



EMPLOYMENT TRIBUNALS

Claimant: Mr Rebelo

Respondent: Serco Limited

Heard at: London South Employment Tribunal (by video)

On: 04, 05, 06, 07 November 2024

Before: EJ J England, Ms E Whitlam, Mr S Townsend

Representation

Claimant: Representing himself

Respondent: Mr I Ahmad, Counsel

JUDGMENT having been sent to the parties on 11 November 2024 and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This is the unanimous judgment of the Tribunal and follows Mr Rebelo's request for written reasons by email of 11/11/24.

The claims

2. The claims brought by Mr Rebelo:
 - a. Unfair Dismissal; and
 - b. Discrimination arising from disability (s.15 EA 2010) based on the act of dismissal and relying on the 'something arising' being his sickness absence that arose because of his stroke.
3. The Respondent defended those claims:
 - a. Unfair Dismissal – Serco claimed that dismissal was for capability arising from ill health.
 - b. Discrimination arising from disability – it was accepted that the stroke amounted to a disability, all relevant knowledge was held, that dismissal had occurred and was because of the sickness absence and that the sickness absence arose from Mr

Rebello's disability. The claim was defended because Serco claimed that dismissal was a proportionate means of achieving a legitimate aim. The legitimate aims were set out in the Grounds of Resistance at para. 25 [52].

4. In terms of case management:
 - a. First Preliminary Hearing (PH) on 28/11/23 – this hearing clarified the issues and listed a further PH to consider time limits for discrimination claims.
 - b. Second PH on 28/05/24 – this considered the time limits for discrimination claims and a separate Tribunal Judge decided that the race discrimination claims (direct discrimination and harassment claims) were out of time and therefore dismissed.
5. At the beginning of the hearing, Serco's Counsel highlighted that Mr Rebello had appealed to the EAT about the PH on 28/05/24 because of its decision that discrimination claims were out of time. After discussion with the parties, the Tribunal considered:
 - a. There was no application from Mr Rebello to adjourn, this had arisen solely because Serco sought to assist us by raising the point. We did then note that the attempt at appeal was also referenced in Mr Rebello's submissions [144] and again this was just explained to be for the Tribunal's understanding.
 - b. The parties suggested that permission had not yet been granted for any appeal but neither party knew much in detail.
 - c. The Tribunal did not consider that it was in the interests of justice to postpone the hearing, nor was either party seeking that result. The facts of the appeal were unclear and ultimately if the appeal was successful there would be a new trial after any appeal hearing, which would be the same result as if we postponed today anyway.
6. The issues were discussed at the start of the hearing and it was confirmed that they were as per the Order produced at the PH on 28/11/23 [61], apart from:
 - a. Issues 1, 6 and 7 had now been resolved at the second PH.
 - b. Upon the Tribunal's enquiry about the Grounds of Resistance, it was confirmed that 'contributory conduct' was not alleged by Serco (as per the PH Order).

Procedure

7. The papers the Tribunal received were a bundle of 551 pages, a supplementary bundle of 41 pages as well as witness statements as set out below.
 - a. As outlined to the parties, the Tribunal read most of the documents referred to in the witness statements. Not all documents could be located because Serco's had incorrect page numbers until we were provided with updated versions and Mr Rebello's had no page numbers. The Tribunal are satisfied that we read all pertinent and key documents.
 - b. References within this judgment in square brackets are to pages of the bundle with a colon indicating a paragraph number. References to two letters followed by a number refers to a paragraph of a witness statement indicated by initials.
8. The parties relied on evidence from the following witnesses who were called to give oral evidence:
 - a. Mr Rebello himself:
 - i. His one page 'witness statement' referred to earlier provided submissions at pages [124-130] and [131-154]. The Tribunal confirmed these pages with him and that he wished to rely on those submissions as his witness statement. Those submissions shall be referred to in this judgment as his witness statement.

- ii. The second set in particular was a response to the Grounds of Resistance.
- b. Respondent:
 - i. Ms Jade Griffiths, who dealt in evidence with the dismissal decision.
 - ii. Mr Steve Hewer, who dealt in evidence with the dismissal appeal decision.
- 9. Submissions: At the end of the hearing, the Claimant provided written submissions and responded orally to the Respondent's. Counsel for the Respondent provided oral submissions and provided a case note print out and two cases.

