EMPLOYMENT TRIBUNALS

Claimant: Mr A Deol

Respondent: Royal Mail Group Limited

Heard at: Reading **On:** 2-5, 8 April 2024
& 3 May 2024 (in chambers)

Before: Employment Judge Anstis
Mr A Kapur
Mr J Appleton

Representation
Claimant: In person
Respondent: Mr R Chaudhry (solicitor)

RESERVED JUDGMENT

1. The claimant was unfairly dismissed.

2. The claimant was dismissed in breach of contract.

3. The dismissal of the claimant by the respondent and not allowing his appeal against dismissal were both acts of unlawful discrimination arising from a disability.

4. The claimant's other claims are dismissed.

REASONS

A. INTRODUCTION AND THE ISSUES

1. This hearing has been convened to consider all four of the claimant's claims against the respondent. In general, the first three of the claims concern events while he was at work and are claims of disability discrimination and for unpaid

wages. The final claim relates to his dismissal and is a claim of disability discrimination, unfair dismissal and wrongful dismissal.

2. The claims have been the subject of three preliminary hearings, as a result of which:

   a. The claimant was either conceded to be or found to have been a disabled person at all material times since October 2019, by reason of both the mental impairment of anxiety and stress and the physical impairment of back pain.

   b. The remedy for the first three claims has been limited to a declaration and compensation for injury to feelings only, by operation of an unless order that the claimant did not comply with.

   c. The issues to be determined by the tribunal at this hearing have been established and are set out in the Appendix to these reasons. Matters struck through in the list of issues signify where the list of issues has been changed during the course of the hearing, and issues in relation to remedy have been omitted from that list of issues.

3. In closing submissions Mr Chaudhry accepted that the claimant's dismissal (and presumably by extension the failure of his appeal) was for a reason relating to his disability. The legitimate aim relied upon was not undermining the bullying and harassment policy and/or not having it misused.

B. THE HEARING

Preliminary matters

4. At the start of the hearing, Mr Chaudhry made an application to strike out the claimant's claim on the basis that the claimant had not provided a witness statement. Both sides had been ordered to provide witness statements to each other by 10 August 2023, and the respondent had been ordered to produce an agreed bundle by 15 June 2023. The respondent had previously complained that the claimant had not been communicating with them. Mr Chaudhry did not have instructions as to when the various preparatory steps been carried out by the respondent, but it appears that the bundle may only have been produced a couple of weeks before this hearing and the respondent only provided the claimant with its witness statements a week before the hearing. It later emerged that the claimant had not in fact been able to access or see the bundle or witness statements until they were produced in hard copy at the hearing.

5. It appeared, therefore, that both sides were in breach of the tribunal's order. In the case of the respondent, this had been by late compliance, but in the case

of the claimant no witness statement had been produced. It was also of some concern that the claimant attended the first day of the hearing with around six boxes of his own documents, compared with the bundle prepared by the respondent which was one lever arch file.

6. The claimant initially said that his witness statement was comprised in three documents already in the bundle, but these documents did not seem suitable as witness statements. There was an adjournment so he could read the respondent's witness statements. In discussions on the afternoon of the first day of the hearing we decided to adjourn in order to provide the claimant with an opportunity to consider matters and prepare a draft witness statement. This was on the following basis:

   (a) that he would supply a draft witness statement to the tribunal and the respondent on or before 12:00 on the second day of the hearing,

   (b) that if there were important documents in his boxes of documents that he wished to refer to, and which were not in the bundle prepared by the respondent, he should refer to those documents in his witness statement, stating what the document was and what its significance was, and

   (c) the tribunal would not at present rule on either the respondent's application to strike out, nor would it provide blanket permission for the draft witness statement to be used in evidence, but it would resume at 14:00 the next day to see whether the respondent was still pursuing the application to strike out and whether the respondent opposed the introduction of any elements of the claimant's witness statement.

7. The claimant produced a draft witness statement in time. He attended tribunal with further boxes of documents, but on discussion with the claimant and Mr Chaudhry it was agreed that there were no documents referred to in the witness statement that were not already in the bundle prepared by the respondent. Given that there was now a witness statement from the claimant Mr Chaudhry took the commendably practical approach of withdrawing his application to strike out the claimant's claim and did not oppose the admission of any part of the witness statement into evidence. Accordingly, the claimant was able to commence his evidence on the afternoon of the second day of the hearing.

8. The claimant revisited the question of his additional documents at the start of his cross-examination of the respondent's witnesses, when he produced documents (not previously referred to in his witness statement) that he wanted to question Mr Charlton about. The tribunal allowed an adjournment for the claimant to consider his position and whether there were any further applications he wished to make, but on resuming he said that he would

continue to pursue his claims only by reference to the bundle supplied by the respondent. Matters continued through to closing submissions on Monday 8 April 2024, with both parties relying predominantly on written submissions. We reserved our decision, setting a provisional remedy hearing for 1 August 2024.

Interpretation

9. At the first preliminary hearing I had experienced some difficulties understanding the way in which the claimant described his claim. It was not clear at that point whether that may be down to a lack of legal understanding by the claimant or the fact that English was not his first language. The claimant expressed himself fluently in English, but it is understood that even those who can communicate very well on an everyday basis may face difficulties under the pressure of a court or tribunal environment (see, for example, para 110 of the Equal Treatment Bench Book).

10. Accordingly, since that first preliminary hearing there has been provision for a Punjabi interpreter. In general, the claimant adopted the position outlined at para 113 of the Equal Treatment Bench Book, communicating in English and calling on the interpreter only when required. We remained somewhat concerned about whether the claimant fully understood some of the language that was being used in tribunal, and of our own motion asked the interpreter to intervene in matters such as when we were delivering our decision on the adjournment for the claimant to produce a draft witness statement.

11. On resuming after a break in his evidence on the afternoon of the second day of the hearing the claimant indicated that he would like to give his evidence through the interpreter, and this continued for the rest of the day, although often in practice the claimant would reply directly to questions in English.

12. The claimant conducted his cross-examination of the respondent's witnesses in English, occasionally calling on the interpreter if a particularly difficult point arose.

