Case Number: 2304226/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Redmond**

Respondent: **Thames Water Utilities Limited**

Heard at: **London South via CVP On: 4/7/2022 to 7/7/2022**

Before: **Employment Judge Wright**

Representation:
Claimant: **In person**

Respondent: **Mr S Liberadski – counsel**

JUDGMENT having been given on 7/7/2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

It was the unanimous Judgment of the Tribunal that the claimant was not a disabled person for the purpose of the Equality Act 2010 (EQA). Furthermore, the dismissal was fair and there was no breach of contract. The claims fail and are therefore dismissed.

REASONS

1. The claimant presented a claim form on 16/10/2019 following a period of early conciliation which started on 21/6/2019 and ended on 18/7/2019. The respondent resists the claims. The claimant's employment commenced on 11/5/2015 and he was dismissed with notice by reason of capability, his employment ended on 5/6/2019.

2. There was a list of issues produced following a preliminary hearing on 4/5/2020. The claimant claimed discrimination contrary to the EQA by reason of the protected characteristic of disability per s.6 EQA, his condition is 'back pain'. The respondent disputes the claimant was a disabled person at the relevant time and it denies any unlawful discrimination.

3. The claimant also claims that his dismissal was unfair contrary to s.94 ERA and claimed a breach of contract. The respondent denies the claims.

4. The Tribunal heard evidence for the respondent from: Dr Seema Sawhney (Specialist Occupational Physician); Mr Stuart Rimmer (HR); Mr Chima Ogueri (Operations Manager/dismissal manager); and Mr Paul Wetton (now Head of Statutory Programme/appeal manager). It also heard from the claimant.

5. There was a bundle of 867-pages. The index was not particularly helpful in locating relevant documents, some documents were poorly reproduced, some were in a small font size which made them difficult to read and handwritten notes were not transcribed. Both parties made oral submissions.

6. At the outset of the hearing, the respondent made an application that whether or not the claimant was disabled be determined as a preliminary issue. The reason was that there was very little evidence-in-chief advanced by the claimant in respect of his condition and it would be a short matter to deal with. The claimant objected, but ultimately, the Tribunal decided to determine the issue as a preliminary matter. The issue was determined and the Tribunal found the claimant was not disabled as per s.6 EQA. That left the claims of unfair dismissal and breach of contract.

7. After a case management preliminary hearing on 4/5/2020 the case had previously been heard over four days in January 2021. There was only time during the four days to hear the evidence and submissions and so Judgment was reserved. One of the panel members was then incapacitated and the parties were invited to agree to a panel of two

determining the claim, under s.4(2) of the Employment Tribunals Act 1996. The claimant did not agree to this and so the case was relisted and heard by this Tribunal and was listed for six days. With the discrimination issue removed, the hearing concluded in four days.

Was the claimant disabled?

8. The condition which the claimant relied upon is 'back pain'. There was very little evidence from the claimant and only one reference to back pain in his impact statement (the claimant was directed to the Guidance produced to assist litigants in person at the preliminary hearing).

9. The Tribunal observed that the claimant's previous period of sickness absence as a result of the incident on the 7/10/2016 ended when his appeal was successful and he was reinstated on 12/2/2018. He was reinstated from the capability dismissal as the respondent accepted Occupational Health's (OH) advice that he was fully fit for work (albeit he had a phased return to work as his absence had been so lengthy) (page 821). The claimant then had a sustained period of fitness for work in his substantive role until he injured his back again, on 25/11/2018. The OH report of 18/12/2018 concluded that the claimant was not fit for his substantive role and he was seconded to the pumping team. During 2019 unsuccessful attempts were made to find the claimant an alternative role, this resulted in his employment being terminated on four weeks' notice on 8/5/2019 and his employment ended on 5/6/2019.

