EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Cairns	**v**	The Royal Mail Group Limited

Heard at: Norwich **On:** 13, 14 and 15 February 2019

Before: Employment Judge Postle

Members: Miss L Feavearyear and Ms R Kilner

Appearances
For the Claimant: Mr D Percival, Union Representative
For the Respondent: Mr I Hartley, Solicitor

JUDGMENT

The unanimous judgment of the tribunal is:

1. The claimant was not unfairly dismissed.

2. The claim under section 15 of the Equality Act 2010 is not well founded.

3. The respondents did not fail in their duty to make reasonable adjustments.

RESERVED REASONS

1. The claimant brings claims to the tribunal on three grounds; claims under the Equality Act 2010 for the protected characteristic of disability, the disability being osteoarthritis and that being conceded by the respondent as a disability within the meaning of section 6 as is the question of knowledge. The specific issues are the failure to make reasonable adjustments under section 20 of the Equality Act 2010, in particular the claimant alleges that a provision, criterion and / or practice applied by the respondent was that the claimant performed deliveries outdoors, the claimant asserts that put him at a substantial disadvantage by reason of his knee condition and the question arises was the respondent under a

duty to make reasonable adjustments, namely to amend his duties to work internally.

2. The second claim is dismissal arising from disability under section 15, in that the claimant alleges that the dismissal arose from the fact that he was unable to perform deliveries outside. It is then a matter for the respondents to justify by showing it was a proportionate means of achieving a legitimate aim.

3. Thirdly there is a claim for ordinary unfair dismissal under the Employment Rights Act 1996. The reason advanced for the dismissal is capability. The claimant argues there was a failure to provide adjusted duties alternative work, renders the dismissal unfair.

4. In this tribunal we have heard evidence on behalf of the respondents from Mr Hinds who dealt with the procedure leading up to the dismissal for ill-health retirement and Mr Williams who conducted the appeal on behalf of the respondents. For the claimant, he gave evidence, as did Mr Wake his Trade Union representative. All witnesses gave their evidence through prepared witness statements. The tribunal also had the benefit of a bundle of documents consisting of 78 pages.

5. The facts of this case show that the claimant was employed in the capacity of a delivery post man based at the Hendon delivery office and commenced that employment in 1990 until his dismissal for capability on 10 March 2018.

6. The claimant suffered an accident at work on 27 April 2016 in which he twisted his left knee. At first the claimant was able to carry on working but eventually the claimant was signed off duty due to the severe discomfort and pain. The claimant underwent an MRI scan in August 2016 where it was established that the claimant had torn a meniscus in his knee. The claimant returned to work on restricted indoor duties following a recommendation from the claimant's GP.

7. The claimant had been involved in prep work which had to be completed by 10 am, for the delivery post men and other ad hoc duties. It would also appear that the operation the claimant underwent revealed osteoarthritis of the left knee. That operation took place in February 2017 and following, two weeks absence the claimant again returned to work as before on restricted indoor duties.

8. The claimant continued working in the restricted indoor work. The respondents have an ill health retirement policy which is agreed with the Trade Union, which is at page 31 and the scope and general definitions are at page 32 and applies to those employees on alternative or adjusted duties for an employee due to ill health, or an ill health referral.

9. The definitions of ill health retirement are at page 32 and defined as cessation of employment as a result of serious physical or mental ill health such that in the opinion of Royal Mail Group, or any associated employer, the member is permanently incapable of carrying out his current duties, or carrying out such other duties for the employer as the employer might reasonably expect that member to perform and engaging in employment with any other employer the type which in the opinion of the present employer would be reasonable and appropriate for the member.

10. Retirement on ill health ground with a lump sum means a cessation of employment as a result of a serious physical or mental health. Such that in the opinion again of the Royal Mail Group, or associated employer, the employee is for the foreseeable future incapable of carrying out his current duties or carrying out such other duties for the employer as the employer might reasonably expect that member to perform.

11. The memo of understanding containing the policies is at page 33 and that refers to the fact that the process is conducted in accordance with the relevant legislation, the Equality Act 2010, and goes on to recite what factors should be taken into consideration when assessing the suitability and reasonableness in identifying appropriate alternate duties that employers might expect an employee to undertake. 'For the foreseeable future' is defined as a period of nine months from the date of the medical opinion.

12. The access to the process at the first stage is a referral to Occupational Health. Such a referral is made by a variety of means which include long illness or accident or a personal request. The policy also deals with the possibility of an appeal to an independent specialist in Occupational Health, at page 37, in circumstances where an employee wishes to appeal for or against a retirement on ill health grounds. The next stage of the process under the policy is for a line manager to interview the relevant employee and make an appropriate decision.

