



EMPLOYMENT TRIBUNALS

BETWEEN

Claimants

(1) MR P BLANKS

AND

Respondent

(1) VELINDRE NHS TRUST

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: CARDIFF ON: 16TH / 17TH APRIL 2018

EMPLOYMENT JUDGE MR P CADNEY

MEMBERS:

MR W DAVIES

MS J SOUTHALL

APPEARANCES:-

FOR THE CLAIMANTS:- IN PERSON

FOR THE RESPONDENT:- MR J WALTERS (COUNSEL)

JUDGMENT

The judgment of the tribunal is that the claimant's claims of:-

1. Unfair dismissal (contrary to s 94/98 Employment Rights Act 1996)
2. Failure to make reasonable adjustments contrary to s 20/21 Equality Act 2010;
3. Discrimination arising from disability contrary to s15 Equality Act 2010;
4. Indirect disability discrimination contrary to s19 Equality Act 2010;

Are dismissed

REASONS

1. By this claim the claimant brings claims of unfair dismissal, and disability discrimination. At a case management hearing on 17 November 2017 the claimant's disability discrimination complaints were identified as follows; firstly that the claimant's dismissal was an act of discrimination arising from disability contrary to section 15 of the Equality Act 2010. Secondly the respondent failed to make reasonable adjustments in the period leading up to the claimant's dismissal. Those adjustments are 1) the failure to offer him light duties, 2) insufficient consideration of steps to redeploy the claimant, and 3) the failure to adjust trigger points in the respondent's absence procedure. Finally there is a claim for indirect discrimination which effectively mirrors that of the reasonable adjustments claim. For the avoidance of doubt in our view the indirect discrimination claim in reality adds nothing to the claim for the failure to make reasonable adjustments. If that claim succeeds then a claim for indirect discrimination adds nothing. If that claim fails it follows that if the respondent had a PCP which placed the claimant at a substantial disadvantage he respondent's justification defence would be bound to succeed in the absence of any adjustments that could be made. Accordingly the focus of the judgment will be on the other heads of claim.
2. The tribunal has heard on behalf of the claimant from the claimant himself and on behalf of the respondent from Mr Richard Jones, Mr Martin Schell, Mr Mark Roscrow and Ms Hazel Robinson. The case was listed for four days but has been heard more swiftly as it has become clear that there is almost no dispute of fact between the parties.

Disability

3. It is not in dispute that the claimant has from 2015, and thus at all times relevant to this claim, been disabled by reason of rheumatoid arthritis.

Facts

4. The claimant was employed by the respondent as a stores operative. His duties included lifting packages weighing between 0.5 kg and 19 kg. He was required to pack goods for onward distribution to hospitals and health centres; and to check-in goods from

suppliers, and to place goods into storage. In addition he was required to drive a forklift truck.

5. The claimant had a period of absence from work in December 2015 to January 2016 as a consequence of the rheumatoid arthritis, but returned to work on light duties on a phased return for one month. He then returned to his full duties but then went off sick on 22 June 2016 and remained off sick until his dismissal, which took effect in August 2017. The whole of the claimant's absence was covered by a series of sick notes issued by his GP. All of those sick notes declare that the claimant is not fit for work and in none of them is it suggested that a phased return to work, altered hours, amended duties, or work place adaptations could allow him to return to work.

6. The claimant's own description of his condition (as at November 2017) was set out in an impact statement which describes a very significant degree of disability: *"My day to day living with rheumatoid arthritis can vary, it also moves around my body and to different joints. My arthritis is very painful and I'm unable to bend or stretch as my joints are extremely painful. When I'm experiencing a flare up this is my daily struggle. My joints throb and become extremely swollen which affects my lifting and mobility. I am unable to undertake normal daily tasks. My fingers buckle over and I'm unable to lift daily objects, get myself dressed, or undergo daily tasks such as making a cup of tea to cooking dinner, this is due to my hands and knuckles being that swollen I am unable to lift any objects or grip them. I'm unable to walk up the stairs and I have to use the stair lift which we have fitted. This is due to me not being able to bend my knees or move my feet as the pain is excruciating. On a daily basis I'm extremely tired and lethargic which means I can't undergo normal daily activities. I am unable to undergo daily activities as in clean around the house or do simple things as my arthritis as being stood for too long or doing too much causes me to be in severe pain. I currently have a wet room fitted as I cannot get in and out of the bath any more as my arthritis has taken over my muscles and joints so I have a walk in shower. In the shower I struggle to wash times due to not being able to bend over or grip soap due to my joints being so stiff and swollen. When I'm experiencing a bad day I am unable to drive my car and have to rely on others to do things for me. Rheumatoid arthritis has taken over my life dramatically and changed how I live from day to day. Some days I have a good day but some days I am unable to focus*

and live a normal life like I have always done." This is not dissimilar to the account given to a consultant rheumatologist Dr Gwenan Huws on 4 May of 2017, and at a physiotherapy assessment in April 2017.

