EMPLOYMENT TRIBUNALS

Claimant: **Mr R Kelly**

Respondent: **Royal Mail Group Ltd**

Heard at: **Leeds** **On:** **4 June 2018 – 6 June 2018**

Before: **Employment Judge Bright**
Mr Taj
Mr Roberts

Representation
Claimant: Mr Fakunle (solicitor)
Respondent: Miss Hobson (in-house solicitor)

RESERVED JUDGMENT

The claimant was fairly dismissed and the age discrimination claim fails. The claims are dismissed.

REASONS

Claims

1. The claimant claimed unfair dismissal, under section 111 of the Employment Rights Act 1996 ("ERA"), and discrimination arising from disability, in accordance with section 15 Equality Rights Act 2010 ("EQA").

Issues

2. It was agreed at the outset of the hearing that the issues to be decided were those set out in the case management orders sent to the parties on 17 January 2018, with the exception of the issue of disability, which the respondent has conceded.

Preliminary matters

3. At a preliminary hearing on 9 January 2018, Employment Judge Jones allowed an amendment of the claim to include a complaint under section 15 EQA. However, Judge Jones did not grant leave for any amendment to include complaints under sections 13, 19, 20 or 27 nor a complaint for unpaid holiday pay, for the reasons given to the parties at that hearing and set out in the case management order sent to the parties on 17 January 2018.

4. At the start of the final hearing on 4 June 2018, owing to an administrative error, no non-legal tribunal panel members were available. It was arranged that the non-legal members could arrive in time to commence the hearing at midday. However, the respondent's main witness, Mr Huston, who no longer worked for the respondent and was on annual leave, indicated that he was only able to attend on the first day of the hearing. The respondent's application for postponement of the hearing to accommodate Mr Huston had previously been rejected.

5. Rather than cause the respondent to have to make a further application for postponement or a witness order for Mr Huston, I decided, with no objection from the parties, to deal with any preliminary, 'housekeeping' matters sitting alone in the morning, prior to the commencement of the full hearing once the panel members arrived. This appeared to me to be expedient and, in effect, enabled case management by way of a preliminary hearing, followed by a full hearing with members which commenced at noon.

6. During the case management stage, in seeking to agree the issues to be decided at the full hearing, it became apparent that Mr Fakunle considered that the claimant had live complaints about victimization, a failure to make reasonable adjustments and unpaid holiday pay. Having considered the wording of the case management order sent to the parties on 17 January 2018 I concluded it was clear that leave had not been granted for amendment to include those complaints. I indicated to Mr Fakunle that the Employment Tribunal Rules 2013 ("ET Rules") provided for an application for reconsideration of Judge Jones' decision, if the claimant had objected to it. If the claimant believed Judge Jones had made an error of law, there was the option of appealing to the Employment Appeal Tribunal. Alternatively, if there had been a change of circumstances, Mr Fakunle could make a fresh application for leave to amend before me. Mr Fakunle indicated that he wished to make a fresh application. However, it was clear from his submissions that the basis of the application was disagreement with Judge Jones' decision, rather than any new ground for amendment. I considered that this was an application for reconsideration made outside the time limit set out in Rule 71 ET Rules, without any explanation of the delay. Moreover, I would not be able to reconsider it without being appointed to do so (Rule 72). The application was made at the last moment before start of the full hearing, on identical grounds to those already considered and rejected at a preliminary hearing. The terms of Judge Jones' case management order were perfectly clear. For those reasons I refused to entertain the claimant's fresh application for leave to amend. We therefore proceeded with the final hearing on the basis agreed set out in Judge Jones' case management orders once the other panel members arrived.

Submissions

7. Mr Fakunle for the claimant made detailed oral submissions which we have considered with care but do not rehearse here in full. In essence, it was submitted that:

   7.1. It is common ground between the parties that carpal tunnel syndrome falls within the EQA, as the respondent has conceded disability. This case is similar on the facts to **Gallop v Newport City Council** [2014] IRLR 211. Carpal tunnel syndrome

("**CTS**") is clearly an 'underlying medical condition' for the purposes of the consideration of dismissal ("**COD**") process. The respondent knew from 2015 onwards that the claimant had problems with his hands and arms. The respondent's knowledge is implied by the adjustments and rehabilitation process put in place for the claimant. The respondent's position that it did not know the claimant was disabled is not plausible.

