Neutral Citation Number: [2024] EAT 80

Case No: EA-2022-000024-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 May 2024

Before :

MATHEW GULLICK KC
DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

MR IAN BUGDEN

Appellant

- and –

THE ROYAL MAIL GROUP LIMITED

Respondent

- -
- -

Mr Barnaby Large (instructed by Laceys Solicitors LLP) for the **Appellant**
Mr Stephen Peacock (of Weightmans LLP) for the **Respondent**

Hearing date: 9 January 2024

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JUDGMENT

SUMMARY

DISABILITY DISCRIMINATION; UNFAIR DISMISSAL

The Claimant was dismissed under the Respondent's attendance management policy as a result of periods of ill-health absence over a number of years. His claims of disability discrimination and unfair dismissal, which had been clarified in the Employment Tribunal at the case management stage and set out in a List of Issues, were dismissed by the Employment Tribunal.

On appeal, the Claimant contended that the Employment Tribunal should itself have raised the possibility of redeployment both as a potential reasonable adjustment under section 20 of the Equality Act 2010 (Ground 1) and in relation to its determination of the fairness of the dismissal under section 98(4) of the Employment Rights Act 1996 (Ground 3). This issue had not been argued by the Claimant before the Employment Tribunal and was not referred to in the List of Issues.

The Employment Appeal Tribunal dismissed the appeal on Ground 1, but allowed the appeal on Ground 3. In respect of Ground 1, the particular adjustment contended for on appeal was not sufficiently clear from the material before the Employment Tribunal. The Tribunal had not erred in law in failing to raise that potential adjustment with the parties itself.

In respect of Ground 3, the Employment Tribunal had erred in law in failing to consider the issue of redeployment, as an alternative to dismissal, when determining the fairness of the dismissal. This was a sufficiently well-established principle that the Employment Tribunal should have addressed as a matter of course even though it had not been raised by the parties. The claim of unfair dismissal was remitted to the same Employment Tribunal for further consideration.

MATHEW GULLICK KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. In this judgment, I shall refer to the parties as "the Claimant" and "the Respondent", as they were before the Employment Tribunal.

2. This is an appeal against the judgment of an Employment Tribunal sitting in the South West Region (Employment Judge Gray, sitting alone) dated 14 October 2021. The Employment Tribunal dismissed claims of (1) unfair dismissal, contrary to the provisions of Part 10 of the Employment Rights Act 1996 and (2) breach of the duty to make reasonable adjustments for the Claimant as a disabled person under section 20 of the Equality Act 2010. A claim for discrimination arising from disability, contrary to section 15 of the Equality Act, was also dismissed by the judgment and is not the subject of this appeal. A further claim of harassment related to disability was dismissed upon withdrawal.

3. The parties had consented to the claims, which included discrimination claims that would ordinarily be heard by an Employment Judge sitting with non-legal members, being determined by a judge sitting alone. There was a fully remote hearing by Cloud Video Platform of four days' duration from 11-14 October 2021. The judgment, with oral reasons, was delivered on the afternoon of the fourth day. Written reasons were requested by the Claimant; they were signed by the Employment Judge on 15 November 2021 and sent to the parties on 8 December 2021.

4. Before the Employment Tribunal, the Claimant represented himself and the Respondent was represented by its solicitor, Mr Harte of Weightmans LLP. On appeal, the Claimant has instructed solicitors and is represented by Mr Large of counsel. The Respondent is represented on the appeal by Mr Peacock, solicitor, of Weightmans LLP. I am very

grateful to Mr Large and to Mr Peacock for their considerable assistance in presenting the arguments for their respective clients.

Background to the Appeal

5. The Claimant was employed by the Respondent (which is a large employer, with 139,000 employees nationally) from 15 August 1994 until 10 December 2019. He was an operational postal grade worker: that is, he was involved in the delivery of mail. The Claimant was dismissed with notice, following the application of the Respondent's attendance management policy, as a result of regular and substantial periods of absence from work over a number of years: between 2015 and 2019, the Claimant had 32 periods of absence, amounting to 297 days in total. The Respondent's managers considered at the time of dismissal that they could have no confidence that the Claimant's attendance would improve in the future. Some of these absences were related to long-term medical conditions. It has never been suggested that any of the Claimant's periods of absence were for other than genuine reasons.

6. The Claimant lodged an ET1 Claim Form at the Employment Tribunal, contending that his dismissal was unfair and that he had been subject to disability discrimination. Following concessions by the Respondent in relation to some of the Claimant's conditions and a preliminary hearing on 13 July 2021 to address whether others amounted to disabilities, the position at the final hearing in the Employment Tribunal was that the Claimant had been found to be disabled by reason of (1) anxiety and depression, (2) visual migraines (3) musculoskeletal disorders and (4) bladder issues. The Respondent accepted that it had the necessary knowledge of disability in relation to all these conditions.