Preliminary Issues

- 10. Adjustments: By an email of 01/11/24, Mr Rebelo wrote that he needed extra breaks due to mental health difficulties. These were discussed, agreed and the Tribunal implemented extra breaks and longer breaks, checking with Mr Rebelo that these were long enough and he was ready to continue. We also adjusted the start time for submissions so Mr Rebelo would have a longer rest and the Tribunal assisted during his questions to make sure that he was asking questions and they were relevant to our role.

Findings of Fact

- 11. The parties gave evidence about a number of matters and this judgment will not make findings on all. It is not the Tribunal's function to record all of the evidence presented and this judgment does not attempt to do so. Although all evidence has been considered, the findings focus on those matters that are material to the issues.
- 12. As discussed at various times in the hearing, the Tribunal's role is focused on the issues we are required to determine, i.e. those set out in the PH Order of 28/11/23 [61]. In contrast, Mr Rebelo's position could often be summarised by his closing submissions that explained, "leaving aside Claims, how about the justice?" [sic.], showing a focus not on the actual legal claims but what he perceived as a broader issue of 'justice'. His position and evidence often urged the Tribunal to look at issues outside of those directly related to the claims, such as the previous claims of discrimination and a broad suggestion that Serco caused his stroke. The Tribunal were mindful of the limits of our powers (such as that we could not revisit the decision that the discrimination claims were out of time) as well as the need to act proportionately. We have no power to deliver a binary concept of 'justice' beyond determining if the claims succeed or not but we aimed to make this decision justly by making sure both sides were heard and we considered all positions neutrally and carefully. That is the justice that the legal system can offer. In meeting this aim, we did listen to everything Mr Rebelo put forward but were not persuaded as to his position. His specific position about the cause of his stroke is addressed further below.
- 13. Serco's business:
 - a. In its Grounds of Resistance, Serco describes itself as an, "international service company which provides crucial business services for public sector organisations".
 - b. When considering the size and administrative resources of the business, the Tribunal noted that it is very large and its ET3 lists the number of employees as 20,000.
 - c. The relevant part of the business was the Immigration Detention Centres services outsourced by the Home Office. The Claimant worked at Brook House, Gatwick.
- 14. Mr Rebelo's role:

- a. He was employed as a “Cleaning Operative”, originally in March 2018 by a thirdparty, later TUPE transferred in May 2020 to Serco.
 - b. His work was explained in unchallenged evidence as, “the cleaning work at the IRC requires good physical health and there is a lot of working between different locations and the cleaning tasks themselves are physical. There is a requirement to operate cleaning machinery safely, such as the industrial buffing machines and electronic IMOPS.” [JG3]. This was put to Mr Rebelo in cross examination and he agreed.
 - c. The Tribunal understood that Mr Rebelo had experienced various personal difficulties, including a stroke about 10 years ago and a physical attack in 2010. As explained in the oral judgment, the Tribunal were impressed that he had nevertheless sought to persevere where possible and to his credit had worked where he felt able to, changing professions to become a cleaner, initially in a school and then later for Serco.
15. There were historic allegations of discrimination made by Mr Rebelo, outlined as above as being out of time to bring a claim within the Employment Tribunal. The Tribunal make no findings about those matters because the claims have been dismissed, but accepted the fact as already found by a Tribunal, “The individual managers against whom these allegations are made had no role in the claimant’s dismissal or the facts which gave rise to the submission of his claim. The claimant brings claims of unfair dismissal and disability discrimination regarding those events” [78:5].
16. The key event in this claim was a stroke Mr Rebelo suffered in late December 2021. The Tribunal can make no ‘positive finding’ about the cause(s) of that stroke, i.e. we have insufficient evidence to identify what was the cause(s). Many of Mr Rebelo’s questions of Serco’s witnesses were about this issue and his contention that earlier issues had caused his health problems. The Tribunal did not consider that we were in any position to decide this very technical, specialised medical question on the available evidence, nor did we consider that this was an issue identified at the earlier PHs. To the extent that Mr Rebelo alleged that Serco had caused his stroke, the Tribunal reject this argument because Mr Rebelo has not produced or identified evidence that shows on the balance of probabilities that an action of Serco’s did cause the stroke. There is nothing in the medical evidence such as Occupational Health (OH) reports, for example, aside from the question of whether any such causative action of Serco was unlawful or unreasonable.
17. Mr Rebelo was absent from effectively immediately after his stroke and did not return to work before his dismissal.
18. The impact on Serco of Mr Rebelo’s absence:
- a. [JG16] explains that due to the security requirements of the site, “it is not possible to employ agency workers or other temporary staff to ‘fill in’ during sickness absence”.
 - b. She further explained in live evidence that this meant that other staff had to fill in to cover Mr Rebelo’s role, therefore not performing their own role, and this included “officers”, i.e. those employed as Immigration Officers tasked with security and the implementation of immigration legal rules and requirements, rather than other cleaning operatives.
 - c. In turn this meant that Serco was not meeting its contractual duties under the terms it had agreed with the Home Office.
 - d. Serco therefore faced financial penalties. Although Ms Griffiths could not identify any documentation about these financial penalties within the bundle, she explained that she was the Compliance Manager and assured the Tribunal that not only was the