7.2. The claimant's absences which related to his carpal tunnel syndrome should have been discounted for the purposes of the absence management policy triggers. The dismissal was very quick and was a 'kangaroo' dismissal. The appeal was not considered properly and the respondent did not consider the claimant's grievance. The respondent should have taken legal advice and could have waited for the claimant to recover, but just sought to dismiss him.

7.3. The reason for dismissal was the claimant's grievances and personal injury claim against the respondent. The respondent has not provided statistics or evidence to prove that the claimant's absence caused problems with postal deliveries or complaints from customers. The respondent has not established that it had a legitimate aim for dismissing the claimant. On a previous occasion when the claimant reached the COD of the absence management policy, the respondent took legal advice and held back from dismissing, suggesting that dismissal was not necessary on this occasion. Dismissal was not proportionate.

7.4. The case of **Spencer v Royal Mail** UKEATS/0040/03 should be distinguished from this case because the claimant in this case was taking authorized leave.

8. Miss Hobson for the Respondent also made detailed oral submissions, which we have considered with equal care but do not rehearse here in full. In essence, it was submitted that:

8.1. The respondent has accepted that the claimant was disabled following receipt of medical evidence following the preliminary hearing. However, prior to that there was no indication that the claimant's CTS amounted to a disability. The claimant had access to OH Assist, the respondent's occupational health ("**OH**") advisers, and he was interviewed on the telephone and in person, but at no point did he allege that his condition amounted to a disability. He was given modified duties before and after his surgery to rehabilitate him, but he was not entirely taken off the sorting machine he operated (the "**IMP**"). The respondent was entitled to treat the claimant's two absences for surgery as separate periods of absence. The claimant told the respondent he was not looking for disability in his discussions with the respondent. There was no basis on which the respondent ought to have known that the claimant's CTS was a disability. In these circumstances the respondent was entitled to rely on the OH reports. The respondent therefore did not know and could not reasonably be expected to have known that the claimant was disabled at the relevant times.

8.2. The respondent's Universal Services Obligation ("**USO**") places obligations regarding delivery of mail on the respondent to retain its license and the prolonged absence of key employees risks compliance. The respondent required a reliable staff base to meet those obligations and meet high public expectations. That is a legitimate aim.

8.3. The reason for dismissal was the claimant's poor attendance. That was 'some other substantial reason' for dismissal. The respondent acted reasonably in treating that reason as sufficient to dismiss the claimant. The attendance procedure had been agreed with the claimant's trade union and was designed to help the respondent meet its obligations. The claimant accepted he had a poor

attendance record. The OH reports recorded him having fully recovered from the first operation and the respondent was under no duty to discount the two absences for surgery. The claimant's extended periods of leave beyond the periods expected meant that the respondent had no confidence that the claimant would meet the expected standards in the future. It was unfortunate that the last two absences related to his CTS, but the attendance procedure was progressive and he had progressed to that stage on 3 occasions in the past and the respondent believed there was no reason to discount his absences on this occasion. The claimant had a full opportunity to put his case forward at every stage, was represented by experienced trade union representatives and had a full rehearing of the case at appeal. Any defects in the dismissal process were remedied on appeal. The case of **Spencer** is relevant.

Evidence

9. The Claimant gave evidence on his own behalf and called no further witnesses.

10. The Respondent called:
    - 10.1. Mr Huston, formerly WCM Champion/Process Improvement Lead for the respondent;
    - 10.2. Mr Joshi, Operational Postal Grade Deputy Manager at the Leeds Mail Centre;
    - 10.3. Mrs Fisher, Independent Casework Manager.

11. The parties presented an agreed bundle of documents of 390 pages, and the claimant provided an additional bundle, which mainly duplicated the documents in the main bundle, but included replacements for pages 30a, 30b and 222a. References to page numbers in these reasons are references to the page numbers in the agreed bundle.

Findings of fact on liability

12. Having considered all the evidence we have made the following unanimous findings of fact. Where a conflict of evidence arose we have resolved it, on the balance of probabilities, in accordance with the following findings.