7. On 29 August 2017, the Respondent notified the Claimant in writing that, to use the

Claimant's description in his evidence to the Employment Tribunal, it was drawing a "line in the sand" in relation to his absence from work and that there would need to be an improvement in his attendance. The background to the notification was that across the three years prior to that date, the Claimant had 16 periods of sickness absence amounting to 134 days in total. 71 of those days involved absence related to the Claimant's disabilities.

8. In the period up to 1 August 2018, which was just over 11 months following the notification letter, the Claimant had a further 10 periods of absence over 26 days in total. Of those, 18 days of absence were related to the Claimant's disabilities.

9. An occupational health report was prepared, dated 6 August 2018. The report recommended that the Claimant's working hours be reduced. The Claimant was then offered a reduction in his working hours (with a corresponding reduction in pay) but he refused it on financial grounds.

10. An initial notification (referred to as an "AR1") under the Respondent's policy was issued to the Claimant on 16 August 2018. The Claimant had a further period of 22 days' sickness absence from 30 August 2018 to 20 September 2018. A meeting to consider the Claimant's position under the absence policy took place on 28 September 2018, when the Claimant was accompanied by his union representative. The result was that on 10 October 2018 a second stage "AR2" notification was issued. The Claimant raised a grievance about the issuing of the "AR2" notification, but this was not upheld.

11. Following the "AR2" notification, over the next 10 months until 8 August 2019 the Claimant had a further six periods of absence of 117 days in total. Four of those periods,

amounting to a total of 108 days, were for reasons of ill health that were not related to the Claimant's disabilities.

12. The Respondent then moved to the third stage of its policy, involving consideration of dismissal. A further occupational health report was obtained, dated 15 August 2019. There was a hearing on 4 September 2019, at which the Claimant was accompanied by his trade union representative. The Claimant was dismissed, with notice, in a letter dated 17 September 2019 on the basis of an unsatisfactory level of attendance which was unlikely to improve.

13. The Claimant appealed against his dismissal, and the appeal (which was by way of re-hearing) took place on 11 October 2019. The appeal was dismissed by letter dated 26 October 2019, with the result that the Claimant's employment terminated on 10 December 2019 at the end of the contractual notice period.

The Claim to the Employment Tribunal

14. The Claimant filed an ET1 claim form with the Employment Tribunal on 7 February 2020. He stated in the claim form that he was claiming for unfair dismissal and disability discrimination; some details of those claims were given, but I think that it is fair to say that the Claimant's case was not extensively set out in the ET1.

15. There was a case management preliminary hearing by telephone before Employment Judge Goraj on 1 October 2020 at which the Claimant appeared as a litigant in person and the Respondent was represented by its solicitor, Mrs Roberts. The Claimant joined the hearing 45 minutes late; the judge's case summary records that matters already discussed were gone through again and that the issues in the case were identified and agreed with him.

16. In relation to the claim for breach of the duty to make reasonable adjustments, the Employment Judge's record of the issues as identified at the case management hearing reads, materially, as follows:

> 2.2 A "PCP" is a provision, criterion or practice. The PCP relied upon by the claimant is the requirement to attend for work in accordance with the respondent's attendance policy / attendance standards. The respondent accepts that it applied such PCP to the claimant.
>
> 2.3 Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability? The claimant contends that he was placed at such a substantial disadvantage as the respondent took into account disability related absences when deciding to issue the claimant with: (a) an Attendance Review 1 on 4 August 2018 (a) [sic] an Attendance Review 2 on 3 October 2018 and (c) dismissing the claimant on 10 December 2019. The claimant is to confirm to the respondent and the Tribunal as directed above by 13 November 2020 in respect of (a) (b) and (c) which of the alleged disability related absences he says should have been discounted, when and why.
>
> 2.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?
>
> 2.5 What steps (the 'adjustments') could have been taken to avoid the disadvantage? The claimant contends that any disability related absences should have been discounted. The claimant to confirm to the respondent and the Tribunal by 13 November 2020 why he says that the discounting of the identified disability related absences would have alleviated any substantial disadvantage i.e. why he says that it would have avoided the issue of Attendance Review 1 and/or 2 and/or his dismissal
>
> 2.6 Was it reasonable for the respondent to have to take those steps and when? The respondent to confirm its position.

17. In relation to the claim for unfair dismissal, the record of the issues identified reads as follows:

> 5.1 Was the claimant dismissed?
>
> 5.2 What was the reason for dismissal? The respondent asserts that it was a reason related to capability which is a potentially fair reason for dismissal under s.98(2) of the Employment Rights Act 1996.
>
> 5.3 CAPABILITY (health) Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
>
> > 5.3.1 The respondent genuinely believed the claimant was no longer capable of performing their duties;

5.3.2 The respondent adequately consulted the claimant;
5.3.3 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
5.3.4 Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;
5.3.5 Dismissal was within the range of reasonable responses.