threat of financial penalties a problem during Mr Rebelo's absence but that penalties were actually incurred. She was unable to provide specific figures but said that an example would be £2500 for dust found on top of a bin, for example.

- e. [JG16] continues, "The cleaning team was working with reduced staff which placed additional work on the remaining members of the team. I felt that it was not sustainable for them to do that in the long term, having already coped in that way for 10 months and that a permanent replacement was needed.". She added in live evidence that she was concerned about "attrition" because remaining staff had to work harder to cover Mr Rebelo's duties and she was worried they would leave because of this extra work, then creating a cycle of greater absences, greater pressure on remaining staff, then more absences and so on.
- f. Further, she explained that it took a long time to recruit staff because extra time was needed as part of the recruitment process because of the vetting process and training.
- g. The Tribunal accepted that the above impacts did exist and did significantly and adversely affect Serco in the way alleged, making the running of the service more difficult, causing financial loss and making the planning of the service more difficult until they had certainty over Mr Rebelo's situation.

19. There was a welfare meeting in February 2022 by Mr Rebelo's then line manager, Mr Philip Mouser. This had to be at Mr Rebelo's house because he was bed bound and was having difficulties with his speech. No minutes are in the bundle.

20. A second welfare meeting occurred on 11 May 2022. Mr Mouser and Ms Griffiths attended ahead of her taking over line management responsibility in July 2022 [270]. This was again at his home because of his inability to attend Serco's premises. The notes record that Mr Rebelo, "explained he was feeling slightly better however he is still struggling with his righthand side. His partner Monica went on to explain that he has started having physiotherapy therapy at home, but is still struggling and only manages to do half the session, but the physiotherapists are very good and don't push him... Carmo stated he was hoping he would be able to return to work by September time.". The Tribunal accepted this was an accurate summary of the discussions, again largely agreed by Mr Rebelo in cross examination who added that at this time he had "only regained 20% or so".

21. Mr Rebelo asked to use his annual leave to go to India for an extended period in order to receive massage therapy. This was agreed and Mr Rebelo went to India "for paid leave for around 4 weeks from 15 May to 20 June 2022. He resumed sick leave when he returned" [JG7].

22. An initial OH report was completed following a telephone call with Mr Rebelo on 28/07/22 [273]. The person who carried it out did not appear to be a physician but detailed themselves as an OH 'adviser'. The Respondent was unable to assist the Tribunal with what this meant in practice or what the adviser's clinical experience was, only supposition was offered in submissions that she was probably a nurse. An OH summary was provided and although Mr Rebelo disputed that all the matters were discussed, he did agree in cross examination that it was nevertheless accurate when stating:

"The stroke has affected his right side, and has significantly affected his functional capacity and day to day life. He continues to do the exercises daily as recommended but reports little progress. He needs support with activities of daily living from his wife and family, and he has aids and adaptations within his home to support his needs. He is able to take a few steps only with the support of a crutch

and he can stand for short periods only. He lives in a second floor flat and is currently housebound.”