The scope of the hearing

13. Although listed to address liability and remedy, it was agreed during the hearing that at this stage we should only address liability, but that that should include any question of contributory fault and a Polkey deduction. A provisional remedy hearing was listed during the hearing in case there was any later need to determine remedy.

C. THE FIRST THREE (NON-DISMISSAL) CLAIMS

14. The claimant's first three claims relate to the period prior to his dismissal.

15. They are set out in the list of issues as being claims of direct disability discrimination, discrimination arising from disability and for unlawful deductions from wages. For the reasons that follow, we can deal with them briefly, and will then move on to consider the fourth claim, which concerns the claimant's dismissal.

Direct disability discrimination

16. The claims of direct disability discrimination arise from the following alleged detriments:

> *"1.1.1 Ban the claimant from working overtime from 13 September 2019 for three months.*
>
> *1.1.2 Suspend the claimant on ~~15 May 2020 and also on~~ 4 July 2020.*
>
> *1.1.3 Stopped the claimants pay on 22 January 2020 for a month.*

17. It is not in dispute that these things occurred – or that things of this nature occurred, even if not quite exactly as they are put in the list of issues. The claimant was banned from carrying out "scheduled attendances" for three months. "Scheduled attendance" appears to be a particular form of overtime operated by the respondent. The respondent says that this happened because the claimant broke the rules on scheduled attendance by not attending and not giving a reason for his non-attendance.

18. The claimant was suspended form work on 4 July 2020, apparently on the basis that he was not complying with reasonable instructions given by his manager.

19. The claimant's sick pay was stopped on 22 January 2020. It is not clear why this happened. The respondent suggested that it may be that the claimant was not complying with the notification requirements.

20. The key question is whether the reason for this treatment (or part of the reason for this treatment) was the claimant being a disabled person (s13 Equality Act 2010). In considering this "*the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself).*" (para 3.29 EHRC Code of Practice).

21. The claimant has the benefit of the burden of proof provisions in s136 of the Equality Act 2010 – that is, he only has to show facts from which we could conclude that there has been discrimination. If he does so, the burden transfers to the respondent to show that there has been no discrimination.

22. The problem for the claimant is that while he has given over the course of the hearing a number of different reasons for this treatment by the respondent, none of those reasons were the fact that he was a disabled person.

23. His witness statement talks of the reason being "*raising an internal grievance*" (first paragraph p2), "*chang*[ing] *… working hours pattern*" (para 5(I)(c)) and later possibly sex discrimination (para 16).

24. The claimant has set out no basis from which we could conclude that this treatment was because he was a disabled person or a matter of direct discrimination. Looking beyond his evidence, we find no evidence from either party from which we could conclude that this treatment was because he was a disabled person, or that a non-disabled person would have been treated any differently in similar circumstances. Accordingly we dismiss the claim of direct disability discrimination.

Discrimination arising from disability

25. There is then the claim of discrimination arising from disability (other than his dismissal), which is:

> *"2.1 Did the respondent treat the claimant unfavourably by not providing the claimant with training for new roles undertaken as an adjustment for his disability?*
>
> *2.2 Did the claimant's need to be found an alternative role arise in consequence of the claimant's disability?"*

26. When asked by the tribunal to explain what he meant in this part of his claim, the claimant explained that it related to the recommendations of his second occupational health report (dated 14 October 2020), in particular where it says "*I recommend that if operationally feasible, management may consider moving him to another area of work such as the RVP area, arrival area or Gate house or logistics either on a temporary or on a permanent basis as his case is ongoing. This will help to prevent ongoing flare ups which may be caused by poor working relationship between himself and his line manager.*" He says that this was not done by the respondent.

27. On the question posed at 2.2 about whether he needed to be found an alternative role because of his disability, the respondent's position is that he was found an alternative role. The claimant says that this role was not provided. As far as we can tell the claimant was offered another role but did not consider that to be satisfactory as it remained close (in terms of location) to his former role and manager. The problem with his claim is that none of this relates to training, which is the point complained of. If (as he says) he was never transferred to an alternative role then there was no need for any training

and a failure to provide training cannot be discrimination arising from disability. If he was transferred to another role we have heard nothing from him about why any further training was necessary and what that training was. That claim is dismissed.

Unlawful deduction from wages

28. By virtue of the unless order, the claim for unlawful deduction from wages can only result in a declaration that there has been unlawful deduction from wages, not any substantial award of compensation.

29. Unfortunately the scope of the unlawful deduction from wages claim is not set out in the list of issues, which refers to unlawful deduction from wages generally.

30. The point is not much clearer in the claimant's witness statement. It seems that some of the matters referred to in his direct discrimination claim (such as not allowing him to undertake scheduled attendance) would have resulted in financial loss to him, but that would not be an unlawful deduction from wages because he had not carried out the relevant work. What we are looking for in a claim of unlawful deduction from wages is work carried out by the claimant that was not paid for by the respondent.

31. The claimant's witness statement says "*I am … owed money for hours worked during overtime (RMG Ref Scheduled Attendance NWED10-Wk1)*". This is the scheduled attendance we have been referring to. The claimant goes on to say "*on the overtime I have been paid, it was never paid correctly according to my flexible working hours …*". If this is scheduled attendance he worked but was not paid for, we have heard no evidence from anyone about that. If it is scheduled attendance he did not work because the respondent removed him from scheduled attendance, we do not think that can properly be the subject of a claim of unlawful deduction from wages. We have heard no evidence at all about overtime incorrectly paid due to flexible working hours.

32. The claimant's witness statement goes on to talk about being off sick only because of mistreatment by the respondent, and that this has deprived him of earnings. Whatever the cause of his absence from work, we do not think that we can declare that there have been unlawful deductions from wages because of the cause of the claimant's sickness absence.

33. The claimant's claim for unlawful deductions from wages is dismissed. He has produced no substantial evidence to support that claim.