5.4 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?

5.5 Did the respondent adopt a fair procedure? The claimant challenges the fairness of the procedure in the following respects:

5.5.1 The claimant contends in particular that the respondent acted unfairly in that (a) it issued the Attendance Review 1 (which lead to the subsequent action against the respondent [sic]) without awaiting diagnosis of the claimant's medical conditions (including in particular the cardiac conditions) (the claimant to confirm to the respondent and the Tribunal by 13 November 2020 that this is his case including any medical conditions / disabilities to which he is referring) and (b) that the respondent took into account disability related absences as referred to previously above.

5.6 If it did not use a fair procedure, would the claimant have been fairly dismissed in any event and/or to what extent and when?

18. At the final hearing of the Claimant's claim in October 2021, Employment Judge Gray heard evidence from the Claimant himself and from four witnesses for the Respondent, including the manager who made the initial decision to dismiss the Claimant and the manager who heard the Claimant's appeal. The material part of the Employment Judge's reasons reads as follows:

The Decision

101. The undisputed reason for the dismissal of the Claimant in this case is unsatisfactory attendance. It is clear from the case authorities I have been referred to that this amounts to some other substantial reason. I find therefore that there is a fair reason for the Claimant's dismissal being SOSR.

102. As to the fairness, the Claimant's challenge is that the Respondent acted unfairly in that (a) it issued the first Attendance Review (which lead to subsequent action against the Claimant) without awaiting diagnosis of the Claimant's medical conditions (including in particular the cardiac conditions) and (b) that the Respondent took into account disability related absences.

103. This overlaps with the complaints of disability discrimination, being a failure to make reasonable adjustments and for discrimination arising from disability.

104. About the complaint for failure to make reasonable adjustments the PCP relied

upon by the Claimant, which the Respondent accepts was applied to the Claimant is the requirement to attend for work in accordance with the Respondent's Attendance Policy/attendance standards.

105. In oral closing submissions the Respondent accepted that this PCP would put the Claimant at a substantial disadvantage compared to someone without the Claimant's disability, in that the Claimant was more likely to have absences than a non-disabled person.

106. The Respondent asserts two lines of defence against this though, firstly that the reasonable adjustment of discounting disability related absence would not have prevented what happened to the Claimant because his non disability related absences qualified him for the issuing of ARs and then dismissal in accordance with the attendance policy.

107. Alternatively, that such an adjustment is not a reasonable adjustment.

108. It is the Respondent's case that it is acting in line with its attendance policy. The purpose of a reasonable adjustment is to return an employee to work. By keeping on discounting disability related absences when the levels are unacceptable, would not help employees to return to work. The Respondent relies on Bray v London Borough of Camden UKEAT/1162/01, where the EAT stated:

"The logical consequences of the argument that an employer should exclude from consideration the entire part of an employee's sickness absence related to disability would be that an employee could be absent throughout the working year without the employer being in a position to take any action in relation to that absence. In our view, the tribunal was correct, as a matter of good sense, to take the point that if any such absences were to fall outside the sickness policy it would generate enormous ill-feeling and be a potential for unauthorised absenteeism."

109. Also, that the EAT in that case had regard that the Respondent as a local authority employer, would have been hampered in its ability to perform its statutory functions if the proposed adjustments to the sickness policy were required. The Respondent submits it too has statutory functions with the provision of its universal service.

110. Based on the facts I have found the first argument succeeds in that the discounting of disability related absence would not have prevented what happened to the Claimant because his non disability related absences qualified him for the issuing of ARs and then dismissal in accordance with the attendance policy. Even if I am wrong on this, I do accept based on the case authorities that I have been presented and considering the facts in this matter objectively, that discounting disability related absences in this case would not be a reasonable adjustment to make.

111. About the complaint of discrimination arising from disability the Respondent accepts that it subjected the Claimant to the treatment at paragraph 12.1 - 12.3 of the list of issues (page 52) (relating to the AR1, AR2 and dismissal).

112. The Respondent accepts that the absences at paragraphs 8.4 to 8.7, 8.9 and 8.11 of the list of issues arose in consequence of Claimant's disability. However, irrespective of whether disability related absences were counted or not, the Claimant would have prompted the AR1, AR2 and Consideration for Dismissal for reasons set

out in the list of issues at paragraph 14. As such, it is not accepted that there was unfavourable treatment arising from disability. This does accord with my findings of fact, and I therefore find that reason for what happened to the Claimant did not arise in consequence of his disability.

