EMPLOYMENT TRIBUNALS

Claimant: Mr KP McConnell
Respondent: WM Morrisons Supermarkets Limited

Heard at: Newcastle Civil & Family Courts & Tribunal, Barras Bridge, Newcastle upon Tyne NE1 8QF via CVP

On: 16th, 17th, 18th, 19th October 2023

Before: Employment Judge AEPitt
Mrs C Hunter
Mrs J Johnson

Representation
Claimant: In Person
Respondent: Mr J Davies, Counsel

JUDGMENT having been sent to the parties on 26th October 2023 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:

REASONS

1. The claimant who was born on 30th January 1972 was employed by the respondent between 30th May 2000 and 29th January 2023. At that time, he was 53 years of age. He brings claims for Claims Unfair, Constructive dismissal, section 98 Employment Rights Act 1996; Direct Disability Discrimination section 13 Equality Act 2010; Indirect Disability Discrimination section 19 Equality Act 2010; Failure to make reasonable adjustments sections 20 and 21 Equality Act 2010; Victimisation section 27 Equality Act 2020. In addition, he claims he was dismissed because there would be a changes to his contract which would have a material detriment to him if he transferred to the proposed new Employer. Regulation 4(9) Transfer of Undertakings Regulations 2006.

2. The Tribunal had before it a bundle of documents which included the pleadings, various documents relating to the claimants employment; occupational health reports and Physio meetings; previous COT3 agreements and documents relating to the proposed transfer to GXO Services.

Introduction

3. Many of the facts set out below are historic in nature and the Tribunal has not been required to make findings of fact about them. Some of the matters pertain to the issue of time limits, others touch on claims. Where there is a conflict of facts which need to be resolved the Tribunal has taken account of the statements and evidence of the witnesses and the documents in the bundle and applied the burden of proof.

4. The respondent is a leading supermarket chain in the UK. The claimant was employed as a Warehouse Operative at its site in Stockton-on-Tees. The warehouse has two main functions; first it is used to store goods which are then packed and loaded to go to stores. This section of the operation has two separate areas. An area for fresh foods which have a shelf life such as diary milk etc., this is called the Fresh, and an area for other goods such as tinned goods this is called the Ambient. The temperature in the Fresh is much lower than the Ambient because of the nature of the goods stored therein.

5. There are a number of different functions in the first warehouse, these include 'picking', an employee is required to select goods from within the warehouse and place them on a pallet ready to be loaded. 'Tramming', using a vehicle to carry bulk loads of stock from one location to another, moving between ambient and the fresh. This requires the employee to drive across 'a plate'. This is a repair to the floor between the two areas. It also includes cleaning and operating forklift trucks. Loading is loading a full pallet of stock onto wagons. On occasion it will require the employee to consolidate stock from two pallets or cages into one. This requires manual lifting. Tipping, is bringing stock into warehouse from wagon, in AF (Ambient/Fresh) these are cages or pallets full of stock, which would be heavy as full of stock in RRU (Returns & Recycling Unit) would either be empty or full of waste to recycle Initially Cleaning was carried out inhouse but this was outsourced before the events of this claim. The two parts of this warehouse are in the same building but are distinct and separate from each other. Historically there were issues with the floor which required repair in a number of areas, one such was at the point where an employee passed from Ambient to Fresh. This was repaired using a 'docking plate'. The plate is at a slightly higher level than the floor, although we don't accept it was like a speed bump in height. This 'fix' was chosen because the floor required to be supported, to carry out the best repair would require closing both areas for the floor to be taken up and re-laid. This had a cost implication for the respondent. H&S were satisfied that the repair was adequate.

6. The second operation carried out on site is that of Returns and Recycling, the RRU. This is in a separate building, but still part of the warehouse. Here goods which are returned and recycled are sorted.

7. From 18th May 2008, the claimant's contract was varied to 45 hours on nights in Ambient Warehouse, up to 2014 he was mainly employed on tramming but also did picking.

8. The claimant sustained an injury to his back in October 2010 and on 13th July 2012 diagnosed with Joint Hypertrophy And Degenerative Disc Disease. The respondent does not dispute that this amounts to a disability for the purposes of the Equality Act it also accepts it had knowledge of the disability at the relevant time. It is clear that the claimant started to have problems with the tasks he was undertaking from 2012.

9. In August 2012 the claimant provided a fit note from his GP which recommended he did not lift. There were issues arising from this and the claimant raised a grievance against his managers. As a result, an Occupational Health referral was undertaken The conclusion was that his back was affecting his ability to undertake manual handling. The claimant told Occupational Health he would be able to carry out cleaning duties if he were using a pallet truck. He was also able to do loading but must drive very slowly over the docking plate.

10. In 2014 following a meeting with his managers, it was agreed the claimant would only carry out picking duties once a week before his day off. The same year the respondent was seeking volunteers for redundancy. The claimant alleges that during a meeting with his managers tried to pressurise him into taking redundancy by informing him that all employees would be expected to carry out picking duties. As a result, the claimant raised a second grievance, Grievance 2 against his managers. The outcome was a letter from the managers outlining how they proposed to move forward with his ongoing health problems. It was agreed that he would continue to pick only once a week and undertake tramming the rest of the time .

