



EMPLOYMENT TRIBUNALS

Claimant: Mr L Finn

Respondent: Royal Mail Group Limited

Heard at: Reading **On: 3, 4 and (in chambers) 5 August 2020**

Before: Employment Judge Gumbiti-Zimuto
Mrs A E Brown, Ms H T Edwards

Appearances

For the Claimant: Mr A Moosa (Union Representative)
For the Respondent: Mr S Peacock (Solicitor)

RESERVED JUDGMENT

The claimant's complaints are not well founded and are dismissed.

REASONS

1. In a claim form presented on the 24 December 2018 the claimant made complaints of unfair dismissal and disability discrimination. The respondent denied the claimant's complaints. The issues to be decided in the claim were discussed and agreed at a preliminary hearing on the 18 September 2019.
2. The hearing of the claim took place on the 3-5 August 2020. The respondent's witnesses were Mr Kieran Barrett and Mrs Clare Tebutt who produced written statements which were taken as their evidence in chief. The claimant also gave evidence in support of his case and produced a written statement which was taken as his evidence in chief. We were provided with a bundle containing 176 pages of documents. From these sources we made the following findings of fact.
3. The claimant was employed by the respondent from 5 October 2006 and 7 January 2019. The claimant was employed as delivery and collection driver for the respondent's Parcellforce business.
4. The respondent has an Attendance Policy (p49) that has been agreed with the trade union under which an employee may be issued with

warnings in the following circumstance: (a) An Attendance Review 1 warning should they be absent for four absences or 14 days in any 12 month period. (b) If however, having been issued with the Attendance Review 1, an employee incurs a further two absences or a single absence of 10 days or more, within the six month period following the date of the Review being issued, an Attendance Review 2 may be issued. (c) If, after the employee has been issued with an Attendance Review 2, the employee incurs a further two absences, or a single absence of 10 days or more, within the six month period following the date of the Review being issued, that employee's dismissal will be considered. (p57)

5. The claimant's absences between August 2016 and March 2017 resulted in the claimant triggering stage one of the procedure resulting in a first attendance review meeting on 1 April 2017. The reason that the claimant gave for his absences at the return to work interviews that took place during this period were migraine, cold or flu bug and chest infection. There was no suggestion at this stage that the claimant had a disability that impacted on his attendance levels.
6. In the period between July 2017 and September 2017 the claimant has two periods of absence for migraine, and diarrhoea and vomiting. This triggered stage two of the procedure with an attendance review meeting taking place on 4 October 2017. At the claimant's return to work meeting on the 27 September 2017 the claimant said to his line manager that the *"doctor said picked up a bug"* (p91).
7. The agenda for the each of the return to work meetings includes a prompt for the line manager to ask, *"are you aware of the services of the First Class Support"*, an employee helpline. At the return to work meeting on the 27 September 2017 the claimant's reply was "yes". There is a further prompt for the line manager to ask, *"is there anything I can do further to help you maintain your health/attendance"*. At the return to work meeting on the 27 September 2017 the claimant's reply was "no". A further prompt requires the line manager to *"consider whether there is a need to meet again to review progress/actions. Would an informal attendance discussion be helpful?"* At the return to work meeting on the 27 September 2017 the claimant's said *"there is no need to meet again"*. For disability and pregnancy related absences the manager is prompted in the following way: *"ensure risk assessment has been carried out and specify progress review arrangements, including dates of weekly review meetings"*. The note of the return to work meeting on the 27 September 2017 records *"not applicable"*. The claimant and his manager then sign and date the note of the return to work meeting. (p92)
8. At the second attendance review meeting on 4 October 2017, discussing his absences since the first attendance review meeting, the claimant said that he had been to the doctor and is being sent for tests, the claimant also said that *"on and off for a while maybe a year but now it has got more frequent"* he gets *"tummy pains and acid reflux."* The claimant's line manager also said to the claimant that she was available to him if *"he ever needs to discuss anything."*
9. The claimant was off work for 1 day on the 16 October 2017. At the return to work meeting the claimant said that he had acid reflux that

"woke me up at 2am"- "ongoing issue" and that he was "waiting for appointment" to have medical tests.