113. Even if I am wrong on this, I do accept based on the case authorities that I have been presented and considering the facts in this matter objectively, that even if there were unfavourable treatment arising from the Claimant's disability, that the Respondent was objectively justified in issuing the ARs and dismissing the Claimant.

114. The Respondent says that: -

> a. it aims were legitimate namely to secure a high standard of attendance in order to enable the Respondent to provide an efficient and reliable service;
> b. its actions were proportionate in light of the Claimant's high level of absences and the adjustments which were made to support the Claimant/accommodate his absences.

115. The Respondent had in place a policy to reduce absenteeism agreed with the Unions, to reduce the negative impacts on its service and costs and provide an efficient and reliable service. A tribunal with err if it fails to consider the business considerations of the employer (see Hensman v Ministry of Defence) albeit the tribunal must make its own assessment on the basis of the evidence then before it. I accept the Respondent's aims were legitimate.

116. As to proportionality, the attendance policy provided for an agreed process of management of absence which was understood by the Claimant, agreed by Unions and also allowed for it being reasonable to stop discounting disability related absences if the Respondent could justify it. The Claimant was given reasonable adjustments in respect of his disability and a large proportion of the absences he was managed for were non disability related. I accept the justification evidence of JP and CT [two of the Respondent's witnesses] about this.

117. Accordingly, therefore I dismiss the Claimant's complaints of failure to make reasonable adjustments and for discrimination arising from disability. With this finding there is no need for me to consider the time limit jurisdictional issues.

118. Revisiting then the fairness of the dismissal, I find that this was reasonable in all the circumstances for some other substantial reason and that there were no procedural failings. The Claimant accepted that SG [the dismissing officer] had all the relevant medical evidence at the time of dismissal. In view of the requirements of the attendance policy as agreed with the Unions, the decision to dismiss the Claimant falls within the band or range of reasonable responses.

119. Therefore, I also dismiss the Claimant's complaint of unfair dismissal.

120. As said at the start of this Judgment this is not a fault dismissal, it is for some other substantial reason, the Claimant's conduct or capability is not the reason. The Claimant indicated in evidence that he wished he did not follow medical advice and also indicated in his closing submissions that he considers no longer following medical advice. I would urge against this. Also, I would encourage the Claimant to continue to reach out to organisations such as Mind which he has done since his dismissal and

> revisit what the Rowlands Trust can do for him. It is good to hear that he is now seeking to develop a better understanding of his health circumstances and how to manage them.
>
> 121. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 15; the findings of fact made in relation to those issues are at paragraphs 19 to 81; a concise identification of the relevant law is at paragraphs 83 to 100; how that law has been applied to those findings in order to decide the issues is at paragraphs 101 to 120.

The Appeal to the Employment Appeal Tribunal

19. Following reformulation after a Preliminary Hearing, two of the three original grounds of appeal against the judgment of the Employment Tribunal are now pursued. They are:

(a) Ground 1: That the Employment Tribunal erred in law when dismissing the claim for breach of the duty to make reasonable adjustments, by failing to consider the possibility of redeployment as a reasonable adjustment. This should have been raised with the parties by the Employment Judge.

(b) Ground 3: That the Employment Tribunal erred in law when dismissing the claim for unfair dismissal, by failing to take into account the potential for redeployment as an alternative to dismissal when determining whether the dismissal was fair.

20. Both these grounds of appeal rely on issues that were not raised by the Claimant before the Employment Tribunal, whether at the case management stage or at the final hearing. During the oral argument on the appeal, Mr Large suggested that the possibility of redeployment had been raised by the Claimant during the cross-examination of one of the Respondent's witnesses. That suggestion had not been made before the hearing of this appeal and there was no agreement between the parties as to what (if anything) had been said. In any event there is no suggestion that this point was relied on by the Claimant in his submissions to the Tribunal on either of the claims. I proceed on the basis that the point was not raised by the Claimant before the Employment Tribunal.

21. The essence of the Claimant's argument on this appeal is that the question of redeployment was an obvious and indeed fundamental point which the Employment Tribunal ought to have raised with the parties itself in relation to both the reasonable adjustments claim and the unfair dismissal claim. In contrast, the Respondent submits that the Employment Tribunal's decision cannot be impugned on this basis: the Claimant did not raise such an argument at any stage in the proceedings below, and so he cannot now seek to overturn the judgment for the reasons advanced.

The Law

22. The statutory provisions in issue in this case are section 20 of the Equality Act 2010 and section 98 of the Employment Rights Act 1996.

23. Section 20(3) of the Equality Act provides, materially, that the requirement on an employer is:

> … where a provision, criterion or practice of [the employer'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.

24. Section 98 of the Employment Rights Act provides, materially:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it-
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
> (b) relates to the conduct of the employee,
> (c) is that the employee was redundant, or
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a

duty or restriction imposed by or under an enactment.

