



EMPLOYMENT TRIBUNALS

Claimant: Miss R Forbes

Respondent: JR Bars Limited

Heard at: Leeds by CVP videolink

On: 14 October 2022

Before: Employment Judge Deeley

Appearances

For the claimant: representing herself

For the respondent: did not attend

JUDGMENT

1. The claimant's complaint of unauthorised deductions from wages under s13 of the Employment Rights Act 1996 fails and is dismissed.
2. The claimant's complaint of breach of contract succeeds and is upheld. The claimant is awarded £1095.20 in respect of this complaint.
3. The claimant's complaint of a failure to provide itemised pay statements under s8 of the Employment Rights Act 1996 is dismissed. The claimant stated in her email of 30 September 2022 that she has since received wage slips for the periods 6/10/21-4/2/22 and for the week commencing 4/2/22.

NOTES

1. Please refer to the case management order of 14 October 2022 which provide the background to the claim.
2. If either party wishes to request written reasons for this Judgment, they must make their request within 14 days of the date on which this Judgment is sent to the parties.

Employment Judge Deeley
14 October 2022

Public access to Employment Tribunal judgments

Judgments and written reasons for judgments, where they are provided, are published in full in the Tribunal's online register shortly after a copy has been sent to the parties in the case.

1. The claimant's claim of unfair dismissal under s98 of the Employment Rights Act 1996 is ???
2. The claimant's claim of direct disability discrimination under s13 of the Equality Act 2010 is ???.
3. The claimant's claim of discrimination arising from disability under s15 of the Equality Act 2010 is ???.
4. [NB CHECK THAT C'S CLAIM FOR FAILURE TO MAKE RAS WAS DISMISSED ON W/D FOLLOWING PH – CF P4, SECOND PAGE OF EJ COX'S LIST OF ISSUES]

INTRODUCTION

Tribunal proceedings

1. Employment Judge Cox managed this claim at a preliminary hearing on 4 November 2021, attended by the claimant (representing himself) and the respondent's representative.
2. We considered the following evidence during the hearing:
 - 2.1 a joint file of documents [and the additional documents referred to below];
 - 2.2 witness statements and oral evidence from:
 - 2.2.1 the claimant; and
 - 2.2.2 the respondents' witnesses:

Name	Role at the relevant time
1) ???	???
2) ???	???

3. We also considered the [oral/written] submissions from the claimant and from the respondent's representative.

Adjustments

4. [INSERT ANY ADJUSTMENTS DISCUSSED]

CLAIMS AND ISSUES

5. Employment Judge Cox agreed the list of issues (or questions) raised by the claimant's claim at the preliminary hearing.
6. [check position re w/d of RAs claim at PH in November 2021]

FINDINGS OF FACT

Context

7. This case is dependent on evidence based on people's recollection of events that happened some time ago. In assessing the evidence relating to this claim, we have borne in mind the guidance given in the case of *Gestmin SGPS -v- Credit Suisse (UK) Ltd* [2013] EWHC 3560. In that case, the court noted that a century of psychological research has demonstrated that human memories are fallible. Memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. External information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all.
8. The process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to the parties. It was said in the *Gestmin* case:
"Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."
9. We wish to make it clear that simply because we do not accept one or other witness' version of events in relation to a particular issue does not mean that we consider that witness to be dishonest or that they lack integrity.

Background

10. The claimant was employed by the respondent from 13 November 1989 until he was dismissed with notice with effect from 24 April 2021. The claimant was paid in lieu of 12 weeks' notice and also received an ill health lump sum payment. The claimant was paid in lieu of 6 weeks' annual leave, after the issue of his holiday pay was raised as part of his appeal.
11. The respondent's staff at the times referred to in the claimant's complaints included:

Name	Role at the relevant time
Mr Graham Pickering	???
Mr Kevin Moore	???

12. The claimant worked at the York Central Delivery Office at the time of his dismissal. His role was that of 'Operational postal grade', which primarily involved delivery duties.
13. The claimant suffered from ??? difficulties from ??? onwards. [CHECK DATES OF ADJUSTED DUTIES BEFORE SICK LEAVE]
14. The claimant's condition worsened significantly in the Summer of 2020 and he went on sick leave on ??? 2020. The claimant had an operation in August 2020, following

which ????. The claimant remained absent on sick leave until he was dismissed. His sick pay ended on ??? 2021.

Occupational health assessment

15. The claimant attended an occupational health assessment in March 2021 with Dr Baig. Dr Baig considered the information provided by the claimant and a report from the claimant's medical consultant dated 11 March 2021. Dr Baig produced a report dated 24 March 2021 (the "**OH Report**").

16. [P149] The OH report stated:

"Current Outlook

Mr Marr remains unfit to take a delivery role, and I cannot predict a clear time frame for this changing as there are limiting factors in his physical health preventing this. He may eventually have an improvement in terms of all of these aspects of his health, but realistically this may not be achieved for a considerable period of time.