13. The claimant worked for the respondent as a postman from 15 July 1996 to 28 August 2017, when he was dismissed. The respondent's evidence was that he had a poor attendance record from the start of his employment, with significant sickness absence and special leave (leave to care for a child or dependent). The claimant accepted that his attendance record had been poor, in part because of demands caused by a family illness. His attendance review warnings were as set out at paragraph 12 of Mr Joshi's statement. According to the attendance records set out at page 193, and accepted by the claimant, from 29 January 2016 the claimant had a series of absences for injuries caused by an assault, insomnia and vomiting, in addition to a number of days' unpaid special leave, followed by a period from 14 June 2016 to 19 August 2016 for surgery to correct the CTS in his right wrist, and a further period from 22 December 2016 to 10 February 2017 related to surgery to correct CTS in his left wrist.

14. The respondent has an attendance policy ("**the Policy**") (pages 31 - 39) which was agreed with the Communication Workers Union and, it is agreed, applied to the claimant's absences. The Policy provides for three attendance review stages (pages 35, 36 and 39) identified as AR1, AR2 and AR3. AR1 and AR2 equate to a warning and final written warning, while AR3 is consideration of dismissal ("**COD**"). ARs 1 and

2 are generally conducted by the line manager and AR3/COD is done by a second line manager or another manager at that level.

15. The Policy provides that, when calculating whether an employee's absence has triggered an attendance review stage, disability related absences will normally be discounted (page 33). Separately, in a section dealing with the action required by the second line manager at the COD meeting (page 36), the Policy requires that manager to take into account the employee's overall absence record including whether the employee is "disabled or has an underlying medical condition". We find that the Policy therefore requires, at the COD stage, a broader consideration of the overall picture of absence and attendance than is required of the first line managers at AR1 or AR2. The claimant did not dispute that he triggered AR1. Nor did he dispute the procedure followed by the respondent. His complaint was that his absences for surgery should not have contributed to triggering the AR2 or been taken into account at the COD because they related to a disability or underlying medical condition. However, we accepted the respondent's evidence that the provision on discounting at page 33 does not concern underlying medical conditions. It was only at the COD stage, that the second line manager was required to take both disability and/or underlying conditions into account. There was therefore no term requiring the respondent to discount the claimant's absence for his CTS surgery for the purposes of triggering AR2 if they did not know or could not reasonably know that it constituted a disability.

16. The respondent conceded that the claimant was disabled at the relevant times, but disputed that it knew or could reasonably have been expected to know that his CTS was a disability. The claimant received his diagnosis of CTS on 8 December 2015 following referral to hospital in connection with pain in his wrists, elbows and fingers. The respondent knew he had problems with his wrists, elbows and fingers and, over the course of the following year and a half, the respondent commissioned a total of 4 Occupational Health ("**OH**") reports from OH Assist (pages 80 – 81, 84 – 85, 121 – 122 and 143 – 148), which were prepared with the benefit of telephone and in-person meetings between a variety of OH professionals and the claimant. In all of those reports the OH professionals unanimously identified that, in their opinions, the claimant's condition did not fall within the EQA at that time. In addition, the reports following the claimant's surgery in December 2016 reported that he had made a full recovery, the prognosis was good and he had no difficulties carrying out his job. The reports did not indicate that the claimant's normal day to day activities were affected by his condition. We accepted the respondent's evidence that this suggested to the respondent's managers that whatever substantial adverse effects on his normal day to day activities he had suffered when his condition was at its worst were not continuing and/or were unlikely to be present for a period of 12 months or to recur.

17. Separately, in none of the claimant's return to work or attendance review meetings did he identify that he considered himself disabled by his condition. We accepted that was because his understanding of "disability" was not based on the legal definition. However, at each of those meetings he was represented by experienced workplace representatives. The claimant gave repeated assurances that he was fit to return to work and his representative at the COD meeting argued only that the attendance policy required "corrective surgery" absences to be discounted. He expressly ruled out disability (page 149), saying "we are not looking for disability". There was no indication given to the respondent by the claimant that there was any adverse effect on the claimant's day to day activities, that it was substantial or that it might be long term. This suggests to us that, at the time, the claimant's own views accorded with the OH reports: he did not consider that his impairment had or would have a long term, substantial

adverse effect on his day to day activities. We accepted Mr Huston's evidence that he believed what the OH reports, trade union and the claimant were telling him, did not feel there was any requirement to make further enquiries and did not know that the claimant's condition amounted to a disability at the time. We find that, in these particular circumstances, there was nothing to suggest to the managers that they might need to look behind the OH practitioners' view that the Equality Act 2010 did not apply.