(3)In subsection (2)(a)-

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

25. Several authorities were cited to me in relation to the obligation on an Employment Tribunal to raise matters when the parties before it have not done so themselves. In *Small v Shrewsbury and Telford NHS Trust* [2017] EWCA Civ 882, [2017] IRLR 889 at §§11-12, Underhill LJ endorsed the observations of the then President of this Appeal Tribunal, Langstaff J, that an Employment Tribunal should take for itself points that are so well-established that they arise "*as a matter of course*", irrespective of whether they have been taken by the parties. The examples given by Langstaff J of such well-established points were: the approach applicable to unfair dismissal claims in redundancy cases set out in *Langston v Cranfield University* [1998] IRLR 172; that applicable to unfair dismissal claims in misconduct cases in *British Home Stores v Burchell* [1980] ICR 303 and *Iceland Frozen Foods v Jones* [1983] ICR 17; and the general heads of loss identified in *Norton Tool Co. Ltd v Tewson* [1972] ICR 501. Underhill LJ went on to hold at §§14-17 of his judgment that the Employment Tribunal should "*on the basis of the particular material before it*" have considered "*as a matter of course*" a claim for future loss beyond the period by which the claimant would otherwise have been dismissed by his employer, on the basis of the approach in *Chagger v Abbey National Plc* [2010] IRLR 47.

26. In *Moustache v Chelsea & Westminster Hospital NHS Foundation Trust* [2022] EAT 204, Her Honour Judge Tucker dealt with an appeal in which the Employment Tribunal had failed to consider a claim for discriminatory dismissal under section 15 of the Equality Act despite all the necessary ingredients of such a claim having been raised by the claimant. Judge Tucker held at §35 of her judgment that it should have been clear to the Employment Tribunal and to the respondent in that case that the claimant was seeking to assert a connection between the impact of her disability upon her and her dismissal; she had set out details which gave "*an obvious indication that the dismissal concerned an asserted disability and so may have been discriminatory*", and had also asserted in her closing submissions that her claim for unfair dismissal was because her employer had failed to address the extent of her disability. Judge Tucker also reviewed the authorities relating to the importance of the List of Issues, noting that they are no more than a case management tool which should not be elevated into a formal or rigid pleading.

27. Turning to the specific question of reasonable adjustments in disability discrimination cases, in *Project Management Institute v Latif* [2007] IRLR 579, the Appeal Tribunal said at §57:

> We accept, however, that the proposed adjustment might well not be identified until after the alleged failure to implement it, and in exceptional cases, as here, not even until the tribunal hearing. Indeed, in certain circumstances we think it would be appropriate for the matter to be raised by the tribunal itself, particularly if the employee is not represented. To take a simple example, where a Code provides an example of an adjustment which on the face of it appears appropriate, that is something the tribunal should take into account. We think that it would be perfectly proper for a tribunal to expect an employer to show why it would not have been reasonable to make that adjustment in the particular case, although of course the employer must have a proper opportunity of dealing with the matter.

28. In *Noor v Foreign & Commonwealth Office* [2011] ICR 695, the claimant's appeal was against a decision to strike out the claim of breach of the duty to make reasonable

adjustments. After citing §§53-57 of the judgment in *Latif*, the Appeal Tribunal said this at §§27-31

> 27. An Employment Judge considering whether to strike out a claim where the disabled person establishes that an arrangement has caused substantial disadvantage ought to keep this guidance firmly in mind. In such circumstances the focus will, of course, be on any specific reasonable adjustment which the employee has put forward; but an Employment Judge should carefully consider whether there is any other potential reasonable adjustment and should strike the claim out only if it is plain and obvious that there is none.
>
> 28. In this case we consider that the Employment Judge fell into error by concentrating on the proposal for re-interview. She ought to have considered also the question whether any adjustment could have been made prior to, or at, the interview to prevent the disadvantage.
>
> 29. If she had done so, we think there is an adjustment which plainly ought to have been considered. It is, we think, certainly arguable that prior to the interview the Respondent ought to have read the Claimant's application form; seen that his form did not address one of the key competencies; appreciated the particular difficulty this would cause at interview; alerted him to this fact; and given him the opportunity to complete, prior to the interview, an application form which dealt with the key competencies. In this way he would have been prepared for the interview in the same way as the other candidates.
>
> 30. It is also, we think, arguable that at the interview, when the Respondent appreciated that the Claimant had not been prepared to deal with a competency, adjustments might have been made before the panel reached a final decision. The Claimant might have been re-interviewed before a decision was taken; or some allowance made in the marking.
>
> 31. We should certainly not be taken as saying that the claim will succeed on any of these bases; it might or might not. But we do not think the claim should have been struck out without consideration of them.