11. In 2017 a further issue arose when the claimant was asked to pick on a day when he was scheduled to work the day following. As a result, the claimant was absent because of pain from his back. A further referral was made to Occupational Health. The conclusion was that the claimant was fit for work with amended duties. Concerns were raised about his ability to carry out picking duties at all. However, the report writer required further medical information before any firm recommendations could be made.

12. An issue arose in relation to access to the medical records and the report was delayed until November 2017. Whilst this was being resolved the claimant raised a further grievance, Grievance 3, because he had been asked to pick on day when he was due to work the following day. The grievance was not upheld.

13. The Occupational Health Report recommended that the claimant continue with his current pattern of work and to try to minimise the amount of picking he did. In November 2017, the claimant was asked to work in RRU and since that time has predominately been working in that section.

14. As a result of the grievance not being upheld the claimant issued proceedings in the Employment Tribunal which ultimately resulted in a COT3 settlement, 'the July agreement'. The relevant part of the agreement for these proceedings reads as follows:

> 'whilst the claimant remains employed at the respondent's Stockton site in his current role, only require the claimant to undertake picking duties for one shift a week immediately prior to a day off from the date of this agreement becomes bindings, unless the claimant requests or agrees to work additional picking shifts (provided everything in this clause is permitted by Occupational Health).
>
> 'provide the claimant with the same opportunity (in terms of frequency) as his colleagues on his shift pattern, to undertake alternative warehouse duties other than picking and recycling (including but not limited to cleaning and tramming) when such duties are available (provided such duties are permitted by Occupational Health)

15. During 2019 the claimant did raise the issue of training with the management team. He raised it during his appraisal in May 2019, requesting that he is trained on loading and tramming. raises he would like to be trained on scanning gun so he can weighing tramming and loading, marked as ongoing trying to improve by asking to be trained in other functions e.g. loading and tramming but no action was taken to look at these options. He also raised an issue with the floor in the warehouse requiring a repair.

16. The claimant lodged a grievance in July 2019, the grievance was not upheld. The claimant commended a second Tribunal case against the respondent. This was settled by a COT3, the December agreement. The relevant term is as follows:

> ' Starting from Sunday 15th December 2019 the claimant's shifts will compromise only non picking duties'

The claimant also agreed to an Occupational Health referral and attend physiotherapy as directed by Occupational Health.

17. An Occupational Health report in January 2020 recommended that the claimant would benefit from continued working in the RRU and no driving on uneven surfaces at work at work, there should be an assessment of the tasks the claimant carried out to avoid pushing pulling bending and importantly twisting the spine. He should not lift weights over 12kg.

18. Ms Pritchard, of the respondent queried the uneven surfaces at work asking if this would include going over a dock plate onto the back of trailer to unload it? She described this as equivalent of going over a speed bump and by no means an uneven surface. Whilst the tribunal has not heard from Ms Pritchard, it does not accept that she lied when describing the situation. In any event the response from the Occupational Health provider stated it would be safe in not repetitive completed in a controlled manner a low level change in height unlikely to exacerbate. However, and in any event the restriction was removed in a further report.

19. A Review meeting was held with the claimant regarding the report was on 4th February 2020. As a result, a Workplace Assessment was carried out on 24th March 2020. The assessment recommended that he continue in the role currently in and not to carry out any duties that may exacerbate his condition such as heavy lifting. Any role he performs should be changed every 20-30 minutes. In relation to picking the assessment did not rule it out indefinitely but he should only pick the lightest load and for no more than 30 minutes. The assessment also recommended that the claimant attend a rehabilitation programme for several weeks.

20. During 2020 the respondent made a change to the way goods were brought into the RRU. It dispensed with pallets and introduced roll cages. The claimant complains that these were causing him problems a further risk assessment should have been carried out. A workplace assessment review was conducted in May 2021 and this recommended that the claimant could push a single cage but this was the only task he could carry out in RRU.

21. At his appraisal in May 2021 seems disengaged with the process, unlike previous years, having no short term or long term goals other than doing his job. He made no further comment about the roll cages. He agreed with his mangers comment, 'Paul tips trailers in the RRU very health and safety conscious and complies with the clean as you go policy.'

22. The claimant did raise the issue of the cages in December 2021 when he gave a copy of the HSE risk assessment for pushing and pulling.

23. The claimant had an accident at work on 29th December 2022 and was absent until 4th January 2023. At this time, he was told he was unable to use a particular vehicle, MHE, to unload. This was because there was an issue with the card key used to start the vehicle overriding safety protocols.

24. It was on this day that the announcement was made to the employees in RRU that the function of the RRU was to be outsourced to GXO. They were informed collectively and given a briefing pack to answer any questions.

25. Following the meeting on 5th January 2023 the claimant contacted ACAS to start conciliation proceedings and thereafter presented an ET1seeking his potion back with the respondent.

26. The decision as to who was 'in scope for the purpose of the transfer was determined by Head Office and not at a local level. As day shift workers were contracted to work in the RRU, they were in Scope. In relation to night shift workers, following discussions, including discussions about employees who working in the RRU because of reasonable adjustments it was determined that the respondent would look at the 26 week period immediately before to see if an employee worked most or all of their hours in RRU.