18. Mr Fakunle submitted that the claimant's periods of leave for surgery were authorized and ought therefore to have been discounted from the AR2 and AR3 trigger calculations. There was no provision in the attendance policy that we could see for the discounting of authorized leave or, indeed, any provisions for authorizing sickness leave. Moreover, this allegation was not put to the respondent's witnesses, nor was it evident from the claim form, witness statements or documents. We accepted the evidence of the respondent's witnesses that they understood the attendance policy triggers to apply to all sickness leave, irrespective of cause, with the possibility of excluding disability-related leave only. Indeed, we find that that accords with the provisions of the Policy.

19. The claimant has also argued today that his surgery-related absences should have been discounted because his CTS was a work-related injury and because he was treated differently at the AR3 stage on a previous occasion. Those allegations were not put to the respondent's witnesses and we find there was insufficient evidence to support them.

20. We accepted Mr Joshi's evidence regarding his decision not to discount the claimant's surgery related absences and to place the claimant on AR2 set out in his witness statement at paragraphs 39 – 47 and we find that he followed the procedure set out in the Policy.

21. In his witness statement, the claimant recounts how the OH reports made recommendations for reasonable adjustments which the respondent did not put in place. However, it is not clear that the lack of any such adjustments led directly to any of the claimant's absences. That allegation was not put to the respondent's witnesses in cross examination. There was insufficient evidence for us to find that the respondent had at any stage failed to make any adjustments requested (see paragraph 23 below). We did not doubt that the claimant's perception of events is as set out in his witness statement and in his grievance, but we find that the claimant did not tell the respondent he needed adjustments because of a disability, nor did the respondent have any reason to go beyond the ordinary 'return to work' rehabilitation adjustments applicable in any return from sickness absence. While allegations of failures to make adjustments clearly made up the bulk of the claimant's grievance, the specific allegations were not put to Mr Joshi in cross examination and we accepted Mr Joshi's evidence contained in his response to the grievance, set out at paragraph 57 of his witness statement.

22. We accepted Mr Huston's evidence that, at the COD stage, in accordance with the Policy (page 26), he took a broader look at the whole of the claimant's sickness record since the respondent's modern records began. He was not merely concerned with the absences which had led to the triggering of the COD, but was tasked to review the whole history of the claimant's attendance. Mr Huston told us, and we accepted, that he particularly took account of the long history of absences and attendance review procedures invoked previously, the unexpected absences before and after the first period of surgery and the additional recovery time required after the second period of surgery. He also took account of the amount of special leave the claimant had taken

and the fact that he had taken so much special leave that the respondent had warned him that any further absences could no longer be treated as special leave. We find that the pattern which emerged was one of repeated episodes of both planned and unplanned leave (sick or special leave) and repeated triggering of the AR process. Even planned leave (such as for the CTS surgery) commenced earlier than predicted and lasted longer than expected. We accepted Mr Huston's evidence that, given the patterns over the previous years, he genuinely concluded he had no confidence in the claimant improving his attendance record, despite the resolution of his CTS and his assurances that his family circumstance were improving.

23. In relation to the absences around the first period of surgery, Mr Huston took the view that the claimant had not made sufficient efforts to maintain his attendance, by failing to contact his managers to discuss possible adjustments to enable him to work. We were initially somewhat perplexed by that view, given that the claimant was in pain and expecting imminent surgery. However, we accepted that the claimant knew he was expected to discuss the matter with his line managers in the circumstances and that the history of previous absences cast his failure in a different light. The claimant told us that previous requests for adjustments had been ignored and he therefore saw no point in discussing the absence with his managers. However, there was insufficient evidence for us to find that the respondent had at any stage failed to make adjustments requested. On the contrary, there was evidence of the claimant being allocated rehabilitation duties (for example, pages 101 and 131 – 133) and being transferred to other areas to make his duties more manageable. We accepted Mr Joshi's evidence (paragraph 17) that, for example, the claimant was moved onto adjusted duties (pages 82 – 83) and that he asked the claimant at a number of meetings whether there was any further support the respondent could offer (for example, at pages 94 – 96). Following a risk assessment, Mr Joshi made further changes to the claimant's work (pages 102 – 105). We accepted Mr Joshi's evidence that, for example, the claimant was moved to parcels, where he had the option to select what he lifted to avoid pain and aggravation of the injury.

