EMPLOYMENT TRIBUNALS

Claimant: Mr N Muhammed

Respondent: Ronnies Ltd

HELD AT: Leeds **ON:** 8 to 10 May 2018

BEFORE: Employment Judge Rogerson
Mr D Wilks
Mr M Taj

REPRESENTATION:

Claimant: In person
Respondent: Mr L Murdin of Counsel

JUDGMENT

The Judgment of the Employment Tribunal is that:-

1. The complaint of unfair dismissal fails and is dismissed.
2. The complaints of disability discrimination, of harassment relating to disability, discrimination arising from disability, a failure to make reasonable adjustments and direct disability discrimination also fail and are dismissed.

REASONS

1. The issues in this case had been identified and agreed at an earlier preliminary hearing on 1 February 2018 (see pages 35-38) and were agreed at the beginning of the case confirmed as the issues to be determined.

2. The Tribunal heard evidence for the claimant from the claimant and for the respondent from Mr Peter Wright (investigating officer), Ms Anne Wainwright (dismissing officer) and Mr M Midwood (appeals officer). We also saw documents from an agreed bundle of documents. From the evidence we saw and heard we made the following findings of fact.

1. The claimant was employed by the respondent as a business manager from 1 August 2013 until his dismissal with pay in lieu of notice, effective from 21 August 2017.
2. In September 2014, there was a TUPE transfer of the business from McDonalds Restaurant Limited to this respondent Ronnie's Ltd.
3. The respondent owns and operates six restaurants trading as 'McDonalds' under a franchise agreement. Its Head Office is based at the Oakwood store where the claimant worked. Ms Wainwright is a director of the business. Each franchisee is a separate legal entity which separately runs and operates its franchise in accordance with the franchise agreement.
4. As a business manager the claimant earned £29,500 per annum. In practice his role involves spending 90% of his time on the 'shop' floor and 10% of his time doing 'office' based work. That model was consistent with how a fast food business like McDonalds would operate. The 'shop' floor is the restaurant where the business operates, the staff, the products and the customers are located which is the 'business' managed by the business manager.
5. The claimant complains that prior to his accident at work he was regularly working overtime, and having to take paperwork home which adversely affected his home/life balance. He was prepared to work hard to achieve success and did achieve some recognition for his effort with his store achieving an award for 'the most improved store' in 2015. He was a well regarded employee and there were no issues regarding his performance at work. He also had a good relationship with Ms Wainwright and Mr Wright. He recalls being sent cards, gifts and presents during his employment. He was also allowed time off/support/funding for a degree which he successfully completed in 2016, He was also allowed a period of sabbatical leave during his employment which he used to help a relative start a restaurant business in London.
6. The relationship described by both parties before the accident at work was positive. However when the claimant returned to work after his sabbatical, Mr Wright raised some conduct issues with the claimant, which had come to light during his sabbatical leave in August to September 2016. These related to the claimant and his wife, who was employed at the same store. The allegation were that a letter had been provided by the claimant to his wife on letter headed paper without authorisation, 5 months leave for the claimant's wife had been approved without authorisation, and the claimant had failed to follow the sickness absence procedure for his absence from work from 10th to 14th August 2016.
7. The claimant's account was that these matters were raised, dealt with and were closed. Mr Wright's account was that the matters were not closed but were to be investigated further. We accepted and preferred Mr Wright's evidence.
8. However before they could be dealt with more formally the claimant had an accident at work on 16 October 2016, which resulted in an injury to his back and an absence from work that continued until his dismissal.
9. This is the spinal injury that the claimant relies upon as a physical impairment which he says meets the definition of disability, set out in section 6 of the Equality Act 2010 which was identified in the list of issues at 6.1, 6.2 and 6.3.

10. The respondent accepted the claimant had a physically impairment namely a spinal injury but disputed any long term substantial effects on normal day today activities.

11. The material time relied upon for disability was from January 2017 to August 2017 when the alleged discrimination occurred. 'Long term' means that the substantial adverse effects of the impairment have either lasted for at least 12 months or were likely to last for at least 12 months or for the rest of the claimant's life.

12. It was for the claimant to prove he was a disabled person and to provide evidence to the Tribunal to support his case. I also noted that in the earlier orders I had made at the preliminary hearing I had specifically referred the claimant to the guidance on the meaning of disability so that he would understand what it was he was required to show at this hearing.

13. I had also suggested that he observe another Tribunal hearing in advance of his case to assist him. I referred him to the Presidential Guidance on General Case Management and to the Equality and Human Rights Commission Code of Practice on Employment 2011, so that he was fully aware of what it was he needed to do and prove at this Tribunal.

14. The evidence the claimant relied upon was an 'impact statement' at pages 53 to 56 and a medical report prepared for the purposes of a personal injury claim. That statement does not set out how the spinal injury has long term substantial adverse effects on his ability to carry out normal day to day activities. The medical evidence report assessed his injury in July 2017 as 'mild to moderate' and not long term.

