



EMPLOYMENT TRIBUNALS

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE SPENCER

BETWEEN: MR A OBIJEZEWANI CLAIMANT
AND
POUNDLAND LTD RESPONDENT

ON: 28-30 January 2019

Appearances

For the Claimant: Mr J Neckles, friend
For the Respondent: Ms K Walmsley, solicitor advocate

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that the Claimant's claim of disability discrimination is not well founded and is dismissed.

REASONS

Claim and issues

1. This was a case of disability discrimination of (failure to make reasonable adjustments and discrimination because of something arising in consequence of disability) brought by the Claimant who worked as a Store Manager for the Respondent until his dismissal with pay in lieu of notice on 14th November 2017. He has insufficient notice to qualify for the right not to be unfairly dismissed.
2. The Respondent accepts that the Claimant was at the relevant time a disabled person by reference to a rotator cuff injury to his shoulder and wrist.

3. The Claimant contends that he was discriminated against because of his inability to carry out tasks namely:
 - a. Moving stock in the warehouse to the shop floor.
 - b. Filling the shelves; and
 - c. Taking delivery from the lorries to the warehouse.

He says that his inability to carry out those tasks was “something arising from his disability”.

4. He identifies 3 allegations of unfavourable treatment which he contends arise in consequence of his inability to do those tasks namely:
 - a. requiring the Claimant to carry out those tasks;
 - b. placing him on a Performance Improvement Plan; and
 - c. his dismissal.
5. The Claimant also alleges that the Respondent has failed to make reasonable adjustments. His case is that the Respondent applied a practice (pcp) of (i) not allowing managers to transfer to different store locations; and/or (ii) not providing managers with the support of an assistant manager. He said that this practice or pcp put him at a substantial disadvantage in comparison to those who are not disabled, and that the Respondent should have made reasonable adjustments by allowing him to transfer to a different location (Penge or Catford) and/or provide him with support, including the provision of an assistant manager.

Evidence

6. The Tribunal had an agreed bundle of documents. We heard evidence from the Claimant. For the Respondent we heard evidence from Mr. Amir, Acting Area Manager and the Claimant’s line manager, from Mr. Meeking, Regional Manager and from Mr. M Fagan, Area Sales Manager, who took the decision to dismiss the Claimant.
7. The evidence was not presented as clearly as it could have been during our 3-day hearing. Some of the documents in the bundle (provided by the Respondent) were illegible and we required the Respondent to provide printed typed versions. In evidence the Claimant was inconsistent. Although he was very animated in his answers in cross-examination, he often did not stop to consider whether his answers accorded with the evidence he had previously given or was contained in the bundle. As a result, we did not find significant part of his evidence wholly credible.
8. On the whole we found the Respondents’ witnesses credible as to the events in this case (though we had concerns about their processes).

Findings of Fact

9. The Claimant was employed as a Store Manager from 1 June 2016 at the Purley Way store, Croydon. A job description for the position of Store manager appeared in the bundle and, although it was a version which had been updated since the Claimant was given a copy, the Claimant did not suggest that there were any significant differences from the version which he had been given. The Claimant accepted that his role included recruiting, training and promoting staff (up to the level of supervisor); setting rotas, delivering sales against targets, dealing with budgets, product focus, and ensuring general hygiene in the store. The Claimant explained that the intended structure at his store was a store manager, an assistant store manager, 3 supervisors (including senior supervisors) and 9 or 10 cashiers. The Respondent said that while stores generally had 11 or 12 staff the positions included a replenishment team whose job it was to stack the shelves and we accept that evidence. The Claimant reported to Mr Amir, who was field based and responsible for a number of stores.
10. On 17th May 2017 the Claimant collided with a colleague and sustained an injury to his left wrist and right shoulder. When Mr. Amir enquired the Claimant said that he was fit to do his job but would need time off to attend appointments. The Claimant acknowledged in evidence that he did not realise the extent of his injury at the time. There was no medical evidence in the bundle before 1st August 2017.
11. In June or July issues arose in the relationship between the Claimant and two of his colleagues (Mr Ajamie, the Assistant Store Manager and Mr Ajmeer, a supervisor). The Claimant raised a grievance about them, and the colleagues raised a grievance about the Claimant. Mr. Amir held a grievance meeting with the Claimant during which the Claimant complained generally about a lack of support but did not refer to his injuries. We accept that what he meant about lack of support was support with workload generally.
12. As a result of those grievances Mr Amir transferred both of the Claimant's colleagues to a different store. In consequence the Claimant was left without an assistant manager. On 30th July the Claimant emailed Mr Amir to ask for additional resource. He acknowledged that Mr Amir had authorised an additional spend of £250 a week (presumably towards staff costs), but he felt that a senior sales assistant could not do the job of an assistant manager. The Claimant did not refer to his inability to do any particular tasks in that email.
13. The evidence presented to the tribunal about what support was given to the Claimant to compensate for the fact that he was without an assistant manager was not wholly clear, but Mr Amir did ask Adnan, the assistant manager at another store (Whitgift), to cover the Claimant's store while he was on holiday. Thereafter Adnan was tasked with attending the Claimant's store 2 – 3 days a week to assist. The Claimant was also given an additional budget for staffing (either recruitment or overtime). The evidence was unclear as to exactly how much he was given (he was given

