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## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4102302/2020**

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**Held on 26, 27, 28 and 29 July 2021 (V)  
(By Cloud Video Platform)**

**Employment Judge: R Gall**

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**Tribunal Members: Mr I Ashraf  
Mr W Muir**

**Mr L Smith**

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**Claimant  
Represented by –  
Mr G Bathgate  
Solicitor**

**Tesco Stores Limited**

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**Respondents  
Represented by:  
Ms A Stobart -  
Advocate  
Instructed by:  
Pinsent Masons –  
Solicitors**

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## **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Unanimous Judgment of the Tribunal is that:-

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1. The claim of discrimination brought in terms of Sections 15 and 20 of the Equality Act 2010 is unsuccessful.
2. The claim of unfair dismissal brought in terms of Section 98 of the Employment Rights Act 1996 is unsuccessful.

As stated at the Hearing, in terms of Rule 62 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, written reasons will not be provided unless they are asked for by any party at the Hearing itself or by written request presented by any party within 14 days of the sending of the written record  
5 of the decision. No request for written reasons was made at the Hearing. The following sets out what was said, after adjournment, at the conclusion of the hearing. It is provided for the convenience of parties. It sets out a summary of why the Tribunal has concluded as it has.

### **REASONS**

- 10 1. This claim was heard on 26, 27 and 28 July 2021. Evidence and submissions were concluded on the last of those dates. The Tribunal considered the case later in the day of 28 July and during 29 July. The hearing reconvened late in the day of 29 July in order that the Tribunal could deliver an Oral Judgment in the case.
- 15 2. The hearing was in respect of liability alone. Mr Bathgate appeared for the claimant. Ms Stobart appeared for the respondents. The Tribunal heard evidence from the claimant, and in addition as his witness from Mr Dillon, Mr McGinley and Mr Nicoll. For the respondents, evidence was given by Ms McFeat, Ms Cameron, Mr Davis and Mr Jones. A joint file of documents was  
20 submitted.
3. Given that evidence was heard over the preceding 3 days, the Tribunal does not propose to rehearse the facts to a significant extent. There was, in any event, a relatively large amount of evidence not in dispute. There was a list of agreed facts and an agreed list of issues.
- 25 4. The claimant was dismissed by the respondents after an extended period of absence. This period of absence was from October 2018 until dismissal on 16 December 2019. He claims that the dismissal was unfair in terms of the Employment Rights Act 1996. He was, at the relevant time, disabled for the purposes of the Equality Act 2010. He claims that there was a failure to make  
30 reasonable adjustments. The PCPs, he says, were that he operate without

assistance in handling crates of groceries and that he return to his contractual duties with the respondents. The claimant also alleges discrimination in that there was unfavourable treatment, being dismissal, because of something arising from disability, namely his absence.

5 5. The respondents dispute liability and argued that if the Section 15 claim was to be regarded as well founded, the treatment, dismissal, was a proportionate means of achieving a legitimate aim. The legitimate aim was that of running the business efficiently.

10 6. There is an overlap between the grounds of claim, in that if it was the view of the Tribunal that there had been a failure to make reasonable adjustments and/or discrimination arising from disability as alleged, that would inform its decision on the claim of unfair dismissal. It would be likely that in either of those circumstances a dismissal would be found to have been unfair.

15 7. The job which Mr Smith had was that of delivery driver in the dot com section of the respondents' business. That involves a day shift or evening shift. For the day shift, when drivers arrive at work their van has been loaded with deliveries going to customers. They require to carry out checks and then will leave to ensure deliveries take place as planned and as promised to customers. The checks take 15/20 minutes. The drivers then return and require to unload the trays from their vans and to load trays onto their vans for the afternoon deliveries. That process takes around 20/30 minutes. For the evening shifts, the vans are "pre-loaded" for the driver. There is only one evening run. The empty trays are removed from the van by the driver on his return to the store.

25 8. The Stornoway store is a very busy one. It operates at, or very close to, full capacity. The aisles are almost always very busy. Deliveries to Lewis or Harris involve trips within Stornoway but also to further flung parts of the island. The respondents have no other store on the island. It is therefore not possible for them readily to interchange employees between stores or to supplement employees in one store by moving an employee there from a  
30 different store.