D. THE CLAIMANT'S DISMISSAL AND APPEAL AGAINST DISMISSAL

Introduction

34. Having dismissed the claims that precede the claimant's dismissal we will now address the more substantial element of his claims – essentially the fourth claim, which address his dismissal. The claimant's dismissal is said to be unfair, wrongful and an act of discrimination arising from disability. Not allowing his appeal is said to be an act of discrimination arising from disability.

The serious warning – September 2020

35. We take as our starting point in considering the claimant's dismissal that on 15 September 2020 he was issued with a "2 year serious warning". The letter imposing this says:

> *"In dealing with this case, I considered the following points:*
>
> *1. Failure to follow a reasonable request in that you continued to transport yorks of mail around the operational, then attempt to sort mail after having been told to stop. In addition to this you failed to wait for your CWU rep as requested at your line managers desk in order to discuss your rehab plan.*
>
> *In the absence of any input from yourself either in person or in writing there is no evidence currently available to support your stance. You had two opportunities to supply supporting evidence but instead chose not to attend the meetings or prove a written explanation.*
>
> *2. Failure to follow a reasonable instruction, in that you failed to leave the operational floor having refused to increase your rehab hours from 2 hours per day, stating "you cannot make me leave, I am not leaving I am continuing with my duty".*
>
> *In the absence of any input from yourself either in person or in writing there is no evidence currently available to support your stance. You had two opportunities to supply supporting evidence but instead chose not to attend the meetings or prove a written explanation.*
>
> *3. Alleged inappropriate behaviour, in that you did not attend or co-operate with the process, by failing to attend meetings or provide any explanation for your behaviour*
>
> *In the absence of any input from yourself either in person or in writing there is no evidence currently available to support your stance. You had two opportunities to supply supporting evidence but instead chose not to attend the meetings or prove a written explanation."*

36. It is clear that the claimant does not accept that he was at fault in the matters that led to this warning, but we do not consider that any of the necessary circumstances exist by which we could revisit this warning (see e.g. Stein v Associated Dairies Ltd [1982] IRLR 447). The serious warning is the starting point for our consideration of the claimant's dismissal.

The bullying and harassment complaint – September 2020

37. The letter delivering the serious warning provided for an appeal to be made in writing within ten working days.

38. The claimant's trade union representative replied to this proposing a meeting to address "*longstanding issues*" affecting the claimant.

39. On 21 September 2020 the claimant submitted a bullying and harassment complaint on the respondent's form H1. This includes the following:

> *"I would like to make a complaint about my suspension and the unprofessional way it has been handling. I am putting bullying and harassment against* [named managers] *…*
>
> *I would like to raise a complaint about the unfair way I have been treated throughout this whole time ... I am still unclear as to why I have been issued with a warning when I have done nothing wrong …*
>
> *I am deeply unhappy about the way I have been treated and wish to raise this complaint under B&H RMG policy …"*

40. It appears that the meeting suggested by the union rep did take place, with the manager who was responsible for the disciplinary sanction writing to the union representatives saying (in an email on 2 October 2020) "*I have moved* [the claimant] *from parcels to manual letters and he will be sitting on the rebuts frames away from people so no issues with social distancing,* [named manager] *will manage him in the area and he needs to speak to* [named manager] *whenever he needs to leave the work area (the issue with social distancing as I spoken already and health & safety still remains?).*"

41. That email also refers to an occupational health referral having been "*completed yesterday*".

42. The email was not sent directly to the claimant but was forwarded to him by one of his trade union representatives on 9 October 2020.

43. The respondent would later criticise the claimant for having made a "*bullying and harassment complaint*" in response to this decision, rather than simply appealing the decision. We were told, and accept, that the claimant did submit

an appeal against the decision but that this was refused on the basis that it was brought outside the ten-day time limit.

Occupational health - October 2020

44. The occupational health referral resulted in a report dated 14 October 2020 which identified the claimant as likely to be disabled (apparently on the basis of his mental health rather than his physical health) and recommended a stress risk assessment be undertaken. It also said:

> *"I recommend that if operationally feasible, management may consider moving him to another area of work such as the RVP area, arrival area or Gate house or logistics either on a temporary or on a permanent basis as his case is ongoing. This will help to prevent ongoing flare ups which may be caused by poor working relationship between himself and his line manager."*

45. The report recommended a phased return to work from the claimant's then current period of sickness absence.

The outcome of the bullying and harassment complaint – December 2020

46. Having completed a series of interviews, the manager assigned to determine the claimant's bullying and harassment complaint wrote to the claimant with his conclusions in a letter dated 11 December 2020.

47. Not only did this not uphold the claimant's complaint, the manager said in the outcome letter:

> *"I also have reason to believe that your complaint was not made in good faith based on more credible evidence from other individuals. This evidence is contrary to your version of events. I am also concerned with your behaviour which led to your suspension and that the way you engage with managers is not in line with Royal Mail behavioural standards and that this leads me to believe that your Bullying and Harassment claim has been made maliciously.*
>
> *It is an employee obligation, set out within the Bullying and Harassment procedure that complaints should be made in good faith. Complaints that are not made in good faith undermine the validity of the procedure and damage the basis of good working relationships.*
>
> *I have considered whether further action should be taken under the Conduct Policy and decided that your manager should consider formal action …"*

48. The respondent's "*Stop bullying and harassment guide for employees*" contains the following:

> *"Complaints which are deliberately false, fictitious or frivolous:*
>
> *Complaints that are deliberately false, fictitious or frivolous (not made in good faith) undermine the validity of the whole investigation process and damage the basis of good working relationships.*
>
> *While a guiding principle of the bullying and harassment procedure is that managers will treat all complaints seriously, there is an obligation upon all employees that complaints be made in good faith.*
>
> *If it is found that a complaint has not been brought in good faith, appropriate action may be taken under the Conduct Policy."*