different amounts at different times) but we find that while he received some additional cash, this did not wholly compensate for being without an assistant manager.

14. On Sunday 13 August 2017 the Claimant sent an email to Mr Amir as follows: –

“I am emailing with regards to your question about the area I would like to be transferred to after I had raised my concerns about not getting the support I need and the area now getting religious and political. Therefore, from Monday 11th September I will be joining Raymond’s area because it’s closer to my home.”

It was a rather odd email to send because usually an individual would ask their own line manager to arrange a transfer. The Respondent’s policy provided that *“If you’re moving and want to transfer to another Poundland location you should speak to your line manager first. You can also contact stores directly in the local area that you’re relocating to. There’s no automatic right to a transfer ..”*. The Claimant was unclear in evidence what exactly had been arranged with Raymond (Mr Ogg) and the email to Mr Amir was not copied to Mr Ogg. There is no reference in that email to any injuries, any inability to carry out physical tasks or particular difficulties with travel. The Claimant had not approached Mr Amir to ask for him to arrange a transfer, and the email suggested that the Claimant had arranged this directly with Mr Ogg, so that Mr Amir did not himself contact Mr Ogg to discuss a transfer for the Claimant.

15. However, the next day, 14th August the Claimant was away from work on sick leave for his wrist and shoulder injuries and was advised not to work till the outcome of his X ray was available. A fit note identified that the Claimant had injuries to his left wrist and right shoulder and should not work until 21st August, that he was unable to lift pallets and was waiting for an X ray. He remained off sick till 5th September when the Claimant telephoned Mr Ogg about a return to work. Mr Ogg told the Claimant that he had not heard from Mr Amir about a possible transfer and the vacancy had now been filled. There was no evidence that the Claimant pressed his case for a transfer any further, or that he had given any explanation for the request beyond what is set out in the email to Mr Amir.
16. A return to work interview took place on 7th September with Mr. Amir. The Tribunal has no notes of that meeting, but Mr Amir accepts that the Claimant told him that he could not pull pallets or lift items. Mr Amir suggested that the Claimant undertake light duties. We accept that it was not at all clear what was meant by this and no practical steps were taken to implement “light duties”. However, it was the Respondent’s evidence, which we accept, that as store manager the Claimant was not required as part of his job to pull pallets or lift items and that it was expected that these tasks would be delegated to more junior members of staff.