10. The claimant had been on holiday in January 2019 and he confirmed that he was fit and well enough to climb two 5000m mountains in Peru. The claimant constantly said that he was flexible and mobile and that he was fully fit to return to his substantive role (page 483). The only thing however the claimant was not doing at the relevant time (November 2018 to May 2019) was his substantive role, he was seconded into an alternative role. His substantive role however was a specialist role which involved heavy lifting and that aspect (which the claimant said he could do) was not a day-to-day task.

11. The one issue that arose during cross-examination which the claimant said was a task he could not carry out, was DIY. The claimant said he had not done any DIY since 2016. This was not referred to in the disability impact statement and it is undermined by the fact the claimant was fit enough to return to his substantive role when he was reinstated in January 2018 and OH agreed he was fit. If the claimant was fit enough to work in that role, it follows that he chose not to carry out DIY tasks. That does not equate to a substantial long-term adverse effect on the claimant's ability to carry out this one daily task. In contrast, the claimant referred to lifting his bulldog off the floor and into a van; he said that he

had been doing that task for the last three years. Lifting is distinguished from performing DIY.

12. For those reasons, the Tribunal finds the claimant was not disabled.

Findings of fact for the unfair dismissal claim

13. The claimant was employed in the Flooding Improvement Process (FLIP team) which comprised 12 members of staff. For health and safety and other reasons, the team works in pairs. The Tribunal was told that the equipment the FLIP team is responsible for is at the lower end of the respondent's skill requirements.

14. The claimant's letter of appointment stated that he was employed as a Technician Dual-skilled on a salary of £28,600 (page 69). The respondent says this job title was an error and in reality, the claimant was a Technician Single-skilled[1]. This came to light during a data cleanse and Mr Ogueri's evidence was that he informed the claimant of the error and the amendment to the job title. The claimant denied that he was ever informed of the change in his job title. There was no change in the rate of pay.

15. The claimant's breach of contract claim related to the change in job title and the issue was recorded at the preliminary hearing on 4/5/2020 as:

> 'Was it a breach of the claimant's contract to fail to increase his pay by £500 pa gross when his job title was changed to Dual Skilled Technician?'

16. At the hearing, the claimant pursued this argument by saying the difference in pay was £15,000 pa. In closing submissions he said the sum was £96,000 over six years.

17. The Tribunal finds that the claimant was a Technician Single-skilled as an electrician. The job title was corrected as a result of the respondent realising its error and it was purely an administrative change. It should however have been confirmed in writing to the claimant and if it had, it would have removed this issue as an element from the claim.

18. The chronology is that the claimant had an accident on 7/10/2016 when he injured his back whilst lifting a lid (similar to a manhole cover). As a

[1] The distinction is that a Technician Dual-skilled have skills in electrical and mechanical engineering, whereas a Technician Single-skilled has either an electrical *or* a mechanical engineering skill. It was accepted the claimant had electrical skills and there was no evidence that he possessed a mechanical engineering skill.

result of that injury, the claimant was absent from work until 3/1/2017, then from 30/1/2017 until he was reinstated on 7/2/2018. Although it was not relevant for the purposes of this claim, the claimant was dismissed due to capability and reinstated upon his successful appeal. It is however relevant to note that the reason the claimant was reinstated was that he was found to be fit for work and had recovered from the back injury by Occupational Health (OH) (page 378).

19. The only point of note in respect of this earlier incident is that OH recorded on 29/1/2018 that the claimant (page 821):

> 'does not have any symptoms currently affecting his back.'

20. Whereas, the claimant's GP records on 26/1/2018 record (page 671):

> 'History came in for fit note
> given
> also would like referral to pain clinic
> says his pain is not managed with anything we have given and would like pain clinic
> referral as per physiotherapy
> explained we need to try alternative measures prior to referral
> pt disagreed with this and demanded a referral says it needs to be done
> agreed to refer onwards'

21. At the very least, that demonstrates the claimant was not being honest with the information he gave to OH. The claimant also pursued a personal injury claim against the respondent in respect of this incident, which the Tribunal was told settled in April 2022.