The evidence suggests the condition has become long-term and there is no foreseeable return date.

The employee has completed more than one year's service.

As a consequence of that it is my opinion that the criteria for leaving the Business with a Lump Sum are met but that the criteria for Leaving with Income support are not met in this case. I have completed the necessary certificate here under. The reason why Income support is not met is because he will be capable of a sedentary role.

I have considered the medical and other reports concerning this employee, and these together with the results of my own assessment have led me to form the opinion that as a result of serious physical or mental ill-health (not simply a decline in energy or ability) the employee is for the foreseeable future incapable of:

a) Carrying out his current duties

b) Carrying out such other duties for the employer as the employer might reasonably expect the employee to perform.

The grounds for my opinion are: Major Health Problems Ureteral Stricture : ICD code: N 35.9, Overactive/smaller capacity bladder ICD code N

Therefore the individual would meet the criteria for medical retirement with lump sum payment.

Disability Advice

The Equality Act is likely to be met in this case because of the enduring nature of the impairment.

The employee would be capable of an alternative duty with the following adjustments:

Mr Marr will be capable of a sedentary role.

I have been asked to remind you that because of the company's group structure and when appropriate the search for an adjusted duty extends beyond your business unit to your local geography.

Follow On Action

No follow on actions required."

Meeting with Mr Pickering

17.???

18.???

18.1 ???

18.2 ???

18.3 ???

18.3.1 ???

18.3.2 ???

18.3.3 ???

Redeployment consideration

19.???

20.???

20.1 ???

20.2 ???

20.3 ???

20.3.1 ???

20.3.2 ???

20.3.3 ???

Notice of dismissal

21.???

22.???

22.1 ???

22.2 ???

22.3 ???

22.3.1 ???

22.3.2 ???

22.3.3 ???

Appeal meeting with Mr Moore

23.???

24.???

24.1 ???

24.2 ???

24.3 ???

24.3.1 ???

24.3.2 ???

24.3.3 ???

Appeal outcome

25.???

26.???

26.1 ???

26.2 ???

26.3 ???

26.3.1 ???

26.3.2 ???

26.3.3 ???

RELEVANT LAW

27. The Tribunal has considered the legislation and caselaw referred to below, together with any additional legal principles referred to in the parties' submissions.

28. [INSERT LAW]

APPLICATION OF THE LAW TO THE FACTS

29. We will now apply the law to our findings of fact.

???

30.???

31.???

31.1 ???

31.2 ???

31.3 ???

31.3.1 ???

31.3.2 ???

31.3.3 ???

ANNEX

The Claimant alleges unfair dismissal, direct disability discrimination and discrimination arising from disability.

The parties agree that:

1. The Claimant worked for the Respondent as a delivery postman from 13 November 1989 to 24 April 2021, latterly at the York Delivery Office.
2. He was dismissed by compulsory ill-health retirement, having been on sick leave since 1 August 2020.
3. At the material time he was a disabled person by reason of an overactive bladder, treated by a supra pubic catheter.

Unfair dismissal: the issue

Did the Respondent act reasonably in all the circumstances in dismissing the Claimant? He alleges that it did not, because it did not take reasonable steps to identify suitable alternative work for him, working indoors with ready access to drinking water and a toilet (both of which are necessary for him to manage his disability). He would have considered vacancies in York, Leeds, Goole or Sheffield. He has identified in particular a suitable vacancy that he says existed at the relevant time at the Customer Service Point in York.

Direct disability discrimination: the issue

In dismissing the Claimant, did the Respondent, because of his disability, treat him less favourably than it would have treated a non-disabled employee of the same abilities in the same or not materially different circumstances?

Discrimination arising from disability: the issue

The Respondent now accepts the Claimant's dismissal amounted to unfavourable treatment because of something arising in consequence of his disability, namely his sickness absence.

Was dismissing the Claimant a proportionate means of achieving a legitimate aim? The Respondent has been ordered to provide further details of its response in relation to these matters. The Claimant says that his dismissal was not proportionate because the Respondent did not explore the possibility of redeploying him to an indoor role with

ready access to drinking water and toilet facilities, with allowances made for his need to take frequent toilet breaks and take time off for hospital appointments.

Note: The Claimant agreed to withdraw his claim of failure to make reasonable adjustments by offering him redeployment, on the basis that those matters will be covered in his claim of discrimination arising from disability.

Remedy

The Tribunal has decided to hold a separate Hearing to decide what remedy to award of any aspect of the claim succeeds, because the Claimant would want to be re-employed in York if his unfair dismissal claim succeeds and there may need to be complex pension loss calculations.

The Tribunal may decide, however, to decide one issue relevant to compensation namely, what the likelihood was that the Claimant would have been dismissed even if the Respondent had acted lawfully.