23. There was a second OH report completed on 25/8/22, this time with a Dr and conducted by telephone [275]. The report included:

“eight months from the start of his stroke, there is only minimal improvement and there is unlikely to be any change in the condition likely long-term. Hence, he is unlikely to be fit to return to his contracted role long term. If there are facilities to retire on grounds of health, this could be facilitated.

...

Are workplace adjustments recommended? He is unfit for work long term”

24. Ms Griffiths explains in her witness statement [JG9] that Mr Rebelo had no option for illhealth retirement within the terms of his pension or any other option. There was no challenge to this and the Tribunal accept it as accurate.

25. The first capability meeting took place on 23/09/22, again at Mr Rebelo’s home because of his difficulties in travelling anywhere else [279]. The recent OH reports were discussed and Mr Rebelo explained his current symptoms. Mr Rebelo was still experiencing significant symptoms of his stroke and the notes of the meeting include:

“I am not feeling good I can’t even do anything I can’t even go shopping and I am always out of breath. I am not even sleeping until 02:00 and this is not good. I get very stressed having to stay in doors all the time”.

“this takes a long time for me to go downstairs, and this can take hours to go down the stairs, I have contacted the council to try and sort out different place due to the stairs”

26. When asked about his treatment in India, Mr Rebelo replied, “it was good for a couple of days but then I came back the pain in my leg was the same”.

27. When asked about redeployment, Mr Rebelo answered, “I think the shop could be the best thing as this is what I wanted originally”. He also said, “I would like to come back in a part time role as this would make it easier”. Ms Griffiths expressed doubts about the suitability of the shop but said she would look into the matter as it was not her department. Mr Rebelo’s union representative shared Ms Griffiths’ concerns, stating, “Due to the location of the shop this could be a difficult place if there was to be an accident. A risk assessment would have to be considered”.

28. The meeting ended with Mr Rebelo alluding to the possibility of undergoing further treatment in India later in the year and he said, “In February/March time [2023] I would be able to make a better decision due to having all the treatment”.

29. Mr Rebelo was invited to a second capability meeting and was warned that one result could be dismissal [283, 548-551]. He was informed of his right to be accompanied.

30. The Second capability meeting occurred on 01/11/22, again at Mr Rebelo’s home because of his difficulties in travelling [284]. Mr Rebelo’s condition had hardly changed since the last meeting and Mr Rebelo explained that he last left his house, “two months ago” [284].

31. Again, Mr Rebelo's position was that he wanted to "have treatment in Goa and come back in February and then you will make a decision to return to work or not" [285]. Mr Rebelo's position was that the previous treatment was not with the best physician and he wanted "one last chance" to have the treatment with the correct person and then he would know if he could return to work or not. In cross examination he accepted that he was not ready to work in his cleaner role or the shop role at this time and would not know if he could return to work until he had the massage therapy, therefore until about mid February 2023.
32. The shop position was discussed and Ms Griffiths stated, "We spoke about a role in the shop. Even for an alternative role we would not be looking until early February. I previously expressed concerns with the shop role due to the location, exits and manual demand", to which Mr Rebelo replied, "Yes, I remember I do agree with you with that, I understand."
33. Ms Griffiths decided to dismiss Mr Rebelo and wrote to him by letter of 04/11/22 conveying this decision [290]. Although there are references to a discussion with HR and other references to these discussions [293, JG17], Ms Griffiths explained when asked by the Tribunal that it was solely her decision and HR just advised on procedure. The Tribunal accepted this unchallenged evidence and considered that the contrary impression is a result of poorly phrased wording in the documentation. Her decision was expressed to be because of "ill health capability" and effective from 04/11/22.
34. Mr Rebelo appealed by letter of 12/11/22 [294]. This was originally sent to Mr Chris Barford, who did not immediately reply because he was apparently absent. Mr Rebelo was greatly concerned by the delay in replying and the fact that Mr Rebelo says he did not receive an out of office reply from Mr Barford, but the Tribunal has no evidence other than Mr Rebelo's speculation that this delay was due to anything other than Mr Barford's absence. In any event, the relevance of the delay was far from clear to the Tribunal and did not suggest any form of wider conspiracy or collusion.
35. By an email of 24/11/22, Mr Hewer wrote to Mr Rebelo to explain that the appeal had been passed to him and to clarify the grounds of appeal [298].
36. Mr Rebelo wrote to Mr Hewer by letter of 29/11/22 to discuss the arrangements for the appeal hearing, including that "if I go down say sometimes, once in two weeks, it's just very close for a walk about 20-30 metres, take rest for a while and return" [301].
37. The appeal hearing took place on 06/12/22 [310] and Mr Rebelo attended. Mr Rebelo's position was similar to that at the disciplinary hearing, seeking "one last chance" [311] to return to India for massage treatment, stating, "In her letter it said I cannot give the preferred date of return but I had said time and again its only when I come back I can give you a date. With this present condition I cannot answer" [312]. Mr Rebelo also raised a comparison with a cleaner colleague, Mr Gary Hearn, who he considered had been off sick for longer than himself [313].
38. By letter of 09/12/22, Mr Rebelo's appeal was dismissed [315].
39. The ACAS Early Conciliation process occurred from 03/02/23 - 17/03/23 and the claim was issued on 14/04/23. All the remaining claims for this hearing were made in time.