22. Upon his return to work, the claimant worked without incident until 25/11/2018 when he sustained a further injury to his back, again whilst lifting a lid. He was absent from work from 26/11/2018 to 6/12/2018 and was referred to OH (page 473).

23. OH's conclusion was that the claimant's current role was 'not ideal' and recommended redeployment (page 469). The main reasons for this conclusion were: the risk to the claimant having had two back injuries in just over two years; the risk to the claimant's colleague, should the claimant injure himself whilst the two were working together; and; the risk to the respondent in exposing itself to a further personal injury claim by the claimant.

24. The Tribunal found the respondent's justification to be reasonable.

25. The claimant went on holiday to Peru in January 2019 and climbed two 5000m mountains.

26. Upon his return to work, there was a capability meeting. The respondent had introduced and was trialling a new medical capability process, as an alternative to the redeployment process used previously (under which the claimant's previous absence, dismissal and reinstatement had been handled). The new process provided for more support and longer periods of time within which to source an alternative role.

27. The meeting was on 30/1/2019 (page 482). The process was explained to the claimant and he was informed that he had a period of time to apply for roles in other areas of the business. He was also informed that if an alternative role was not found, his contract would be terminated. At that point in time, the claimant had been seconded to the pumping team. At the meeting the claimant talked about his activities whilst on holiday and indicated that he was 'fully fit'. The claimant was given six weeks to secure an alternative role.

28. The claimant complained that when he joined the respondent the recruitment process took six months. The Tribunal finds that there is a difference between an externally recruited candidate and one that transfers internally. In the event, the medical capability process was extended.

29. The second capability meeting took place on 12/3/2019 (page 523). The claimant's efforts to find an alternative role were acknowledged. The medical capability process was extended by a further four weeks. The Tribunal heard that the claimant had had difficulties applying for roles via the respondent's portal, although he had assistance and had four interviews during the preceding six weeks. The difficulties the claimant had were part of the reason for extending the process.

30. The third meeting took place on 9/4/2019 (page 547). The fact the claimant had been applying for dual-skilled roles was discussed and it was suggested to the claimant that he apply for single-skilled roles or for a Tech 1 job. Tech 1 was a lower skilled role than the claimant's substantive role. The possibility of the claimant obtaining a qualification in order that he could apply for a dual-skilled role was raised; however the respondent took the view that it would take two years for the claimant to do so. From the respondent's point of view, that was not sustainable. The respondent took the view that if the period was say, six months, it could have supported the claimant, but two years was not feasible. The Tribunal finds this stance to be reasonable.

31. The medical capability process was extended for a further four weeks. It was confirmed during this meeting that the claimant's pay would not be protected if he accepted a lower level role. It was also confirmed that at the next meeting, a higher level manager would be in attendance and that the claimant may be given notice.

32. The fourth and final capability meeting took place on 8/5/2019 (page 575). Mr Ogueri informed the claimant he was giving him four weeks' notice and that if he did not find an alternative role during that time, his employment would terminate. Although the claimant's trade union representative requested a further extension of time, that was refused. The claimant was informed of his right of appeal. During the meeting the claimant stated that he could get a letter from his physiotherapist or doctor to state that he was fit and he was asked why that information was being mentioned at this stage of the proceedings. The claimant did not produce such a letter.

33. The claimant was accompanied by his Trade Union representative at all the meetings.

34. A letter dated 15/5/2019 confirmed the claimant's employment would terminate on 5/6/2019 (page 591).

35. The claimant appealed the decision to terminate his employment on 20/5/2019 (page 601) and an appeal meeting was held on 20/6/2019 (page 620). The appeal was unsuccessful and that was confirmed to the claimant by an undated letter (page 628). During the appeal meeting the claimant maintained that he was fit for work, said he had told OH the same and that his GP said he was fit for work (page 621). He also maintained the two back injuries were stand alone or separate injuries. Again, no evidence was produced.