27. Ms Butterworth in her statement sets it out as follows I Paragraph 20, 'There were 16 employees on night shift in the RRU The Claimant was one of these

employees as he worked nights. When applying the 26 week average, the Claimant had worked every single one of his shifts on RRU in the 26 weeks leading up to the transfer. This was not criteria put in place to target the Claimant, as he suggests. It applied to fifteen other Warehouse Operatives. Even if a 52 week average had been applied, the Claimant had still worked all of his shifts on RRU. When I did my secondment at the Stockton site during 2020, I had also been aware then that the Claimant only worked in the RRU. Therefore, the Claimant was deemed to be assigned wholly to the RRU operation and was in scope to transfer' In fact the claimant had worked almost exclusively in the RRU since 2107. Other employees who were in the RRU because of reasonable adjustments. Wayne Harland and Brian Richardson were temporarily assigned to RRU, as a result of reasonable adjustment, the hours they worked did not place them in Scope of the Transfer.

28. Ms Butterworth was overwhelmed by queries from employees on 5th January 2023. Ms Butterworth explained that when the claimant spoke to her, it was an impromptu meeting and she did not have a note taker with her. The Tribunal accepts her account that she tried to reassure the claimant and advised that she would attempt to deal with his queries in a formal one to one. Clearly, an impromptu conversation such as this was not the appropriate place to discuss the details of any one individual.

29. The respondent had strict time limits, as set out at page 168 to adhere to and were having to field queries from a large number of employees. As some of the employees were night shift workers Ms Butterworth and her team had to be available at a convenient time for them as well as the day shift/. The Tribunal accepts that this was a difficult time for MS Butterworth and the team involved in the transfer.

30. It is understandable that this would be an anxious time for all the employees concerned especially those with reasonable adjustments. As a result, Ms Butterworth held a meeting with two representatives form GXO, Paul Oliver and Rowena Crutchley. They confirmed to her that any reasonable adjustments would transfer with employees. A public meeting was held with the affected employees with a presentation by Rowley and Crutchley. Following the meeting many of the employees spoke to Rowley and Crutchley about the transfer. Their recollection is that no-one raised their own specific situation, and the queries were more general.

31. A first formal consultation meeting was held with the claimant on 12th January 2023. During this meeting the claimant raised the issue of his position going through at length the historic issues. It is clear that the claimant had concerns that upon his transfer he would be faced with a medical capability situation with GXO. He asked to be taken out of Scope of the Transfer. He was reassured that all his terms and conditions, including his adjustments would transfer with him. However, if he did not want to transfer he could look to secure another role with the respondent or he could object to transferring in which case he would be deemed to have resigned. The Tribunal concurs with Ms Butterworth he did take too much information

with him, that he was not listening to what he was told about his situation, the meeting became it was confusing and the claimant was perhaps trying to muddy the situation.

32. On 17th January 2023 the claimant informed the respondent in writing that he did not wish to transfer to GXO. He stated 'I wish to opt out because there is no suitable position for me within RRU due to the disability I have... I am not prepared to sign over to another company and continue in a role that causes me increased pain every shift.' He specifically relies on Reg 4(9) of TUPE, that there would be a substantial change in his working conditions.' He was advised he needed to complete a pro forma to opt out. It was clear in the briefing pack that an employee could do this , they could look for alternative employment within the respondents, but if they failed they would be deemed to have resigned.

33. A second consultation meeting was held with the claimant on 20th January 2023. This meeting followed much the same pattern as before. The claimant wants to air his grievances rather than discuss the transfer including referring back to historic Occupational Health reports.. The claimant was reassured that his adjustments would transfer with him.

34. On 25th January the claimant had a discussion with Rowley and Crutchley concerning his adjustments. Having reviewed the note of the conversation the Tribunal concluded that the claimant was trying to get the GXO employees to say that GXO would not comply with the adjustments, for example asking why would GXO comply with the COT3, they were not a party to it and it was not contractual. This is a very slanted way to ask a question. Indeed he goes further my proposing a hypothetical scenario 'If I were a new employee seeking employment would you employ me?' Unsurprisingly neither Rowley not Crutchley replied. Indeed, whilst posing many questions about his health neither replied in any way. This is not surprising, clearly the claimant had an agenda when he initiated this conversation. Having already indicated he did not want to transfer, he was now seeking confirmation from GXO that his position would change. This was an ambush by him and the Tribunal cannot read into the silences an agreement to his propositions.

35. A third consultation meeting was held on 25th January 2023 and the claimant raised the conversation with Rowley and Crutchley and produced his note of the conversation. He was again reassured that there was a role for him at GXO and this had been confirmed by Ms Crutchley. The claimant refused to sign the respondents opt out pro forma and so he would not be entitled pay in lieu of notice as it would classed as a resignation.

36. On 27th January 2023 Ms Butterworth rang the claimant to inform him the employees in Scope would transfer on 30th January 2023 but as he had not consented his employment with the respondent would end on 29th January 2023.

37. The claimant's employment terminated on 29th January 2023.

List Of Issues

38. The Issues were set out at a previous hearing and clarified at the commencement of the hearing as follows:-

TUPE

1.Was the claimant assigned to the part transferred namely Returns and Recycling Operation (RRU)

2. Did the claimant object to becoming employed by the transferor GXO Logistics, such that he was not dismissed by the respondent (Trasnferor) according to Regulation 4(&) & (8) of Transfer Regulations 2006

3.Was the claimant dismissed under Regulation 4(9) because the transfer involved or would involve a substantial change in his working conditions to his material detriment

Constructive Unfair Dismissal

1.Was the claimant, otherwise, constructively dismissed under sections 95(1)(c) and section 93 Employment Rights Act 1996

2.The claimant relies upon :-

An alleged breach of Clause 3.6 of the July COT3
An alleged failure to make reasonable adjustments.
An allegation that he was subjected to a discriminatory workplace
An allegation that the respondent 'was responsible for an ongoing/continuing situation of discrimination – the claimant has not particularised this

3.Did the above amount to a fundamental breach of contract of employment?

