Case Number: 3311882/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr N Oliveira	**v**	WM Morrisons Supermarket Ltd

Heard at: Bury St Edmunds **On:** 20-23 November 2023

Before: Employment Judge R Wood; Mrs S Elizabeth; Mr A Schooler

Appearances
For the Claimant: Mr C Fray (Representative)
For the Respondent: Mr S Liberadzki (Counsel)

STATEMENT OF REASONS

Claims and Issues

1. Page numbering referred to in square brackets in these reasons are to pages in the bundle, unless otherwise stated.

2. This is a claim which involves allegations of a failure to make reasonable adjustments in respect of a disability, as well as unfair dismissal. The respondent asserts that the claimant was dismissed in June 2022 on the grounds of capability (i.e. an inability to carry out the work he was employed to do) relating to long term ill health problems. It is common ground that at all material times, the claimant had been diagnosed with depression, which amounted to a disability as defined under the Equality Act 2010 ("2010 Act").

3. The claimant agrees that capability was the genuine reason for the dismissal, but he submits that the respondent was premature in terminating his employment. He suggests that it should have waited for at least 4-5 weeks, pursuant to the advice provided in an occupational health report. The claimant argues that the failure to follow this advice not only rendered the dismissal unfair, but also placed the respondent in breach of its duty to make reasonable adjustments. The respondent asserts that its decision to dismiss fell within a band of reasonable decisions in the circumstances. Further, that there was no breach of its duty under section 20/21 of the 2010 Act because the advice in the report did not constitute a 'provision, criteria or practice ("PCP") as defined. Neither did the failure to follow the advice amount to a breach of a PCP.

Procedure, Documents and Evidence Heard

4. The Hearing took place on 20-23 November 2023. The claim was heard at a face to face hearing at the Employment Tribunal in Bury St Edmunds. We first of all heard testimony from the respondent's witnesses. We heard evidence from Miss Iwona Makowska (who at the relevant time was employed by the respondent as a production manager); and from Mr Jason Beaumont (head of operations for horticulture). We also heard from the claimant, Mr Nuno Oliveira. Each of the aforesaid witnesses adopted their witness statements and confirmed that the contents were true. We also had an agreed bundle of documents which comprises 504 pages (12 pages of the claimant's medical notes were added to the bundle during the hearing). We also heard helpful submissions from the claimant and Mr Liberadzki, who also provided us with written closing submissions.

5. In coming to our decision, the panel had regard to all of the written and oral evidence submitted, even if a particular aspect of it is not mentioned expressly within the decision itself.

Legal Framework

12. The relevant case law in relation to unfair dismissal is to be found in the Employment Rights Act ("ERA") 1998 at section 98:

"*General*

(1) In determining for the purpose 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 of qualifications of the employee for performing work of the kind which he was employed 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."

13. In relation to the claim that the respondent failed to make reasonable adjustments, the relevant parts of 2010 Act in this case reads as follows:

"20

Duty to make adjustments

(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage…..

21
Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person…..”

List of Issues

14. The agreed list of issues in relation to unfair dismissal were?

    (i) What was the reason or principal reason for dismissal? This was agreed by the parties as being capability on ill health grounds.

    (ii) In which case, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. The Tribunal will usually decide, in particular, whether:

    - The respondent genuinely believed the claimant was no longer capable of performing their duties;
    - The respondent adequately consulted the claimant;
    - The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
    - Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;
    - Dismissal was within the range of reasonable responses.

15. In relation to the claim for failure to make reasonable adjustments, the issues for the Tribunal were as follows (see [94]):

(iii) Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

(iv) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:

- Not implementing the the proposals of the occupational health report dated 18 May 2022, in particular by not giving the claimant a further four to five weeks to assess the impact of the adjusted medication and continued counselling

(v) Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability?

(vi) Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

(vii) What steps could have been taken to avoid the disadvantage

(viii) Was it reasonable for the respondent to have to take those steps [and when]?