The Law - Unfair Dismissal:

40. The principal legislation was contained at s.98 Employment Rights Act 1996:

98.— General.

- (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,
[...]
- (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
[...]
- (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.

41. The Tribunal considered in particular:

- a. *O’Brien v Bolton St Catherine’s Academy* [2017] EWCA Civ 145, a case handed up with commentary by Serco in closing submissions.
- b. *East Lindsey District Council v Daubney* [1977] ICR 566. The Tribunal accepted the analysis highlighted by Serco at paragraph 571C-G, as well as the broader point that an employee should be consulted and the true medical picture ascertained [571H].
- c. The overlap between the ‘*Burchell*’ test and the approach needed for a capability dismissal arising from ill health. This was a point made in *DB Schenker Rail (UK) Ltd v Doolan* [2010] UKEAT/0053/09 and highlighted in oral submissions by Serco. Moreover, the case highlights the need to avoid “the substitution mindset”, i.e. the question for us is not ‘what would we have done’ but is a broader one looking at the reasonableness of Serco’s actions and assessing whether those actions were within the range of reasonable responses.
- d. As submitted by the legal commentary handed up by Serco, “When investigating the medical position, an employer should be judged by the standards of the reasonable employer, not by the standards of whether it left no stone unturned. In *BS v Dundee City Council* [2013] CSIH 91, the Inner House of the Court of Session decided that an employment tribunal had set the bar too high in concluding that the dismissal of an employee who had been off sick with depression for a year was unfair, due to the fact that the local authority could have made a further enquiry about the medical position”.
- e. An employer should consider whether there is any suitable alternative employment before taking the decision to dismiss (*First West Yorkshire Ltd v Haigh*

[2008] IRLR 182) but is not under a duty to create a job where none exists (*Merseyside v Taylor* [1975] ICR 185).

42. The Tribunal also considered *Haigh* (above) because of its statement that employers who have pension schemes that provide early ill-health retirement benefits should ensure that employees are considered for such pensions before a decision to dismiss is taken, otherwise the dismissal may be unfair. However, we accepted the evidence of Ms Griffiths on this point as above and did not consider that any point of unfairness therefore arose.

The Law – Discrimination Arising from Disability:

43. The principal legislation was contained at s.15 Equality Act 2010:

15 Discrimination arising from disability

- (1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising inconsequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

44. As general points, the Tribunal reminded itself of the guidance for s.15 claims from para.31 of *Pnaiser v NHS England* [2016] IRLR 170.