24. The claimant's extended absence following his first surgery was caused by a fall which delayed his recovery. His absence after his second surgery was extended because his recovery was slower than predicted. Again, we were initially somewhat perplexed by these factoring so significantly in Mr Huston's considerations, as it was not suggested that the claimant should have done anything to avoid the fall or increase the speed of his recovery. However, we accepted that had the claimant communicated with his managers more effectively, there might have been ways to minimize his absence. We accepted that these further extended periods of absence, aggregated with his previous history of absences, contributed to Mr Huston's loss of confidence in the claimant.

25. We asked Mr Huston about his decision to treat the surgery for the left and right hands as separate episodes of leave for the purposes of the policy. That decision appeared somewhat unusual to us, in the face of a condition such as CTS which often affects both hands. We put to Mr Huston that it was the medical professionals' decision to operate on the claimant's hands at different times. We did not follow Mr Huston's logic in suggesting that separate surgeries following an accident should be treated as one period of absence, while surgery on each wrist for the same condition should be treated as two. However, we accepted that, for the purposes of the Policy and the trigger points for attendance review/COD, the respondent was entitled to treat the absences as distinct. Separately, we accepted that, in considering the whole picture of the claimant's attendance history, these were further episodes of prolonged absences which contributed to Mr Huston's loss of confidence in the claimant.

26. It was agreed that, following his return to work after the second surgery, the claimant had four months of good attendance and that he told Mr Huston he had sorted out his problems at home. However, we find that Mr Huston genuinely remained of the opinion that, considering the pattern of historic absences, the claimant was unlikely to continue to attend reliably.

27. We were satisfied that Mr Huston applied the Policy and gave consideration to all of the factors set out at paragraph 43 of his witness statement, including the medical evidence and alternatives to dismissal. We were also satisfied that the claimant and his representatives had every opportunity to put forward their arguments and that Mr Huston genuinely considered those arguments and rejected them for the reasons explained to us at the hearing. Mr Huston did not seek further medical evidence and relied on what was available to him as well as the claimant's representations. We accepted Mr Huston's evidence that he never felt he really got to the bottom of the reasons for the claimant's poor attendance history and that he genuinely did not have confidence in the claimant maintaining satisfactory attendance in the future.

28. The claimant alleged that one reason Mr Huston dismissed him was because of Mr Huston's poor relations with the claimant's trade union representative. While Mr Huston accepted that the tone of the COD meeting was emotional, there was insufficient evidence for us to find that Mr Huston set out to dismiss the claimant because of dislike of or animosity towards his trade union representative. Further, that allegation was not put to Mr Huston in cross examination.

29. The claimant also alleged that he was dismissed because he had raised grievances against Mr Joshi and other managers and/or had brought a personal injury claim against the respondent. Again, there was insufficient evidence for us to find that that was the case. While the claimant's grievance may not have been satisfactorily resolved and he may have a personal injury claim, we accepted Mr Huston's evidence that it did not feature in his consideration of dismissal.

30. The claimant also suggested that other employees with far worse attendance records than his were not dismissed and that he himself had been treated differently on a previous occasion. However, there was insufficient evidence of any direct comparisons and this allegation was not put to the respondent's witnesses.

31. We accepted the respondent's evidence at para 43.18 of Mr Huston's witness statement and paragraph 32 of Mrs Fisher's statement, regarding the standards required of the respondent to maintain its license and the need for regular and reliable attendance by its employees, in particular those like the claimant, specially trained to work on the IMP machines. We accepted Mr Joshi's description of the difficulties caused by unexpected absences and sickness absence. We accepted Mr Huston's evidence that maintaining the required standard of service was his aim in dismissing the claimant and that he considered alternatives to dismissal but rejected them. We accepted that it was not easy for the respondent to substitute other employees at short notice to do the claimant's IMP duties, as training and extra funding was required.