(ix) Did the respondent fail to take those steps?

Findings of Fact

16. Having listened carefully to all of the oral testimony in this case, and having read the documents presented to us, the Tribunal makes the following key findings of fact relevant to the issues we had to determine.

17. The claimant was employed by the respondent as a warehouse operative from November 2015 until his dismissal on 10 June 2022. The claimant was first absent from work due to ill health on 3 June 2021. We accept that he had experienced problems with his mental health prior to this. However, it had not caused him to be on sick leave. We also accept that he was first diagnosed formally with depression in or around June 2021.

18. It was at about this time that the claimant was first prescribed anti-depressants in the shape of fluoxetine. He continued to be prescribed fluoxetine at 20mg per day until 9th May 2022, when the dose was doubled. His prescription was changed on 13 July 2022 to a 75mg daily dose of venlafaxine (the claimant knew it by its brand name, Effexor). We also accept that the claimant was referred to MIND in 2021, and continued to have regular counselling sessions there throughout the period relevant to this case. The claimant also had some therapy at the Northampton Hospital between about October 2021 and February 2022, and had support from the community mental health team. The claimant had been referred for further therapy by his

GP but had remained on the waiting list throughout the period from April 2022 onwards.

19. There is some important background to this case which does not strictly fall within the parameters of the claim. On 10 May 2021, the claimant was called to a formal investigation meeting by the respondent. It was in relation to alleged breaches of the respondent's 'respect in the workplace' policy. We accept that this investigation, and the disciplinary process which followed, had a profound impact on the claimant's perception sense of wellbeing, and his perception of the quality of the relationships he had with colleagues at work, particularly management figures at Morrisons as a whole. It is not a coincidence that the claimant's sick leave commenced on 3rd June 2021, a few days after the investigation meeting. We do not find that the process caused the claimant's illness. However, it exacerbated the claimant's mental health state, and he experienced low moods and anxiety, amongst other symptoms.

20. We do not need to go into the nature of the investigation in any detail. In short, it was alleged that the claimant had conversations with colleagues which contained offensive racist references. It is important to note that we fully accept that the respondent was obliged to investigate this matter. The claimant himself appeared to accept this at the hearing. Moreover, the respondent found that there was no case to answer so far as the claimant was concerned. It may not have been the ringing endorsement that the claimant sought, but it was a positive outcome from his perspective. We have not identified any substantive flaw in the process adopted by the respondent. None were highlighted to us.

21. At some point in 2021, the claimant lodged a grievance against his managers. There is some dispute as to precisely when the grievance was first raised but in our view little, if anything, turns on the point. The grievance centred upon his perceived treatment at the hands of his managers, who he said had ignored him for long periods of time going back to 2019. There were other allegations of mistreatment, which included the suggestion that he had not been treated the same as other staff when 'Covid-19' bubbles were established in 2020. We stress that this is only the briefest summary of the grievance because, as with the disciplinary process, it is not necessary for the purposes of this claim to examine the matter in detail. Again, it suffices to say that the respondent found against the claimant on the grievance on 14 December 2021. The claimant appealed, but again was unsuccessful on 11 February 2022.

22. The processes associated with the claimant's grievance, and the disciplinary hearing, left the claimant with a sense of injustice which extended to the whole of the Morrison's company, and not just his direct managers, or the site at which he worked at Rushden. In this regard, we accept the observations of Dr Adrian Jowett (Occupational Health Physician) dated 18 May 2022 [249]. In his report, Dr Jowett observed that "*Mr Oliveira was clear today that he disagrees with the outcomes the employer has reached, both in terms of his initial complaint, and a subsequent appeal to that outcome. He states that*

as a result, he does not trust the employer sufficiently enough to consider a return to work. He feels that a return to work would result in too great a risk to his mental health for him to do so.". Indeed, the claimant told us at the hearing that he feared a return to work because of the risk that the treatment had had received from his managers previously would be repeated.