4.The claimant relies on a breach of the implied term of trust and confidence. Did the respondent conduct itself in such a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties

5. Did the claimant resign in response to the breach

6. Did the claimant affirm any such breach

Time Limits section 123 Equality Act 2010

1.Are the claimants claims for discrimination within time?

2. Was there a continuing act of discrimination extending over a period and /or should time be extended on a just and equitable basis.

<u>Direct Discrimination</u>

1.Was the claimant treated less favourably that his comparators Wayne Harland and Brian Richardson because of his disability?

2. The less favorable treatment relied upon is treating the claimant as assigned to the group to be transferred to GXO Logistics, when his comparators were not so treated

3. In relation to his comparators, were there no material difference between the circumstances relating to each case?

Indirect Disability Discrimination section 19 Equality Act 2010

1.Did the respondent apply the PCP of expecting employees working on a tipping function to fully empty trailers of all their contents?

2.Did this put persons who share the claimant's disability at a particular disadvantage in that it increases the amount of pain and makes them very tired

3.Did this put the claimant at a disadvantage from 2017 onwards and in particular from about October/November 2020 onwards with the introduction of cages

4. Does the respondent show that it was a proportionate means of achieving a legitimate aim?

Victimisation

1.Was the claimant subjected to a detriment because he had done a protected act of raising a grievance in Oct 2017

2. Did the respondent subject the claimant to the following detriments
Taking him off the tramming work in November/December 2017

3. From November 2017 2017 onwards not training him on loading work which he says would have been more suitable for his condition and

4. In November/December 2017 sending him to work in the RRU

Failure to make reasonable adjustments.

1.Did the respondent apply the PCP of expecting employees working on tipping functions to fully empty trailers of their contents?

2.Did the respondent take such steps as was reasonable to have to take to avoid the disadvantage

The adjustments are:

1.Taking him off the tipping role and deploying him onto a role that did not involve pushing and pulling cages, including being put back in the Ambient section of the warehouse.

The Law

Transfer of Undertakings (Protection of Employment) Regulations 2006

39. Where the Tupe Regulations apply to a transfer a number of rights and protections exist to protect employees, particularly the preservation of their terms and conditions. The Regulations also regulate the circumstances where an employee may be lawfully dismissed or treated as dismissed when a transfer occurs. It is accepted here that this transfer falls within the ambit of the regulations.

40. Under The Regulations 'Assigned' means assigned other than on a temporary basis.

41. employment and the rights and powers , duties and liabilities under or in connection with if of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.

42. Regulation 4(8) where an employee so objects the relevant transfer shall operate so as to terminate his contract of employment with the transferor but he shall not be treated for any purpose as having been dismissed by the transferor.

43. Regulation 4(9) where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1) such an employee may treat the contract of employment as having been terminated and the employee shall be treated for any purpose as having been dismissed by the employer.

44. The purpose of Regulation 4 is to give an employee an opportunity to refuse to transfer, but a refusal may have implications for claims of unfair dismissal. For example, the claimant relies on Regulation 4(9) on the material detrimental for his reason for refusal. Whereas the respondent relies on Regulation 4(8) and maintain the claimant refused to transfer.

45. Counsel for the respondent referred the Tribunal to the following cases Botzen v Rotterdamsche Droogbok Maatschappi BV C-186/83 [1985] ECR 519. Sets out the correct approach on who transfers when only part of an undertaking is to be transferred is to consider first whether there was an undertaking which was transferred and then decide whether the employee was an employee of that part.

46. Duncan Web Offset (Maidstone) Ltd v Cooper [1995] IRLR 633, dealing with assignment where the whole of a business transfers.

Constructive Dismissal

47. Section 95 Employment Rights Act 1996, The Act, defines constructive dismissal as follows: (1)(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.'

48. Section 98 The Employment Rights Act 1996 confers on an employee a right not to be unfairly dismissed. In determining whether a dismissal is fair '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.'

49. The case of Western Excavating v Sharp 1978 IRLR 27 held that if the employer is guilty of conduct which is a significant breach of the contract going to the root of the contract or shows it no longer intends to be bound by one of the essential terms of the contract, then the employee is discharged from further performance.

50. This was expanded upon in Malik v The Bank of Credit and Commerce International 1997 ICR 606; the test to be applied is, 'the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and an employee.'

51. Lewis V Motor World Garages 1996 ICR 157CA established the principle of the last straw. That is to say, where the behaviour of the employer itself may not be a significant breach going to the root of the contract, the cumulative behaviour of the employer may lead to such a breach.

52. London Borough Council of Waltham Forest v Omilijau 2005 IRLR 35 establishes the last straw does not have to be of the same character as previous acts complained of. In addition, this should be looked at objectively.