9. Training of drivers requires personnel to attend from the mainland to assess the prospective driver and to accompany him/her on training delivery runs. It involves multiple choice tests, heavy lifting training and watching training videos. Around two days of training and assessment are involved. The cost involved in the training, assessment and approval is higher than it would be if on the mainland given the need for an assessor to fly in or arrive by ferry.
10. Temporary employees as drivers are hard to recruit and to retain. An employee taken on a temporary basis will often leave that employment having obtained a permanent post elsewhere.
11. Mr Smith's health has unfortunately not been great for some time. He is affected by a back issue and also by mental health issues. The Tribunal had much sympathy for his situation and the very real troubles he has experienced. His employment with the respondents commenced in January 2014. He had periods of absence during his employment. The respondents varied arrangements in relation to his duties for a temporary period in 2016 by providing a "second person" to assist him with deliveries and loading. That ceased however from the end of April 2016.
12. It remained the case, however, that assistance with loading the van was in place for Mr Smith. That was possible as the respondents operated at that time a "same day delivery" service. This involved additional staff within the store so that orders could be taken, picked and be organised for delivery. That created "spare capacity" meaning that assistance for Mr Smith by way of loading the van was possible.
13. In September of 2018, the respondents decided that the same day delivery service was not one they were able to maintain. It ceased. Staffing was adjusted. This meant that there was no spare capacity to enable assistance to be available for Mr Smith with loading of his van.
14. Since April 2018 Mr Smith had been working evening shifts as part of a phased return to work. In light of the change in September 2018, the respondents offered Mr Smith the option of remaining on evening shifts, those

shifts not involving him in loading of his van. He was also offered the opportunity to redeploy into the store. He did not take up either of those options, choosing to return to day shift with no assistance to load his van.

5 15. Mr Smith was at work at this point. An Occupational Health report in September 2018 had confirmed that he was able to carry out his duties although he should avoid heavy manual handling tasks.

16. In later October 2018 Mr Smith was absent from work. He remained absent until his dismissal on 16 December 2019.

10 17. In the period of his absence the respondents had various meetings with Mr Smith and his representative. Those are documented in the agreed statement of facts. They obtained medical information in relation to Mr Smith during this time. Relevant reports were within the bundle. Those reports were discussed with Mr Smith, as was a possible return to work with possible adjustments. Mr Smith was asked to discuss the possible adjustments with his GP. He was  
15 given the opportunity to suggest any further or alternative adjustments.

18. As time progressed it appeared that the more significant difficult issue for Mr Smith affecting his possible return to work was that of his mental health. The respondents put in place counselling sessions for Mr Smith, which were attended by him. In addition, a psychiatric report was obtained by him and  
20 passed to the respondents. That report was discussed with him by the respondents. It recommended 6 to 8 sessions of CBT. It said that if immediately available and engaged with by Mr Smith, then it was considered likely that over 3 to 6 months his symptoms would improve so that he would no longer meet the criteria for a Major Depressive Order or any formal  
25 Psychiatric diagnosis. The report also stated that from Mr Smith's description of anxiety experienced in attending the store and having contact with the respondents "it was unlikely that he would be able to return to this particular establishment", but that after recovery "it would be likely he could return to similar work elsewhere".

19. The respondents intimated to the claimant that a further meeting would be held and that dismissal was a possibility. They arranged for a manager to be brought in from a different store to conduct that meeting. That was Mr Davis. The meeting was held on 16 December 2019.
- 5 20. The respondents confirmed that they would meet the cost of CBT. At that meeting on 16 December they established, however, that there was a waiting period of 6 to 9 months for an appointment for CBT to be conducted face to face, that being the method adopted as standard at that point. This was confirmed in a phone call between Ms McFeat and Mr Ford of Nuffield.
- 10 21. Mr Davis sought to obtain information from Mr Smith as to when he foresaw himself as being able to return to work. He said he did not think he would be able to return at that point and that at that time he could not give a specific date of return. Several possible adjustments were discussed. Those are narrated in the letter confirming dismissal. The decision Mr Davis took was to  
15 dismiss the claimant. He had regard to the length of absence, there being no anticipated date of return to work from medical information and from the view of Mr Smith himself and the issues for the business in having to recruit, train and retain temporary drivers. He was conscious of various options provided by the respondents to support the claimant in a possible return to work and  
20 the fact that those options did not result in Mr Smith feeling able to return to work at that point or for there to be an anticipated date of return. There was substantial delay in possible commencement of CBT and no certainty of outcome to that course of treatment. In addition Mr Smith was unable to be in the store due to his mental health.
- 25 22. An appeal was taken by Mr Smith against dismissal. He relied upon what he viewed as the respondents' failure to make reasonable adjustments and in particular their failure to arrange CBT. The appeal was conducted by written representations being made. This was at the request of Mr Smith. It was dealt with Mr Jones.
- 30 23. Mr Jones asked various questions, putting those into writing. Mr Smith's solicitor replied to those questions. The appeal process was conducted

through these questions and answers between 28 January 2020 and the point of decision on 20 April 2020.