15. The claimant was in difficulty when his own medical evidence describes a 'mild to moderate' condition of 'limited duration in terms of its effect'. In terms of normal day to day activities it refers to domestic chores and shopping being 'mildly' affected as at the date of examination on 12 July 2017. The expert has reviewed all the post accident medical records before arriving at his opinion. He finds that the claimant did on the day of the accident develop 'severe pain, stiffness and discomfort in the back but these had improved' and by the 12 July 2017 any effects were mild to moderate not substantial.

16. That report was also consistent with the Occupational Health Advice the respondent obtained with the benefit of GP input which advised the claimant was not a disabled person because the impairment did not have substantial adverse long term effects.

17. Based on the evidence that we saw the claimant has not satisfied us that the spinal injury he suffered on 16 October 2016 falls within the requirements of section 6 of the Equality Act 2010. The claimant was not a disabled person at the material time because his spinal injury had not lasted 12 months was not likely to last 12 months or for the rest of the claimant's life. Although the impact at the time of the accident was substantial any substantial adverse effect on normal day to day activities was short term not long term.

18. As the claimant was not a 'disabled person' at the material time all his complaints of disability discrimination fail because they all rely on the claimant having that protected characteristic.

19. Turning then to our findings of fact relevant to the remaining complaint of unfair dismissal. Following the accident at work on 19 October 2016 the claimant did not return to work and Mr Wright then followed the respondent's ill-health absence review procedures and its accident reporting procedures.

20. The accident is the subject of a personal injury claim and we do not make any findings of fact in relation to the accident or its cause. For that reason it was agreed that the evidence of the claimant's two witnesses who did not attend, which goes to the alleged cause of the accident was not relevant to the issues to be determined.

21. We have to note that before, during and at the end of this hearing we have reminded the claimant of the list of issues identifying the questions the Tribunal has to answer to try to keep the claimant focused on his complaint and the relevant issues. Despite this, the claimant continued to present a case based on his perception that the role he was performing for two years prior to his accident was not the role he should have been performing, based on his view of the job description.

22. His unhappiness with the accident and it's aftermath in relation to his employment have resulted in his interpretation of events retrospectively not as they were but as he believes they should have been.

23. On 26 October 2016, Mr Wright emailed the claimant to check how he was doing and to question what the anticipated date of return was likely to be in light of the sick notes that had been provided.

24. On 13 December 2016, he emailed the claimant to suggest a return to work discussion. The claimant advised that he would not be returning to work before 10 January 2017 and he would be providing a sick note.

25. On 19 December 2016, the first ill health review meeting took place (8 1/2 weeks after the absence). The purpose of the meeting was to ascertain the claimant's health and well being, whether there were any improvements, whether he could return to work and whether there were any adjustments that needed to be made. All of those are reasonable enquiries an employer can/should make in these circumstances.

26. At this meeting the claimant told Mr Wright that he would need to rest for one hour after every 30 minute interval of working. Mr Wright had no medical evidence/occupational health advice to that effect. He referred the claimant to the private healthcare provider so that the claimant could access physiotherapy treatment more easily.

27. On 21 December 2016, Mr Wright wrote to the claimant confirming the private healthcare provider's details and arranged a further health review meeting.

28. On 2 January 2017, the claimant requested and it was agreed that the investigation meeting into the alleged misconduct allegations would be postponed until the claimant returned to work.

29. On 15 January 2017, after the second ill health review meeting took place Mr Wright decided that a referral to occupational health and a GP's report should be obtained.

30. The GP's report is dated 15 February 2017 and is at page 149 in the bundle. A report was also obtained from Occupational Health dated 19 May 2017 at page 163 and 165 in the bundle. It is clear from the Occupational Health Advisor's

report that their view was that the claimant was not a disabled person because the impairment was not long term. The claimant had said he wanted to be re-deployed to an alternative role because he did not want to return to his business manager role. They suggest "*management will need to determine whether this can be facilitated from an occupational and business perspective*"

31. In terms of reasonable adjustments, Occupational Health advice was that the claimant was able to walk and to stand for reasonable periods of time as long as he has the opportunity to "*sit occasionally if he is uncomfortable"*.

32. A second capability meeting takes place on 31 May 2017 and the notes at page 181 record the claimant requests, which are

> T*o be off the shop floor 90% of the time and 10% on the floor. Also you would like this putting into your contract. You have also requested that you would do another role within the business such as training or HR"*.

33. Mr Wright decided to seek further clarification from Occupational Health about the requested adjustment pointing out his view that "as a restaurant/retail business this was not appropriate". He asks occupational health "*What percentage of time would you recommend being sedentary out of 40 hours a week?* The answer he is given is "*it is difficult for me to put a precise percentage on office versus floor based duties. I would say that he is able to undertake work that doesn't involve sitting, as long as this does not involve repetitive bending or lifting weights heavier than 2kg and with the opportunity to sit as required ie if he feels some discomfort. Therefore from a medical point of view he should be able to undertake more than 10% floor work depending on the physical activities work floor involves"*.