23. Dr Jowett continued: "*Although Mr Oliveira is medically unfit for work due to depression, in my professional opinion, his position in relation to the workplace issues is likely to be a significant barrier to his returning to work. I cannot advise you of when Mr Oliveira's view on the workplace issues is likely to change. It may be that an irretrievable breakdown in trust has been reached.".* Having listened very carefully to the evidence of Mr Oliveira, and considered with care the notes of the various capability meetings, we accept this assessment of the claimant's prevailing attitude towards the respondent. We would add that the breakdown in trust was wholly unilateral. We accept that there was no loss of trust so far as the respondent was concerned. We dwell on this issue because we think it is a significant dynamic of the overall fairness of the decision to dismiss.

24. The capability process was guided by the 'Attendance Management Policy' which appears at [107]. There was surprisingly little reference to this during the hearing. When asked, Mr Fray stated that he alleged only one breach of the policy, namely that the respondent had failed to make reasonable adjustments. This is touched upon in the policy at page 109 of the bundle, in the fourth column of that page. It requires that all reasonable adjustments be explored in capability meetings, having regard to the possibility that attitudes may have changed since previous discussions. In all other regards, the claimant accepts that the respondent complied with its own policy. We agree with his assessment.

25. We note in passing that the policy states: " *A Medigold referral will be made, who will be able to provide advice on whether or not the colleague is able to return to work. This will be taken into consideration at the meeting.*". Medigold is, of course, the occupational health provider for the respondent.

26. Pursuant to the said policy, there was a telephone discussion with the claimant on 8 March 2022, during which he confirmed that he was not fit to work in any capacity and that he could not provide any time scale for his likely return. He declined an occupational health review at the time, as he didn't think it would change anything [224].

27. There was a capability meeting on 6 April 2022, the notes of which appear at page 226. It was chaired by Miss Makowska. We accept her account of this meeting, as we do her accounts of other meetings. This evidence was largely unchallenged by the claimant. She explained that the claimant was due to see his GP in the following few days and that he was hopeful of making some progress with his treatment. She explored some alternative roles. In particular, we find that Miss Makowska suggested that the claimant might return to work at the site that she managed, at Thrapston, as a way of her overseeing his return, and ensuring his wellbeing. She also suggested a

return to the logistics side of the business, or to retail. The claimant was told that there were "many roles" they could consider. He was offered roles driving fork lift trucks or PPT's (another type of vehicle) at the Rushden site or any other site [228].

28. She asked if he could operate vehicles whilst taking his medication. She was told that it was not possible at the moment but that this might change with his new treatment. She asked him to consider options around shorter hours and different sites.

29. The meeting was reconvened on 11 April 2021. Miss Makowska asked the claimant about his GP appointment. He explained that he had been referred to a psychiatrist, and that he needed to follow the advice of his GP. The claimant went onto state that he was not fit to return to work. He was asked if he had considered the alternative roles and options discussed at the previous meeting. Mr Oliveira began speaking about his grievances and disciplinary hearing. He was asked if he could see himself coming back to work. The claimant stated that it was impossible to answer.

30. The meeting was again reconvened on 22 April 2022. The claimant explained that he was due to change his medication, but that he was still unfit to return to work. He didn't have any dates for his return. Somewhat cryptically, he talked about the need to make a fair decision for both sides. He was asked if he might return to work in the foreseeable future. He said no, and that it was hard for him to "forget all the process". He talked about having missed the deadline to bring a constructive dismissal claim. Miss Makowska offered the claimant a trial, a walk around the site with her. He refused saying it would be a "mistake" for him. He went on to discuss Morrison's sacking him, and paying him for lost wages and pension.

31. Following this meeting, the claimant agreed to be referred to Medigold. As a result, the respondent did not contact the claimant's GP. The resulting report, already referred to, was dated 18 May 2022. It is axiomatic to both side's arguments in this case.

