



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr P Wilson

v

H B Clark & Co (Successors) Ltd

FINAL HEARING

Heard at: Leeds

On: 2 & 3 July 2019

27 August 2019 (Reserved Decision)

Before: Employment Judge Shulman

Members: Mr R Stead

Mr J Howarth

Appearance:

For the Claimant: Mrs L Wilson (Wife of Claimant)

For the Respondent: Mr D Penman, of Counsel

JUDGMENT

1. The claimant's claims of discrimination arising from disability, failure to make reasonable adjustments and unfair dismissal are dismissed.

REASONS

1. **Introduction**

In this case Mr Wilson (the claimant) was employed by H B Clark & Co (Successors) Limited (the respondent). At all material times the claimant was employed by the respondent as a warehouse operative. His continuity of service was from 28 September 1989 until his dismissal on 18 December 2018. The claimant was a good employee. He suffered with his back from 2017. The respondent is an independent drinks wholesaler with 9 depots across England. The claimant was employed in the Wakefield depot.

2. **Claims/Issues**

The claims and issues are set out by Regional Employment Judge Robertson in a Preliminary Hearing of this case dated 18 April 2019 as follows:

- 2.1. Discrimination arising from disability contrary to section 15 Equality Act 2010 (EA) because the claimant was dismissed because he could not carry out the full duties of a warehouse operative because of his back problems. The respondent accepts that the dismissal amounted to unfavourable treatment but that it was a proportionate means of achieving the legitimate aim of maintaining business efficiency, in that the claimant could not do his duties and the respondent could no longer sustain a job for the claimant, which was a genuine role within the business.
- 2.2. Failure to make reasonable adjustments contrary to sections 20 & 21 EA, because reasonable adjustments should have been made to allow him to remain on light duties and to have delayed any decision about his employment pending his forthcoming back operation.
- 2.3. Unfair dismissal as the claimant could have been kept on light duties or a decision delayed pending the back operation.
- 2.4. The respondent accepts the claimant was disabled within the meaning of section 6 EA, because of his back condition.

3. The Law

The Tribunal has to have regard to the following provisions:

- 3.1. Section 15 EA – discrimination arising from disability
 - (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.
- 3.2. Section 20 – duty to make adjustments
 - (1) Where the Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 & 22 and the applicable Schedule apply; for those purposes, a person on whom the duty is imposed is referred to as A.
 - (2) The duty comprises the following three requirements:
 - (3) The first requirement is a requirement where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled to take such steps as it is reasonable to have to take to avoid the disadvantage, (The other two requirements do not apply.)

Section 21 – failure to comply with duty.

- (1) A failure to comply with the first requirement is a failure to comply with a duty to make reasonable adjustments.
- (2) A. discriminates against a disabled person if A. fails to comply with that duty in relation to that person.

3.3. Unfair dismissal

Section 98 - General

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
 - (a) The reason for the dismissal, and
 - (b) That it is a reason falling within subsection (2).
- (2) A reason falls within this subsection if it (a) relates to the capability of the employee for performing work of the kind which he was employed by the employer to do.....
- (3) Where the employer has fulfilled the requirements of subsection (1) the determination on the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
 - (a) Depends on whether in the circumstances (including the size and the 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
 - (b) Shall be determined in accordance with equity and the substantial merits of the case.

4. **Facts**

The Tribunal having carefully reviewed all the evidence (both oral and documentary) before it finds the following facts (proved or on the balance of probabilities):

- 4.1. The claimant changed to being a warehouse operative from a driver in 2015.
- 4.2. On 8 December 2017, after suffering severe problems with his back, the claimant went into hospital for a back operation. The claimant was off sick until 22 January 2018. There was an Occupational Health (OH) assessment on 25 January 2018 and the claimant was put on half days from 29 January 2018. During the period on half days the claimant's duties included moving vehicles out of the yard in the morning, picking crisps and nuts for orders, stapling paperwork, stock rotation, processing waste stock and sweeping up.
- 4.3. The claimant attended a welfare meeting on 22 February 2018, with his supervisor Mr Armitage and the warehouse manager Mr Hunt. The claimant agreed to increased light duties, including picking up wrap and cardboard and dealing with damaged bottles. He was given the option to increase his hours if he felt capable to do so.
- 4.4. The claimant returned to full time working on 12 March 2018 but submitted a fit note that he needed to remain on light duties with no heavy lifting with effect from 15 March 2018.
- 4.5. On 12 April 2018 a further welfare meeting took place between the claimant and Mr Gilmore, Group Operations and Logistics Manager, and

Mr Hunt. The claimant was in pain, doing around 40% of his role and could not do heavy lifting, so the claimant was referred to OH.