10. The claimant was off work with flu from 2 January 2018 until 8 January 2018. At his return to work meeting on the 9 January 2018, in response to the question about the cause of the absence, the claimant said *"man flu, akey (sic), shaking not energy"*, the claimant says he took the following steps *"stayed in bed, beechams cold+flu tablets"*.
11. The claimant was off work due to vomiting on the 12 March 2018, at his return to work meeting he said that he *"had sick bug, ... I picked it up from being around kids on Sunday."*
12. The claimant is absent from work 30 April 2018 to the 4 May 2018. At his return to work interview on the 8 May 2018 the claimant said that his absence is due to *"stomach problems"*, the claimant explains that he has *"ongoing issue, acid reflux which is burning and made me physically sick, been getting pain just above the stomach"*.
13. The claimant's absences since the second attendance review meeting had triggered the third stage of the attendance procedure and the claimant was invited to a consideration of dismissal interview. The interview took place on the 5 July 2018.
14. As a matter of course when an employee is invited to a consideration of dismissal interview under the respondent's attendance procedure a referral is made to OH Assist, the respondent's occupational health advisers, for a report.
15. At the consideration of dismissal interview the claimant discussed with Mr Barrett the absences giving rise to his first attendance review, migraine, flu symptoms and chest infection. The claimant does not suggest that there is any other reasons than the stated reasons for the absence. Asked why he was *"susceptible to bugs/flu/chest infections"*. The claimant proffered an explanation which was *"Unlucky, I am in out of schools all day long with so many collections, meeting people every day that could spread germs."*
16. Discussing the absences that gave rise to the second attendance review meeting of the absence for diarrhoea he said that *"possibly in hindsight it could have been acid reflux"* and later the claimant says that last four absences that he had were *"due to acid reflux"*. The claimant goes on to explain that he has had two endoscopies, that he has been given a diagnosis of *"hiatus hernia"* which is *"including the "acid reflux"*. The claimant also goes on to say that the condition is controlled by medication. The claimant said that he was due to have an *"ultra-scan"* the following week. The claimant does not say and his union rep does not say that the claimant has a disability.
17. Mr Barrett then adjourned the meeting to await the report from OH.
18. A report was received however Mr Barrett thought that the report was inadequate and after consultation with the claimant's union representative, and the claimant made a request for the report to 'redone'.

19. The claimant and Mr Barrett met again on the 30 August 2018, on that occasion the claimant agreed that the second report was "*much better in my opinion*". Mr Barrett then informed the claimant that he would take time to consider all the points before making his decision.
20. In a letter dated the 14 October 2018 the claimant was informed that he was to be dismissed with notice. The claimant's last day of service with Royal Mail would be the 7 January 2019. The claimant appealed his dismissal and worked his notice period except the last two weeks or so when the claimant was absent because of work stress.
21. The claimant's appeal hearing took place 6 November 2018 and on 15 November 2018 he was informed that his appeal was unsuccessful.
22. The claimant's medical record state that on 24 December 2018 the claimant told his GP "*he would like a sick note from 27/12- 7/1*" the claimant was told by the GP that she "*can't forward date a certificate so he will call back after Christmas*". On the 27 December 2018 the claimant was signed off work by his GP for "*stress at work*" until the 7 January 2019 when his employment came to an end.
23. The issues to be decided in this case were set out in a case management summary from the preliminary hearing of 18 September 2018.

Unfair dismissal

24. The claimant and the respondent agree that the reason for the claimant dismissal was some other substantial reasons, the claimant having been dismissed under the respondent's attendance policy.
25. The claimant contends that the dismissal was unfair. In the list of issues as set out in the case management summary it is said: "*The claimant asserts unfairness in the application of the attendance procedure whereas the separate, long term sickness procedure would have been more appropriate.*" This was not the way that the claimant has presented his case to this Tribunal. In his evidence and in his submission on the evidence to the Tribunal the claimant has said that:
"I believe my condition is disability related and the Respondent should have treated my absences as per the disability provisions and made a reasonable adjustment by disregarding my disability related absences. They should have also allowed reasonable adjustment to allow time for the doctors to diagnose my condition and start the treatment."
26. We have understood the claimant's arguments to be that dismissal was not within the range of responses of a reasonable employer because: (a) The claimant was disabled, and the respondent should have treated him as such when considering the attendance procedure. (b) The claimant says that at the time of dismissal, a fair minded employer would not have dismissed the claimant but would have exercised a discretion to continue his employment by taking a step back in the procedure or ignoring the admitted breach of the attendance procedure. The claimant relies on the

following matters in support; that he had a good conduct record, his length of employment (12 years), the fact that medication was working and his attendance had improved. Taking all those matters into account it is said dismissal was not within the band of reasonable responses.

27. The respondent contends that dismissal was within the band of reasonable responses for an employer in the respondent's position. The claimant admittedly breached the attendance policy. The claimant was not disabled. But even if he was disabled the respondent says it needs its employees to attend for work on a regular basis and to meet the attendance standards which are agreed between the business and the union. The respondent is facing increasing pressure from competition and a reduction in the workforce can no longer sustain absences of such a level. The claimant was unable to attend for work on a regular basis and therefore failed to meet the agreed standards. The claimant had been in the attendance procedure, without exiting the procedure, for two years and even if the absences which the claimant attributed to acid reflux in his return meetings are discounted he was still in breach of the agreed standards.
28. The conclusion of the Tribunal is that that the claimant was dismissed for some other substantial reason namely that that he failed to meet the respondent's attendance standards set out in the attendance policy. This is a potentially fair reason.
29. The dismissal was in our view within the range of responses of an employer in the respondent's position. In coming to this conclusion, we take into account the following factors.
30. The respondent considered whether the claimant was or was not a disabled person and concluded that he was not a disabled person. The respondent took into account the claimant's length of service but did not have any regard to his conduct record. The claimant had been in the attendance procedure for two years without exiting. The respondent attaches importance to meeting the attendance standards as set out in the policy. The claimant was fully aware of the expected standards. The respondent had commercial reasons for wanting the employees to comply with the attendance standards because it was facing increasing pressure from competition and a reduction in the workforce meant it can no longer sustain absences at the level that the claimant had. The respondent, at dismissal stage and at the appeal stage considered whether the claimant would be able to meet and maintain the respondent's required and agreed standards of attendance in the future and concluded that the claimant would not be able do so. All these matters are conclusions that the respondent was reasonably entitled to come to.
31. The claimant was not unfairly dismissed.