32. In broad terms, the report coincided with the increase in the claimant's daily dose of fluoxetine. We find that the dose was doubled because the existing dose was not having sufficiently beneficial impact on the claimant's symptoms. We further find that the claimant and his GP were hopeful that the change to his medication might improve his mental health state in the coming weeks. However, we accept the observations of Dr Jowett that "*Significant and sustained further mental health recovery will be required before a return to work is likely to be feasible.*".

33. This comment was followed by what has turned out to be the focus of this case, namely Dr Jowett's observation that "*The dose of the controlling medication is anticipated to increase in the coming few days. That may take 4 or so weeks to demonstrate effect. The employer* ***could*** *[our emphasis] consider OH review for Mr Oliveira at the 4-5 weeks stage to evaluate*

whether significant benefit and so mental improvement has occurred by that stage.".

34. The report of Dr Jowett is one which deals with a number of different issues. It seems to us that there is a danger in placing too great an emphasis on one part of the report. We take the view that it is necessary to look at at the findings and recommendations of Dr Jowett as a whole. We agree with the observations made by Miss Makowska and Mr Beaumont to that effect.

35. The capability meeting was reconvened on 10 June 2022. We note that the meeting was held at the claimant's home, pursuant to his request. The notes of this meeting appear at [237A to 240], and then at [255 to 256]. We accept that the notes were separated in the bundle as a result of a genuine error. The respondent was not in the habit of including the details of meetings at the head of any minutes, so that it was not always easy to tell which minutes related to a particular meeting.

36. At the 10 June meeting, the claimant explained that he was feeling better. He said he felt more distance from the problems (we assume a reference to the history of grievances with his managers). He also said he was sleeping better, and attributed this to his new medication regime. However, he explained that he was still unfit to work. He did return to the previous issues, and clarified that his problem was with the whole of the company and not just with those at the Rushden site.

37. At the conclusion of the meeting, Miss Makowska dismissed the claimant with immediate effect. The reasons are set out in the notes of the meeting, and in a letter dated 17 June 2022 [258]. In summary, the reasons for dismissing the claim were as follows. He had not worked due to mental illness for about 12 months. There remained no prospect of the claimant being fit for work in the foreseeable future, for purely medical reasons. In addition, there was the question of trust, which she concluded had broken down so far as the claimant was concerned. It was Miss Makowska's view that the proper processes had taken place in respect of both the disciplinary matter and the claimant's own grievance, and that these issues had been exhausted. Accordingly, she concluded that there was no substance to his obvious sense of injustice. Despite offering to make a number of adjustments, there seemed no prospect of the claimant coming back to work in any capacity.

38. The claimant appealed his dismissal. In essence, his point at appeal was as it is before us, namely that the decision to dismiss was premature having regard to Dr Jowett's suggestion. The appeal was dealt with by Mr Beaumont. We heard from him during the hearing and accepted his evidence. Like Miss Makowska before him, it appeared to us that he gave measured and straightforward testimony. In his witness statement, he explained that his role had been to review the decision taken by Miss Makowska, and to decide whether the correct decision had been made. Before us, he added that he was prepared to take into account new information as part of that process. We accepted this evidence.

39. The appeal hearing was held on 25 August 2022. It was delayed, in part, by the claimant's request for an interpreter. There has been some criticism of the respondent during the hearing that an interpreter was not present at previous meetings. We accept the respondent's observation that an interpreter could have been requested at any time by the claimant. We are satisfied that had one been requested, then it would have been provided. In all other regards, the respondent went to some lengths to accommodate the claimant during the capability process. We see no reason why it's approach would have been different on this issue. Moreover, we accept that the respondent was somewhat surprised to find that an interpreter might be necessary. The claimant's first language is Portuguese but we accept that it was their genuine understanding that his English was more than adequate for the purpose of the processes undertaken. We also note that although an interpreter was provided on 25 August. The claimant was introduced to her at the outset of the meeting, but did not not interact with her any further.