- 4.6. The claimant was moved to the Crisp room on 16 April 2018 to undertake lighter duties.
- 4.7. The claimant attended an OH appointment on 25 April 2018. OH said that the claimant should not lift more than 3kg and avoid repetitive bending and twisting. The claimant was advised to remain active and not stand still or sit down for prolonged periods (the latter advice changed). It was agreed that OH would write to the claimant's GP. In his conclusions and recommendations OH was unable to say whether the claimant was likely to provide the respondent with a reliable and efficient service in the long term.
- 4.8. The claimant's GP did write to OH on 11 May 2018. The GP stated that the claimant's left leg pain was returning and enclosed a letter from the claimant's Neurosurgeon, which recorded an initial good recovery after the operation in December 2017, but stated that things had reversed and were progressing or getting worse at that stage.
- 4.9. The OH report followed in or about June 2018. This recorded that the claimant had severe lumbar spinal disease, likely to degenerate further, likely to be inoperable and minimally treatable. The report referred to spinal stenosis, but it is not necessary for us to make a finding of fact in relation to this. The claimant's obvious back condition is accepted by the respondent as a disability. The report went on to say that the claimant's condition was potentially serious, threatening permanent effects on mobility. OH said that he did not foresee any improvement in the claimant's condition or work capacity.
- 4.10. In or about July 2018 there was a further OH report. OH gave the opinion that the claimant was now permanently unfit for all heavy and moderately heavy manual work, but that the claimant could work on the lightest of duties, but now should be allowed to sit at will (see 4.7 above). This time OH raised the possibility of "removing" the claimant "from the environment altogether".
- 4.11. There were further meetings on 25 and 26 July 2018, when at the first meeting Mr Williams, the Regional Operations Manager and Anthony Harris, the HR Manager, went through the claimant's duties with him. At the second meeting Mr Hunt discussed with the claimant the possibility of ill-health retirement.
- 4.12. On 16 August 2018 the claimant attended a meeting with Mr Harris and four other Managers. The respondent stated that the claimant was only capable of approximately 50% of his duties in the Crisp room, equating to 4 hours work per day. The meeting also looked at the claimant doing other duties such as tele-sales. The claimant declined this and other alternatives were considered - part-time, which was not an option, office work, which the claimant declined and ullages, where employment was not currently available. Further the claimant was asked if there were adjustments that could be made to comply with OH but the claimant said there was nothing. Management expressed the need to support the claimant. Termination on the grounds of health was referred to as a last

resort. It appeared that the no more than 3kg lifting restriction was now being reduced to 1.5kg, being the weight of a box of Crisps, as identified by OH. Further, Mr Gilmore said that the Crisp room role was not a role, with which the claimant agreed. Where there is conflict about the events of this meeting between the version of the respondent and that of the claimant we prefer the respondent's version.

- 4.13. The claimant was invited to a final capability meeting on 23 August 2018, but he raised a grievance on 22 August 2018 and the capability meeting was cancelled.
- 4.14. The grievance hearing took place on 29 August 2018 and an outcome letter was dated 17 September 2018, upholding most of the respondent's points in respect of which the claimant had raised a grievance.
- 4.15. A grievance appeal meeting was held on 1 October 2018 and on 17 October 2018 the respondent's decision was upheld.
- 4.16. On the next day the claimant was given a fit note for back pain and work-related stress. During the period of the claimant's work-related stress the capability process was suspended and a report of the claimant's GP was requested.
- 4.17. The claimant returned to work on 15 November 2018, by which time he knew he would be having a further back operation, then believed to be within the next 8 – 12 weeks. The claimant was given a new list of duties.
- 4.18. On 28 November 2018 the respondent decided that because the claimant was on light duties he should not be entitled to overtime any more.
- 4.19. On the same day the respondent employed a new HR Manager, Mrs Cattanach. She introduced herself to the claimant on 4 December 2018.
- 4.20. On 5 December 2018 the claimant's GP report was received and the respondent invited the claimant in to discuss it. At that meeting the claimant accepted that his health was worse. He now referred to a 12-week window for his operation and that there was no guarantee of success. The claimant also referred to be "stressed to death" and that he did not know if he could ever resume normal duties. The claimant admitted that in his present role he was not doing much and that his present role was not a job. The claimant again declined the possibility of other jobs. He said he wanted things to come to a head. If there was nothing suitable, the respondent said that it may have to consider a capability ill-health dismissal and invited the claimant to resume the capability process on 18 December 2018. Indeed, on 14 December 2018 the claimant was written to convening the appropriate meeting.
- 4.21. At the meeting on 18 December 2018 Mrs Cattanach was accompanied by Mr Hunt and the claimant by his wife. The claimant confirmed that he had received all the OH reports. The claimant said he could not resume his normal warehouse duties at that moment in time, that he was still waiting for his operation date and that the operation may not be successful. The claimant was asked whether there were any additional duties the claimant could do or roles he could fulfil in the business and the claimant answered in the negative. Mrs Cattanach told the claimant

