EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
MR K HAMID DANKALI

Respondent
LONDON UNITED BUSWAYS LIMITED

Reconsideration Orders

ON: 3 April 2021

Employment Judge Russell (sitting alone)

Background

Following a hearing on 17 December 2020 attended by Mr Ibekwe, Union rep for the Claimant and Mr Craven , Solicitor for the Respondent I gave a judgement on 18 December 2020 as follows .

Judgment

The Claimant's claim of race discrimination and or harassment under s,9,13 and or 26 Equality Act 2010 are dismissed upon withdrawal by the Claimant.

The Claimant's claim of claim of automatic unfair dismissal under Reg 7 TUPE Regs 2006 and Part 10 ERA 1996 are dismissed upon withdrawal by the Claimant.

The Claimant's claims of unfair and wrongful dismissal and a failure to make reasonable adjustments based on his disability continue to a full hearing.

Due to pandemic related delays causing a backlog in the Tribunal this Judgment (with reasons) was not promulgated and sent out to the parties until 5 March 2021 and on 9 March (so in time for their application) the Claimant applied for a reconsideration of the judgment by letter (with reasons given and copied to the respondent so in accordance with Rule 71 of the ET rules) of 9 March 2021.

The Reconsideration Application

The application was limited to a review/ reconsideration of the issue of the Claimant's unfair dismissal complaint only by reference to paragraph 5 – 11 of the judgment reasons which paragraphs are reproduced below in bold italics.

5 The Claimant's principal argument was that the Guidelines for Dealing with Long term Sickness Absence (the Policy) were inherited by the Respondent under TUPE

in or around 2003 and were not taken [into] account by the Respondent . In particular in respect of clauses 5 and 9 .

Clause 5 "DISABILITY" CASES In all cases of sickness absence, managers must consider whether or not the employee is "disabled", within the meaning of the Disability Discrimination Act 1995 and managers should seek advice from HR in case of any doubt about this. If so, the requirements and procedures laid down in the Act will apply and must be followed. In particular, there is a duty to consider reasonable "adjustments" to enable the "disabled" employee to return to work, in their normal - or some other - capacity. This is a much more demanding and complex requirement than mere consideration of suitable alternative employment, and in all "disability" cases managers should consult with HR at every stage

Clause 9 NOTICE Termination of employment on medical grounds is a dismissal and notice should be given. This notice is 1 weeks' notice for weekly paid employees with less than two years' service and 4 weeks' notice for salaried staff with less than five years' service. For weekly paid staff with two or more years' service and salaried staff with five or more years' service, one weeks' notice is paid for each year of service (up to a maximum of 25 weeks).

6 This is what I said of the Policy after the hearing on November 9

"There was no evidence that this policy was being used by the Transferor at the time of the relevant transfer to the Respondent on or about 30 January 2003. Whether it has contractual effect or not as part of a collective agreement (transferring over under Reg 5 TUPE along with the Claimant's employment at that time) or otherwise is unclear .It may be that it is simply part of a series of discretionary employment policies used by the Transferor . But I cannot make and do not make a finding about this given the lack of documentation available and in the absence of evidence"

7 It is clear that it is legitimate for the Claimant to argue this Policy applies as part of his unfair and or wrongful dismissal complaint . And the Claimant's wrongful dismissal claim / breach of contract claim is straightforward as far as the issues are concerned. This is limited to claiming an extra 4 weeks paid notice under clause 9 of the Policy. He was employed from 18 February 2003 to 24 January 2020, so this is 16 full years and so claims 16 weeks' notice under the Policy (allegedly inherited by the Respondent) as opposed to the 12 weeks he actually received being his minimum statutory entitlement under section 86 ERA 1996. I had already decided on 9 November that this must be determined by the full tribunal and it will be . I observe the amount at stake is a relatively small sum of 4 weeks' pay. This does involve considering the nature of the Policy claimed by the Claimant to be a collective agreement and whether it did pass over on any Transfer and whether it has contractual effect.

8 The disability part of the Claimant's claim is harder to deal with given the Claimant is not seeking to suggest there was a stand-alone case of disability discrimination as far as the dismissal is concerned (and I pressed Mr Ibekwe on this as I did in respect of the original claim that the dismissal was TUPE related and he confirmed more than once that the Claimant did not wish to proceed with either claim) .What

the Claimant is stating is that due to the Claimant's disability the Respondent should have followed clause 5 of the Policy in dealing with his absence and should have considered " reasonable adjustments" .And their failure to do so meant they were in breach of the policy and added a further layer of unfairness to the process.

9 The Respondent states that when they dismissed the Claimant it was clear that , inter alia, he was not suffering from a disability (which he claims as a physical disability relating to chronic back pain) and although he was not getting any better, he was only using OTC medication to alleviate the symptoms and that there were no reasonable adjustments that could have been made to assist the Claimant (and none he suggested) . Given his job as a bus driver with the obvious strains that might put on one's back, they had come to the end of a fair process at that point (24 January 2020) at which time the Clamant had been off with sickness for some 176 calendar days.