17. While the Claimant away sick, Nigel Fisher, retail director, visited the store and on the Claimant's evidence, was "not happy".
18. Mr Meeking also visited the store on 29 September as part of his regular store visits. (Mr Meeking would visit each store on average once every 8 to 12 weeks.) Following the visit Mr Meeking emailed the Claimant (83), copied to Mr Amir, setting out the issues that he had found. These related to compliance (stock in the wrong place and not out), housekeeping, and commercial. In relation to housekeeping Mr Meeking noted that it was *"very poor, debris under fixtures, floor not swept or mopped, warehouse loose stock all over the place."* The Claimant was not in the store at the time of Mr Meeking's visit, nor on the previous day, but we accept that the issues he raised were long-term and were not simply issues that had arisen during the Claimant's brief absence. The same day Mr Meeking instructed Mr Amir to put the Claimant on a Performance Improvement Plan (PIP) (90).
19. Mr Amir visited the store on 1st October and informed the Claimant that he would be placed on a PIP. Mr Amir began to take the Claimant through the Plan but halfway through the Claimant declined to participate any further in the meeting or the plan and refused to sign the notes. He then left the store. He told Mr Amir that he would speak to HR and his lawyers and it was unfair because his left hand was injured, and he was not getting enough support from Mr Amir.
20. Mr Amir reported this to Mr Meeking. He also sent Mr Meeking the latest performance statistics for the Claimant's store. This identified that the Claimant had scored 4/10 on each of Mr Amir's previous 3 visits and that he had overspent his budget by over £1,000 in the previous 4 weeks. Sales were below target.
21. The Claimant emailed Mr Meeking apologising that he had not been in store at the time of the visit *"due to severe pain from the injuries I sustained at work"* and complaining that he had not been given an Assistant Store manager. He complained *about "lack of support and the way Farhad [Mr Amir] manages issues."* He complained that Mr Amir had not been addressing the various issues he had raised, had not progressed a transfer request, and was setting him up for failure either because he had expressed his concerns or had requested to leave his area.
22. On 4 October 2017 the Claimant submitted a grievance (117). This was partly about religious/race discrimination by Mr Amir and partly about lack of support *"Additionally since the last three weeks I came back from the first X-ray he has caused me unnecessary pain and suffering by removing the ASM helping me out 2 days a week with 6 staff down, knowing that I am yet to fully recover due to an accident at work and yet he come round to criticise instead of doing the right thing like support."*

23. On 5th October Mr Meeking visited the store again. He found that things had improved but that the back area was still in need of improvement.
24. On 9th October, the Claimant was invited to attend a grievance hearing on 12th October at 3 pm to be followed by a disciplinary hearing at 4pm. Both would be heard by Mr Fagan. The allegations which he was required to answer at the disciplinary hearing were:
 - a. failure to uphold the company's core values, namely to respect one another; This related to walking out of the PIP meeting,
 - b. failure to fulfil your role as store manager resulting in failing to meet the competencies outlined in your job description; and
 - c. continuous poor performance.
25. The Claimant attended the (postponed) grievance and disciplinary hearings on 24th October accompanied by his trade union representative.
26. The notes of the grievance and disciplinary hearings record that, at the hearing, the Claimant complained about the behaviour of Mr Amir and a lack of support. Although he refers to having hurt his hand, he does not at any time say that he had been required to carry out manual tasks such as unloading pallets or sweeping the floor. On the other hand, he does he say that he has been given "insufficient resources" to sweep the floor, which suggests that he was expecting others to do that.
27. By letters dated 10 November 2017 (i) the Claimant's grievance was not upheld and (ii) he was dismissed for poor performance (162)
28. The Claimant appealed. The Respondent asked him to clarify his grounds of appeal but, when the Claimant did not do so, did not progress the appeal any further.

The relevant law

29. Section 21 of the Equality Act provides that an employer discriminates against a disabled person if it fails to comply with a duty to make reasonable adjustments.
30. Section 20 provides that where a provision, criterion or practice applied by or on behalf of an employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable to have to take in order to avoid the disadvantage.
31. Para 20 (1) of Schedule 8 to the Equality Act also provides that a person is not subject to a duty to make reasonable adjustments if he does not know, and could not reasonably be expected to know, that the disabled person has a disability and is likely to be placed at a disadvantage by the PCP. An

employer is required to make reasonable enquiries as to whether an employee is disabled and as to the effect of that disability.