that as there were no reasonable alternatives for the claimant and the fact that he could not do his job as a warehouse operative, that the respondent had no alternative and to terminate the claimant's employment on capability ill-health grounds.

- 4.22. The respondent wrote in confirmation on 21 December 2018.
- 4.23. The claimant appealed Mr Stirling, the Finance Director who heard the appeal on 29 January 2019 and upheld Mrs Cattanach's decision of 18 December 2018 on 18 February 2019.
- 4.24. The claimant's operation took place of 31 January 2019. We find as a fact that (barring the appeal decision) that we do not and cannot take into account in coming to our decision anything which occurred subsequent to 18 December 2018.

5. **Determination of the issues**

(After listening to the factual and legal submissions made by and on behalf of the respective parties):

- 5.1. With regard to the claim of discrimination arising from disability, the respondent accepts that it treated the claimant less favourably because of his disability. The detrimental action relied upon by the claimant was his dismissal. The respondent knew and accepts that the claimant had a disability within the meaning of section 6 EA. The respondent accepts that it has treated the claimant unfavourably because of something arising in consequence of the claimant's disability, but we find that the respondent shows that the treatment of the claimant was a proportionate means of achieving a legitimate aim, namely, sound business reasons.
- 5.2. The claimant's disability became apparent in 2017. There is a catalogue of meetings and attempts to accommodate the claimant's disability throughout 2018. It is clear that the claimant's duties as a warehouse operative reduced substantially throughout that year and his abilities to carry out that job. In the end those abilities reduced to such an extent, that, despite his being disabled under section 6 EA, he was no longer able to fulfil approximately half his required duties and in the circumstances it became no longer viable for the respondent to keep his job open. It is true that the claimant was undertaking surgery but the length of time and/or the outcome at the time of the decision to dismiss did not give the respondent a reasonable option to wait, taking into account all the circumstances.
- 5.3. As to alleged failure to make reasonable adjustments the claimant complains that he should have been allowed to remain on light duties and that the respondent should have delayed any decision about his employment pending the forthcoming back operation. Under this heading the respondent must not discriminate against the claimant. The claimant establishes that the detrimental action relied upon was his dismissal. The respondent only discriminates against a disabled person if the respondent fails to comply with a duty to make reasonable adjustments. Failure to comply with that duty has to be reasonable but we find that it would not have been reasonable for the respondent to make such adjustments in the circumstances. The duties which the claimant was currently undertaking were uneconomical from the respondent's point of

view, taking into account the needs of the business. Further, at the time the outcome of the claimant's operation was unknown and could not be predicted as a success.

- 5.4. As to unfair dismissal the reason for the dismissal was capability. Was it reasonable? We have taken very carefully into account the claimant's evidence as to his dissatisfaction with the process as he saw it. Before the arrival of Mrs Cattnach there were many meetings and attempts, having regard we are sure to the claimant's length of service and the good service that he gave the respondent. Section 98(4) Employment Rights Act 1996 requires that we look at whether in the circumstances that respondent acted reasonably or unreasonably in treating the claimant's capability as a sufficient reason for dismissing the claimant by determining the same in accordance with equity and the substantial merits of the case. We think that throughout the period up to Mrs Cattnach's appointment the respondent discharged this onus looking at matters from the point of view of reasonableness, equity and the substantial merits and, therefore, this is in favour of the respondent. Mrs Cattnach arrived, if there was any unreasonableness up to that stage, which we do not find, the process was entirely corrected. In any case there had been discussions about the claimant's future well before she was appointed. So we find that there was no surprise for the claimant in his dismissal. By the time of the dismissal meeting, if there had been shortcomings, then these were put right by Mrs Cattnach and upheld by Mr Stirling on appeal.
- 5.5. In all the circumstances the claimant's claims for discrimination arising from disability, failure to make reasonable adjustments and unfair dismissal are dismissed.

Employment Judge Shulman

Date: 3 September 2019

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