34. The second capability meeting took place on 28 July 2017. The Occupational Health advice was discussed with the claimant. Mr Wright asked the claimant how he though he could complete the business manager role doing 90% in the office. The claimant's response to that is "*We have cameras CCTV. I have assistant managers. I can get up and walk around" suggesting he could do the role remotely*.

35. Page 204 of the notes records a discussion about the adjustments that the claimant would require in order to return to work. He sets out a list of the adjustments that he now "*demands*" are made which are

> "*90% office 10% floor, to be based in Oakwood for three to four years, to refrain from bending and lifting and to have the facility to go home and lie down every two hours"*.

36. On 31 July 2017, the claimant is invited to a meeting with Ms Wainwright on 7 August 2017.The invitation letter warns a potential outcome could be dismissal. The claimant is provided with a copy of the documents that will be considered at that hearing, which include all the medical information, the records of all the meetings, the capability meeting report, the additional questions asked of Occupational Health and the claimant's GP and their responses.

37. The claimant criticises Ms Wainwright for not contacting other franchisees for vacancies in other stores. Ms Wainwright explained each franchise operator is independent and one franchisee can't ask another franchisee to take its employees. It was reasonable for the respondent to limit consideration of alternatives to those available to it as the employer.

38. At the capability meeting on 7 August 2017 there was a further discussion with the claimant about the adjustments he was requesting for a return to work. He maintains his position of 90/10 see page 220. In that meeting Ms Wainwright makes it clear that 90% office and 10% shop floor is not feasible given the nature of the business and explains why. She states "You must be present on the shop floor. You are looking after over 100 staff. To my mind you would walk around the store and be in the mindset that you can't pick anything up. The BM is all about giving direction and it is always a changing environment".

39. The claimant is unhappy and gives Ms Wainwright an ultimatum that he will only go back on his terms if he could do the job in the way he wanted to not the way the business were asking him to do it.

40. Following that meeting Ms Wainwright sent a letter of dismissal (see page 228). It sets out the reasons for dismissal. She considered all the evidence. She considered the claimant's requests which could not be accommodated by the business. She looked at alternatives to dismissal but no other roles were available. Given the claimant's position of no compromise there was no alternative to dismissal. She carried out a fair and thorough process before reaching her decision to dismiss.

41. The claimant was also given a right of appeal against dismissal which he exercised. He complains that he was given 7 days to appeal instead of 14. Although the respondent accepts it should be 14, this mistake did not cause any prejudice to the claimant, who was able to provide his 5 grounds of appeal in the time provided.

42. The appeal hearing was considered by Mr Midwood another franchise operator because there was no one else within the respondent company that could hear the appeal, of sufficient seniority with no prior involvement.

43. The first three grounds of appeal expressed the claimant's general feeling of unhappiness. After 14 years of service, he felt he was being punished because of his accident. The other two of the grounds suggest the respondent should have offered a different role and should have amended his duties in the way he requested.

44. Mr Midwood carried out a thorough and fair appeal process. He considered all the five points the claimant had raised and gave the claimant the opportunity to put his case. It is clear that even at the appeal stage the claimant's mindset had not changed it was still his way or no way. The claimant was not prepared to return to his previous role without the adjustments he requested which could not be accommodated by the business and had not been medically recommended. This, combined with the fact that there were no alternative roles available meant that unfortunately there was nothing further the respondent could do for the claimant.

45. Mr Midwood out his reasoning in his appeal outcome letter which we accept reflects the reasons why the appeal was dismissed.

46. For the unfair dismissal the first question is whether the reason for dismissal is a potentially fair reason. It was not disputed that this was an ill-health 'capability' reason which was a potentially fair reason. We then have to consider whether at the stage of dismissal there was a reasonable investigation of the medical position and a reasonable investigation. We were satisfied that reasonable enquiries made with the claimant's GP and Occupational Health. Mr Wright made

further enquiries when he needed to do so. All the information obtained was provided to the claimant before dismissal. The process that was followed, the enquiries that were made and the time taken (October 2016 to September 2017) demonstrate that this was not a rushed dismissal. We find that the investigation process as a whole was fair and reasonable.

47. Was the decision to dismiss within the band of reasonable responses open to a reasonable employer? It is not for this Tribunal to substitute its views for the employer. We have to look at this employer, its particular circumstances, including the nature of the business its size and resources to decide if it acted reasonably in dismissing the claimant for 'capability'. This employer faced with the claimant's demands about how he would perform the role and his unwillingness to compromise left them with no other choice. There were no alternatives. We accepted the evidence of Ms Wainwright that if this had been a matter of looking at the adjustments proposed by occupational health and working with them there could have been some progress but the claimant did not want to do that. He set out his list of demands. Unless they were met he was not returning to work.

48. In relation to the appeal process the five points raised were considered by Mr Midwood and he carried out a fair appeal process. Everything the claimant raised was considered and addressed at the appeal.

49. In all those circumstances the dismissal was fair and the complaint of unfair dismissal fails and is dismissed.

Employment Judge Rogerson

____22June 2018