45. Proportionality. The Tribunal considered in particular:

- a. The Equality and Human Rights Commission Code of Practice on Employment (2011), in particular the sections dealing with the meaning of “proportionate” for the discrimination claim [4.30-4.32].
- b. *O'Brien*, above. In particular that “a balance” of the discriminatory effect against the impact of the continuing absence must be assessed. The Tribunal accepted the analysis highlighted by Serco that, “The argument ‘give me a little more time and I am sure I will recover’ is easy to advance, but a time comes when an employer is entitled to some finality” [O'Brien para. 36].
- c. *Department of Work and Pensions v Boyers* [2020] (Unreported, UKEAT, 0282_19_2406) and its examination of the justification defence.

Conclusions

46. The following section addresses the Tribunal's conclusions on the issues and makes further findings of fact where necessary.

What was the reason or principal reason for dismissal? The respondent says the reason was capability (long term absence).

47. The Tribunal accept the reason was capability. No credible reason or evidence was put forward by Mr Rebelo to counter Serco's position. The dates of Mr Rebelo's absence were agreed and Serco's witnesses were credible in live evidence that this absence was the reason for his dismissal.

If the reason was capability, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant?

Did the respondent genuinely believe the claimant was no longer capable of performing their duties?

48. As above, the Tribunal assessed the Serco witnesses as credible and truthful. At the point of dismissal, and appeal, Mr Rebelo himself agreed both at the time and in his live evidence that he was incapable of performing his role.
49. Mr Rebelo makes a vague reference to a "conspiracy" in his witness statement, centred on a delay after he emailed Mr Barford. The Tribunal do not accept there was a conspiracy and Mr Rebelo's reasoning for this general assertion was unclear. There is no evidence of a link between Mr Barford and the later decision makers and the Tribunal further note that Mr Barford's seemingly passive involvement was after dismissal in any event.
50. Mr Rebelo refers throughout his witness statement and submissions to the previous claims of race discrimination and how he says he was treated badly prior to having his stroke. There was no coherent link to the claims. As above, the PH had already found, "The individual managers against whom these allegations are made had no role in the claimant's dismissal or the facts which gave rise to the submission of his claim" [69:5] and putting aside the legal problems of challenging this factual finding, Mr Rebelo did not put any contrary position during the trial.
51. The Tribunal therefore concluded that Serco did genuinely believe that Mr Rebelo was no longer capable of performing his duties.

Did the respondent adequately consult the claimant?

52. There were two welfare meetings and two capability meetings, outlined above. At each one, Mr Rebelo was asked for and provided an update on his health position. His position was stark – he had been very dramatically affected by his stroke and was barely capable of even leaving the house.
53. In his witness statement, Mr Rebelo says, "though their CSOP sets out a three-stage process, they cut it off in 2 stages, first in September 2022 and the 2nd and the last stage meeting on 1st November, 2022" [sic.]. The Tribunal's view was on this point was:
- Serco's procedure is potentially problematic because the end is left open, i.e. it could be 2 stages in total or it could be 3, as Mr Rebelo highlights. It is evidently clearer for employees and the managers implementing the policy if a set number is prescribed. On the other hand, the Tribunal could see the benefits of flexibility and responding to individual circumstances when needed.
 - Ultimately, the policy provides that 2 capability meetings were permitted before dismissal, rather than 3, so the approach was compliant.
 - Mr Rebelo did not establish why not having a 3rd meeting was unfair in his case. Ms Griffiths explained that under the policy a third would have occurred at one month after her final meeting, therefore there would not have been a change in condition expected.
 - Moreover, in light of the impact on Serco of Mr Rebelo's absence, the Tribunal did not consider that not waiting until Mr Rebelo had returned from India for the second time was unfair. No change was expected on the medical evidence. Mr Rebelo's only basis for there being a change and therefore justifying a third meeting was his "hope"

that a further trip to India would help. As analysed below, this had no evidence of a likely benefit other than Mr Rebelo's hope and therefore the Tribunal did not consider that Serco needed to delay for this reason, specifically it was not outside the range of reasonable responses to have not waited.

54. The Tribunal concluded that Mr Rebelo was adequately consulted.

Did the respondent carry out a reasonable investigation, including finding out about the up-to-date medical position?

55. There were two OH reports and Mr Rebelo was adequately consulted and able to explain the stark and unambiguous reality of his physical condition.