13. At some time, the date unknown but likely to be in December, the claimant was spoken to by a manager, believed to be Mr Rowe, in passing about the merger of sorting offices and the question whether the claimant was interested in ill health retirement. The claimant said he would look at it but he was not accepting anything, it was an option that the claimant would look at.

14. It would appear around the same time the claimant was also approached by another manager, not known to the claimant, whom advised him there was a scoping exercise for alternative jobs for the claimant and he could get back to the claimant to discuss what jobs could be allocated on a permanent basis.

15. On 3 January, the claimant received a call from Occupational Health Assist advising a telephone consultation on 4 January with a Doctor. As agreed the consultation took place and the report from a Dr Lloyd was

provided, at pages 44 – 45. That report said, in summary, concluding that the claimant met the criteria for ill health policy retirement with a lump sum payment, taking into account the Doctor's own assessment and the claimant's own orthopaedic consultant's letter.

16. Shortly after the report was obtained, Mr Rowe appears to have discussed with the claimant the amount the claimant would receive if he was medically retired, i.e. lump sums.

17. In accordance with the policy, the next stage was a line manager to interview the claimant and make a decision about the future. On 10 February the claimant was invited to such a meeting by letter, at page 46, the letter confirms serious consideration is now being given for retirement on ill health grounds and refers to the Occupational Health Report. The fact that no final decision has been made until the claimant has been given an opportunity to put forward reasons why that course of action should not be followed. The letter went on to say that the claimant was entitled to be accompanied by a work colleague or Trade Union representative. The meeting was to be conducted by Mr Hinds, who was another manager of a delivery depot who did not know the claimant personally.

18. The meeting takes place on 14 February with the claimant and the Trade Union representative Mr Wake in attendance and Mr Hinds. Brief notes, both hand written and typed are at pages 49 – 53. At that meeting the claimant was warned of the possibility of dismissal on the grounds of ill health and discussed the history of his health since the accident and his limitations from a work point of view. Also, where he wished to be considered for possible alternative work, at which the claimant indicated North London or the North West, where he would consider any vacancies. Other than the skills of an indoor / outdoor postman the claimant had no other particular skills. The meeting also discussed the possible merger between the Hendon office and the Mill Hill office, although Mr Hinds was unaware when that would finally take place. It was agreed at that meeting that Mr Hinds would conduct a scoping exercise to see what was available to accommodate the claimant working indoors.

19. It is also noted that in the handwritten notes, in the margin, there was some discussion about the claimant covering a possible three days per week for indoor workers, that appeared to be in relation to scheduled attendances in which certain employees had appeared not to be covering.

20. On 16 February Mr Hinds circulated a memo to all Delivery Managers in the North West / North area of London to enquire about the possibility of vacancies which might be suitable for the claimant, at page 54, and that memo outlines the claimant's restrictions. The response from the various Regional Managers was that there were no vacancies suitable and in fact when Mr Hinds raised the issue of the merger and when it would take place with Mr Doyle, the Operations Manager, he responded on 20 February that no date as yet had been set, it was likely to take place

later in the year and likely to reduce the overall number of indoor jobs as there would be some duplication, we see that at page 58.

21. On 28 February, the claimant was retired on ill health grounds with a lump sum payment and payment in lieu, the letters set out the right of appeal and that is at page 59. The claimant duly appealed on 5 March, page 61, the grounds for his appeal appeared to be two fold. Firstly, due to a very damning Occupational Health report and secondly, that he had been fulfilling the duties since his accident at work and that no scoping exercise had been carried out as far as he could see. Although, what the claimant had not done was appealed against the Occupational Health report by way of asking for an independent medical assessment which under the respondent's procedure could and should have done.

22. The claimant's appeal was to be heard by Mr Williams, again another Delivery Depot Manager not particularly know to the claimant. The letter inviting the claimant was dated the 17 April, page 64, for a hearing on 24 April. That meeting was rescheduled as a result of the claimant's Trade Union representative not being available and the appeal hearing eventually took place on 2 May. In attendance again was the, Mr Wake his Trade Union representative and Mr Williams. Minutes of the appeal are at pages 68 – 70 and the claimant accepts he was given every opportunity to raise matters with Mr Williams and go through the points of his appeal at that meeting. Mr Wake again raised the issue of a merger, he thought it was likely to be in four weeks' time. The claimant, Mr Wake thought, slotted into an indoor role due to his seniority and in the meantime overtime resulting from scheduled attendance work would provide the claimant three days' work.