10 And so, the issue of the Claimant's disability remains disputed . The Respondent denies he had long term sickness related to a disability . In part because he was expected to be able to return to work even though he did not and in part because his medical reasons for absence varied. However, it is clear that the Respondent's OH department classed his sickness as " long term absence " with " an underlying condition" and so the
Claimant believes the Respondent should have accepted their own occupational Health Guidelines and categorised the Claimant as disabled without the need for him to argue this, then or now. However, as the position is disputed and as clause 5 (if applicable) of the Policy only applies , as do clauses 20 and 21 Equality Act 2010 , if the Claimant is disabled there is a need for further medical evidence to establish whether he was , in fact, legally disabled in accordance with Section 6 Equality Act 2010 (which supersedes the DDA 1995 of course).

11 This leads to the rather strange situation that the only stand-alone claim of discrimination is a failure to make reasonable adjustments in compliance with Clause 5 of the Policy or clause 20/1 Equality Act 2010, but the Claimant does not wish to include , as part of his dismissal , an allegation of direct or indirect discrimination based on his disability under ss13,15 or 19 Equality Act 2010.Which is reflected in the issues set out in separate case management orders.

And so that the relevant parts of the documents under consideration are in one place I reproduce the Claimant's argument here also in bold italics .

The Claimant argues / contends as set out below –

(i) That the construction of a contract is a matter / question of law;

(ii) That the correct or appropriate construction of the contract, must be based upon the factors which were known to the Respondent employer at the point of making or reaching the decision to dismiss the Claimant;

(iii) That the Claimant does not need or require to claim a free-standing complaint of disability in order to rely upon the particular term of the contract which he claims benefit or aid of;

(iv) Otherwise, it would mean that the Respondent must be statutorily bound to stay or delay making any decision about termination of the contract (dismissal) if or once there arises a dispute about the question of disability of a relevant employee, in order to prevent or preclude the employee concerned from suffering prejudice or hardship of being dismissed without compliance by the Respondent of the relevant term / provision set out at paragraph 5 of the Judgment reasons;

(v) Accordingly, the correct interpretation of the contract, must be that when / once the Respondent employer has Medical opinion or advice that the Claimant is likely to come under the EqA 2010 as a person with a disability, this is all the contract required for the Respondent to comply with the relevant provision;

(vi) In the particular case of the Claimant, the Respondent's own OHA advised or recommended to the Respondent that the Claimant is likely to be considered to be a person with a disability under the EqA 2010;

(vii) Accordingly, this is / was enough to impose upon the Respondent employer to comply or cooperate with the relevant term / condition of the contract, and the Claimant does not have to prove such disability by having to be subjected to an actual Employment Tribunal proceeding to prove disability;

(viii) In the particular case of the Claimant, the Respondent's failure or refused to comply with the particular term or provision of the contract, which is engaged, is a matter / factor which goes towards the issues of whether or not the Respondent had a potentially fair reason for the dismissal, or otherwise whether or not the decision is unfair in the circumstance;

(ix) Accordingly, whereas in the particular case of the Claimant, the Respondent wholly chose to ignore their own medical advice / recommendation and proceeded to dismiss without seemingly consideration the Claimant's disability, then there has been an established breach of the contract, which without more goes towards the factors which the Employment Tribunal is / are supposed to consider in these proceedings.

Accordingly, the Claimant contends that the Employment Tribunal is / was wrong to decide that the question of disability has to be established, before the particular term / provision can become engaged, irrespective or notwithstanding the medical advice or recommendation which was in front of the Respondent employer.

Reconsideration Orders

.

1. I have , in accordance with Rule 72 of the ET rules considered the Claimant's application. Although the Claimant invited comment from the Respondents, I am unaware of any objection or other comment from them. My provisional view is that is that the reconsideration should be allowed to the extent set out below .

2. If the Policy is shown to have contractual effect then the obligation upon the Respondents was to consider whether or not the Claimant was "disabled", within the meaning of [s 6 of the Equality Act 2010].

3. Whether the Claimant was or was not disabled under s 6 of the Equality Act 2010 is a matter for the Tribunal to determine at the full hearing but the Claimant need not prove he was so disabled for the provisions of clause 5 to potentially apply in the context of an unfair dismissal complaint if the Respondent is shown to have failed to comply with such provision when it should have done.

4. The wider conduct of the Respondent , to potentially include its compliance or otherwise with clause 5 of the Policy, will be considered in determining the issue of unfair dismissal under S98 ERA 1996 and the Claimant may refer to their reconsideration contentions (i) to (ix) above in support of the unfair dismissal claim with the Tribunal determining the relevance and weight of such argument .

5. Whilst this affects the way the issues are framed it is not necessary to vary the judgement given on 18 December but only necessary to vary/clarify part of the reasons for that judgement , specifically that whilst the Claimant does have to show he was disabled at the relevant time to pursue his claim under section 20/21 Equality Act 2010 he may not have to do so to pursue his claim under s 98 ERA 1996 relating to his alleged unfair dismissal .

6. I am of the view that the reasons of the judgment can be considered varied accordingly as set out in the above orders and without the need for a separate hearing or a variation to the judgment itself unless the Claimant or Respondent object within 14 days of this order being sent out (marked for my attention and copied to the other side under rule 92).If there is no objection then this reconsideration shall be reflected in the issues presented before the Tribunal by the parties at the full hearing.

EMPLOYMENT JUDGE

3 April 2021
Order sent to the parties on

.06/04/2021.

for Office of the Tribunals