49. The outcome letter was accompanied by a report, which concluded:

> *"It is an employee obligation, set out within the Bullying and Harassment procedure that complaints should be made in good faith. Complaints that are not made in good faith undermine the validity of the procedure and damage the basis of good working relationships.*
>
> *The statements taken from the respondents are detailed and are consistent in contradicting* [the claimant]*'s account which lacks detail. They all state that he failed to engage with the management team, that his behaviours were poor.* [Named managers] *state that he had a history of putting in grievances or cases without substance. I have confirmed with HR that that you have raised a number grievances over the last 5 years and of these only one has been partially upheld. I am also concerned by the evidence that he did not respond to or attend meetings.* [Named manager] *provides a detailed timeline of non-attendance, this is confirmed by* [another named manager] *who showed me a time line of an AR and story board in 2019 which shows failure to attend meetings or to respond to invites on multiple occasions.* [Named manager] *suggests that he lied in his referral by stating that he was working in the semi-automated parcel area when in fact he had already been moved to letters.*
>
> *Based on the above it is therefore reasonable to assume that* [the claimant] *is using the Bullying and Harassment process in bad faith."*

50. In discussing what "*not made in good faith*" meant, Mr Chaudhry accepted that the allegations made by the claimant could not be considered to be "*fictitious or frivolous*" and that meant that "*not made in good faith*" should be taken to be a finding that the complaint was "*deliberately false*".

51. The claimant immediately submitted an appeal against this decision.

The appeal decision on the bullying and harassment complaint – March 2021

52. It appears that the claimant did not attend any appeal meetings, and on 3 March 2021 the appeal manager wrote upholding the earlier decision and, as had been suggested by the manager originally addressing the grievance, conduct proceedings were started against the claimant

The start of the conduct proceedings – April 2021

53. The conduct proceedings started with a "fact finding interview" with the claimant, at which his union representative was present. This took place on 21 April 2021. The manager who conducted this meeting concluded that "*I have come to the conclusion that the accusations of b&h against the four managers were indeed made in bad faith … As I feel the possible punishment for the offence committed is outside of my remit and* [the claimant] *already has a two year serious warning outstanding I will pass the case upwards for a senior manager to deal with."*

54. In other words, the manager had decided that the possible sanction that this alleged misconduct may involve required, under the respondent's procedures, a more senior manager to make any disciplinary decision. By a letter dated 14 May 2021 the claimant was notified that Ms Romao would take over the matter.

The initial letter from Ms Romao – June 2021

55. On 11 June 2021 Ms Romao wrote to the claimant saying:

> *"Further to my consideration of your case. I am writing to inform you that I am currently still going through your case papers. I apologise for the delay in resolving your concern, please he assured that I am working as quickly as possible to reach a decision. The delay is due to that I'm going on annual leave, I will endeavour to pick this up on my return from leave*
>
> *I will contact you again as soon as possible."*

56. This letter was addressed to the claimant's address in Hillingdon. It is agreed that he received this letter.

The disciplinary invitations

57. In fact Ms Romao did not contact the claimant again until sending a letter dated 13 October 2021 inviting him to a "conduct meeting".

58. The claimant was sent multiple invitations to a "conduct meeting". These were sent on 13 October 2021, 25 October 2021 and 10 December 2021

59. All were sent to an address in Hillingdon, as was a letter sent to him inviting him to an outcome meeting on 16 March 2022.

60. The claimant's pay slip for 7 January 2022 is addressed to a different address, in Ickenham, as was his eventual outcome letter.

61. The parties agree that at some point the claimant moved from Hillingdon to Ickenham. Despite the potential significance of this there was no evidence from either party when this occurred. We invited the parties to produce any documentary evidence they had as to when the claimant had notified the respondent of his change of address.

62. The claimant's position was that he had moved in May or June 2021, and that he had changed his address at that time on the respondent's systems using an app provided by the respondent.

63. In response to this, Ms Romao produced a screen shot of the respondent's TRMS system from around the time of the claimant's dismissal showing the claimant's old address in Hillingdon. It was Ms Romao's case that the claimant had to notify resources of his change in address so that it could be changed on the TRMS system, but that he had not done so. She said that the change of address on the app would only have been effective for the "PSP" system – a new system as yet only partly implemented at the claimant's work site, for which the TRMS system was also used.

64. It appeared to be accepted by the respondent that the claimant had used the app to change his address on the "PSP" system but that this was not sufficient and he should also have reported this change of address separately to resources so that it could be changed on the TRMS system.

65. The respondent produced no documentation on how employees at the claimant's work location should notify it of a change in personal circumstances such as a change of address.

66. The position was further complicated by Ms Romao's evidence as to what she had done in order to ascertain the correct address to send her letters to.

67. She said that she had obtained the address by speaking to the claimant's line manager, as it was only the line manager who had direct access to the PSP system. If so, it is irrelevant when (if at all) the address was changed on TRMS as she was relying on PSP not TRMS to obtain the claimant's address. Any failure by the claimant to report his new address so that it could be

changed on TRMS did not affect where the disciplinary invitations were sent, since Ms Romao had not relied on the address recorded by TRMS.

68. Ms Romao said that she was sure that the address she had been given for the claimant was the correct one as at the time of her enquiry about his address the claimant's line manager had said that he lived in the same road as the claimant.

69. There was some suggestion from the respondent that the claimant retained a connection with his Hillingdon address and may have rented it out. It was also suggested that the respondent's employees were entitled to free mail redirection services, but there was no evidence that the claimant had taken advantage of that, nor that he had seen any of the letters addressed to the Hillingdon address after June 2021.

70. It might have been thought that the best way to communicate with the claimant was to hand-deliver letters to him when he was at work, but we were told that the claimant refused to accept official letters given to him at work.

71. When asked why he had not followed up on the matter despite not having heard anything following the June 2021 letter he said that having heard nothing more about it he assumed that the matter had been dropped.

72. The disciplinary invitation letters says that the misconduct in question is "*raising a bully and harassment complaint in bad faith*". They say that the previous two-year serious warning will be than into account and "*if the conduct notification is upheld, one outcome could be your dismissal with notice*".

The disciplinary decision – March 2022

73. The end result of this is that following what Ms Romao described as "*the claimant's lack of engagement*" in the face of three invitations to three disciplinary hearings, she made a decision on the papers without any input from him and sent this decision to him in writing on 24 March 2022. This letter was sent to the Ickenham address, with Ms Romao apparently having made further enquiries about his address prior to sending out the letter.