56. The OH process could have been improved. The first report carries limited weight without the Tribunal knowing the background of the person who conducted it. Ultimately though, Mr Rebelo accepts that summary of medical background contained is correct and did not challenge it at the time to Serco so they were entitled to treat it as accurate.

57. Mr Rebelo asserts that the second OH (25/08/22) was a problem because it was on the phone and not in person. He does not however explain why this was a problem, nor evidence any material issue. No questions were put to Serco on this point. The Tribunal can see why in-person may have been better as a general point about medical examinations but here cannot identify what difference an in person examination would have made in light of the very stark symptoms that Mr Rebelo was able to articulate on the phone. Again when asked in cross examination, Mr Rebelo agreed with the findings, as he confirmed at the time in the relevant hearings.

58. The Tribunal concluded therefore that there was a reasonable investigation.

Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;

59. Mr Rebelo's main attack on his dismissal is that he should have been allowed to go again to India in the hope of recovery and he says he would have known about whether he had recovered or was going to recover by about mid February 2023. The Tribunal considered:

- a. On Mr Rebelo's account, his previous visit to India for the same treatment had not materially helped his condition. His report was, "it was good for a couple of days but then I came back the pain in my leg was the same" [279]. Although he now wanted to have treatment from the father of the person who undertook the first treatment, the Tribunal did not place much weight on Mr Rebelo's hope that the father's treatment would have different results given there was no evidence for this other than Mr Rebelo's hope and even he was not particularly optimistic, stating, "If it doesn't work it doesn't work" [288].
- b. Moreover, there was no evidence from any medical source, such as OH or Mr Rebelo's GP that the massage treatment would help his condition, whoever performed the massage. Mr Rebelo agreed in cross examination that there was nothing in his medical notes to suggest he would benefit from the treatment.
- c. Mr Rebelo also explained in cross examination that he had told OH of his proposed treatment. Despite this, OH's prognosis was dire, stating he was, "unlikely to improve long term", as cited in the dismissal letter.

- d. By the time of dismissal, Mr Rebelo had been signed off sick for 10 months and this was already a lengthy period of time.
- e. There was no specific or likely return date, nor did Mr Rebelo suggest one. Even at the appeal hearing his position was a hypothetical, "again it's only when I come back I can give you a date. With this present condition I cannot answer".
- f. There was a significant impact on Serco, as listed above.
- g. The Tribunal notes the observations of *O'Brien* that, "The argument 'give me a little more time and I am sure I will recover' is easy to advance, but a time comes when an employer is entitled to some finality". The Tribunal considers this applicable here given the lengthy absence already, the highly speculative process suggested by Mr Rebelo and the problems of staff management.

60. The Tribunal considered whether Serco could reasonably be expected to wait a little longer given they had, "already coped in that way for 10 months", as JG16 explains. This wait however had caused significant detriment to Serco, ultimately resulting in it not meeting its contractual obligations for an important public service contract and being fined as a result. In light of the highly speculative prospects of there being an improvement in Mr Rebelo's health, the Tribunal concluded that Serco could not reasonably be expected to wait longer.

Was Dismissal within the range of reasonable responses?

61. As explained above, the Tribunal's focus is on whether dismissal was 'within the range of reasonable responses', not whether we would have taken the same action.
62. Mr Rebelo raises a comparison to his previous colleague Mr Hearn, asserting that Mr Hearn's lengthy absence before dismissal shows that he was treated differently:
- a. The Tribunal considered that this point overlapped with the issue above about whether Serco could have been expected to wait longer or not, therefore applied the same reasoning to this issue.
 - b. The facts relating to Mr Hearn were not entirely clear, with neither party explaining them fully in their witness statements nor could the Tribunal identify any detailed or sufficient documentation.
 - c. In live evidence and his questions of Serco, Mr Rebelo explained his belief that Mr Hearn had been absent for somewhere between 15 and 22 months.
 - d. When asked by the Tribunal, Ms Griffiths asserted that Mr Hearn's case was different to Mr Rebelo. Firstly, Mr Hearn was said to have been absent for about 300 days (although whether this was calendar or working days was never fully explained), and therefore was comparable to Mr Rebelo rather than considerably more. Further and in contrast to Mr Rebelo, Mr Hearn's original injury was a hand injury that was expected to get better and he did in fact return at times during his period of absence, therefore providing a reason for Serco to wait for his return. His absence was also said to have caused less impact on Serco because it was during covid when the resident population was lower and therefore less work for the cleaners to do. Finally, Ms Griffiths explained that when Mr Hearn's situation was the same as Mr Rebelo's because a new injury of COPD meant he was not expected to return to work, he was in fact then dismissed (by mutual consent).
 - e. The Tribunal accepted Ms Griffiths' unchallenged evidence and accepted that Mr Hearn was in a factually distinct position to Mr Rebelo. We therefore did not conclude that this demonstrated a decision outside of range or that Serco could have reasonably been expected to have waited longer for Mr Rebelo to return.