Discussion

Ground 1

29. Mr Large submitted that the Employment Judge should have raised with the Claimant whether or not redeployment was a proposed adjustment which he wanted to pursue as part of his claim for breach of the duty under section 20 of the Equality Act. Mr Large submitted that in accordance with the decision of this Appeal Tribunal in *Latif* (as applied in *Noor*), an adjustment can be raised even at the final hearing and that an alternative adjustment to that set out in Employment Judge Goraj's case management summary should

have been identified by the Employment Judge at the final hearing in this case. Mr Large also pointed out that *Latif* had not been cited to the Employment Judge, and indeed was not mentioned in any of the authorities referred to in the written reasons. He reminded me that the Statutory Code of Practice issued by the Equality and Human Rights Commission states, in relation to the duty to make reasonable adjustments (at page 87), that an employer "*should consider whether a suitable alternative post is available for a worker who becomes disabled (or whose disability worsens) where no reasonable adjustment would enable the worker to continue doing the current job*". In relation to dismissal, the Code states (at page 282) that, "*Where an employer is considering the dismissal of a disabled worker for a reason relating to that worker's capability or conduct, they must consider… whether they could transfer the worker to a suitable alternative role.*"

30. Mr Large focused his submissions on this ground of appeal on the issue of the Claimant's mental health. He submitted that the Claimant had asserted that the disability-related absences which had arisen as a result of his mental health condition had in part (although not exclusively) resulted from the actions of one of his managers, Mr Wilkinson; for example, on 5 September 2018, the Claimant said in a telephone call that his anxiety and depression had worsened following a conversation that he had with Mr Wilkinson. Mr Large also pointed out that in the ET1 Claim Form, the Claimant had alleged that he was being "*micromanaged by the shift manager, which increased my stress and anxiety levels*". Mr Large submitted that this was an issue that 'shouted out' from the material before the Employment Judge and that he ought to have raised the question of redeployment to a role in which the claimant was no longer managed by Mr Wilkinson as a potential reasonable adjustment to alleviate the substantial disadvantage caused by the application of the identified provision, criterion or practice ("PCP").

31. Mr Peacock submitted that there was no such error as contended for by Mr Large, on the material before the Employment Judge. This was not, he submitted, an issue which 'shouted out' for consideration. He noted that absences relating to mental health were only one part of the overall picture of both disability-related absences and other absences, that there had been two occupational health reports which had made no such recommendation as now contended for and that this proposal had not been raised by the Claimant himself either with the occupational health consultants, during the dismissal process or in his witness statement for the Employment Tribunal. Mr Peacock also noted that the evidence before the Employment Judge as to the effect of being managed by Mr Wilkinson on the Claimant's mental health condition (and on related absences) was limited; at §49 of the written reasons, the Claimant was recorded as saying in the telephone call on 5 September 2018 that "*his anxiety and depression had increased due to the stress of his gallbladder and his conversation with* [Mr Wilkinson] *about the Claimant leaving the shop floor*."

32. In my judgment, the Employment Judge was not in error, in the particular circumstances of this case, in failing to raise the possibility of the alternative adjustment that is now contended for by the Claimant on this appeal. It is important to analyse the nature of the error contended for. Mr Large did not submit that it was incumbent on the Employment Judge to reformulate either the identified PCP (the requirement to attend for work) or the identified substantial disadvantage (the taking into account of disability-related absences). His submission was that given the PCP and the substantial disadvantage which had been identified, redeployment to a role which did not involve the Claimant being managed by Mr Wilkinson was a potential reasonable adjustment to alleviate the substantial disadvantage caused by the application of the PCP and should have been raised by the parties with the Employment Judge.

33. I accept the submissions of Mr Peacock on this ground of appeal. I do not consider that this was, as Mr Large contended, an issue which 'shouted out' from the material before the Employment Judge. Absences resulting from the Claimant's mental health condition were only one part of the overall picture of ill-health absence and given the Claimant's other disabilities they were only one part of the picture in terms of absences related to the Claimant's disabilities. Moreover, it was far from clear on the evidence before the Employment Judge what, if any, effect being managed by Mr Wilkinson had on the Claimant's mental health condition or the absences resulting from it. That, as set out at §49 of the written reasons, the Claimant may have considered in September 2018 that his mental health condition had at that point worsened in part (but not exclusively) as a result of a particular conversation that he had with Mr Wilkinson does not, in my judgment, mean that it was incumbent on the Employment Judge to canvass with the parties the potential adjustment now contended for on appeal on the basis that management by Mr Wilkinson was, in more general terms, contributing to the Claimant's ill-health absence and nor does the non-specific allegation in the Claim Form about the impact of being "*micromanaged by the shift manager*" (which does not raise a link with periods of absence from work). Further, as Mr Peacock submitted, a possible move away from Mr Wilkinson's team was not something put forward at the time either by the Claimant or by the occupational health reports; nor was it raised by the Claimant during the dismissal process, in his claim to the Employment Tribunal or at the hearing.