24. Mr Jones sought in the appeal process to find a way in which Mr Smith might be able to return to work. He had enquiries made as to CBT and established that this could potentially be done via Skype. It was also established from Mr Smith that Mr Smith had in fact commenced CBT through the NHS, that being started in late February 2020. Mr Smith's view to the respondents was that this was not a quick fix and that he envisaged a long road ahead. He did not regard CBT conducted via remote means, telephone or video conference, as being effective.

25. In the appeal process Mr Jones looked to obtain any information from Mr Smith which might indicate a possible timescale for return to work. There was however no likely date for return to work available. He bore in mind that fact and the length of and history to Mr Smith's absence. He kept in mind the issues and costs the respondents had with temporary employees, recruiting, training and retaining them. He had regard to the various proposed adjustments the respondents had offered, none of which were acceptable to Mr Smith in enabling him to return to work. Those were discussed at time of dismissal and involved possible redeployment within the store, possible transfer to a different store (necessitating a move to the mainland for work), Mr Smith swapping duties with a colleague from in store while the colleague loaded Mr Smith's van, Mr Smith taking unpaid time while the van was being loaded for him, lighter runs being given to Mr Smith, a facilitated meeting with a colleague with whom Mr Smith had a problematic relationship and Mr Smith carrying out evening work thereby avoiding the need for him to do the van loading. Mr Jones concluded that the appeal would not be upheld.

26. The Tribunal considered the facts in the case as it regarded them having heard the witnesses. It considered the law and cases to which both Mr Bathgate and Ms Stobart referred it. It very much appreciated the copy of the cases sent on and the written submissions tendered and spoken to.

27. It should also be said that the Tribunal had great sympathy for Mr Smith. He has clearly had a very difficult time with his health, both physical and mental. He struggled at times while giving evidence to remember dates and the detail of events. That is not a criticism, however. It is very much hoped that his health improves in all aspects. Mr Smith was viewed as a credible witness. The respondents' witnesses were also regarded as credible. The Tribunal was particularly impressed by the evidence from Ms McFeat and regarded her, and Mr Davis, as credible in relation to the area of contention around whether and when the respondents became aware of the delay in provision of CBT.
28. As mentioned above there was an agreed list of issues. Answering those, the Tribunal concluded:-

## **UNFAIR DISMISSAL**

### **Fairness**

29. Did the Respondent take adequate steps to discover the true medical position? In the view of the Tribunal they did. They had the Occupational Health reports. They also had the view of the Consultant Psychiatrist. They had the claimant's own statement that he could not envisage a return to work at time of the dismissal or within a particular period after that point. The caution required in relying on an employee's own assessment of his/her health was kept in mind by the Tribunal. At time of the appeal the respondents had Mr Smith's view as to there being an extended period of time for CBT to be effective, this also having been stated by the consultant psychiatrist. They considered CBT potentially being conducted by Skype. There was no indication at any stage of what the respondents had hoped for, namely a broad timeframe for return to work by Mr Smith.
30. Did the Respondent adequately consult the Claimant? Yes, in the view of the Tribunal. They met with Mr Smith regularly and made various suggestions as to possible adjustments. They asked that he consult with his GP about them.



They took into account any comments made by the claimant as the Tribunal saw it.

- 5 31. Did the Respondent reasonably believe that the Claimant was unfit to carry out his job (with any reasonable adjustments)? Yes in the conclusion of the Tribunal. The evidence of both Mr Davis and Mr Jones was accepted on this point. The adjustment which Mr Smith sought of an employee carrying out loading of his van without any job swap by Mr Smith during that time and without there being time unpaid to Mr Smith during that time was not considered by the Tribunal to be a reasonable adjustment having regard to the disruption and cost involved in this proposed adjustment. Given all the information before the respondents it was reasonable for them to conclude that Mr Smith was unfit to carry out his job with any reasonable adjustments to it.
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- 15 32. Could the Respondent reasonably be expected to wait longer for the Claimant to return to work? The Tribunal concluded that this question was to be answered "No". The Tribunal had regard to the history of the case involving absence on the part of Mr Smith from October 2018 until dismissal on 16 December 2019, the absence of any anticipated date of return, with the anticipated length of time CBT treatment might involve and risk in it being effective, together with issues on the part of Mr Smith in being in the store. All proposals made by the respondents to try to assist Mr Smith with return had not led to return to work being possible.
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- 25 33. Was dismissal within the range of reasonable responses open to the Respondent? Yes, in the conclusion of the Tribunal. Again regard was had to the entire history during absence, length of absence, adjustments proposed and to there being no date of return to work for Mr Smith foreseen.
34. Did the Respondent and the Claimant comply with the ACAS Code of Practice? Agreed as not applicable.
- 30 35. The respondents made a submission as to *Polkey*. That is not dealt with in the circumstances of the decision reached.