32. The claimant contends that he was a disabled person because of physical impairment arising from hiatus hernia and acid reflux. The respondent denies that the claimant was a disabled person.
33. A person is disabled within the meaning of section 6 of the Equality 2010 if they have a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
34. The respondent accepts that the claimant had a long-term impairment, namely hiatus hernia and acid reflux.
35. The respondent did not accept that the impairment was substantial, i.e. that it had a substantial adverse effect on his ability to carry out normal day to day activities. We take into account the Guidance on the definition of disability (2011) which states:
- “The requirement that an adverse effect on normal day-to-day activities should be a substantial one reflects the general understanding of disability as a limitation going beyond the normal differences in ability which may exist among people. A substantial effect is one that is more than a minor or trivial effect.”
36. The claimant in his impact statement on disability said that he was unable to eat or sleep as a result of the impairment. The claimant does not clearly set out the extent to which this occurs. The claimant however does refer to episodes of uncertain duration in August 2017, March 2018 when he was unable to eat or sleep. The claimant has also described how *“the illness has more often than not left me unable to eat drink and sleep. Due to this I have missed out on socialising with people and many family gatherings, as I cannot participate in the activities.”* The claimant's impact statement makes reference to this happening *“sometimes”* and on *“a few occasions”*.
37. We take into account that the impact statement was dated 17 September 2019. We contrast that with what the claimant was saying to his employer. In his appeal meeting on 6 November 2018 the claimant describes the effect of the acid reflux affecting his ability to eat. The claimant was asked does it stop him undertaking day to day activities? The answer he gave was *“Yes pretty much I would not want to do a great deal as my mind set would not be great I would not always go out for meals I would be due to attend that was one time when I was due to go out with my partner and father.”* In his oral evidence the claimant said that when he said *“yes pretty much”* what he meant and how it should fairly be understood was him saying *“yes pretty much all the time”*. We have not been convinced by this. If it was what he meant we do not see why he could not have said so, he gave no explanation for why he did not say that, also such an interpretation is contrary to what the claimant says at other times which suggest the issues were intermittent. For example, the claimant only refers to one occasion when he was unable to socialise with his father and partner because of the impairment.

38. We also considered the contents of the occupational health report which stated that: *“He describes that he is currently engaging in his day activities and his symptoms appear not to be associated with significant impairment.”* The occupational health report stated that the claimant is not covered by the Equality Act.
39. We have come to the conclusion that the claimant’s impairment was not substantial, in coming to this conclusion we take into account that when the claimant was not ill he was able to fully discharge his duties and work over time. The claimant himself stated to his GP that he walked 7-10 miles a day. To the extent that the claimant suffered a lack of sleep it did not affect his ability to discharge his role as a delivery and collections driver- we bear in mind that the claimant was off work for a variety of reasons the majority of which did not include the instances arising from the alleged disability. The apparent frequency, i.e. *“sometimes”* and *“a few occasions”* of the impairments and the conclusions of the occupational health report which was prepared following a consultation with the claimant. All of which suggests that the impact of the impairment was not substantial.
40. In any event the conclusion of the Tribunal is that the respondent did not know and could not reasonably have known that the claimant was disabled. The claimant stated that he himself did not know that he was disabled and so he could not have told the respondent that he was. We note however that Mr Barrett and Mrs Tebbutt were both alive to the possibility of disability being an issue. They considered it and concluded, in our view correctly, that the claimant was not disabled. The occupational health report on which they relied, not exclusively but substantially (about 80% according to Mrs Tebbutt) said the Equality Act did not apply in the claimant’s case. The claimant never mentioned disability in his engagement with his line manager, we note that the issue of disability was one of the prompts in each of the Welcome back to work meetings. We also note that the claimant was represented by his union at all the meetings and there was no suggestion from the union representative at the meetings that the claimant was disabled. There were therefore a wider range of factors that the respondent took into account when considering the question of disability, not just the occupational health report.
41. The Tribunal’s conclusion is that the claimant was not disabled. We consider that where the respondent formed that view here it would in our view have been a reasonable view for the respondent to form on the facts of this case even if the conclusion which we have reached is wrong. In the circumstances of this case respondent did not know that the claimant was disabled and could not reasonably have known that the claimant was disabled.
42. The claimant’s claim of disability discrimination based a failure to make reasonable adjustments is not well-founded, the claimant was not disabled. In any event if the claimant was disabled the respondent did not

know and could not reasonably be expected to know that the claimant was disabled.

Employment Judge Gumbiti-Zimuto

Date: 7 August 2020.

Sent to the parties on: 11 September 20

For the Tribunals Office

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