34. As the judgment of this Appeal Tribunal in *Latif* makes clear, it will be an exceptional case in which the adjustment is not identified until the final hearing and only in certain circumstances will the Employment Tribunal be expected to raise a particular adjustment with the parties for itself. This was not, in my judgment, such a case. It was not a case in

which the adjustment now contended for "*plainly ought to have been considered*" (see *Noor* at §29). The matters relied on by Mr Large are not, in my judgment, enough to elevate this issue into one that was sufficiently clear that the Employment Judge was required to raise it with the parties himself. In reaching this conclusion, I bear in mind Mr Large's submission, relying on §39 of *Moustache*, that the Claimant was a litigant in person appearing at a remote hearing in the Employment Tribunal; but I nonetheless consider that the Employment Judge did not err in law, in the particular circumstances of this case, in failing to raise with the parties the possibility of making the adjustment now contended for by Mr Large.

35. I therefore dismiss Ground 1 of the appeal.

Ground 3

36. Mr Large's argument on Ground 3, in respect of the claim for unfair dismissal, was considerably wider in scope than that which he advanced on Ground 1. Mr Large submitted that consideration of the possibility of redeployment to another role, as an alternative to dismissal, was such a familiar point in relation to a claim of unfair dismissal arising from ill-health absence that the Employment Judge should have addressed it even though it had not been raised by the parties, in accordance with the principle endorsed by the Court of Appeal in *Small*. Mr Large relied on the Appeal Tribunal's statement in *Williamson v Alcan (UK) Ltd* [1978] ICR 104 at 107 that:

> "… It is also necessary, because it seems reasonably fair and good practice that a man who is going to be dismissed should have a say in the matter. It is also necessary because, quite apart from the medical condition, his whole employment situation requires to be assessed and considerations of alternative employment taken into account…"

37. Mr Large submitted that this was shown to be a well-established principle by the Appeal Tribunal's judgment, given some 30 years later, in *First West Yorkshire Ltd v Haigh* [2008]

IRLR 182 at §40:

> "As a general rule, when an employee is absent through ill health in the long term, an employer will be expected, prior to dismissing the employee, to take reasonable steps to consult him, to ascertain by means of appropriate medical evidence the nature and prognosis for his condition, and to consider alternative employment. An employer who takes such steps will generally meet the standard set out in section 98(4)."

38. Mr Large further relied, in support of his argument that the principle was sufficiently well-established, on the ACAS Guide to Discipline and Grievances at Work, which states (pages 71-72) in relation to "*frequent and persistent short-term absence*" that, "*if there is no improvement, the employee's length of service, performance, the likelihood of a change in attendance, the availability of suitable alternative work where appropriate, and the effect of past and future absences on the organisation should all be taken into account in deciding appropriate action*" (emphasis added). He pointed out that the Respondent's own attendance management policy, which was applied in the Claimant's case, states as one of its "*Guiding Principles*" that:

> Where an employee's capability is impacted by their health to the extent that they can no longer undertake their normal role, Royal Mail Group will work with the employee to identify a suitable alternative role wherever possible.

39. Mr Large also referred to the section of the policy headed "*Long Term Absence*", which states:

> This process will be followed when an employee is absent from work for more than 14 days. It can also apply when repeated absences are due to an ongoing health condition. The aim is to enable a return to normal work activities at the earliest opportunity or, if that is not possible, to find an alternative outcome.

The section goes on to state:

> Alternatives to a Return to a Normal Role
>
> If a return to the normal role is not possible, then alternatives will be considered:
> - Permanent job modifications
> - Redeployment
> - Leaving the business

40. Mr Large submitted, in reliance on these passages of the Respondent's policy, that the question of whether redeployment had in fact been considered as an alternative to dismissal in the Claimant's case, and particularly (in relation to the statutory question of reasonableness) where the Respondent was a very large employer, was one which 'shouted out' from the very policy which its managers were purporting to apply and that it should have been raised with the parties by the Employment Judge.