32. The Code of Practice on the Employment 2011 (chapter 6) gives guidance in determining whether it is reasonable for employers to have to take a particular step to comply with a duty to make adjustments.
33. In *Environment Agency v Rowan 2008 ICR 218* and *General Dynamics Information Technology Ltd v Carranza 2015 IRLR 4* the EAT the EAT gave general guidance on the approach to be taken in the reasonable adjustment claims. A tribunal must consider:
 - the PCP applied by or on behalf of the employer, or the physical feature of premises occupied by the employer
 - the identity of non-disabled comparators (where appropriate), and
 - the nature and extent of the substantial disadvantage suffered by the claimant.
34. Section 15 of the Equality Act 2010 provides that
 - (1) A person (A) discriminates against a disabled person (B) if—
 - (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.
 - (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
35. Although A must know or have been expected to know that the Claimant was disabled, it is not necessary for A to know that the “something” arose in consequence of that disability. (*City of York V Grosset 2018 IRLR 746*)
36. *Basildon v Thurrock NHS Foundation Trust v Weerasinghe (2016 ICR 305)* the EAT explained that “*The current statute requires two steps. There are two links in the chain, which are causal, though the causative relationship is differently expressed in respect of them. The tribunal has first to focus the words “because of something”, therefore have to identify something – and second upon the fact that something must be open to something arising in consequence of B’s disability, which constitutes the second causative open consequential) link.*”
37. As to the burden of proof section 17A(1C) provides that:-

“Where, on the hearing of a complaint under subsection 1, the complainant proves facts from which the Tribunal could, apart from

this subsection, conclude in the absence of an adequate explanation that the Respondent has acted in a way which is unlawful under this Part, the Tribunal shall uphold the complaint unless the Respondent proves that he did not so act.”

Guidance on the effect of the reversal of the burden of proof in DDA cases is given in the code of practice at paragraph 4.42.

Conclusions.

Discrimination arising from disability

38. It is the Claimant’s case that he was subjected to unfavourable treatment because he was unable to do tasks (the “something arising”) because of his rotator cuff and wrist injuries.
39. He identifies 3 allegations of unfavourable treatment.
 - a. Requiring him to carry out tasks which he was incapable of doing because of his disability. It is the Claimant’s case that he was required or expected to pull pallets, unload deliveries, carry heavy loads, and sweep the floor amongst other manual tasks
 - b. Placing him on a Performance Improvement Plan.
 - c. Dismissing him.
40. As to a. in cross examination the Claimant accepted that these were not his core duties. Rather he says that he was significantly understaffed for much of the period that he was the Store Manager and, in particular, he did not have an assistant store manager. As a result, he was left with no alternative but do these manual tasks himself. He said he was expected to sweep the floors and to make the warehouse and the store clean. His particular store had a problem with mice. He said that at times there was only himself and a cashier in the store and so he had no alternative but do these tasks himself.
41. The Respondent denied that that the Claimant had to undertake these tasks or that he was ever instructed to do these tasks himself. All 3 of the Respondent’s witnesses said that these were not tasks for the store manager. His job was to manage the staff and the labour cost effectively. It was however his responsibility to ensure that tasks were completed. The Claimant had a budget and sole authority to recruit staff up to the level of supervisor. Deliveries arrived in scheduled delivery slots 3 times a week in the afternoon and it was therefore the Claimant’s job to ensure that the store was adequately staffed at the time that the deliveries arrived. He had other duties to do such as recruiting staff, managing staff, merchandising, budgeting and ensuring health and safety, (including a clean and tidy shop floor and warehouse.)
42. We prefer the evidence of the Respondents witnesses. We find that the Claimant was not required to do the manual tasks that he now alleges. It is

notable that in the grievances that the Claimant has submitted, in the notes of the performance review meeting, and in the disciplinary hearing notes he does not suggest that the reason that his store was under performing was because he (personally) had to (but was unable) to undertake these manual tasks. The Tribunal does not accept that the Claimant was required or expected to carry out tasks which he could not do because of his disability. We accept that as store manager he was expected (and able) to delegate those tasks to more junior members of staff, including the replenishment team. This was so even if the Claimant's store was not fully staffed.