74. The decision letter said:

> *"I wrote to you on 3 separate occasions which were;*
>
> - *13th October 2021 for a meeting on the 20th October 2021 at 18:15*
> - *25th October 2021 for a meeting on the 3rd November 2021 at 18:15*

- *10th December 2021 for a meeting on the 16th December at 18:15*

To discuss the formal notification of Raising a Bully and Harassment in Bad faith. In my 3rd and final invite I made it clear that this would be your final opportunity to provide an explanation or mitigation before proceeding with the evidence to hand at the time.

I am writing to advise that I have investigated this case in accordance with Royal Mall Conduct Code process. As you have not taken the opportunity afforded to you to answer the notification against you; I have concluded my investigation using the evidence currently available to me. I have now carefully considered all the circumstances of your case and my decision is detailed below:

Decision: Gross misconduct - in that you raised a bullying and harassment complaint in bad faith.

Decision Result: Summary Dismissal

…

Your last day of service with Royal Mail Group will be 25/03/2022."

75. The letter was accompanied by a report containing the following "deliberations":

"Considering that [the claimant] *failed to provide any explanation or mitigations to the allegation and provided no evidence or mitigation. I have looked at all the information provided to me from the original Bully and Harassment investigation; the appeal of the decision of the Bully and Harassment and the first fact-finding interview of the Conduct code. I have concluded the following:*

1. *Mr Deol has shown throughout the investigation inconsistencies; provided no evidence and failed to attend meetings. Mr Deol showed a lack of respect for management. Mr Deol failed to engage with management Mr Deol forgot the basic responsibility which is; every employee must ensure that they are able to meet the business standards with respect to their behaviour. Throughout the whole process it is evident that Mr Deol's behaviour is below standard.*

2. *Mr Deol used the Bully and Harassment Policy in maliciously and with bad faith. The reason for this is; Mr Deol are given a penalty by* [named manager] *on the 15th September 2022; Mr Deol does not appeal the decision but instead submits a Bully*

and Harassment complaint on the 21st of September 2020 via Sheffield.

3. *When this is concluded on the 10th December 2020 Mr Deol appeals the decision on the 17th December 2020.*

4. *After submitting the appeal, Mr Deol failed to attend 3 meetings which were set up by the appeals manager. This shows how uncooperative Mr Deol is even when it is in his interest. Clear example of how much lack of respect, consideration, engagement and cooperation Mr Deol has at following Royal Mail Policies and towards management.*

5. *In the fact finding with* [named manager] *on the 21st April 2021 Mr Deol mentioned that the witnesses were not interviewed. Yet in the original investigation Mr Deol never mentioned the witnesses.*

6. *I invite Mr Deol to 3 meeting during his working hours. I even verified if Mr Deol was in attendance. Once again Mr Deol showed lack of respect for management and processes. Mr Deol didn't even provide me with an explanation as to why he did not attend.*

Balance of probabilities: taking the above into account you were given a penalty by [named manager] *you did not like the outcome, instead of embracing the agreed processes with RM/CWU/CMA Mr Deol instead submits a Bully and Harassment complaint this act shows that the his intentions were malicious and done in bad faith. By refusing to attend the meetings Mr Deol failed to comply with the agreed process; by doing Mr Deol is showing a lack integrity and this action shows his disregard towards management."*

76. It is apparent from this, and accepted by Ms Romao in her evidence, that both the claimant's lack of response to her disciplinary invitations and him submitting a bullying and harassment complaint (but not an appeal) in response to the first disciplinary decision played a significant part in her decision. In answer to questions from the tribunal, she said that she had concluded that the claimant's bullying and harassment grievance was malicious because he had submitted that instead of appealing against the disciplinary decision, and that if he had appealed "*it would have been a completely different case*". She said that if there had been both an appeal and a bullying and harassment complaint that would not have demonstrated malicious intent and that if she had known that the claimant had submitted a late appeal against the first disciplinary decision it is likely she would have decided on a lesser penalty – suspended dismissal.

77. When asked by the tribunal whether she had formed a view on whether the claimant might genuinely have thought he was being bullied and harassed, Ms Romao accepted that the claimant may have thought that he was being bullied.

78. Ms Romao also said that she would not have dismissed the claimant if he had not had his two year serious warning. Without the two year serious warning she said her decision would have been either a two year serious warning or suspended dismissal.

79. It was pointed out to Ms Romao during her evidence that her disciplinary invitation letters had spoken only of dismissal with notice, whereas the outcome was summary dismissal. She accepted that the invitation letters had spoken of dismissal with notice but said that on consulting with HR about the dismissal letter they had told her that it should be summary dismissal in these circumstances, and that is what she had implemented.

The claimant's appeal against dismissal – April 2022

80. The claimant promptly appealed against the decision to dismiss him. His grounds of appeal included: "*I have not received any letter as per your letter form you and would like to know where you have posted them – can I have proof of letters.*"

81. The respondent nominated Julie Forde to hear the claimant's appeal. She wrote to him on 13 April 2022 inviting him to a meeting to take place via Teams on 20 April 2022. At the claimant's request this was moved to 6 May 2022 so that his union representative could attend. One point arising from this was that Ms Forde agreed to make a further occupational health referral for the claimant. Pending this, Ms Forde conducted further interviews with others in relation to the appeal.

Occupational health – June 2022

82. The occupational health report was dated 20 June 2022. It includes the following:

> *"Did a medical condition cause or contribute to the behaviour, refusing to obey a reasonable instruction and raising a bullying and harassment complaint in bad faith?*
>
> *Obviously It is not for occupational health to say whether management's instruction was reasonable or not, and I cannot say whether the grievance was raised in bad faith. (He certainly seems to be aggrieved still, which would suggest that he raised the grievance because he was genuinely aggrieved and felt he had a case). What I*

can say is that based on the information available to me and the history taken today, he had anxiety and depression at the time, of the incident in 2020, and that this medical condition was on balance of probabilities a significant contributor to the behaviours he exhibited at that time."