7. In the first Occupational Health report post-dating his absence from work in June 2016, dated 31 August 2016, Dr Atherton apparently understood that one month after he had gone off sick his GP had provided a fit note requesting adjusted duties. This in fact is incorrect and she recommends that she be notified of what adjustments the respondent was able to offer him.
8. There was another Occupational Health report dated 25 October 2016. At that stage Dr Atherton stated; *"As regards Mr Blanks role in stores I do not think Mr Banks is fit for unadjusted duties of work. My assessment leads me to conclude that he would be fit to undertake adjusted duties and stores where the manual handling required of him would be less intense. However I gather this is not currently thought a reasonable adjustment I formed the impression that Mr Blanks is fit to undertake his driving responsibilities. The reason for this is the difference in physical requirements of these roles."*
9. The next report is dated 11 April 2017 is a physiotherapy report. from Gareth Tremain whose conclusions are as follows: *"Unless Mr Blanks symptoms were significantly reduced for several weeks without any episodes of flare up it would not be appropriate for him to return to work at Cwmbran stores even on amended duties. At present the symptoms will would prevent him from managing to work safely on even the lightest rotation -/theatre packs. If his symptoms do improve greatly it is likely he would only be able to manage the lighter of the rotations including theatre packs, M&S hospitals and clinics and M&S RG H3. I'm unable to predict when/if Mr Blanks will be able to return to work even if he was offered amended duties as this is dependent on his response to future treatment which is not guaranteed to significantly improve his symptoms. It seems unlikely that Mr Blanks will ever be able to return to the rotations that require heavy/repeated lifting including food, non-food and receipts."*
10. A further occupational report from Dr Atherton dated 20 April 2017 suggests given that the claimant was able to continue his work as an out of hours driver *".... it would be*

reasonable to explore whether it be possible for you to offer him modified duties in the stores driving the forklift truck.”

11. By May 2017 the claimant had been off work for some 11 months. As a consequence on 15 May 2017 the claimant attended a formal long-term sickness interview with Mr Mark Roscrow. In advance of that hearing Mr Roscrow was provided with a formal report with a number of appendices including the medical evidence referred to above. At the hearing the claimant was represented by Alwyn Hockin of the trade union Unison. It is not disputed that during the course of that meeting it was made clear by the claimant's representative that the continued likelihood of work was not an option, and was not the outcome they were looking for. At that stage they were hoping to secure ill-health early retirement for the claimant. Self-evidently this would only be available if at the very least the claimant were unable to work for the respondent even with any adjustment, and it was not suggested at the meeting that there were any adjustments that could be made at that stage which would have allowed that the claimant to return to work. Nor was a specific case presented for retaining the claimant in employment.
12. Unsurprisingly Mr Roscrow took the view that the medical evidence, and indeed the representations of the claimant's trade union representative was such that the claimant was unable to return to work and as a consequence he decided to dismiss the claimant from his post as he was highly unlikely to be able to return to his role within the foreseeable future. However given the claimants expressed wish to explore the possibility of ill-health early retirement, rather than dismissal with immediate effect with pay in lieu of 12 weeks' notice, he decided simply to give the claimant 12 weeks' notice so as to allow him to pursue the possibility of early ill-health retirement whilst the claimant was still in employment. The letter dismissing the claimant notified him he had 14 days in which to appeal the decision. Initially the claimant did not appeal but at the conclusion of the notice period he submitted an appeal out of time which was rejected for that reason.

Conclusions

Reasonable adjustments.

13. It is sensible to deal with this claim first as, if there were adjustments which could and should have been made then this claim would succeed, and it would follow in all likelihood that the section 15 claim (discrimination arising from disability) and the unfair dismissal claim would also succeed. In addition this claim encapsulates the dispute between the parties. The claimant's case is that he had worked well for some fifteen years, and was then off sick for one year before being dismissed. During that year he was given no opportunity to test whether there was some form of work he was able to do. As he put it on a number of occasions, if he had been given the opportunity but had not been able to carry out the work, he would have resigned. It is the absence of the opportunity which rankles and which he described as a point of principle.
14. In broad terms the respondent's position is that they have to be guided by the medical evidence. They owe duties of care both to the claimant and other employees and could not simply allow the claimant to attempt a particular role if the medical evidence did not support that decision. In broad terms in our judgment this must be correct.
15. As set out above at the case management discussion three reason adjustments were identified. First the failure to offer him light duties; secondly insufficient consideration of steps to reply redeploy him; and thirdly the failure to adjust just trigger points in the respondent's absence procedure.
16. Dealing with the first of those that there is in fact no recommendation at any stage that the claimant be placed on light duties by his general practitioner, who consistently affirmed that he was unfit for work even with adjustments. The specific contention is therefore not supported by the medical evidence. Indeed the only specific adjustment recommended is that in April 2017 by Dr Atherton when she posed the option of exploring whether the claimant would be able to drive a forklift truck. The respondent was sceptical as to whether this was physically within the claimant's capacity, a scepticism which is understandable given the contents of the physiotherapy report of almost exactly the same date. However on the assumption that Dr Atherton is correct

and that this was at least a physical possibility the respondents contend that it was not in any event an adjustment they could have made.