41. Mr Peacock submitted that there was no error of law in the Employment Judge's conclusion that the Claimant's dismissal was within the range of reasonable responses. He submitted that the Judge was not required to leave every stone unturned and that consideration by the Employment Judge of the issue of redeployment as an alternative to dismissal would have been to go 'off piste'. In relation to the passages of the Respondent's attendance policy relied on by Mr Large, Mr Peacock argued that policy did not state that the Respondent was positively required to consider redeployment as an alternative to dismissal in a case such as the Claimant's, because the particular section relied on only applied where a "*return to the normal role*" was not possible - and the Claimant was able to perform his role. Mr Peacock highlighted that the Claimant's dismissal was not, as he put it, an 'ill-health' dismissal, in the sense that the Claimant was not capable of performing his role when at work, but was an 'attendance' dismissal, in that the Claimant was dismissed for unsatisfactory attendance, and the reason for the dismissal found by the Employment Tribunal to apply for the purposes of section 98 of the Employment Rights Act (which had not been challenged on appeal) was 'some other substantial reason' rather than 'capability': see *Kelly v Royal Mail Group Ltd* (UKEAT/0262/18/RN, Judgment 14 February 2019) at §§20-25. He submitted that even if the proposition advanced by Mr Large was sufficiently well-established in cases of dismissal for capability, it was not so established in cases of dismissal for some other substantial reason arising from ill-health

absence.

42. In my judgment, the appeal must be allowed on this ground, substantially for the reasons advanced by Mr Large. The identified issue for determination by the Employment Tribunal, in relation to the unfair dismissal claim, was whether dismissing the Claimant was within the range of reasonable responses of a reasonable employer. I accept that one of the necessary questions in the present circumstances of dismissal arising from ill-health absence, and one which should have been addressed by the Employment Tribunal even if it had not been raised by the parties, was the question of whether there had been consideration of redeployment to an alternative role. I reject Mr Peacock's submission that the need for an Employment Tribunal to address that question, in connection with its determination of the reasonableness of dismissal, is confined to ill-health cases where the statutory reason for dismissal is found to be capability. As the Appeal Tribunal stated in *Kelly* at §23, "*... labels are not determinative. What is important is the factual basis for the dismissal being put forward by the employer.*" In the present case, the Claimant was dismissed as a consequence of his record of absence from work arising from ill-health; indeed, the Respondent's Grounds of Resistance in the Employment Tribunal averred at §34 that:

> The Respondent contends that in all the circumstances (including the Respondent's size and administrative resources) it acted reasonably in treating the Claimant's absences as sufficient reason for dismissing him/her [sic] and that the Respondent had due regard to equity and the substantial merits of the case.

43. It does not, in my judgment, matter for present purposes which of the permissible statutory reasons in section 98 of the Employment Rights Act was, in these circumstances, found to be the reason or principal reason for the dismissal (and I note that at the case management stage, the Respondent relied on capability as being the reason for dismissal). In my judgment, Mr Large is right to submit, based on the authorities upon which he relies,

that in a case such as the Claimant's the question of whether the employer has considered redeployment as an alternative to dismissal, and the impact of that on the reasonableness of the decision to dismiss, is one that an Employment Tribunal can be expected to consider as a matter of course when addressing the statutory question of whether the employer's decision to dismiss was reasonable in the circumstances. In omitting to consider that question in this case, even though the parties had not specifically raised it, the Employment Tribunal erred in law.

44. I am not in a position to substitute my own decision for that of the Employment Tribunal in relation to the fairness of the Claimant's dismissal. The claim for unfair dismissal will therefore need to be remitted to the Employment Tribunal for further consideration. In so doing, I should not be taken as indicating what the result of that further consideration ought to be. It is a question for the assessment of the tribunal of first instance, and not for this Appeal Tribunal to determine in the absence of any exploration of the matter during the course of the evidence and submissions in the Employment Tribunal.

45. The conclusion which I have reached is, in my judgment, potentially fortified by the terms of the Respondent's attendance management policy which was applied to the Claimant and which makes specific reference to redeployment as a possible alternative to dismissal. I do not consider that the only tenable construction of the significance of that reference is the one advanced by Mr Peacock (namely, that it had no application to the Claimant's particular case). But as the proper construction of the Respondent's policy in this respect may well be an issue between the parties when the claim is remitted, and because it is not necessary for me to determine it in order to allow the appeal, I say no more on the point.

Conclusion

46. For the reasons which I have given, the appeal is dismissed on Ground 1 but is allowed on Ground 3. The consequence is that the Employment Tribunal's judgment dismissing the claim of unfair dismissal will be set aside, and the claim remitted to the Employment Tribunal for further consideration of that claim, limited to the issue that arises under Ground 3 of the appeal.

47. Applying the guidance given in *Sinclair, Roche & Temperley v Heard* [2004] IRLR 763, in my judgment there is no reason in the circumstances why this claim should not be further considered by the same Employment Judge; and, given the error is an omission to address a specific point rather than any fundamentally flawed reasoning then I consider it is more appropriate that it be considered by the same constitution of the Employment Tribunal. I will therefore direct that the claim is, insofar as practicable, remitted to Employment Judge Gray. Beyond that, the future conduct of the proceedings (including whether it is necessary to hear further evidence) will be a matter for the Employment Tribunal to determine.