Indirect Discrimination Section 19 Equality Act 2010

53. (1) A person (A) discriminates against another (B) if A applies to B a provision criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's
    (1) A PCP is discriminatory if
        a. A applies or would apply it to a person with whom B does not share the characteristic.
        b. It puts or would put persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it
        c. A cannot show it to be a proportionate means of achieving a legitimate aim.

54. In determining whether the treatment was because of a protected characteristic the Tribunal should focus on the factual reasons why the employer acted as it did. This may include considering subjective motivation. In Nagarajan v London Regional Transport 1999 ICR 877, HL: Lord Nicholls said 'Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on [protected] grounds will seldom be forthcoming. Usually, the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances.'

Reasonable Adjustments Section 20 and 21 Equality Act 2010

55. Section 20 imposes a duty on an employer to make a reasonable adjustment. The Duty has three requirements but only the first is relevant to this case.

> (1) a requirement where a provision, criterion or practice of A 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 are reasonable to avoid the disadvantage

56. Paragraph 20(1) of Schedule 8 Equality Act 2010 makes it clear that for the duty to arise a person must have knowledge of the disability or could be reasonably expected to know of the disability.

57. Where a person fails to comply with the duty, they discriminate against a disabled person Section 21 of the Act.

58. The Tribunal must therefore consider what is the practice criterion or policy which the respondent applied to its employees, whether the PCP put the claimant at a substantial disadvantage when compared to an employee who was, but for the disability in the same position in all material facts to the claimant. consideration of comparators; the nature and extent of the disadvantage suffered by the claimant. Environment Agency v Rowan 2008 ICR 218 EAT.

59. Having identified the substantial disadvantage, the Tribunal should then go on to consider whether the adjustment proposed is a reasonable one Thompson v Vale of Glamorgan Council EAT 0065/20.

Victimisation Section 27 Equality Act 2010

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60. Victimisation is defined as A person (A) discriminates against person (B) if A subjects B to a detriment because B does a protected act or A believes B has done or may do a protected Act.

61. For the purposes of this case the following are protected acts, bringing proceedings under the Act, giving evidence of information in connection with this Act, Doing any other thing for the purpose of or in connection with thus

Act, Making an allegation that that A or another person has contravened this act.

62. Conduct will be a detriment if a reasonable worker might take the view in all the circumstance that the conduct was to the workers detriment the test is satisfied Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065 HL.

Submissions

63. Both parties submitted written representations to the Tribunal it is not intended to rehearse them in full here.

64. The respondent's case is the claimant was assigned to the RRU and therefore his employment would transfer to GXO. There was no change in his working conditions and the assignment was not a discriminatory act.

65. In relation to the constructive dismissal although the respondent puts forward argument in relation to the alleged breach the main thrust of the argument is that the claimant resigned because of the transfer not for any breach of the employment contract.

66. As to disability discrimination the claims as put, do not stand up, the claimant refers to tramming and emptying cages, but the evidence was in relation to tipping. In any event adjustments were made over a substantial period. Although this meant there was little variety of work for the claimant that he could actually undertake.

67. The claimant's case was that he was not assigned to the RRU. That the respondent had breached his contract on a number of occasions. The only reason he was selected to be assigned to RRU for the purpose of the transfer was because of his disability. Harland and Richardson were not disabled and were not assigned to the RRU

Discussions and conclusions

General

68. This case involves a large national employer with a number of resources available to it. It is clear that from the time of the initial injury causing problems for the claimant, apart from some hiccups the respondent has acted in a responsible manner towards the claimant and his disability. No employer is perfect, and a Tribunal does not expect perfection. Whilst the claimant is a single employee, acting without representation he has been able to speak for himself since his injury, he has lodged grievances and when he is dissatisfied has commenced Tribunal proceedings. Indeed, he has the ability to conclude a settlement agreement with the respondents. From the evidence we heard the claimant was primarily assigned to the RRU from 2017 and from January 2020 it was the advice of occupational

health that that was the best place for him. Despite the respondent's preference for its employees to be multiskilled by 2021 it was in a position where a number of adjustments had been made and the work available for the claimant to do was limited.

The Issues

TUPE

69. The first issue to be determined for the purposes of the TUPE issues is: Was the claimant assigned to the RRU? The part of the business that was to be transferred was the RRU. This was a distinct operation within the respondents site. It carried out a different role to the Ambient and Fresh and although on the same site was a different building. There has been no challenge to the fact of the outsourcing or that the TUPE Regulations applied to it. Whilst the claimant was contractually working as a Warehouse Operative – Ambient, he was contractually obliged if required by the respondent to work within any one of three areas. From 2017 he predominantly worked in the RRU and the Occupational Health report in January 2020 stated he would benefit from continuing to work in the RRU, with some restrictions. The only time the claimant raised an issue about his work within the RRU was the introduction of roll cages in late 2020. He complained that there should have been a further workplace assessment at that time. The claimant did aggravate his back at work in December 2022, but it appears this was unrelated to the roll cages. The tribunal noted that at his appraisal in 2021, which refers to his work in the RRU the claimant makes no complaint about his work, he does not seek any further training and as noted seemed disengaged with the process.

