



EMPLOYMENT TRIBUNALS

Claimant: Mr C Sale

Respondent: Bournemouth Transport Limited (in administration)

Heard at: Southampton Employment Tribunal via Video hearing
On: 17 August 2023

Before: Employment Judge Youngs
Mrs D England
Mr D Stewart

Representation

Claimant: Ms E Skinner, counsel
Respondent: Not in attendance

REASONS

JUDGMENT having been given 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:

Claims and parties

- 1) By a Claim Form dated 27 January 2022 the Claimant brought claims of unfair dismissal and disability discrimination.
- 2) The Respondent filed a Response on 10 March 2022. The Respondent subsequently went into administration. The administrators consented for the proceedings to continue, but indicated that the Respondent would not play a further part in the proceedings.

Procedure, documents and evidence heard

- 3) The Claimant was represented at the hearing by Ms Emily Skinner of Counsel. The Claimant submitted a witness statement and gave oral evidence before the tribunal. The tribunal had a Bundle running to 258 pages (including the index). The Respondent did not attend or submit any statements.
- 4) The Tribunal asked questions of the Claimant and heard submissions from Ms Skinner before retiring to consider its decision.

The issues

- 5) At the start of the hearing, the Tribunal discussed and confirmed the issues with the parties. The issues for the Tribunal were set out by EJ Livesley at a case management preliminary hearing on 4 May 2023. At the start of final hearing, Ms Skinner clarified that the issues remained as set out in EJ Livesley's Order, save that due to the Respondent being in administration, and the Claimant being limited in what he could claim from the NIF, the Claimant was only asking the Tribunal to consider making a declaration of discrimination and awarding a basic award if his claim succeeds.
- 6) The issues were therefore as follows:

1. Discrimination arising from a disability (section 15 Equality Act 2010)

- 1.1. As at 01 October 2021, was the Claimant disabled within the meaning of Section 6 Equality Act 2010? The Claimant submits that he suffered from 'Long Covid', and that this amounted to a physical and/or mental impairment satisfying the definition on that date.
- 1.2. Did the Respondent know, or ought the Respondent have known, that on 01 October 2021 the Claimant suffered from a disability (namely, 'Long Covid')?
- 1.3. Both parties agree that the Claimant was dismissed on 01 October 2021.
- 1.4. Did the Claimant's dismissal constitute unfavourable treatment?
- 1.5. If so, was the Claimant dismissed because of "something" arising from his disability? The "something" relied on is the Claimant's sickness absence.
- 1.6. If so, was the Claimant's dismissal a proportionate means of achieving a legitimate aim? Whilst the Claimant makes no submission as to whether the Respondent's actions were in furtherance of a 'legitimate aim', the Claimant contends that the Respondent did not act proportionately because:
- i. The timing of his dismissal was primarily dictated by the Respondent's desire to avoid having to start paying him sick pay following furlough coming to an end.
 - ii. The Claimant was scheduled to attend the Long Covid Clinic on 11 October 2021; it was unreasonable for the Respondent to have dismissed the Claimant prior to the results of that clinic having been received.
 - iii. The Claimant was suffering from a condition that, at the time, was unknown; the Respondent failed to sufficiently investigate the Claimant's prognosis.
 - iv. The Claimant had not yet even started to exhaust his contractual sick pay entitlement.

2. Unfair Dismissal

- 2.1. Both parties agree that the Claimant was dismissed on 01 October 2021.
- 2.2. Both parties agree that the Claimant was dismissed on the grounds of capability, which the parties agree is a potentially fair reason.

2.3. Did the Respondent act reasonably or unreasonably in treating that as a sufficient reason for dismissal? The Claimant contends the Respondent did not because of the factors listed in paragraph 1.6 i – iv above.

3. Remedy

3.1. **Disability** - Should the Tribunal make a declaration, and if so what declaration? The Claimant seeks a declaration that he has been subjected to disability discrimination.

3.2. **Unfair dismissal** - What basic award should be awarded to the Claimant?

Findings of fact

- 7) The Claimant was employed by the Respondent as a bus driver from July 2015 to the 1 October 2021, when he was dismissed by reason of capability. He was paid an hourly rate of £11.73 as at the 1 October 2021. When working, he worked variable hours on the basis of a rota, of between 23.4 and 25.8 hours a week.
- 8) The Claimant contracted COVID in January 2021, which developed into long COVID. He phoned in sick on the 13 of January 2021.
- 9) From the week commencing 22 January 2021, by agreement, the Claimant commenced a period of furlough leave.
- 10) The Respondent had a number of sickness absence interviews with the Claimant during the period April to September 2021 and the Claimant also attended a number of occupational health appointments in that period, the most recent occupational health appointment being on 27 August 2021, which resulted in a report dated 1 September 2021. The Respondent was provided with details of the impact of the Claimant's condition as a result of these meetings and occupational health reports.
- 11) The government furlough scheme was due to end on 30 September 2021.
- 12) On 9 September 2021 the Respondent wrote to the Claimant to invite him to a meeting on 24 September at 9:00am. The purpose of the meeting was to discuss the Claimant's medical information, whether he would be capable of return to work, and the Claimant was warned of the potential termination of his employment.
- 13) The meeting went ahead on 24 September but in the event was adjourned to 1 October 2021 to be concluded on that date.
- 14) In the intervening period, on 29 September the Claimant had a conversation with the Long COVID Centre about the nature of his condition and the support that may be available.
- 15) The Claimant met again with the Respondent on 1 October 2021 as planned. The Claimant and/or his representative on his behalf tried to update the Respondent as to the Long COVID appointment on 29 September and that the Claimant was being referred to specialists. The Claimant says this fell on deaf ears. We find that to be correct. There is no reference to the 1 October meeting in the letter sent by the Respondent following the 1 October meeting. That outcome letter appears to have been