32. The claimant appealed against the decision to dismiss him and an appeal meeting was held with Mrs Fisher on 16 June 2017. The claimant appealed on the bases set out in Mrs Fisher's witness statement at paragraph 9. We accepted her evidence relating to her consideration of the claimant's points of appeal set out at paragraphs 13 to 28 of her witness statement. We find that she looked into whether the absences should be

discounted and concluded that there was no reason to do so. We also accepted her evidence that there was no indication to her that there was any reason to look behind the OH reports and what the claimant and his representative were saying about his condition and his capabilities. We find that the appeal was a re-hearing of the evidence and that Mrs Fisher conducted her own investigation to establish whether Mr Huston's decision had been tainted by his relations with the claimant's union representative. We find that Mrs Fisher also checked that the procedure leading to the dismissal was correct.

33. We accepted Mrs Fisher's evidence that she genuinely concluded the decision to dismiss the claimant was the right one, because she too had no confidence that he would maintain his attendance going forward. The claimant's allegation at the hearing that Mrs Fisher's decision was tainted by her poor relations with the claimant's regional trade union representative was not put to Mrs Fisher and is unsubstantiated.

The law

Unfair dismissal

34. We had regard to Section 98 of the Employment Rights Act 1996 ("**ERA**"). The onus is on the employer to show the actual or principal reason for dismissal. "Some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held" (section 98 (1) (b) ERA) is a potentially fair reason for dismissal. The protection of business interests may be a substantial reason justifying dismissal, provided it is a sound, good business reason.

35. In determining whether the employer acted reasonably or unreasonably in dismissing for the reason given, the burden of proof is neutral and it is for the tribunal to decide. Section 98(4) ERA reads

> *The determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case.*

36. The test of whether or not the employer acted reasonably is an objective one, that is tribunals must determine the way in which a reasonable employer in those circumstances in that line of business would have behaved. The Tribunal must determine whether the employer's actions fell within the range of reasonable responses open to a reasonable employer in the circumstances (**Iceland Frozen Foods Limited v Jones [1983] ICR 17** (approved by the Court of Appeal in **Post Office v Foley, HSBC Bank PLC (formerly Midland Bank PLC) v Madden [2000] IRLR 827**)). The Tribunal must not substitute its decision for that of the respondent. The range of reasonable responses test (the need for the tribunal to apply the objective standards of the reasonable employer) must be applied to all aspects of the question whether the employee was fairly and reasonably dismissed (**Sainsbury Supermarkets Limited v Hitt [2003] IRLR 23**).

Disability discrimination

37. Section 15 EQA provides that a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Section 15(2) makes it clear that the prohibition from discrimination arising from disability 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'.

38. To prove a prima facie case of discrimination and shift the burden to the employer to disprove his or her case, the claimant will need to show that he has been subjected to unfavourable treatment, that he is disabled, a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment and some evidence from which it could be inferred that the 'something' was the reason for the treatment. Under section 15(2) if the employer can prove that it did not know, or could not reasonably have been expected to know, that the employee was disabled, section 15(1) does not apply.

39. If section 15(1) applies, the burden of proof shifts to the employer and, to avoid a finding of discrimination, it must show that the reason for the unfavourable treatment was not the 'something' that arose in consequence of the claimant's disability or that the treatment was justified as a proportionate means of achieving a legitimate aim.

40. Case law has established that, in relation to knowledge of the disability, an employer cannot simply turn a blind eye to evidence of disability. The EHRC Employment Code paragraph 5.15 states that it must do all it can reasonably be expected to do to find out whether a person has a disability, even where one has not been formally disclosed. Moreover, an employer is expected to proceed with caution when told by an OH adviser that an employee is not disabled, because the tribunal may still find that the employer had constructive knowledge. The employer must make its own factual judgment as to whether the employee is disabled and not merely 'rubber stamp' the medical adviser's report (**Gallop**). However, an employer may attach great weight to the informed and reasoned opinion of an OH consultant in reaching its own assessment, on the basis of the evidence before it and a reasonable enquiry, as to whether the employee is disabled for the purposes of the EQA (**Donelien v Liberata UK Ltd** [2018] EWCA Civ 129).