70. The decision about who would be in Scope was discussed during a phone call on 9th January 2023. It was a decision taken centrally although People Services from all sites were involved. There were clearly legal issues in making this decision. Employees who were on day shift clearly were assigned. The issue of assignment arose in relation to those employees with adjustments many of these were temporary and these involved a legal question as to who was 'assigned' .The local people Services teams were instructed to review the last 26 weeks to establish the percentage of time a person was working in the RRU. Whilst simply looking at a percentage of working may not be the best formula, in the situation the respondent found itself in the Tribunal concluded this was the most appropriate way to make this decision as it was purely objective. The tribunal concluded that the formula to be used was decided centrally in relation to who was assigned, because of legal issues to be considered. The Tribunal has seen an email from Keith Lupton setting out the assessment for the claimant Harland and Richardson at Page 256. All three were on a 36 hour contracted week. Mr Lupton did not take account of any sickness or holidays and only counted hours work. There were a possible 936 hours. The claimant had worked 732 hours in the RRU, he had not worked anywhere else in the business, Richardson had 53 hours in the RRU, the other hours made up from picking and loading in the ambient and fresh. Harland had worked 178 hours in the

RRU the other 517.25 hours he was assigned to loading. The latter two were working in the RRU because of adjustments to the work they could do.

71. The Tribunal concluded that the claimant was assigned to the RRU. Although his contract stated Warehouse Operative, Ambient, he could be required to work anywhere. As a result of the 2020 Occupational Health report RRU was deemed the most suitable place for him to work. He was not temporarily assigned to RRU, it seems on the evidence unlikely he could ever work in any other part of the business. On no interpretation of the word assigned could the Tribunal concluded he was assigned elsewhere in the business.

72. Next the Tribunal considered whether the claimant objected to the transfer. By letter dated 17th January 2023, the claimant gave notice that he wished to opt out of the transfer to GXO. His reason was 'I am not prepared to sign over to another company and continue in a role that causes me increased pain every shift' He went on to quote Regulation 4(9). He clearly anticipated at that time he could claim unfair dismissal. The claimant's intentions were actually clear from 5th January when he commenced the ACAS conciliation period. The Tribunal concluded that all his actions thereafter were an attempt to manipulative both the respondent's employees and employees of GXO to try and obtain evidence to support his claim. This is evident from the conversation on 25th January 2023.

73. As noted above it was clear form 5th January the claimant had no intention of transferring to GXO. At that time, the Tribunal concluded, he had no information upon which he could base a reasonable belief that there would be any change to his working conditions. The claimant seems to rely upon a conversation with GXO employees on 10th January 2023, of which there is no note. Nor does the claimant say he was told at that time his working conditions or role would change. The claimant appears to place great reliance on the conversation of 25th January 2023. However, there are two problems here; first the claimant had already indicated he did not want to transfer citing regulation 4(9). Secondly, The tribunal concluded that there was nothing in the conversation which indicted his working conditions would change. This is a clear example of an attempt by the claimant to manipulate people.

74. At the first consultation meeting on 12th January the claimant was reassured that all his adjustments would move with him. Indeed, he was reassured throughout the process that there would be no change. The Tribunal noted that the respondent did not simply accept the refusal but continued to engage with the claimant.

75. The claimant did object to the transfer and appeared to make the decision to do so as early as 5th January 2023 but gave the respondent notice inwriting on 17th January 2023.

76. The Tribunal concluded that the claimant was not dismissed because of a substantial change to his working conditions. There was no evidence of any change to his working conditions, in particular at the time the claimant engaged with ACAS there was no such evidence, nor was there any such evidence as at 17th January 2024 when the claimant formally objected. Nor has the Tribunal heard any evidence that would persuade it that the working conditions would change if the claimant had not transferred.

77. The Tribunal has been unable to find any evidence that there would be a substantial change in the claimant's working conditions. The Tribunal has been asked to conclude on the basis of a conversation where GXO employees did not answer hypothetical questions that the working conditions would change.

78. The claimant was not dismissed in accordance with Regulation 4(9). The claimant objected to the transfer on 17th January 2023 and therefore his termination falls within Reg 4(8)

Discrimination
Direct Disability

79. Initially the claimant, Harland and Richardson were placed withing scope of the transfer because they did work in RRU. The latter two were later removed and were not part of the employees who were transferred.

80. The Tribunal considered first whether these two were appropriate comparators by considering whether there was a material difference between their circumstances and the claimant's. All three were employed on the same contract of 36 hours as Warehouse Operative Ambient. For a period prior to the transfer all three were at times, working in the RRU. The claimant had worked there exclusively since 2020. Harland and Richardson were there temporarily because of adjustments. Whilst the claimant argues he was not assigned because of his contract, he had never raised this with the respondent. The contract he Harland and Richardson worked under permitted the respondent to move them between the three different areas. it is entirely possible without the adjustment of working in the RRU the claimant may have been unable to work for the respondent. He had not raised an issue about his placement in the RRU, although he had complained about the cages. It seems until the transfer was announced the claimant was satisfied with his position.

81. The difference between the three therefore is this. The claimant had been working permanently in the RRU for two years without complaint. The OH report had advised that RRU was the best place for him to work, precluding working in Ambient and Fresh. In contrast, Harland and Richardson were temporarily assigned to RRU and still carried out work in Ambient and Fresh, it would seem to facilitate their return to their usual role. This is a difference in their circumstances and therefore they are not appropriate comparators.

82. However, the Tribunal did consider the issue of whether the treatment was because of the claimant's disability. The claimant's case is that the management team wanted him gone because of his disability and that was why he was assigned to the RRU for transfer.