40. The notes of the meeting appear at [288]. We find that at no point during this meeting did the claimant suggest that he was fit for work. He was asked on more than one occasion what he wanted from the meeting in terms of outcome. At no time did he asked to return to his employment with the respondent. He said he simply wanted to know if the right decision had been made. The claimant accepted that he had been offered alternative roles, shift patterns and locations, but had refused them. He explained that he could not drive because of his medication and that the respondent had not properly considered the health and safety implications of his return to work. Again, the claimant returned to the issues of his disciplinary and grievance. The claimant went on to say he was feeling better and sleeping more, but that he was not fit for work and could offer no timetable for return in the foreseeable future.

41. The claimant disagreed with this at the hearing. He highlighted an answer he had given at page 291 of the bundle, namely that he had recently had an appointment with a specialist about his health, and that 'they' had decided he was fit for work. At the hearing he suggested this advice had been giving by his GP, not a specialist. In either case, no documentary evidence of this advice has ever materialised. It was never provided to the respondent, and has not been presented to the Tribunal. We therefore place little weight on this part of the claimant's case. We prefer Mr Beaumont's evidence, and that in the contemporaneous notes of the meeting of 25 August, that the overriding impression the claimant gave was that he remained unfit to work and that there was no immediate prospect of return.

42. By letter dated 5 September 2022, the respondent upheld the dismissal [294]. Mr Beaumont told us that had there been any indication of a significant change of circumstances, either in terms of the claimant's mental health, or his prevailing attitude towards the respondent, then he may have considered seeking further information with a view to overturning the decision. However, he felt there was an absence of such information at the meeting. It appeared that little had changed since June. He was satisfied that all reasonable adjustments had been considered.

43. The claim was received by the Tribunal on 20 September 2022 after a period of early conciliation through ACAS.

Decision and Reasons

44. By reference to the list of issues set out above, the Tribunal has arrived at the following decisions.

45. We find that the genuine reason for dismissal was capability. It has not always been the claimant's case that he admitted this fact. However, having discussed the matter with Mr Fray on more than one occasion, we are satisfied that the claimant no longer takes issue with this aspect of the respondent's case. In any event, it is plain from the witness evidence we have heard, and from the contemporaneous documents, that the respondent was correctly preoccupied with the question of capability arising out of the claimant's long term ill health absence from work.

46. We are also satisfied that the respondent adequately consulted with the claimant. Again, it is our understanding that this is not contested by the claimant. Nonetheless, it is apparent from the wealth of correspondence in the bundle that between June 2021 and June 2022, that the parties were in constant contact. Moreover, the capability meeting itself was held over 4 different occasions. We find that this was the result of the respondent's desire to ensure that the claimant had every opportunity to provide them with information, and to convince them of his fitness to work, if not immediately, then within a reasonable time frame.

47. This question ties in with the next, which is whether the respondent carried out a reasonable investigation, including finding out about the up to date medical position. The claimant was referred to the respondent's OH advisor on two separate occasions, the second of which took place on the eve of the decision to dismiss. This report was therefore as up to date in terms of the medical situation as could reasonably be expected. We find that it was reasonable of the respondent to have taken the option to refer to Medigold, rather than wait for correspondence from the claimant's GP. In any event, there is no criticism of the Medigold report. Indeed, the claimant relies upon it as the crux of his case. There is no suggestion that the respondent did not have in it's possession all of the relevant information about the claimant when it made the decision to dismiss. What is alleged is that the information was wrongly interpreted, or not given sufficient consideration.

48. This brings us to the final and most contentious question, namely whether the respondent could reasonably have been expected to wait longer before dismissing. In our judgment, the claimant's case in this regard is based on a misunderstanding of the overall content of Dr Jowett's report, and its purpose in the context of the capability process as a whole. Firstly, the report is for guidance only. It is clear from the policy itself that the obligation upon the respondent is to consider the contents of the report. They are not instructions. It is to be considered along with the other information that the employer may have available to it. In other words, it is part of the picture.