written in advance of the meeting with no intention to hear further from the Claimant. The Claimant was dismissed with effect from 1 October 2023.

- 16) On 11 October 2021 the Claimant had a further Long COVID appointment and was referred to medical specialists.
- 17) The Claimant appealed his dismissal, and a hearing took place on 21 October 2021. The appeal outcome was issued on 4 November 2021. The appeal was not upheld.
- 18) The Claimant contacted ACAS for pre claim conciliation on 21 October 2021. The ACAS certificate was issued on the 2nd of December 2021. The Claimant then filed his claim on 27 January 2022.

The Law

Disability

- 19) Section 6(1) of the Equality Act 2010 ("EqA") provides that a person, 'P', has a 'disability' if he or she 'has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.'
- 20) Schedule 1 of the EqA 2010 sets out factors to be considered in determining whether a person has a disability. Section 6(5) of the EqA 2010 provides for the issuing of guidance about matters to be taken into account in deciding any question for the purposes of determining who has a disability, and such guidance came into force on 1 May 2011.
- 21) The relevant time to consider whether a person was disabled is the date of the alleged discrimination; see *McDougall v Richmond Adult Community College* [2008] IRLR 227, [2008] ICR 431.
- 22) For any claim to succeed, the burden is on the Claimant to show, on the balance of probabilities, something in the nature of an 'impairment' whether it is a mental or physical condition.

Disability discrimination arising from disability

- 23) Section 15(1) of the EqA provides -

“(1) A person (A) discriminates against a disabled person (B) if –
(a) A treats B less favourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- 24) Paragraph 5.6 of the Equality and Human Rights Commission: Equality Act 2010 Code of Practice provides that when considering discrimination arising from disability there is no need to compare a disabled person's treatment with than of another person. It is only necessary to demonstrate that the unfavourable treatment is because of something arising in consequence of the disability.

Burden of proof: discrimination

- 25) In determining whether the respondent discriminated the guidelines set out in *Barton v Investec Henderson Crossthwaite Securities Limited* [2003] IRLR 332 and *Igen Limited and others v Wong* [2005] IRLR 258 apply. The Claimant must satisfy the Tribunal that there are primary facts from which inferences of unlawful discrimination can arise and that the Tribunal must find unlawful discrimination unless the employer can prove that he did not commit the act of discrimination. The burden of proof involves the two-stage process identified in *Igen*. With reference to the Respondent's explanation, the Tribunal must disregard any exculpatory explanation by the respondents and can take into account evidence of an unsatisfactory explanation by the respondent, to support the claimant's case. Once the claimant has proved primary facts from which inferences of unlawful discrimination can be drawn the burden shifts to the respondent to provide an explanation untainted by sex [or in the present case age], failing which the claim succeeds.

Unfair dismissal

- 26) Section 94(1) of the Employment Rights Act 1996 ("the ERA") provides that an employee has the right not to be unfairly dismissed by her employer.
- 27) A fair dismissal for long-term illness requires consultation, medical investigation and consideration of options such as alternative employment. Capability can be assessed with reference to health or other physical or mental qualities – Section 98(3)(a) of the ERA.
- 28) Section 98(4) ERA provides that 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 reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the respondent's undertaking) the employer acted unreasonable or reasonably in treating it as a sufficient reason, and this shall be determined in accordance with equity and the substantial merits of the case.
- 29) The question for the Tribunal is the reasonableness of the decision to dismiss in the circumstances of the case, having regard to equity and the substantial merits of the case. The Tribunal will not substitute its own view for that of the Respondent. In order for the dismissal to be fair, all that is required is that it falls within the band of reasonable responses open to employer. It is necessary to apply the objective standards of the reasonable employer – the "band of reasonable responses" test – to all aspects of the question of whether the employee had been fairly dismissed, including whether the dismissal of an employee was reasonable in all the circumstances of the case.

Conclusions

Disability

- 30) We find that the Claimant had a physical impairment of long COVID. We find this did have a substantial effect on his day-to-day activities, including for example his ability to do household tasks, drive, the effect on his memory, his ability to concentrate, and his

general ability to undertake any physical activity.

- 31) As to whether his condition was likely to last 12 months as at the date of termination of employment and or the date of his appeal hearing, we find that it was likely. The Claimant had already been off sick for 8.5 months with no foreseeable return to work and no foreseeable imminent improvement. Occupational health had suggested a further review in two to three months and the Respondent did not accept that there would be improvement within that time. It must be the case that the effects could well have lasted 12 months as at the 1st of October 2021.
- 32) We therefore conclude that the Claimant was disabled at the material time within the meaning of s.6 of the Equality Act 2010.