43. We are satisfied that the Claimant was not subjected to the unfavourable treatment referred to in paragraph 39a above. He was not required, to do such manual tasks, nor was he left with no practical alternative but to do them.
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44. As to b and c above, it is not in issue that the Claimant was placed on a PIP or that he was dismissed. The issue here is whether placing the Claimant on a PIP and /or dismissing him amounted to unfavourable treatment because he was unable to do certain physical tasks. We are satisfied that it did not. He was unable to do those tasks, but these were not tasks that were required or expected of him. He was able to delegate. Essentially his job was mainly managerial and supervisory; to ensure that the tasks were done and not to do them himself. He was placed on a PIP because the Respondent's managers (rightly or wrongly) believed that he was not managing the store to the required standard. This had nothing to do with his inability to sweep floors or pull pallets. He was not placed on a PIP or dismissed because of something arising from his disability.

Failure to make reasonable adjustments.

45. The Claimant's case is that the Respondent should have made reasonable adjustments for his injuries by
- a. Allowing him to transfer to a location closer to home; and/or
 - b. providing him with additional staff and an assistant manager.
46. His case is that the Respondent applied a practice (pcp) of (i) not allowing managers to transfer to different store locations; and/or (ii) not providing managers with the support of an assistant manager. He said that this practice or pcp put him at a substantial disadvantage in comparison to those who are not disabled, and that the Respondent should have made reasonable adjustments by allowing him to transfer to a different location (Penge or Catford) and/or provide him with support, including the provision of an assistant manager.
47. As to (i) the Claimant did not make a proper request to transfer. He did not make any request to Mr Amir, other than the rather confusing email referred to above, which did not ask Mr Amir to do anything. After the

vacancy was filled by Mr Ogg the Claimant does not repeat his request for a transfer. There was no failure to allow him to transfer.

48. In any event the Claimant has not established that he was at a substantial disadvantage by such a pcp. Mr Neckles, on behalf of the Claimant, submitted that the substantial disadvantage suffered by the Claimant by not being allowed to transfer was that
 - a. The Catford and Penge stores were fully staffed and had an assistant manager so the Claimant would not have had to undertake these manual tasks.
 - b. His rotator cuff injury impacted on his ability to drive longer distances.
49. As to the former we have already said that the Claimant was not in fact required or expected to undertake such tasks. In relation to the contention that his disability impacted on his ability to drive longer distances there was no medical evidence to support it. More fundamentally there was no evidence to that effect in the Claimant's witness statement. The Claimant's email to Mr Amir did say that he wanted to work nearer home, but he did not suggest that there was a medical reason for this request. The Claimant reasons for wanting to transfer relate his concern about not getting the support he needed and the area "now getting religious and political". At the grievance and disciplinary hearings with Mr Fagan the Claimant also referred to wanting to work closer to home but does not link that request to any shoulder or wrist injury.
50. We do not accept that the Claimant was placed at a substantial disadvantage in comparison to those without a rotator cuff injury by not being permitted to transfer, so that a duty to make a reasonable adjustment arose.
51. It is also the Claimant's case that he was put at a substantial disadvantage in comparison with persons who were not disabled because he had insufficient support and in particular, after Mr Ajamie was transferred out of his store, no assistant manager.
52. As we have said, it was not the Claimant's role to undertake the manual tasks that he now suggests. It was his duty to manage and supervise other people to do those tasks. While he may have been understaffed the disadvantage that this caused was no different to the disadvantage that would be caused to a manager who had no rotator cuff injury. The issue in a reasonable adjustments case is whether the Claimant was substantially disadvantaged in relation to a relevant matter in comparison with persons who are not disabled, and we find that he was not.
53. As we have said we have had significant concerns about the Respondent's processes and the way that the grievance and dismissal hearings were

handled. However, this is not a claim for unfair dismissal. In cross examination many questions were put to the Respondent's witnesses designed to establish that the Claimant was not underperforming at all, was performing his role very well and that the reason that he was put on a performance improvement plan and dismissed was because the Respondent was "out to get him" or was victimizing him. However, that case was in itself at odds with the Claimant's case that he could not perform to standard because of his inability to carry out certain physical tasks. The issue for the Tribunal was not whether his dismissal for poor performance was fair or justified, but whether the Respondent discriminated against him contrary to sections 15, 20 and 21 of the Equality Act 2010 and we find that it did not.

Employment Judge Spencer
25 February 2019