23. The appeal is turned down and by letter of 15 May, at pages 71 – 72, Mr Williams does deal with each point raised. In particular, point one,

"the merger is only four weeks away", it was said, *"it would be wrong not to keep Ray's job open for a further four weeks as he will be able to sign for an indoor role".*

Mr Williams had spoken to Mr Hinds who confirmed to him that the question of when the merger was going ahead and whether the claimant would pick up indoor duty based on his seniority, had spoken with the Operations Manager Mr Doyle who stated there was no date set in stone for the merger to go ahead, therefore Mr Hinds had to base his decision at the time on the facts available to him and was able to keep the claimant's position open indefinitely. Also, Mr Williams had spoken to Mr Rowe about the claimant performing an indoor role once the merger went ahead, Mr Rowe stated that at certain times indoor staff are required to perform outdoor roles such as going out on delivery on foot due to sick leave etc. Therefore, that part of the appeal was not upheld.

24. The second point of the appeal concerned when Mr Rowe is said to have stated that he had at least three days' work for the claimant who could pick up overtime at Hendon which was not being signed for because of the shift pattern at Hendon where they were on a nine day fortnight, and then there would only be the need to find the claimant other work for one day. Again, Mr Williams investigated this point and Mr Rowe had stated he had no recollection of any conversation where he said that at least three days' work for the claimant could be picked up as overtime at Hendon which was not signed for. He had also raised a point with Mr Hinds who stated that he had rung Mr Rowe to discuss this point at the claimant's ill health retirement interview, even though it was not typed up in the notes of the interview and Mr Rowe had stated that Mr Hinds did not have any indoor role for the claimant to perform until the merger went ahead. Therefore, he did not uphold this point.

25. Then he deals with point 3, that the business did not look very far for an alternative role for the claimant to remain at The Royal Mail, Mr Williams' investigations conceded that the scoping exercise was not carried out straight away and that the claimant was informed about the results of the scoping exercise late. However, Mr Hinds was able to produce evidence that a scoping exercise had indeed taken place and no other role, at that time, was available to Mr Cairns and therefore, although the exercise had been performed late, he partially upheld this point. The appeal against the dismissal was not upheld.

The Law

26. Dismissal for ill health is potentially a fair reason for dismissal as it relates to the capability of a person performing the work to which they are employed and that is seen at section 98(2)(a) of the Employment Rights Act 1996.

27. That is not the end of the matter, the second limb is the question of fairness under section 98(4), namely, did the employer act reasonably in treating ill health as a sufficient ground for dismissal? Some of the equation will depend on the procedure and the other will depend on the medical advice available to the respondents at the time they took the decision which is relevant to the question of reasonableness. The range of reasonable response tests of fairness applies both to the decision and to the procedure that was followed in reaching such a decision. Again, what might appear harsh on the one side, might not be harsh to another. In summary, therefore, an employer should discuss the matter with an employee, seek his views, request a medical investigation / report to establish the nature of the injury or illness and the prognosis and consideration of other options.

28. The law on section 15 of the Equality Act 2010 says 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. In essence, the section provides that it would be unlawful for an employer or other person to treat a disabled person unfavourably, not because of that person's disability itself, which would of course amount to direct discrimination under section 13, but because of something arising from or in consequence of that person's disability. Therefore, in order to succeed with the claim of discrimination arising from disability, the claimant must establish the following:

28.1 that he has suffered unfavourable treatment; and

28.2 that the treatment is because of something arising in consequence of his or her disability.

29. Clearly if the claimant can establish the above then it is down to the employer to show that the unfavourable treatment is a proportionate means of achieving a legitimate aim and that it had no knowledge of the claimant's disability. We remind ourselves here that there is no need for a comparator to show unfavourable treatment.

30. In relation to the failure to make reasonable adjustments, this sets out a general scope of duty on the employers to make adjustments. It comprises of three elements and in reaching the decision the tribunal will also have an eye on the Equality and Human Rights Commissions Statutory Code of Practice on Employment 2010. The basic question here, has the employer taken such steps as is reasonable in all the circumstances in order to avoid or prevent the provision, criterion or practice having that disadvantageous affect?

The Conclusions

31. In dealing with the claim first under section 15 of the Equality Act 2010, it is accepted in this case that the unfavourable treatment is the dismissal and that arises out of the claimant's inability to perform the role of an outdoor postman. The respondents argue that dismissal was a proportionate means of achieving a legitimate aim, in particular ensuring the efficient and economic operation of the delivery office. The claimant it has to be said, was performing a temporary job, a supernumerary job that did not need to be done per se. He had been doing this for nine months. Clearly, it would not be reasonable to expect an employer to continue forever in such a temporary role that is not an adjusted role, it is a role that does not need to be performed per se.