83. It is thus established, and accepted by the respondent, that "*this medical condition*" i.e. the claimant's mental health condition "*was … a significant contributor to the behaviours he exhibited at that time*", which must be taken to include "*raising a bullying and harassment complaint in bad faith*". Accordingly we have the respondent's correct concession that the claimant's dismissal was for a reason relating to his disability and (subject to the justification defence) is discrimination arising from disability.

84. The occupational health report addresses the possibility of recurrence:

"If so are there any steps that can be taken that will guarantee that it will not happen again?

I cannot give any guarantees about what might happen for any employee in the future. It would probably be helpful if any difficult conversations between him and management are held in the presence of his union representative as they may be able to defuse difficult situations and explain the situation In work, and management's position, to Mr Deol. He may have misunderstood his situation and thought that being covered by the Equality Act 2010 meant that management had to make all possible adjustments rather than simply considering reasonable adjustments, and if necessary justifying why an adjustment cannot be reasonably accommodated by the business. The present of the union rep may be useful in explaining the situation, and It may be that he accepts an explanation of the situation from a rep rather than management, whom he may mistrust. Just to be clear the situation is that management must consider reasonable adjustments and make reasonable, but not all possible, adjustments. There would be an expectation to treat him fairly compared to colleagues. You could also consider mediation to try to resolve the historical issues, if both him and management were willing to go through that process."

The outcome of the appeal against dismissal – July 2022

85. On 5 July 2022 Ms Forde sent to the claimant the material she had compiled during her investigation, including notes of interviews with various managers and colleagues of the claimant. She asked for any further comments from the claimant within three days. The claimant and his union representative presented brief replies. He was given a further opportunity to make any final comments by 22 July 2022.

86. On 25 July 2022 Ms Forde wrote to the claimant saying *"I have now completed my re-hearing of the case and given full consideration to everything that was put forward at the appeal. In the light of all the evidence, my decision is that you have been treated fairly and reasonably and therefore I believe that the original decision of dismissal is appropriate in this case."*

87. The decision letter was accompanied by a lengthy report. In relation to the occupational health advice, Ms Forde says:

> *"What I did note that the Occupational Health Practitioner cannot provide assurances that Ash will behave in a reasonable way and that includes putting in complaints against the managers.*
>
> *Having considered all the evidence of this case and what has been said in this Occupational Health report there is nothing that suggest to me that Ash will be able to work reasonably and stop raising complaints about the managers behaviour towards him. I am genuinely concerned that if I was to reinstate him we will shortly find ourselves back in the same situation with Ash being disruptive refusing to co-operate with management and using the grievance and Bullying & Harassment process as a way of getting at the managers."*

88. Some points of Ms Forde's oral evidence contrasted with that of Ms Romao. On the question of whether the claimant genuinely believed he was being bullied and harassed, she said that she did not see how he could have thought that and that while he was not completely making his allegations up he was "twisting" them. It was her position that the claimant's behaviour was sufficient to justify dismissal in itself, irrespective of the fact that he was on a two year serious warning. She said that one of the reasons she had come to the conclusion that dismissal was appropriate was that (in the light of the occupational health advice) she could not be confident the claimant would not raise bad faith complaints again as a means of retaliating against ordinary management actions. She said that the only way of mitigating this that occupational health had suggested was via trade union involvement, but the union had previously been very involved at the start and that had not prevented the problem first arising. She said she was aware that there had been an out-of-time appeal against the original disciplinary decision.

E. THE LAW

Introduction

89. The claimant's dismissal gives rise to three separate complaints.

Discrimination arising from disability

90. Discrimination arising from disability is addressed in s15 of the Equality Act 2010. Dismissing someone will amount to unfavourable treatment. It having been accepted that the claimant's dismissal was because of something arising from his disability that will amount to unlawful discrimination if (s15(1)(b)):

> "[the respondent] *cannot show that the treatment is a proportionate means of achieving a legitimate aim.*"

91. The legitimate aim in this case is said to be "*not undermining the bullying and harassment policy and/or not having it misused*". The respondent must demonstrate that this is a legitimate aim and that it was acting in pursuance of that aim in its unfavourable treatment of the claimant.

92. Beyond that, to be a proportionate means of achieving a legitimate aim it must be a reasonably necessary means of achieving the aim (Homer v Chief Constable of West Yorkshire [2012] UKSC 15), and this is to be assessed on an objective basis by the tribunal – there is no "*range of reasonable responses*" (Land Registry v Houghton UKEAT/0149/14). The tribunal must consider whether or not a lesser measure could have achieved the respondent's legitimate aim (Noeem v Secretary of State for Justice [2017] UKSC 27).

Unfair dismissal

93. In a claim of unfair dismissal, the respondent must first demonstrate on the balance of probabilities that the claimant was dismissed for a potentially fair reason. In this case it is said to be a reason related to the claimant's conduct. The claimant has never suggested that there is any other reason for dismissal, and in this case all the evidence points to the claimant's dismissal being for a reason relating to his conduct. We accept that the respondent has demonstrated that the claimant was dismissed for a potentially fair reason.

94. What remains is whether dismissal for that reason was fair. Under s98(4) of the Employment Rights Act 1996:

> *"… 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 a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

95. On the question of the size and administrative resources of the respondent, its initial ET3 describe it as employing 130,000 staff. It is one of the largest employers in the country.

96. It is well established that a decision to dismiss will only be unfair if it is outside the "*range of reasonable responses*" open to an employer. It is the fairness of the employer's decision that is to be assessed, and not whether the tribunal itself would have dismissed the claimant in these circumstances. For a conduct-related dismissal the principles in BHS v Burchell [1978] IRLR 379 apply – that is, (i) did the employer believe the employee to be guilty of misconduct, (ii) did the employer have reasonable grounds for believing that the employee was guilty of that misconduct and (iii) had the employer carried out as much investigation as was reasonable? The range of reasonable responses test applies to each of those factors, and also to the decision to impose a disciplinary sanction of dismissal (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23).

97. "*Any provision of the* [ACAS Code of Practice Disciplinary and Grievance Procedures] *which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining* [whether dismissal is fair or not] *…*" (s207(2) Trade Union and Labour Relations (Consolidation) Act 1992).