63. Another point made by Mr Rebelo was to assert that he should have been allowed to work in an alternative role of 'the shop'. This was a shop selling various snack and essential items to the residents:
- a. At the point of dismissal, and appeal, Mr Rebelo's position was in agreement with Serco that he was not currently able to work in the shop due to its physical demands and his physical struggles. This is unsurprising given the stark medical evidence.
 - b. Serco were particularly concerned about safety, citing the difficulties in exiting the shop if there was an incident, which required passage through the resident area, i.e. where the hypothetical trouble would be. Ms Griffiths explained in cross examination that the area was classified as a 'hotspot' because of the prevalence of security incidents that arose and the mixing of the residents, and that this meant not only might Mr Rebelo have problems escaping but the area could also go into lockdown so there could be a delay in getting to him. Photos of the area were provided in the supplemental bundle.
 - c. Ultimately, there was no vacancy at the relevant time in the shop, although the option to move staff around was never fully explored in evidence.
 - d. The Tribunal considered that the issue of the shop was tied up with that of Mr Rebelo's proposed visit to India. He accepted he was not ready to work in the shop but hoped he might be when returning from India. In light of the Tribunal's view above that Serco could not reasonably be expected to wait for Mr Rebelo to visit India, the Tribunal concluded that not allowing Mr Rebelo to work in the shop or carry out some other adjustment such as a trial basis was within the range of reasonable responses.
64. In all the circumstances and in particular considering the absence to date, the prognosis for Mr Rebelo's health condition and the impact on Serco's operations, the Tribunal concluded that dismissal was within the range of reasonable responses.

s.15 Equality Act 2010 – Discrimination claim

65. The legitimate aims were stated by the Respondent as:
- a. "The efficient maintenance of its workforce to provide services under its client contract,
 - b. The maintenance of a fair, effective and transparent sickness management regime".
66. The Tribunal accepted these as legitimate aims. There was no contrary challenge.
67. In considering whether Serco had acted proportionately in trying to achieve these legitimate aims, the Tribunal appreciated that the legal issues addressed above were not exactly the same but there was plainly significant overlap. For the reasons addressed above and considering in particular, the absence to date, the prognosis for Mr Rebelo's health condition and balancing this against the effect on Serco and the aims stated above, the Tribunal concluded that Serco had acted proportionately in dismissing Mr Rebelo.

'Polkey'/dismissal in any event

68. Our conclusion is that there was a fair dismissal and the Tribunal considered it therefore too hypothetical to provide a precise hypothetical view of the chances of a fair dismissal if there was a procedural problem. However, the Tribunal did consider that any procedural failing would have been extremely unlikely to have made a material difference to the likelihood of dismissal. In particular, there was no credible evidence that a delay for another

trip to India would have improved Mr Rebelo's health such that Mr Rebelo would have returned to work in any form.

69. The Tribunal note that Mr Rebelo did in fact not go to India despite his hope for recovery, he has not fully recovered now and has not worked since dismissal.
70. Our reasoning was the same in respect of a hypothetical discriminatory dismissal.

Employment Judge England
Date: 25 November 2024

Sent to the parties on:
27 November 2024

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employmenttribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case. **Recording and Transcription**

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practicedirections/>