17. As was explored in evidence, in particular in the witness statement of Richard Jones, a number of points are made about the ability of the respondent to offer forklift truck driving as a an adjustment. There were two forklift trucks, one external which received goods at the Delivery Bay, there being about 25 to 30 deliveries per day; and an internal forklift truck which was used to move goods internally. Even if one driver was allocated to both, which the respondent contends was in any event impractical as they could both be required simultaneously, for a driver who was only working on the forklift trucks and not doing any other associated work, this would occupy about 55% of the working day. In addition the respondent has an agreement with the trade unions that the work in the depot there is varied such that an individual does some heavy lifting, some lighter lifting, and at some forklift truck driving. This essentially is a health and safety measure designed not to expose any of the employees to excessive heavy lifting. If one individual was allocated all of the forklift truck driving duties they would necessarily not be available to other employees who would necessarily have to carry out a higher proportion of lifting duties including heavy lifting. In addition the respondent requires its employees to be able to operate the forklift trucks; and in order to maintain their licence to do so they have to drive relatively regularly. For all those reasons it would not be possible to allocate forklift truck driving simply to one person. The respondent's evidence therefore is that the adjustment contended for even if the claimant were physically able to have met it was not one which they could provide the reasons set out above. We accept that evidence.

18. The second adjustment contended for is a failure to adjust trigger points in the respondent's absence procedure. In the course of the hearing this has in fact become a more specific allegation that her Mr Roscrow could and should have delayed making a final decision in May 2017 and given the claimant further time to improve. The evidence before us from the claimant is that the position as at November 2017 was very similar to that in May 2017. However since that time his condition in fact improved as he has been given new treatment with different drugs. Whilst it is pleasing that is has occurred there was no evidence before Mr Roscrow in May 2017 that there was any likelihood of an

improvement in the condition. It follows that in our judgement there was no basis on the medical evidence available to Mr Roscrow in May 2017 that any postponement of the decision would be likely to result in any different medical position in the foreseeable future, and in addition it was not suggested either by the claimant or his representative at the time in May 2017 that any decision be postponed. Indeed as set out above they were seeking ill health early retirement.

19. The final adjustment contended for there is that insufficient consideration of steps to redeploy the claimant were made. The respondent's position is that as a matter of fact as at the point at which redeployment would have been considered in May 2017 the medical evidence was clear that the claimant was not fit to perform any role and therefore the question of redeployment in effect simply did not arise, which was effectively confirmed by the claimant and his representative in the meeting. In our judgement this must be correct.

20. We accept the respondent's contentions in respect of all of the allegations of a failure to make reasonable adjustments and we are unable to find any adjustment which could have been made at any stage prior to May 2017.

Indirect Discrimination

21. As set out above, the claim of indirect discrimination is effectively bound to fail for the same reasons, as in the absence of any adjustment the justification defence is bound to succeed.

Unfair Dismissal/ s 15 Discrimination Arising from Disability

22. That leaves the claims of unfair dismissal and discrimination arising from disability. They are both based upon the decision to dismiss.

23. Dealing first with the unfair dismissal, capability is a potentially fair reason for dismissal and we accept that the genuine reason for dismissal was that the claimant was unlikely to be able to provide any service for the foreseeable future. The question of whether that decision is fair depends upon whether the employer has waited a reasonable time before

coming to that conclusion; whether reasonable steps have been made both to obtain and share with the claimant the medical evidence in respect of that condition; whether the employee has been given a reasonable opportunity to comment upon or challenge the medical evidence; and whether it is a reasonable conclusion based upon that medical and other evidence.

24. The medical evidence is set out above and in our judgement it is incontrovertible that the conclusion that the claimant was unlikely to be able to provide any service in the foreseeable future is a reasonable conclusion, and in reality the only conclusion that could have been drawn from the medical evidence at the time. Moreover it was effectively adopted by the claimant and his representative in the meeting. That being the case in our judgement that the decision to dismiss falls squarely within the range of decisions open to Mr Roscrow, and was substantively necessarily fair.
25. In terms of procedure the only arguable procedural failing was the refusal to hold an appeal. However the letter of appeal was not sent until 14th August 2017, and in any event confirmed that the claimant did not want his job back, which would have rendered any appeal somewhat academic. In our judgement in those circumstances the decision not to allow an appeal out of time was reasonably open to Ms Robinson and its absence does not fundamentally affect the fairness of the dismissal.
26. In terms of her the section 15 claim clearly the claimant has been dismissed as a consequence of something arising from this disability, that something being his absence from work and inability to return in the foreseeable future. Thus in order for the respondent succeed it would need to satisfy the justification defence that it had a legitimate aim and the dismissal was a proportionate means of achieving that legitimate aim. Clearly the legitimate aim is having a workforce able to provide the work the respondent was required to do and fulfil its requirements. Where after nearly a year and employee is unable to work, and will continue to be unable to do so for the foreseeable future, and where there are no adjustments which would enable a return to work, in our judgement that that dismissal is a proportionate means of achieving that end.
27. It follows that in our judgement all of the claimants claims must be dismissed.

EMPLOYMENT JUDGE Cadney

Dated: 12th June 2018

JUDGMENT SENT TO THE PARTIES ON

.....2 July 2018.....

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FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS