# EMPLOYMENT TRIBUNALS

| **Claimant:** | | **Respondent:** |
|---|---|---|
| Mr A Din | **v** | DHL International (UK) Limited |

**Heard at:** Reading (by CVP) **On:** 29 – 31 March 2021

**Before:** Employment Judge Anstis
Mrs A E Brown
Mr M Pilkington

**Appearances**
**For the Claimant:** Ms I Ferber (counsel)
**For the Respondent:** Mr J Font (advocate)

## JUDGMENT

1. The claimant's disability discrimination claim is dismissed.

2. (By a majority) the claimant's unfair dismissal claim is dismissed.

3. The respondent's application for costs is dismissed.

## REASONS

A. INTRODUCTION

1. The claimant was employed by the respondent from 22 June 2015 to 28 January 2019 as an Operation Processor at its Southern Hub near Heathrow Airport.

2. Around March 2016 the claimant suffered a back injury. He says this injury was acquired during his work. This is not accepted by the respondent, but the parties agree that for the purposes of this hearing we do not need to decide how the injury was caused. Following this injury, the claimant had substantial periods of time off work, and prior to his dismissal had not been at work since November 2017.

3. The claimant was dismissed by the respondent on 28 January 2019. It is agreed that the reason for his dismissal was a reason relating to his capability.

4. The claimant brings claims of unfair dismissal and (following an amendment permitted at a case management hearing on 28 October 2019) a claim of a disability discrimination (failure to make reasonable adjustments) described as follows:

> *"The provision, criterion or practice was to require the claimant to perform duties which involved heavy lifting.*
>
> *The substantial disadvantage was that the claimant could not perform heavy lifting duties due to back pain.*
>
> *The reasonable adjustment was to be given light duties that did not involve heavy lifting."*

5. During the course of the hearing, Mr Font identified the period during which this obligation to make reasonable adjustments applied as being 22 April 2016 to 19 November 2018.

6. The respondent accepts that the claimant was at the relevant times a disabled person.

B. THE HEARING

7. The hearing proceeded by CVP, with all parties (and every member of the tribunal) attending remotely. We heard evidence from the claimant, Jerome Blair (the respondent's Senior Sort Supervisor and the person who made the decision to dismiss the claimant) and Neil Bradford (the respondent's Export Manager, who heard the claimant's appeal against his dismissal).

8. The hearing proceeded on the basis that we would initially hear evidence and submissions in relation only to liability (but including any *Polkey* deduction), moving on to consider remedy later if necessary.

9. On the morning of the final day of the hearing we heard the parties' closing submissions. After substantial deliberations, we reconvened the hearing in the afternoon at which point we gave the parties our decision, explaining that the decision on unfair dismissal had been made by a majority. The employment judge explained that in order to ensure that the difference of opinion amongst the panel was properly expressed, oral reasons would not be given at that stage, but written reasons would follow. These are those written reasons.

10. Except as specifically mentioned, these reasons represent the unanimous view of the tribunal.

11. At the conclusion of the hearing Ms Ferber made an application for costs which is outlined below.

C. THE FACTS

**Introductory matters and the initial period of absence**

12. The claimant was employed as an Operation Processor at the respondent's Southern Hub. It is common ground that this is a warehouse-type environment in which an Operation Processor would be required to undertake a range of duties that would include physical handling of packages.

13. Around March 2016 the claimant suffered a back injury. As set out above we do not need to go into the circumstances of that injury. He was signed off sick as unfit for any work until 22 April 2016, when his "fit note" said that he would be fit to return on amended duties, with the doctor commenting "avoid lifting weight". He then returned to work in May 2016.

14. We were not taken in any detail through what happened following that up to the claimant's intended return to work in November 2017, but during closing submissions Ms Ferber described the position in the following terms, which, we understand, are not disputed. The claimant was at work from May to August 2016, then absent from September to November 2016 (the reason given being "lower back pain"). From November 2016 to November 2017 he was mostly at work, and then he was off work from November 2017 until his dismissal in January 2019. The reason for any periods of substantial absence was his back injury. We have in the tribunal bundle paperwork showing an attempt at a phased return to work in May 2017.

15. The claimant's contention is that throughout this period the respondent ought to have made the adjustment of removing heavy lifting duties from him, but (despite occasional promises made) did not do so. This is shown most clearly in a note prepared by the claimant of a conversation with his managers on 9 June 2016. The provenance and accuracy of that note is disputed by the respondent, but it clearly sets out the claimant's case that as early as 9 June 2016 the respondent's managers told him *"you are giving us … amended duties notes we cannot accept anymore, and we cannot offer you any light duties*".

**The intended return to work**

16. The claimant's most recent period of absence commenced in November 2017. We have in the tribunal bundle doctor's notes certifying the claimant as being unfit for any work from April 2018 onwards. There must have been earlier notes but these are not in the tribunal bundle.

17. Following a "sickness review meeting" on 6 June 2018 Mr Blair made an occupational health referral in respect of the claimant. A subsequent occupational health report dated 29 August 2018 recorded that the claimant had told the respondent's occupational health advisor that he "*may be able to return to work in the next 4-8 weeks*" and that "*he will require permanent modifications to his role when he returns to work*". However, the occupational health advisor also said that they had difficulty in

understanding what the claimant's actual diagnosis was, and recommended getting further information from his GP.

18. This further information was acquired, and the occupational health advisor reported again on 12 October 2018, stating that:

> *"I am unable to comment on a timescale for Mr Din's recovery and thus, his return to work. Ultimately DHL International will need to decide what is reasonable for them to accommodate in relation to an open ended absence as a return in the foreseeable future seems unlikely."*

and

> *"… DHL International now has all of the information required to manage this case. There is currently no requirement for any further case management intervention."*

19. In a brief sickness review meeting on 18 October 2018 the claimant is recorded as saying that his hip pain was getting worse, and that he thought he would be signed off sick again on the expiry of his sick note at the end of the month. The notes record the occupational health reports as having been read out to him, with the HR representative concluding "*as you have now been signed off for coming up to a year and have shown no signs of improvement … we will need to consider how long we can keep your job open for you which may ultimately result in your termination from the company*". The claimant replies that he can look at returning to work on completion of his physiotherapy at the end of November 2018.

20. On 5 November 2018 the claimant was invited to a "capability meeting", with the warning that "*a possible outcome of this meeting may be dismissal on the grounds of capability*".

21. The meeting eventually took place on 19 November 2018, by which time the claimant had been discharged from physiotherapy, with the discharge report saying that "*the patient reported up to 50% improvement in his function*" and that "*he is keen to return to work*".

22. At the meeting, the claimant told Mr Blair "*I just have a little bit of pain but my back is good. Bit of pain when I'm lifting something heavy* [later described as 20-30kg]." The following exchanges are recorded in the notes of the meeting:

> *"JB … are there any activities you could do within the workplace or how do you see yourself return to work.*
>
> *AD Last time I came back with a bad back I was back on light duties but* [my supervisor] *asked me to do another thing which is heavy and I couldn't do that.*
>
> *JB Ok so that happened in the past an this is a different scenario now.*

*AD But it is related as that made me go off again.*

*JB Ok so you are saying you could return on lighter duties. Do you think DHL can offer you any more support at this stage?*

*AD You could put me on lighter duties, before I did scanning and imaging.*

*JB Ok so there are options to look into then.*

*AD Yes, the office work.*

*…*

*JB Ok what I would like to add you mentioned about the last experience returning to work but management has now changed here and we would follow a phased approach with you returning to work we would follow a process to ensure you are happy and comfortable coming back into work. When we spoke last time you were happy with this?*

*AD Yes I am.*

*…*

*JB … you will return on Monday 3rd December, when you come in we will do a return to work and in that meeting we will discuss your gradual return to work are you happy for us to go back to* [occupational health advisors] *with this?*

*AD Yes*

*…*

*JB Happy? Do you have any questions?*

*AD No"*

23. Mr Blair followed this up with a letter on 22 November 2018, saying:

*"We discussed your current state of fitness and symptoms and you informed me that you have progressed extremely well with your recovery and now only have hip pain when you lift heavy boxes …*

*We discussed a potential return to work and informed me that you felt ready to return on light duties after the expiry of your current doctor's certificate on 30th November 2018. Therefore we agreed that you would return to work on Monday 3rd December 2018. On this date we will conduct a return to work interview and look to bring you back to work on a gradual return to work programme with amended duties and hours.*

> *As an extra support to you, we will re-refer you … for occupational health advice on what activities they feel will be appropriate during your gradual return to work programme. They should be in contact with you via telephone in the next few days."*

24. Following this Mr Blair completed a "management referral form". This described the "brief reason for referral" as being "gradual return to work", and under "any other relevant information" Mr Blair has added:

> *"After a meeting with Asim on the 19/11/18 is has been agreed that he will return to work on the 03/12/18. Asim stated that his condition has improved enough for him to return and I would like you to assess his fitness to work and agree a gradual return schedule."*

25. This prompted an email from the occupational health advisors to Mr Blair suggesting they speak on the phone on 27 November. They eventually spoke on 28 November 2018. This referral to occupational health (and its outcome) had not been mentioned by Mr Blair in his witness statement, nor had he been questioned on it by Mr Font. It was only identified (by the tribunal) after Mr Blair had completed his evidence. He was recalled to address this, and comments in relation to it that appeared in the later dismissal letter. He said that he could not remember what had been discussed in the phone call on 28 November 2018. The occupational health advisor followed up on this phone call with an email as follows:

> *"Hi Jerome*
>
> *Many thanks for your time earlier. As discussed please see the below phased RTW plan to support your employee … I hope this is helpful for you.*
>
> *Week 1 – 3 days on 50% hours*
>
> *Week 2 – 4 days on 60% hours*
>
> *Week 3 – 5 days on 70% hours*
>
> *Week 4 – 5 days on 100% hours"*

**December 2018**

26. The claimant did not return to work as intended. As he puts it in his witness statement:

> *"I had to return to work on 3 December 2018, but had suffered excruciating hip pain, which had occurred several days prior … This was connected to my injury at work."*

27. This was supported by a doctor's note certifying the claimant as unfit for work from 3 December 2018 to 10 December 2018 because of "*right hip pain*". Further sick notes followed covering the period from 11 December

2018 to 11 February 2019 stating that the claimant was unfit for work due to "*back pain, unspecified*".

**The decision to dismiss the claimant**

28. Mr Blair wrote to the claimant on 14 December 2018 saying:

> *"I am writing further to our meeting on 19th November 2018 regarding your capacity to fulfil your role of Operations Processor. During this meeting you informed me that you were fit to return to work on light duties commencing 3rd December 2018. You failed to return to work on this date and have since provided me with a further doctor's certificate declaring you unfit to work until 11th January 2019. As stated in my letter dated 22nd November 2018 if unfortunately you are unable to return to work on the agreed date of 3rd December 2018, you will be invited to a further capability meeting."*

29. The letter goes on to invite the claimant to a meeting on 18 December 2018, warning him that "*a possible outcome of this meeting may be dismissal on the grounds of capability*". This meeting was rearranged twice, to 28 January 2019, to accommodate the availability of the claimant's trade union representative.

30. During the course of that meeting, the claimant said:

> *"My back pain is ok, since when I spoke to you it was very bad hip pain, I went to GP and they sent me for an x ray ...*
>
> *… they recommended physio, I went to physio last Friday and continuing. He said the injury is healing now. GP said it will take 4-6 weeks and at this current moment I'm not fit for work …*
>
> *… now I've realised I have a hip problem too, because of my hip on my right side I cannot stand properly so that is why they sent me for x ray.*
>
> *… they have told me 4-6 weeks* [to return to work] *because of the physio as I am in the healing process.*
>
> *… hopefully in 4-6 weeks I will be ok.*
>
> *I am 99% sure I will be ok.*
>
> *… I am following the physio and he has said I will be ok in 4-6 weeks* [from 25 January] *hopefully."*

31. After an adjournment, Mr Blair gave his decision:

> *"Where we are today is that you have been away from work for over 14 months, you haven't given me any evidence to say you will be returning to work in the near future as it is not definite. The decision has been made to terminate your contract effective today. If once the*

> *time has gone by and you are ready to come back we are more than happy for you to reapply."*

32. This decision was followed up by a letter from Mr Blair dated 1 February 2019, in which he said:

> *"As an extra support to you, we referred you again to* [occupational health] … [They] *stated on 18 December 2018 you were fit to return on a gradual return to work …*
>
> *You notified me on 2nd December 2018 that you were unable to return to work on 3rd December due to hip pain you were experiencing and have not returned since …*
>
> *On 28th January 2019* [we] *met to discuss your current status … You informed me that you were experiencing hip pain and had started physio treatment for this. You confirmed the physio had told you if you continue with the exercises then you should hopefully be fit to return to work in 4-6 week, however, failing this there would be an option of an injection/surgery to help your medical condition.*
>
> *On the basis of all the information discussed at our meeting, and the medical information available the last of which was dated 18th December 2018 from occupational health where they stated you were fit to return on a phased return, I can confirm that regrettably a decision has been made to terminate your employment on the grounds of medical capability. This difficult decision has been made due to the longevity of your absence and the fact that medical evidence cannot guarantee that you will be able to return to your position of Operations Processor in the near future."*

33. A clear problem with this is that there was nothing in the tribunal bundle dated 18 December 2018 from occupational health. As referred to above, Mr Blair was recalled to give evidence on that point on the second day of the hearing. Even then all that could be identified by the respondent was an email from occupational health to the respondent's HR attaching the chain of emails containing the phased return schedule set out above.

34. Mr Blair accepted on being recalled that "[the] *date of 18 December does not make sense*", that all he had in writing from occupational health was the chain of emails including the phased return schedule, that he thought occupational health had contacted the claimant (but did not know or check that they had) and that he could not remember what he had discussed with occupational health in the phone call on 28 November 2018.

35. In his witness statement Mr Blair gave this account of his decision:

> *"Based on the facts that* [the claimant] *had been absent from work for over 14 months, and he had not given me any evidence to suggest that he would be returning to work in the near future, I made the decision to terminate* [his] *employment … I did not foresee him*

*coming back in the near future and he had not provided me with any evidence to demonstrate he could return to work and fulfil his job role."*

**The appeal and subsequent matters**

36. The claimant appealed the decision to dismiss him. The reason given for his appeal (dated 6 February 2019) was:

*"I would like to challenge the decision … because my accident was caused by DHL's negligence and lack of attention of health and safety, not once but twice."*

37. This appeal was heard by Mr Bradford on 27 February 2019. As with previous meetings, the claimant was accompanied by his trade union representative. The claimant's appeal was dismissed by Mr Bradford in a letter dated 20 March 2019.

D. THE LAW

38. Neither party suggested to us that this case required anything other than the application of orthodox principles of disability discrimination and unfair dismissal law. We will refer briefly to the material provisions of disability discrimination law in our discussion and conclusions below.

39. In respect of unfair dismissal, the respondent must show the reason for the claimant's dismissal, and that this is a reason within s98(2) of the Employment Rights Act 1996. If this is done, s98(4) provides that:

*"the determination of the question whether the dismissal is fair or unfair …*

*(a) depends on 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*

*(b) shall be determined in accordance with equity and the substantial merits of the case."*

40. In Monmouthshire County Council v Harris UKEAT/0332/14 HHJ Eady QC at para 40 described the position in relation to the fairness of an ill-health capability dismissal as follows:

*"Where the dismissal is for a reason relating to the Claimant's capability due to ill-health, in circumstances where the employee has been absent from work for some time, guidance has been laid down in BS v Dundee City Council [2014] IRLR 131 CSIH (approving and drawing upon earlier guidance from the EAT in the cases of Spencer v Paragon Wallpapers Ltd [1976] IRLR 373, and East Lindsey District Council v GE Daubney [1977] IRLR 181), notably as follows (paragraph 27):*

> *"27. … First, … it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. … this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered.""*

41. In Kelly v Royal Mail Group UKEAT/0262/18, Choudhury P said that in considering the fairness of an ill-health capability dismissal:

> *"the correct approach … involves the Tribunal considering whether or not the employer's conduct in treating the reason as sufficient to dismiss was within the band of reasonable responses"*

E. DISCUSSION AND CONCLUSIONS

**Disability discrimination**

42. We can deal briefly with the claimant's disability discrimination claim.

43. The claim is a complaint of a failure to make reasonable adjustments, over a period stretching from 22 April 2016 to 19 November 2018, in the following terms:

> *"The provision, criterion or practice was to require the claimant to perform duties which involved heavy lifting.*
>
> *The substantial disadvantage was that the claimant could not perform heavy lifting duties due to back pain.*
>
> *The reasonable adjustment was to be given light duties that did not involve heavy lifting."*

44. Mr Font submitted that a claim of a failure to make reasonable adjustments was a complaint of a continuing failure to act, meaning that for the purposes of this claim time ran from the end of the period over which the adjustments should have been made: 19 November 2018.

45. We disagree. A failure to make a reasonable adjustment is an omission, to be dealt with under s123(3)(b) and (4):

> *"(3)(b) failure to do something is to be treated as occurring when the person in question decided on it,*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something:*
>
> *(a) when P does an act inconsistent with doing it, or*
>
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."*

46. As we understand it, the claimant's case is that on his initial return to work, the alleged PCP was imposed on him and he was not permitted to undertake light duties. If so, this is an act inconsistent with making the adjustment he contended for, and would trigger time limits for his claim under s123(4)(a). This was in June 2016, meaning his claim is years out of time.

47. If Mr Font is correct, and it is 19 November 2018 that is the point from which time is to be counted, there are two difficulties with this. First, at that point the respondent was explicitly contemplating his return on duties that did not include heavy lifting, so the PCP alleged is not made out. Second, even if 19 November 2018 is the relevant time, the claim is still brought outside the time limit for such a claim.

48. In either case, no explanation has been given by the claimant for why his claim was not in time, nor has any basis been put forward on which we could conclude that it was just and equitable to extend time. The claimant's claim of disability discrimination is dismissed.

**Unfair dismissal generally**

49. There is no dispute that the reason for the claimant's dismissal was a reason related to his capability.

**Unfair dismissal – the minority view**

50. The minority (Mr M Pilkington) find that the claimant's dismissal was unfair. These are the reasons for that decision:

    50.1. A fair dismissal for ill-health reasons requires that "*proper medical advice*" is obtained. While the occupational health report of October 2018 had said that "*there is currently no requirement for any further case management intervention*", that had been superseded by the fact of the claimant's near-recovery and subsequent development of hip pain in November 2018.