32. In the absence of an alternative position, the respondent is not required to create a position for the employee, nor is he expected to bump employees out of their job. There was, at the time we are satisfied on the balance of probabilities, no relevant alternative employment that the claimant could have done. Although the respondent is a large employer, the respondent still has to work within its budgets and must come to a point where a

person doing a job which is created as surplus must come to an end. It is a balancing exercise, however unfair that might appear to the claimant. Therefore, the dismissal in the tribunal's mind was a proportionate means of achieving a legitimate aim.

33. As to the reasonable adjustment claim, the provision, criterion and practice was the requirement for the claimant to work outside as a delivery postman. The claimant could no longer undertake that because of his osteoarthritis. That clearly puts the claimant at a substantial disadvantage. That then puts into play the need for the respondents to consider reasonable adjustments. The tribunal reminds itself, it is such reasonable adjustments as are reasonable in all the circumstances. It is accepted that the respondents were aware of the claimant's disability, the fact that he could do only indoor work with some limitations according to the recent Occupational Health report. Again, the tribunal reminds itself that the claimant was doing a role that had been created temporarily for him, prepping work for delivery postmen and other ad hoc work. That was supernumerary. The alternatives; there were no alternatives. It is argued on behalf of the claimant there was in the Calls Office alternative work, but that was not available we are satisfied, either before or after the merger as the same employees would continue in those roles and there was also uncertainty as to what level of work, if any, was available indoors in relation to scheduled attendance work.

34. With or without a merger, there appeared to be no available jobs as alternatives as a reasonable adjustment. Therefore, that claim fails.

35. Turning to the claim under the Employment Rights Act 1996, what we have here is a potentially fair reason to dismiss capability. The claimant was no longer able to perform the job to which he was employed. At some stage, and one accepts is not entirely clear, a conversation ensued about ill health retirement with the claimant. One is prepared to accept that may not have been started by the claimant, nevertheless, a conversation took place, the claimant said it was an option, he would look at and as a result of the claimant's nine months on temporary work, in accordance with the agreed policy with the Trade Union, the claimant was classified after an Occupational Health report, page 43, as a candidate for ill health retirement with lump sum.

36. The second stage of the process is for a manager to interview the claimant. That fell to Mr Hinds, a Delivery Office Manager. He wrote to the claimant inviting him to a meeting on 10 February, page 46, that letter sets out that,

"…following the Occupational Health report and receiving advice from them, we are giving serious consideration to you being retired on the grounds of ill health."

The letter makes it clear that before a final decision was taken,

"…we are offering you the opportunity to come to the meeting to put forward any reasons why this course of action should not be followed". The letter goes on to advise the claimant of his right to be accompanied at that meeting.

37. The claimant duly attends the meeting with Mr Hinds on 14 February, at which the claimant / his Union is given an opportunity to put forward proposals. The minutes of those are at pages 49 – 51. There is some talk about the merger, the fact the claimant is still on modified duties, that he cannot do his main job and possibly three days' work may be available, that he was interested in any vacancies that might be in the North West London or North London.

38. In accordance with the policy, following that meeting Mr Hinds does circulate to the managers in the North and North West regions for what is called a scoping exercise to see if there are any vacancies, we see the letter of 16 February and the subsequent email to the various managers listing a number of managers in the region and it sets out the claimant is unable to do delivery work, he has osteoarthritis, he can manage indoor tasks, where he is prepared to work and the fact that the Occupation Health report requires the claimant still to have some adjustments as he cannot walk or stand for long periods.

39. That results in a response that there are no vacancies. Mr Hinds does not leave it there. He raises with Mr Doyle an Operations Manager about the merger and the response from Mr Doyle, Mr Hinds has no reason to disbelieve him, at that stage was,

"…we don't have a date yet, it will be later in the year and that will rightly reduce the overall number of indoor jobs as there will be some duplication".

Those are the facts known to Mr Hinds at the time and the fact that the claimant could no longer do his main job as a postman, he therefore dismissed him in accordance with the respondent's ill health policy having made the appropriate enquiries.

40. Whilst it might not be a counsel of perfection, he nevertheless covered the process, he made enquiries and there were, we are told, no vacancies and the merger was not going to occur in the foreseeable future and therefore on that basis he took the decision to dismiss with the information available to him at the time. That is a reasonable response of the employer with the information available to him at the time he took the decision to dismiss.

41. The appeal took place. The claimant was candid in that respect, he had a fair appeal and that he was listened to and had an opportunity to raise matters with the Appeal Officer Mr Williams and as the Tribunal have already said, Mr Williams responded on 15 April to the points raised by the

claimant and his Trade Union at the appeal hearing dealing with each of them. The appeal against dismissal was not upheld for those reasons. The dismissal is a fair dismissal.

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Employment Judge Postle

Date: 18 / 4 /2019

Sent to the parties on: 18 /4/ 2019

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For the Tribunal Office