98. Procedural defects in an initial decision to dismiss may be remedied by a comprehensive appeal process (Taylor v OCS Group Limited [2006] IRLR 613).

99. Although distinct branches of law with their own considerations, there can often be connections between the question of whether a dismissal is an act of discrimination and whether it is unfair. In particular, it is highly likely that a decision that a dismissal is an act of unlawful discrimination will lead to a decision that the dismissal was also unfair.

Wrongful dismissal

100. A claim of wrongful dismissal is a claim of breach of contract – in this case that the claimant was dismissed without notice. The question is, as a matter of fact, whether the claimant's behaviour amounted to a repudiatory breach of contract justifying immediate dismissal. This is typically described as gross misconduct. It is for the claimant to prove on the balance of probabilities that his dismissal was a breach of his employment contract, and the tribunal must determine on an objective basis whether his behaviour amounted to a repudiatory breach of contract.

F. DISCUSSION AND CONCLUSIONS

Disability discrimination and unfair dismissal

101. Because of the possible overlap between the two claims we will consider disability discrimination and unfair dismissal together.

102. The claimant was dismissed by Ms Romao for raising a bullying and harassment complaint in bad faith, and this decision was endorsed by Ms Forde on appeal.

103. The respondent's "*stop bullying and harassment guide*" says that employees will be liable for action under the conduct policy "*if it is found that a complaint has not been brough in good faith*". The guide goes on to say that "*complaints that are deliberately false, fictitious or frivolous*" are not made in good faith.

104. The respondent's witnesses properly accepted that there may be many bullying and harassment complaints that are not upheld, and that the simple fact that a bullying and harassment complaint fails does not mean that it is not made in good faith. More than simply the complaint not succeeding is necessary in order to find that it was not made in good faith. The additional factor is that the complaint must be "*deliberately false, fictitious or frivolous*". Clearly the claimant's complaints were not frivolous, nor were they fictitious, in the sense of being totally made up and having no basis in reality. They were based on events that had actually occurred. That leaves the bad faith as being raising complaints that were "*deliberately false*".

105. Both Ms Romao and Ms Forde struggled somewhat with what this might actually mean if, for instance, the claimant genuinely but mistakenly believed that he was being bullied. Ms Romao accepted that he may have genuinely thought that he was being bullied, but nevertheless found that he had raised his complaint in bad faith (i.e. on the basis that it was "*deliberately false*"). Ms Forde considered that the claimant could not properly have thought that he was being bullied and that although the complaints may have had some basis he was "twisting" them.

106. The disciplinary process started with the grievance manager's decision not only that the bullying and harassment grievance should not be upheld but also that it was brought in bad faith.

107. This positive finding that the grievance had been brought in bad faith led to the disciplinary process, but also put Ms Romao in the rather difficult position of having to decide a point that the respondent seemed already to have decided – that the grievance was brought in bad faith. The decision of the manager hearing the grievance was not that it may have been brought in bad faith and that this would warrant further consideration, but that it had been brought in bad faith.

108. Ms Romao's difficulties were compounded by the fact that she made her decision without the benefit of any input from the claimant, and without knowing that he had submitted a late appeal. We have already seen that what she considered to be the claimant's use of a bullying and harassment complaint as an alternative to an appeal against the original grievance outcome played a part in her decision to dismiss, as did the claimant's failure to attend the disciplinary hearings she had scheduled.

109. The claimant did not attend the disciplinary hearings because he did not know about them. Despite the fact that he had changed his address on the system she sought to use to identify his address, she sent the letters to his old address. There is no evidence that he ever received these. It was not unreasonable for the claimant to take the view that in the absence of any further communication from the respondent the matter had been dropped.

110. It was the respondent's fault that the claimant was not properly notified of the disciplinary hearings. It was also the respondent's fault that the disciplinary decision was made in ignorance of the late appeal having been made.

111. If Ms Romao had known of the late appeal she was clear that she would not have made the decision to dismiss the claimant.

112. It was later established that the claimant's behaviour in raising his bullying and harassment complaint in a way that the respondent found to be misconduct was a matter arising in consequence of his disability. Ms Romao did not consider this. However, she knew or ought to have known from the previous occupational health report that the claimant had a mental health disability. The respondent cannot take advantage of the exception in s15(2) of the Equality Act 2010 concerning lack of knowledge of a disability. We will consider the question of discrimination arising from disability once we have considered what happened with the appeal.

113. We will look later at whether the appeal makes any difference to our decision, but pausing at this point it is clear that the original decision to dismiss the claimant was unfair. This is because (1) Ms Romao could not properly have found that the claimant had raised deliberately false allegations in circumstances where she accepted that he may have believed the allegations to be true, (2) she did not take sufficient steps to investigate the matters complained of – in particular making her decision on the false basis that there had been no appeal against the grievance, and (3) the claimant was not properly notified of the disciplinary hearing.

114. Perhaps aware of the problems that there were with the initial dismissal decision, the respondent has placed considerable reliance on the appeal before Ms Forde. We accept that this was a complete re-hearing of the matter. In particular, the claimant was properly notified of and had full opportunity to

participate in the appeal process and Ms Forde was aware that there had been an out-of-time appeal against the grievance. Those two aspects of unfairness no longer operated by the time the appeal concluded.

115. Mr Forde took steps to fully appraise herself of the medical situation, and was told that the claimant's disability was "*a significant contributor to*" the behaviour the respondent was seeking to discipline the claimant for. The main point that arises with the appeal is her response to this.

116. The respondent says, and we accept, that *"not undermining the bullying and harassment policy and/or not having it misused"* is a legitimate aim and was the legitimate aim pursued by the claimant's dismissal. The more difficult question is whether dismissing the claimant (in this context the most extreme way of pursuing the legitimate aim) was proportionate – that is, appropriate and necessary to meet the legitimate aim.