    50.2. Mr Blair had correctly identified in the meeting of 19 November and letter of 22 November 2018 letter that he needed to take further medical advice, but then had failed to do so in any meaningful way. "*All that the employer requires to do is to ensure that the correct question is asked and answered*" – but despite what appears to have

been his intention, Mr Blair did not either ask the right questions or get answers to his questions. The best we have is the referral form that Mr Blair completed and sent to occupational health and a chain of emails which suggests that the occupational health advisors were giving generic advice on what a phased return to work might look like. Mr Blair did not ensure, in accordance with his letter dated 22 November 2018, that "*occupational health advice on what activities they feel will be appropriate during* [the claimant's] *gradual return to work programme"* was obtained. Furthermore, when completing the "management referral form" Mr Blair had asked occupational health *"… to assess his fitness to work and agree a gradual return schedule".* No contact was made with the claimant by occupational health and, therefore, no agreement was reached on a return schedule.

50.3. Mr Blair had expected that the occupational health advisors would contact the claimant. As stated above, they did not, and he did not check whether they had done so.

50.4. The primary source material for determining the respondent's reasoning for the dismissal is the letter of dismissal. In this case the letter is hopelessly muddled and contains multiple errors of fact. Occupational health had never stated that the claimant was fit to return to work. That information had been provided by Mr Blair himself in the referral form. They had not stated that the claimant was fit to return to work on a phased return. There was no occupational health advice dated 18 December 2018. When asked about this Mr Blair had simply been unable to explain why he had included this in the letter.

50.5. While acknowledging that dismissal in these circumstances is a question of the range of reasonable responses, this failure to properly address the question of medical advice took the respondent's decision outside the range of reasonable responses, and renders the dismissal unfair.

**Unfair dismissal – the majority view**

51. The majority (Employment Judge Anstis and Mrs A E Brown) find that the claimant's dismissal was not unfair. These are the reasons for that decision:

51.1. The majority acknowledge the criticisms made by the minority, particularly in respect of the confusion over the involvement of occupational health at the last stage of the process. The majority share the minority's concerns about the terms in which the dismissal letter was written. However, the majority place greater emphasis on the following:

51.2. The claimant had been absent from work for around 14 months, which itself had followed upon a period of lengthy absence from work.

51.3. His latest medical condition – his hip pain – was on his own admission a further manifestation of the injury which had caused him to be absent for so long. There is no material distinction to be drawn between his back pain and his hip pain. They are all aspects of the same condition.

51.4. Occupational health had previously said, in effect, that there was nothing more they could add to what had previously been provided.

51.5. The claimant's previous assurances of a return to work had not come good.

51.6. The best place to look for the respondent's reasoning on the dismissal is what Mr Blair said during the meeting at which the claimant was dismissed. That will be a more reliable expression of what was in his mind at the time than the subsequent letter. The notes of the meeting essentially say that the claimant was dismissed because the respondent could not wait any longer for the claimant to return to work. That accords with Mr Blair's oral evidence, as set out in his witness statement.

51.7. In circumstances where the claimant had been off for so long, and where an expected return to work had been postponed by a relapse of his condition, this was a decision that was within the range of reasonable responses, and the claimant's dismissal was not unfair.

**Further comments**

52. We were told that it is the respondent's practice that adjustments to a role would only be discussed on an individual's return to work. When we asked whether this was something that was set down in a formal policy by the respondent, Ms Ferber referred us to an extract from the sickness absence procedure which said:

> "*Every case should be reviewed and a RTW plan agreed with the employee prior to it taking place.*"

53. This seems to us to support what we would have expected to be the orthodox position: adjustments being discussed and agreed with the employee prior to and in anticipation of their return to work. While given the facts of this case it has not been material to our decision, we suggest that the respondent should consider carefully whether only discussing adjustments on an individual's return to work is the correct way of proceeding.

F. THE COSTS APPLICATION

54. At the conclusion of the case, Ms Ferber made an application for costs arising from the claimant's application to amend his claim which was considered at the hearing on 28 October 2019. That application was dismissed for reasons given orally at the time and which will not be provided

in writing unless requested within 14 days of the date this judgment and reasons is sent to the parties.

**Employment Judge Anstis**

Date: 23 April 2021

Sent to the parties on: .....

.....
For the Tribunals Office

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