49. It is true to say that Dr Jowett does mention that the respondent 'could consider an OH review at the 4-5 week stage….". In our view, it is very much a suggestion, and one which must be read in conjunction with the other observations made in the report. In our judgment, the predominant message of the report is that for two reasons, the claimant is unlikely to be fit to return to work in the foreseeable future. The reasons being, the claimant's ill health, and the breakdown of trust so far as he was concerned. There was clearly a significant and important interplay between these two factors. In our view, it would have been very difficult to have resolved one of these issues without the other. For perhaps understandable reasons, the claimant had become entrenched in his view of the respondent and his employment. There seemed little if any likelihood of this situation changing. This was the overarching reason why the respondent dismissed the claimant, together with the fact that the claimant had already been off sick for 12 months. We agree with its assessment of the situation in June 2022, and it's interpretation of the prevailing message of the OH report.

50. We are satisfied that the respondent did all that it could to break this impasse. It has been suggested by the claimant that the only alternative role he was offered was that of packing. This was clearly untrue. As we have set out above, he was offered several roles, at numerous locations, and a phased return to work on reduced hours. Miss Makowska even offered to take him under her wing at Thraptson, and to walk him around the site by way of introduction. We fail to see what else the respondent could have done. As was suggested by her at the time, it was not open to Miss Makowska to turn back time. The past could not be changed. In our view, she was correct to take the view that the previous internal processes had been exhausted and that the parties should move on. It is perfectly plain to us that the claimant was unable to do this, and that by April/May/June 2022, he hoped for an exit from the company with a compensation payment. In other words, he had little if any intention of returning to work for Morrisons, and said as much on more than one occasion. We therefore find that the evidence clearly supported the conclusion that there was no purpose in having a further OH review in June/July 2022.

51. Neither can we see any proper ground for criticising the appeal process. As we have stated, the situation had not materially changed from the one which presented to Miss Makowska. We are satisfied that had this not been the case, that Mr Beaumont was open minded and fair enough to have considered a different approach. It is interesting to note that that even on 25 August 2022, the claimant was still not fit to return to work, and could offer no timetable to return. This does rather suggest that the respondent was correct, and that to have waited for a further 4-5 weeks in June would not have borne fruit.

52. Accordingly, we find that the decision to dismiss was one which fell within a band of reasonable decisions that an employer might have made. It was a fair dismissal.

53. We then turn to the claim under section 20/21 of the 2010 Act, namely a failure to make reasonable adjustments. I am afraid that we take the view that this aspect of the claim is misconceived. It is submitted that the PCP here is "***Not*** *[our emphasis] implementing the proposals of the OH report dated 18 May 2022, in particular by not the claimant a further four to five weeks to assess the impact of the adjusted medication and continued counselling*." (See Judge Ord's case management order).

54. In our judgment this is not capable of amounting to a PCP as defined by the 2010 Act. It is neither a provision, criteria or practice to implement proposals in OH reports. The relevant policy goes no further than creating the obligation upon the respondent to consider the contents of such reports. It is certainly not a PCP to **not** implement any proposals in such a report.

55. In this case, it is out judgement that the respondent correctly obtained a report from Dr Jowett, and properly considered his findings. In our view, its approach this information, and to the all of the other evidence it had acquired during the capability process, cannot be criticised. It had regard to the report, and applied it in a fair way. The section relied upon by the claimant was nothing more than a suggestion, to be understood against the back drop of what had come earlier in the report, namely that there was little, if any, prospect of the claimant's return to work in the near future, even after 12 months of ill health absence.

56. We therefore dismiss this aspect of the appeal on this ground. However, in a broader sense, we find that the respondent left no stone unturned in seeking to accommodate the claimant. It would, in our judgment, be against the preponderance of the evidence to suggest that the respondent had, in any sense, failed to make reasonable adjustments in the circumstances of this case.

57. The claims are therefore dismissed.

Employment Judge R Wood

Date: 8 December 2023…….

Sent to the parties on: 12/1/2024

N Gotecha
For the Tribunal Office