Discrimination arising from disability

- 33) We find that the Respondent knew or ought reasonably to have known that the Claimant was disabled. The Respondent had knowledge of all of the elements comprising the test of disability based on the information they had received from the Claimant and from the various occupational health reports. As set out above, the Respondent did not accept that the Claimant's health would improve.
- 34) It is accepted that the Claimant was dismissed on the 1 October 2021. Clearly dismissal is unfavourable treatment.
- 35) We therefore considered whether the dismissal was because of something arising in consequence of the Claimant's disability?
- 36) The Claimant says he was off sick and that his sickness absence arose from his disability. Clearly it did. The Claimant says that this means he would have been entitled to 12 months sick pay, which was enhanced above the rate of SSP potentially being up to 80% of his pay for a number of months. The timing of the dismissal was the day after the furlough scheme ended, which we find to have been a motivation in the timing of the Claimant's dismissal. The Claimant's entitlement to sick pay arises from his sickness absence. Whether the dismissal was because of absence or because of a continuing obligation on the Respondent to pay sick pay, we find that the dismissal was in consequence of something arising from his disability.
- 37) We then have to consider whether the dismissal was a proportionate means of achieving a legitimate aim. We carefully considered the particulars of the Response and found nothing put forward by the Respondent that would amount to a legitimate aim. There is nothing to suggest that dismissal was required to achieve a legitimate aim and nothing to suggest dismissal was proportionate. No other evidence has been submitted by or on behalf of the Respondent. Accordingly we find that the dismissal was not a proportionate means of achieving a legitimate aim and therefore the claim for discrimination arising from disability succeeds.

Unfair dismissal

- 38) It is agreed that the Claimant was dismissed and that there was a potentially fair reason for dismissal, namely capability. The question is whether the dismissal was fair.

- 39) The Tribunal notes that as at 1 October 2021, the date of the dismissal meeting, the Claimant had had an appointment on 29 September 2021 and he knew he would have another appointment shortly. The Respondent did not wait for the outcome of that second appointment. By the time of the appeal the Claimant knew that he was going to be referred to specialists. The Respondent could have reconsidered its position but again would not wait.
- 40) The letter of 1 October 2021 does not reference anything that was said at the meeting on 1 October, which leads us to conclude that the Respondent's decision was made before that meeting and that there was no intention of taking into account what the Claimant had to say. We have no notes of any meetings to suggest otherwise. That approach is outside of the range of reasonable responses.
- 41) We have taken into account that the Claimant was furloughed for approximately 8.5 months and that his furlough pay was based on 80% of his full-time earnings. We have also taken to account that it was clear that the Respondent considered the Claimant to be sick whilst furloughed and he was in fact sick at this time, and the timing of the dismissal was immediately after the end of the furlough scheme.
- 42) However the Claimant was a long serving employee with an exemplary record and in all of the circumstances as discussed above it was outside of the range of reasonable responses for the Respondent not to wait for specialist input, or even to consider the timing of when that input may be available, even if that would have meant a dismissal fairly soon after the actual termination date. Accordingly we find that the Claimant was unfairly dismissed.
- 43) The Claimant confirmed at the start of the hearing that he seeks a declaration as his remedy for disability discrimination we make that declaration. He also seeks a basic award as compensation for unfair dismissal and we award the basic award to the Claimant with no deductions.

Remedy – basic award

- 44) The Employment Rights Act 1996 (Coronavirus Calculation of a Week's Pay) Regulations 2020 ("the 2020 Regulations") amended the method of calculating a week's pay with the aim of ensuring that employees were not disadvantaged by taking a reduction in pay whilst furloughed. In very brief summary, weeks spent on furlough are taken into account in calculating a week's pay, but paid at the rate under the Claimant's contract of employment. It was submitted by Ms Skinner that Regulation 5 of the 2020 Regulations is applicable in this case. As the Claimant's pay varied depending on the hours worked, we needed to establish the hours for which the Claimant was paid whilst on furlough to then calculate what he would have been paid had he not been furloughed.
- 45) We do not know how many furloughed hours the Claimant was paid for. It is entirely unclear what hours the Claimant was furloughed for, or what hours he would have worked had he not been furloughed, because we do not have the rotas. However, on the balance of probabilities, based on pay and his pattern of working between 23.4 and 25.8 hours a week, we find that the Claimant was furloughed for an average of 24.6 hours a week.

- 46) Whilst we did not have the Claimant's contract of employment before us, we had payslips showing that the Claimant's normal hourly rate of pay was £11.73 as at the effective date of termination of his employment.
- 47) Based on that average, we therefore found a week's pay to be 24.6×11.73 , which is £288.56.
- 48) The Claimant had six years' service and was aged 56 as at the Termination date.
- 49) His basic award is therefore: $288.56 \times 6 \times 1.5 = £2,597.04$.

Employment Judge Youngs
Date: 09 November 2023

Reasons sent to the Parties: 04 December 2023

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