement the same.
25. The claimant however, was extremely unsettled by the sick note and it caused him to visit his doctor at 5 pm the same day, following which he was provided a sick note running through to January 2018. The sick note identified a range of conditions including coeliac disease and stress at work.
26. That sicknote was provided to Mr Hargraves who felt that the claimant was reneging on arrangements which had been discussed and agreed at noon on 4 December. Mr Hargraves frankly doubted the legitimacy of the sick note or the information that the claimant had provided to his GP to obtain it. He decided to consult with Mrs Read, an HR adviser, to obtain her view on how the matter should be approached under the attendance management policy and in particular whether ESP was properly payable.
27. A further factor which weighed upon Mr Hargraves and which he had referred to in correspondence with the Occupational Health Advisor was whether the claimant was strictly adhering to his diet and whether he had earlier been the author of his own misfortunes in being unable to perform the LGV duties.

28. Both those factors were significant ingredients in Mr Hargraves decision, informed by HR advice, to place the claimant on SSP rather than ESP for the period going forward from 5 December. It is unfortunate that there was no direct communication between the claimant and his manager at that point in time to explain why the former had decided to visit his GP and the influence of the payslip. Equally, Mr Hargraves failed to approach the claimant to obtain a fuller appreciation of what had gone wrong given their settled arrangement at lunchtime on 4 December. Such communication on both sides might have avoided the difficulties that then unfolded.
29. The reason for the payment of SSP was formalised in Mr Hargraves' letter of the 7 December 2017. There then followed an extensive grievance process. A grievance meeting took place on 3 January. The claimant, in the course of that meeting, complained that Mr Hargraves had proposed that he would only pay SSP. It was not clearly explained by the claimant why he had been so unsettled by that proposal and the relevance of the payslip but we accepted the claimant's account that his inability to explain the background circumstances was affected by his stressed condition at the time.
30. The claimant ultimately returned to work on 9 January 2018. He attended warehouse training and was then able to perform the adjusted duties in line with his GP's recommendations and in accordance with the requirements of the Equality Act 2010.
31. The outcome of the grievance was provided by letter dated 12 January 2018, recording a finding that the claimant had chosen to absent himself from work on 5 December. The grievance manager implicitly equated the claimant's non-attendance with an disciplinary infraction bringing with it the significant financial consequence of a substantial reduction in pay during the period for which only SSP was paid.
32. Mr Hargraves decision to withhold the ESP on the grounds of the claimant's presumed non-adherence to his dietary recommendations was not satisfactory addressed in the grievance determination. The claimant lodged an appeal against that grievance outcome and the hearing took place on 18 January.
33. The Stage 2 grievance outcome dated 21 February 2018, was that the claimant had absented himself from work. There was no consideration of the sick note nor the reasons why the claimant had gone to his GP. The fact that a sick note had been provided and the circumstances which had caused the claimant to consult with his GP were matters which, in the Tribunal's view, clearly necessitated close inquiry.
34. The claimant submitted an appeal letter against the Stage 2 grievance outcome dated 28 February 2018. The claimant indicated in the course of that final stage grievance meeting that stress had caused his coeliac disease to flare up and that had caused his prolonged sickness absence from the 5 December. The outcome of that process once again was to

reject the claimant's grievance at Stage 3, That decision was communicated to the claimant on 11 April 2018

Conclusions

35. The first matter to consider is was there unfavourable treatment for the purposes of the Section 15 complaint. It is clear that there was through the decision to pay at SSP rather than ESP rate.
36. Was the action of the employer discrimination arising in consequence of disability for the purposes of Section 15? There are two significant reasons of the treatment complained of. One was the claimant's non-attendance to perform cleaning duties on the morning of 5 December and the second was that such non-attendance was attributed to a perceived failure to adhere to his recommended diet. The Tribunal is satisfied that both of those reasons fall comfortably within the ambit of Section 15(1)(a) as matters arising in consequence of the claimant's disability.
37. The real issue in contention is whether or not the treatment in question was justified. That entails consideration of the legitimacy of the aim of giving robust effect to the provisions of the respondent's absence policy and then to consider matters of proportionality.
38. So far as the legitimacy of the aim is concerned there is no doubt that it is appropriate for a discretionary employment benefit of this kind to be operated in a way that avoids abuse and non-payment may well be justified if there are substantiated concerns. At first blush there was some basis for Mr Hargraves' concern that this was simply the claimant performing an about turn and refusing to adhere to the position that he had adopted at lunchtime on 4 December.
39. In the Tribunal's view, the issuing of a sick note should have prompted the respondent to undertake careful enquiry into the circumstances that caused the claimant to approach his GP. If that enquiry had been undertaken and if the claimant's response to the payslip had been considered, it would have come to light that the payslip was founded on an erroneous appreciation by the claimant's manager of his entitlement to ESP during the previous week.
40. The failure to engage in such inquiry undermines the respondent's case that its actions were justified. The Tribunal was perplexed as to why assumptions about the claimant's adherence to his diet when he was undertaking LGV duties should have had any bearing upon whether it was appropriate for him to receive ESP once those duties had ceased. The fact that the claimant was unable successfully to manage his coeliac disease through dietary adjustments was the very reason why the role had been adjusted so as to enable him to operate from base. To use that factor as a basis for non-payment of the enhanced sickness entitlement did not show a proportionate application of the attendance management policy.

41. For those reasons the Tribunal concluded that the factors that the respondent applied in deciding to withhold ESP placed them in breach of the relevant provision of the Equality Act 2010. We will proceed to consider matters of remedy.

Employment Judge Sutton QC

Date : 30 October 2018