83. The evidence suggests otherwise. It was a decision taken centrally not at a local level. Therefore, any suggestion that the local People Services manipulated the process cannot be sustained.

84. In addition, the respondent used a defined empirical formula to determine which employees would be in scope. This was an objective assessment and took away any potential for emotions, or bias to influence the decision. The Tribunal concluded that the claimant was not assigned to the RRU because of his disability,

Indirect Discrimination

85. There was a PCP of expecting employees working on a tipping function to fully empty trailers of all their contents in place which would put persons who share the claimant's disability at a particular disadvantage in that it increases the amount of pain and makes them very tired.

86. The evidence the Tribunal heard about emptying trailers was limited, as the claimant appeared more concerned about the pushing and pulling of cages not emptying them, continuing to raise this for example by producing the HSE guidance. In fact, in 2017 the claimant's concern was being asked to 'pick' when he was due to work the next day and although this appears to have been agreed he was asked to pick. The claimant raised a grievance about the picking but did not mention tipping. In the July COT3 the first clause concerns picking. The only reference to tramming is in clause 3, which requires the respondent to provide the claimant with an opportunity for tramming and cleaning provided such duties are permitted by Occupational Health. There is no evidence that in 2017 the claimant was complaining about tramming being a problem because of his disability.

87. In relation to the period from October/November 2020 the evidence concerned the pushing of cages, hence the claimant showing the HSE Guidance to management. In his witness statement from paragraph 46 the claimant refers only to the pushing and pulling, which he referred to his manager, and also, he alleges he sustained an injury as a result. There is little evidence about the emptying of the trailers and the impact. In a review meeting in February 2020 there is no reference to emptying cages causing him problems. Nor is it raised in an informal grievance meeting in April 2021.

88. In order for an indirect discrimination claim to be made out it must be established that the PCP actually put this claimant at the disadvantage alleged. The Tribunal concluded it did not. There was no evidence before the Tribunal about the emptying of cages causing the claimant a problem; he was not raising it as an issue with his employers which would have assisted

The Tribunal concluded there was no evidence that the PCP put him at a disadvantage.

89. In any event the respondent did not know that the emptying of the cages, rather than the pushing, was causing issues for the claimant. Therefore, the respondent did not know that the PCP was putting the claimant at a disadvantage. such a disadvantage.

90. In any event the respondent continued to make adjustments according to the issues the claimant raised following the 2020 Occupational Health report and physio and risk assessments.

91. However, the Tribunal is satisfied that the respondent was unaware of any issues of emptying cages and was following OH advice that the claimant should only do activities that did not hurt or aggravate him.

Reasonable adjustments

92. There was a PCP of expecting employees working on tipping functions to fully empty trailers of their contents which was applied to all employees.

93. To an extent this head of claim is bound up with the indirect discrimination claim referring as it does to the same PCP. For the reasons stated above under indirect discrimination the Tribunal concluded that at all times the respondent was reacting to complaints from the claimant about the effects of tasks on his back. In doing that, where necessary the claimant was referred for professional advice either from Occupational Health Advisers of Physiotherapists including carrying out a workplace assessment. An employer is entitled to rely on such advisers.

94. The Tribunal is satisfied that the respondent did take all reasonable steps to help the claimant. It was not a reasonable adjustment to send him back to the Ambient section because this had been ruled out by OH.

Victimisation

95. The protected act here is the raising a grievance in 2017, Grievance 3. The claimant alleges three detriments starting from 2017; taking him off tramming work in November, December 2017; from November 2017 onwards not training him on the loading work which he said would be suitable for his condition; in November 2017 sending him to work in the RRU. The claimant is arguing that these are conduct extending over a period and therefore his claim is not time barred.

96. The Tribunal notes that these detriments are alleged to have occurred and continued after the July COT3 and perhaps more importantly the December COT3. The July COT3 specifically refers to tramming as a training issue, the respondent asserts that the December COT3 supersedes the July COT3 or that the claimant affirmed any breach of the July COT3.

97. The Tribunal concluded that it did not have to make a decision on whether the December COT3 superseded the July COT3 because, no later June 2021 the claimant ceased to raise any issues about training, including loading and tramming and did not raise it further until the ET1 was issued. Whilst the Tribunal notes the claimant's assertion that the failure was still on going, by June 2021 he seems to accept the failure and therefore affirmed the breach.

98. It is difficult to accept that every single manager since 2017 has deliberately kept the claimant in the RRU because he complained about a manager in 2017. The Tribunal was of the view that the respondent and in particular the witnesses from whom we heard were attempting to establish positive relations with the claimant.

99. In any event the Tribunal concluded that the events surrounding his move to the RRU and the subsequent adjustments to his working role were not because he had lodged a grievance in 2017. At all times the adjustments which have been made were as a result of Occupational Health input, which was provided for in both COT3s. The July agreement stated that provided such duties are permitted by Occupational Health.

Constructive Dismissal

100. In any event the Tribunal concluded that if there was a breach it was affirmed by the claimant by his failure to pursue training as evidence in his May 2020 appraisals.

101. Turning to the alleged failure to make reasonable adjustments. As can be seen under the relevant heading the Tribunal do not conclude that the respondent failed to make reasonable adjustments.