117. In her report, Ms Forde says "*there is nothing that suggest to me that* [the claimant] *will be able to work reasonably and stop raising complaints about the managers behaviour towards him*" and "*I am genuinely concerned that if I was to reinstate him we will shortly find ourselves back in the same situation with Ash being disruptive refusing to co-operate with management and using the grievance and Bullying & Harassment process as a way of getting at the managers*". The legitimate aim is nothing to do with "*working reasonably*" or "*being disruptive refusing to co-operate with management*". The legitimate aim is only concerned with preventing misuse of the bullying and harassment procedure. The respondent's position is that the only effective means of preventing the claimant from misusing the bullying and harassment procedure is to dismiss him.

118. We do not accept this. In considering wrongful dismissal and questions of Polkey and contributory fault we will look at whether the claimant has actually misused the procedure or raised complaints in bad faith, but even adopting the respondent's position that he has raised complaints in bad faith the respondent is in charge of its own procedures and it would be entirely possible to adapt the procedure in order to guard against misuse by the claimant – for instance, by providing (as an alternative to dismissal) that he can only continue to work on the basis that he is not permitted for a particular period of time to raise bullying and harassment complaints or, perhaps more realistically, by providing some sort of initial gatekeeping procedure whereby complaints made by the claimant are subject to an initial review before deciding whether they can continue. It seems to us to be questionable even whether the respondent needed to impose these restrictions. The respondent's reaction in dismissing him is as if he has consistently been flouting or exploiting the bullying and harassment procedure, but this is the first time he has been found to have used it in bad faith. Even if his disability

made him more likely than others to make such complaints the respondent ought surely to have looked to warnings or (in their procedures) suspended dismissal before concluding that the only option was to dismiss him. There were many options short of dismissal that the respondent could have adopted in order to achieve its legitimate aim.

119. Under all this is a flavour that the claimant had become difficult to manage and was liable to disobey or protest at ostensibly reasonable instructions from managers, but if that was the respondent's concern then his dismissal was in pursuance of some aim other than avoiding misuse of its bullying and harassment procedure.

120. The claimant's dismissal was an act of discrimination arising from disability. It was not suggested by Mr Chaudhry that the dismissal could be unlawful discrimination but also fair. We find that the disability discrimination means that the dismissal was also unfair.

Wrongful dismissal

121. For wrongful dismissal the question is whether we find that the claimant committed a repudiatory breach of contract.

122. For that we have to decide whether the claimant actually did anything wrong at all. It is not clear that he did. Ms Romao felt that maybe the claimant did think he was being bullied and harassed. Ms Forde considered it a case of "twisting" rather than totally making up things. The medical evidence is that the claimant was more likely than others to raise complaints in this way. In those circumstances had the claimant done anything wrong at all, or is this simply a case of allegations being made and being found not to be proven?

123. Having heard all the evidence it seems to us that the claimant did not do anything wrong. It is clear and never really challenged by the respondent that rightly or wrongly he had formed the view that he was being bullied and harassed. Given that it is not surprising that he resorted to the relevant procedure. The respondent then had to decide whether there was truth in the allegations made. They found that there was no bullying or harassment, but there is considerable distance between that and finding that the allegations made were "deliberately false". Particularly given the medical evidence it is necessary to consider whether these allegations were deliberately false, or whether the claimant had simply proceeded under a misapprehension that he was being bullied or harassed when in fact he was not. It seems to us having heard all the evidence that the latter was far more likely. The claimant had not committed any misconduct let alone gross misconduct or a repudiatory breach of contract in raising those allegations.

Polkey and deductions from contributory fault

124. Having found that the claimant raising these allegations was not an act of misconduct we do not think there is any room for a finding of a Polkey deduction nor of any deduction from either the basic or compensatory award for unfair dismissal for contributory fault.

Next steps

125. At the conclusion of the hearing a provisional remedy hearing was listed for 1 August 2024. That hearing will now proceed (unless remedy can be agreed between the parties in the meantime) and separate orders will be issued for preparation for that hearing.

Employment Judge Anstis
Date: 13 May 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
3 June 2024

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FOR EMPLOYMENT TRIBUNALS

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APPENDIX – LIST OF ISSUES

1. Direct disability discrimination (Equality Act 2010 section 13)

1.1 Did the respondent do the following things:

1.1.1 Ban the claimant from working overtime from 13 September 2019 for three months.

1.1.2 Suspend the claimant on ~~15 May 2020 and also on 4~~ July 2020.

1.1.3 Stopped the claimants pay on 22 January 2020 for a month.

1.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The claimant has not named anyone in particular who he says was treated better than he was.

1.3 If so, was it because of disability?

1.4 Did the respondent's treatment amount to a detriment?

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

(claim numbers: 3302697/2020, 3324382/2020 and 3300345/2021)

2.1 Did the respondent treat the claimant unfavourably by not providing the claimant with training for new roles undertaken as an adjustment for his disability?

2.2 Did the claimant's need to be found an alternative role arise in consequence of the claimant's disability?

2.3 Was the treatment a proportionate means of achieving a legitimate aim?

(claim number: 3311146/2022)

2.4 Did the respondent treat the claimant unfavourably by (i) dismissing him and (ii) not allowing his appeal, because he had made a complaint?

2.5 Did the complaint arise in consequence of the claimant's disability?

2.6 Was the treatment a proportionate means of achieving a legitimate aim?

(all claims)

The Tribunal will decide in particular:

2.6.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

2.6.2 could something less discriminatory have been done instead;

2.6.3 how should the needs of the claimant and the respondent be balanced?

2.7 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From when?

…

4. Unfair dismissal

4.1 What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

4.2 If the reason was misconduct, 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:

4.2.1 there were reasonable grounds for that belief;

4.2.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

4.2.3 the respondent otherwise acted in a procedurally fair manner;

4.2.4 dismissal was within the range of reasonable responses.

…

6. Wrongful dismissal / Notice pay

6.1 What was the claimant's notice period?

6.2 Was the claimant paid for that notice period?

6.3 If not, was the claimant guilty of gross misconduct? / did the claimant do something so serious that the respondent was entitled to dismiss without notice?

7. Unauthorised deductions

7.1 Did the respondent make unauthorised deductions from the claimant's wages and if so how much was deducted?