## DISCRIMINATION - DISABILITY

### Discrimination arising from disability

36. Was the Claimant treated unfavourably because of something arising as a consequence of their disability (Claimant relies on extended absence as at  
5 paragraph 7 of the statement of claim)? Claimant relies upon his dismissal as the act of unfavourable treatment.

The Tribunal concluded that dismissal, albeit a fair dismissal, was nevertheless unfavourable treatment. The claimant lost his job. Even a fair dismissal placed him at a disadvantage. Dismissal took place because of his  
10 absence. Absence was something which arose as a consequence of his disability.

37. In treating the Claimant in that way what aim was the Respondent seeking to achieve? The Respondent relies on ensuring that the Dot Com department could operate adequately so as to avoid placing an undue burden on the  
15 Claimant's colleagues and providing an appropriate standard of service to the Respondent's customers.

Answering this and the next question, the Tribunal was satisfied that the aim was as set out by the respondents. It was also satisfied that the aim was a legitimate one.

20 38. Was that aim legitimate?

39. Was the treatment a proportionate means of achieving that aim or was there a less discriminatory way of achieving it? On the evidence, the Tribunal found that dismissal was a proportionate means of achieving the legitimate aim. It had regard to the time for which the claimant had been absent from work. It  
25 was also conscious of the difficulties and costs the respondents had in recruiting, training and retaining drivers, the last element being especially the case where a temporary contract was involved. The evidence in this area was as to the general position, however was applicable to, and essentially unchallenged as being, the situation of Mr Smith's absence. Other options as

to possible variation of duties or working arrangements had been suggested to Mr Smith, but did not result in agreement from him or the ability to return to work on his part. It is recognised that he based his response both on his own view and also upon medical advice from his GP. Absence and consequent issues for the respondents were likely to continue for some time, on the information which the respondents had. In those circumstances, the Tribunal accepted that dismissal was a proportionate means of achieving a legitimate aim.

### Reasonable adjustments

10 40. Did the Respondent apply a provision, condition or practice ("PCP") and if so what was that PCP? The Tribunal was not convinced that the PCPs advanced did in fact constitute PCPs. The respondents had not insisted that Mr Smith operate without assistance in handling crates of groceries. Assistance had been offered to him as part of the arrangements for possible return. They had also not insisted he return to his contractual duties. They were prepared to vary those by the arrangements discussed with him. The Tribunal answers the subsequent questions, however on the basis that the PCPs applied.

15 41. If so, did the PCPs place the Claimant at a substantial disadvantage in comparison with employees who were not disabled? A return to duties of day time deliveries requiring the claimant to load his van entirely without assistance would have placed him at a disadvantage given his issue with his back

20 42. Did the Respondent have knowledge of the substantial disadvantage which it is alleged the Claimant has suffered? No longer of relevance on the evidence the Tribunal heard.

25 43. Did the Respondent make reasonable adjustments? Yes, in the view of the Tribunal. For the reasons given above, although adjustments were not made, they were offered. Those were reasonable adjustments. As detailed above, the view to which the Tribunal came was that the adjustment which the claimant sought of having an employee load his van without there being a job

5 swap or time unpaid whilst that occurred was not a reasonable one, given the cost and disruption to the respondents. The time involved was not, of itself, huge. It was however, if implemented, a regular daily requirement involving time out of store for an employee in a store working to capacity or near capacity. Issues with holidays, sickness and other pressures of work were also relevantly considered in assessing reasonableness of this potential adjustment.

### **Conclusion**

10 44. For the foregoing reasons the Tribunal unanimously concluded that the claim was unsuccessful.

15 Employment Judge: Robert Gall  
Date of Judgment: 29 July 2021  
Entered in register: 11 October 2021  
and copied to parties