36. The claimant was still able to apply for roles with the respondent once his employment had terminated, although he chose not to do so (page 631).

37. The Tribunal can understand that the claimant's confidence may have diminished during the medical capability process, it does however find that the claimant was assisted and supported. His CV was reviewed, he was assisted in applying for roles and he was given feedback. It was also suggested that he lower his sights in respect of the level of role he was applying for and apply for roles that were within his skill-set.

Law

38. The definition of disability is found at s.6 EQA and schedule 1:

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

39. Section 94 of the Employment Rights Act (ERA) states that an employee has the right not to be unfairly dismissed by his employer.

40. Section 98 ERA states:

(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 (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held

(2) A reason falls within this subsection if it—

(a) ***relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do****,*

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

…

(3) Where the employer has fulfilled the requirements of subsection (1), the determination of the question 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 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

[Tribunal's emphasis]

41. The ERA requires the claimant to prove that he has been dismissed. The burden then shifts to the employer to prove the reason for the dismissal. If the respondent succeeds in showing a potentially fair reason for dismissal, there is a neutral burden for the purposes of determining whether or not the dismissal was fair.

42. If the respondent fails to show a potentially fair reason for a dismissal it is unfair. If a potentially fair reason is shown, the general test of fairness in s. 98(4) ERA must be applied. The helpful test is the range or band of reasonable responses, a test which originated in the misconduct case of British Home Stores v Burchell [1980] ICR 303, but which has been subsequently approved in a number of decisions of the Court of Appeal.

43. The manner in which the employer handled the dismissal is important in considering whether the respondent acted reasonably in all of the circumstances in treating that reason as a sufficient reason for dismissing the claimant. A Tribunal will therefore be keen to find out that the process which led to the claimant's dismissal was affected in an appropriate way, i.e., within the range of reasonable responses applicable to an employer of the size of the respondent with such administrative resources available.

44. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer.

Conclusions

45. As a preliminary issue, the Tribunal had decided the claimant was not disabled.

46. The respondent has satisfied the burden upon it that the claimant's dismissal was due to the claimant's incapability to perform his substantive role. That was the conclusion of OH and the Tribunal accepts the rationale behind the respondent's decision, for the reasons given; that it could not risk him continuing in the FLIPs team.

47. Although the claimant was originally given four weeks to find an alternative role, that process was extended. Ultimately and reasonably, the claimant had 14 weeks and that was then extended by his four week notice period. He was supported and assisted during that period, albeit the outcome was not successful in that he did not secure an alternative role.

48. The process which the respondent applied does not have to be perfect, only reasonable; it was reasonable.

49. At some point, the respondent had to take the decision not to allow any further extension of time and to terminate the claimant's employment. The respondent taking that decision after 14 weeks, with a further four weeks' notice was within the band or range of reasonable responses.

50. Mr Rimmer said the respondent has approximately 7,000 employees. It therefore has considerable administrative resources. Under s.98(3)(b) ERA the Tribunal is obliged to take that into account. The Tribunal finds the respondent did act reasonably in conducting four medical capability meetings, at which the claimant was represented and reconsidering the matter on appeal (although the appeal was unsuccessful). Certainly, the respondent could have extended the period for longer, although the Tribunal accepts that at some point, it was reasonable for it to decide that it could no longer sustain continuing to employ the claimant. It was reasonable to decide not to give any further extension of time.

51. Whilst there is considerable sympathy for the claimant in that he was not able to secure an alternative role, irrespective of that, for those reasons, the Tribunal finds the dismissal was reasonable and therefore fair.

52. The claimant's breach of contract claim is simply not understood. He did not advance this claim, the sum claimed was not particularised and kept increasing.

53. The Tribunal could not, based upon the evidence it heard, find a breach of the claimant's contract related to the change in his job title.

54. For those reasons, the claimant's claim fails in its entirety and is dismissed.

Employment Judge Wright
07 July 2022