102. The next breach is an allegation that he was subjected to a discriminatory workplace this has not been further particularised by the claimant but the Tribunal concluded he was relying upon the issues raised by him under the Equality Act of Direct and Indirect Discrimination, Harassment and Victimisation. These are all dealt with under the relevant headings. As the Tribunal concluded none were made out there is no breach of contract.

103. The final breach is an allegation that the respondent 'was responsible for an ongoing/continuing situation of discrimination, again the e claimant has not further particularised this and the Tribunal has concluded he was relying on his Equality ACT claims. As the Tribunal concluded that none were made out there is no breach of contract.

104. As none of the breaches are made out, there cannot be a fundamental breach of contract of employment.

105. The claimant also relies on a breach of the implied term of trust and confidence. The question for the Tribunal is did the respondent conduct itself in such a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties? As already

commented upon the Tribunal does not expect perfection from an employer and it is noted that during 2017-2019 the claimant did raise issues which ultimately led to the issue of Tribunal proceedings. These were settled amicably, and the claimant continued to work for the respondent. For that reason, the Tribunal have disregarded, for the purpose of the implied term of trust and confidence, the events prior to the signing of December COT3. At this time the claimant had confidence that the respondent would follow through on the agreement.

106. After that date there are some complaints about the respondent's behaviour which have already been outlined above. The Tribunal concluded that from 2019 the respondent was acting in the best interest of the claimant, following professional advice about his deployment and the roles he could undertake. The Tribunal concluded not only did the respondent not intend to act in a manner calculated or likely to destroy the employment relationship, on the evidence the Tribunal heard it is not reasonable to say that that was a possible outcome.

107. The Tribunal considered it important to look at the reason for the resignation. The Tribunal concluded that the letter refusing to transfer is evidence that the claimant did not truly believe that any of his terms and conditions had been breached.

108. The claimant resigned because of the transfer. He did not want to go and work for GXO, he was fearful, unreasonably so, that he would lose his adjustments and possibly his job. This is clear from his resignation letter. However, the Tribunal concluded that the claimant made the decision to resign on 5th January 2023 and that is the reason why he contacted ACAS that day.

<u>Time Limits</u>

109. The claim for Direct Discrimination is within the permitted time limits.

110. The claim for indirect discrimination and reasonable to the issue of tramming and loading, and the victimisation claim whilst it is possible to argue that any alleged discrimination was continuing as claimant did ask to move to tramming and loading or a substantial period. However, his complaint/request in relation to this about stops in June 21. At this time the claimant accepts his role in RRU as shown by his appraisal in 2021. There is no evidence that following this there was any discrimination. It was not until ET1 was issued that the claimant resurrected this issue because of the TUPR transfer. The Tribunal concluded, if it is required to do so, that these two claims were out of time.

111. The Tribunal did not consider there was a continuing chain of events. There was no causal link between direct discrimination claims and the indirect and reasonable adjustments claims. Other than the fact they are based on the claimant's disability. In particular however the latter claim is a distinct claim arising 19 months after the other matters.

112. It is not just and equitable to extend the time limits and allow the claims to proceed. The Tribunal concluded that because of the passage of time and the balance of prejudice and hardship lies with the respondent. The events are of some age, some 5 years in the past, it will be difficult for witnesses to recall any events. In addition, some of the witnesses upon whom the respondent may wish to rely on 25are no longer available.

Conclusions

TUPE

113. The claimant was assigned to the part transferred namely Returns and Recycling Operation (RRU)

114. The claimant objected to becoming employed by the transferor GXO Logistics, such that he was not dismissed by the respondent (Trasnferor) according to Regulation 4(&) & (8) of Transfer Regulations 2006

115. The claimant was not dismissed under Regulation 4(9) because the transfer involved or would involve a substantial change in his working conditions to his material detriment.

Constructive Unfair Dismissal

116. The claimant, was not otherwise, constructively dismissed under sections 95(1)(c) and section 93 Employment Rights Act 1996

Direct Discrimination

117. The claimant was not treated less favourably than his comparators Wayne Harland and Brian Richardson because of his disability.

118. There was a material difference between the circumstances in relation to his comparators Harland and Richardson and the claimant.

Indirect Disability Discrimination section 19 Equality Act 2010

119. There was a PCP of expecting employees working on a tipping function to fully empty trailers of all their contents applied to all employees.

120. The PCP did put persons who share the claimant's disability at a particular disadvantage in that it increases the amount of pain and makes them very tired.

121. The PCP did not put the claimant at a disadvantage from 2017 onwards and in particular from about October/November 2020 onwards with the introduction of cages.

122. If there was such a disadvantage the respondent did not know of it.

Victimisation

123. The claimant was not subjected to a detriment because he had done a protected act of raising a grievance in October 2017.

124. None of the detriments were because the claimant had done a protected act in 2017.

Failure to make reasonable adjustments.

125. There was a PCP of expecting employees working on a tipping function to fully empty trailers of all their contents applied to all employees.

126. The respondent did take such steps as was reasonable to have to take to avoid the disadvantage, they worked with professional advisors to ensure appropriate adjustments were in place.

Time Limits

127. The direct discrimination claim is in time. All other discrimination claims are out of time. It is not just and equitable to extend the time for presenting the claims.

128. All claims are dismissed.

Employment Judge AEPitt

Date14th March 2024