41. The respondent's representative referred us to the case of **Spencer** in which the EAT upheld the decision of the minority view of the employment judge that, although the incident which triggered stage 3 of the absence procedure was an unprovoked assault, the respondent was entitled to attach very significant weight to the simple fact that the claimant had failed to meet the attendance requirements. The EAT found that within the terms of the respondent's agreement with the union, there was a presumption in favour of dismissal, if the stage 3 part of the process had been passed and there was no issue of unfairness in the way it had been handled. The EAT concluded "*it must be borne in mind that the entire motivation behind this scheme is for the employer to maintain a level of manpower to enable it to maintain its public service and regular absentees have to expect, at times, treatment which might appear to be harsh*".

Determination of the issues

Disability discrimination.

42. We find that the claimant was treated unfavourably (dismissed) because Mr Huston and Mrs Fisher had lost confidence that he would regularly attend work. We find that that loss of confidence was mainly because of the claimant's history of absences which were, in part, caused by his CTS. Although his surgery absences were not the only cause of the loss of confidence, they clearly played a key part and caused the AR2 and

AR3 to be triggered. We find that there was a link between the claimant's CTS and his absence and therefore that he suffered unfavourable treatment because of something (the absence) arising from his CTS. The respondent has agreed that the CTS was a disability at the relevant times.

43. The key issues in dispute are therefore:

    43.1. did the respondent have actual or constructive knowledge that the claimant was disabled; and

    43.2. if so, was dismissal a proportionate means of achieving a legitimate aim?

44. We accepted that the respondent did not have actual knowledge that the claimant was disabled. The OH reports, the claimant's trade union and the claimant himself all ruled out disability. The question is therefore whether the respondent had constructive knowledge. As in the example given in the EHRC Code at paragraph 5.14, this is a case in which the claimant, though it is now accepted he met the definition of disability, did not think of himself as a 'disabled person'.

45. We find that, in this case, Mr Huston did consider whether the claimant was disabled but, faced with four separate OH advisers' reports telling him that was not the case, and the claimant and his trade union representatives' views expressed in the meetings, he did not see a reason to conduct further enquiry. Mr Fakunle appeared at times in his cross examination and submissions to suggest that the respondent must have known the claimant was disabled because a CTS diagnosis and/or an 'underlying condition' must automatically be a disability. That is clearly not the case. Carpal tunnel syndrome is not automatically a disability, unlike conditions such as cancer or multiple sclerosis. A condition such as CTS, or any 'underlying condition', may be capable of being a disability for the purposes of the EQA, but the definition must be met for it to do so. It is therefore equally capable of not meeting the definition, for example if the effect on day to day activities is not substantial or not sufficiently long term. While a diagnosis of CTS suggests that an employer should consider the issue of disability, the employer must still make its own factual judgment as to whether the employee is disabled.

46. In this case, the fact that Mr Huston and others referred the claimant to OH Assist on four occasions, the unanimous and unambiguous advice provided by the OH advisers, the prognoses of full recovery and the express words and focus of the trade union representative and the claimant at the meetings all weighed against the possibility of the claimant's CTS being a disability. In these circumstances we find that it would be a rare employer indeed who would seek further clarification as to whether an employee might be disabled. We find that there was nothing to alert Mr Huston and Mrs Fisher to the need to look behind the conclusions of the advisers and their decision to attach weight to the OH opinions, in these particular circumstances, was reasonable. The fact that the claimant had been given rehabilitation duties and adjustments had been made to accommodate him does not necessarily indicate knowledge of disability. Such adjustments may equally be made where an employer knows that an employee has a short term or temporary health related difficulty. On the balance of probabilities, we find that the respondent has shown that it did all it could reasonably be expected to do to find out whether the claimant had a disability. It did not know and could not reasonably have known that the claimant's CTS was a disability (section 15(2) EQA). There is therefore no breach of the EQA.

47. Although we are not required to do so, by virtue of our findings above, we have considered for completeness whether, if we are wrong about the respondent's

knowledge, the respondent has anyway shown that dismissal was a proportionate means of achieving a legitimate aim. The claimant's representative did not challenge the legitimate aim or issues of proportionality, nor was it put to the respondent's witnesses in cross examination. The tribunal panel members therefore put the matter to the respondent's witnesses. We were satisfied, from their responses which led to our findings of fact above, that the respondent's service obligations to the public and under the USO were real and demanded reliable attendance by the respondent's employees. We find that the respondent has shown that it had a legitimate aim and the claimant's dismissal was in furtherance of that aim, because the respondent did not have confidence that he would provide reliable attendance. Mr Huston considered alternatives to dismissal and took account of the claimant's history of poor absence and the logistical and financial strain the claimant's absences caused. We find that, in the circumstances and given the managers' genuine loss of confidence in the claimant's reliable attendance, dismissal was proportionate.

48. The claim of disability discrimination therefore fails and is dismissed.

Unfair dismissal

49. The respondent submitted that the lack of confidence that the claimant would maintain his attendance record, or provide reliable attendance was 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position the employee held' (section 98 (1) (b) ERA). We accepted the respondent's evidence that, despite the claimant's full attendance following his second surgery, the managers had genuinely lost any confidence that the claimant's attendance would improve or that he would provide reliable attendance in the future. We accepted the respondent's evidence that that was the reason for the claimant's dismissal. We did not accept the claimant's evidence that there was another, ulterior, motive for dismissing him. There was insufficient evidence for us to find that the claimant's grievance against Mr Joshi or others or Mr Huston's or Mrs Fisher's relations with the claimant's trade union representatives had any influence on the dismissal. We find, in the circumstances, given the respondent's service obligations to the public and under the USO, and the real need for reliable attendance by the respondent's employees, in particular IMP operators, a loss of confidence in reliable attendance was sufficient to justify dismissal of an employee in the claimant's position. We find that the respondent has shown that the reason for dismissal fell within section 98 ERA.

50. In considering whether the respondent acted reasonably or unreasonably in dismissing the claimant, we have weighed up various factors. In particular, we have considered the fact that the claimant's most recent absences were for corrective surgery, he had shown an improvement in attendance since his last absence and had recovered from the surgery. We also took into account the claimant's length of service and the fact that his disability related absences were counted towards his absence record. We also considered the fact that the respondent treated the two surgeries as separate episodes of absence for the purpose of the attendance review triggers despite the fact that they related to one condition. We considered that this was rather harsh, given that the CTS was unavoidable and it was on NHS advice that the claimant had his hands operated on separately. We also considered that the weight attached by Mr Huston to the extension of the absence by an unintentional fall and slow recovery (neither of which the claimant could avoid) was rather harsh. However, we accepted that the recent absences only formed a part of Mr Huston's consideration and that his loss of confidence in the claimant's reliable attendance was prompted by a review of the whole history of the claimant's attendance over recent years, which the claimant accepted

was poor. We found that the procedure followed by the respondent prior to the dismissal was reasonable and was in accordance with the Policy. The claimant had opportunities to put his side and be represented by his trade union. He also had the opportunity to appeal and we find that Mr Huston and Mrs Fisher both considered his arguments properly and reached their conclusions in good faith.

51. The decision in **Spence**, while appearing very similar to this case on the facts, dates back to 2003 and we did not attach any particular weight to it, as we were unclear about the similarities of the attendance agreement referred to in that case and the one in force at the time of the claimant's dismissal in this case. However, our conclusions are broadly the same. We find that, while Mr Huston's decision to dismiss was somewhat harsh in the respects set out above, we do not consider that it was so harsh that no reasonable employer would have dismissed in these circumstances. While another employer, or indeed we ourselves had we been the employer, might have waited to see whether the claimant's attendance improved over the coming years, that is not the test we are required to apply under section 98(4) ERA. In all the circumstances, including the size and administrative resources of the respondent, and in particular in light of the respondent's business requirements and the claimant's long history of absences and attendance review referrals, we find that dismissal was within the range of reasonable responses of a reasonable employer.

52. The claim of unfair dismissal fails and is dismissed.

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Employment Judge Bright

_______________04.07.2018 _____________

Date