Case Number 1307862/2019
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr C Wilson		**Jaguar Land Rover Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
(RESERVED JUDGMENT)

HELD AT Birmingham **ON** **10 – 12 & 15 February 2021**
16 February 2021 (Panel Only)

EMPLOYMENT JUDGE GASKELL **MEMBERS:** **Mrs K Ahmad**
Mr T Liburd

Representation
For the Claimant: **Dr M Ahmad (Counsel)**
For Respondent: **Ms A Smith (Counsel)**

JUDGMENT

The unanimous judgment of the tribunal is that:

1 The respondent did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's complaints of direct race discrimination, discrimination for a reason arising from disability and victimisation, pursuant to Section 120 of that Act, are dismissed.
2 The claimant was fairly dismissed by the respondent. His claim for unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1 The claimant in this case is Mr Carl Wilson who was employed by the respondent, Jaguar Land Rover Limited, as a Production Associate, at its Solihull Plant, from 2 January 2012 until 18 June 2019 when he was dismissed. The reason given by the respondent at the time of the claimant's dismissal was capability.

2 By a claim form presented to the tribunal on 17 October 2019 (following due compliance with the ACAS early conciliation procedure), the claimant brings

claims for unfair dismissal and disability discrimination. The claimant claims that, at all material times, he was a disabled person as defined by Section 6 and Schedule 1 of the Equality Act 2010 (EqA) by reason of suffering from mental health impairments - ADHD and stress/anxiety. The strands of alleged discrimination are direct discrimination (s13 EqA); discrimination for a reason arising from disability (s15 EqA); and victimisation (s27 EqA).

3 In its response to the claim, the respondent's admits that the claimant was dismissed but maintains that he was dismissed for a reason relating to his capability and that the dismissal was fair. The respondent admits that, by reason of the mental health problems outlined above, the claimant was a disabled person, but denies any form of discrimination. The respondent does not admit that the claimant did a protected act for the purposes of the victimisation claim. The respondent also maintains that pursuant to Section 123 EqA the tribunal lacks jurisdiction to consider claims arising from any alleged act/omission on the respondent's behalf occurring prior to 18 June 2019.

The Evidence

4 The claimant gave evidence on his own account; he did not call any additional witnesses. The claimant made a witness statement running to 77 Paragraphs and 18 Pages. He was cross-examined; and the panel had the opportunity to ask him questions.

5 The respondent relied on the evidence of three witnesses: Mr John McGee - Production Manager; Mr Stuart Cadwallader - Production Manager and the dismissing officer in this case; and Mr Errol Bell - Manufacturing Manager who dealt with the claimant's appeal against dismissal. Each of them had made witness statements; were cross-examined; and the panel had the opportunity to question them.

6 In addition, we were provided with an agreed a hearing bundle running to approximately 528 pages. In reaching our decision, we have considered those documents from within the bundle to which we were referred by the parties during the course of the Hearing.

7 We find that all four witnesses were truthful. But the claimant made frequent assertions as to his physical fitness to perform roles within the respondent's plant which were at variance with the information he was providing contemporaneously to Occupational Health (OH) and which were variance with OH guidance provided to the respondent. In Paragraph 56 of his witness statement, the claimant asserts that he has "*never had a problem with bending or lifting*": however, within the Hearing Bundle there is a Functional Assessment Form, completed by the claimant personally on 1 March 2018, in which he

expressly states that he has problems with bending and lifting. In cross-examination the claimant accepted that his witness statement was wrong. The evidence given by the respondent's witnesses contained no such inconsistencies and was consistent with contemporaneous documents.

The Facts

8 On 2 January 2012, the claimant commenced employment with the respondent at its Solihull Plant. By 2015, he was working as a Production Associate in Zone 9 – Chassis. The claimant's line manager was Mr Adrian Franklin. In evidence the claimant told us of two occasions in 2015 when he claims that Mr Franklin treated him unfairly; the claimant did not raise a grievance on either occasion. We were not provided with details, but it appears that the claimant claims that, in March 2016, he suffered an injury at work and consulted solicitors regarding a potential personal injury claim. On two occasions in June 2016, the claimant requested leave of absence; these requests were refused by Mr Franklin. On 30 August 2016, the claimant complained to his trade union regarding these refusals - nowhere in his email of complaint does he make any reference to his mental health or to disability. On 16 September 2016, the claimant purported to raise a formal grievance against Mr Franklin which he also sent to his trade union. Nowhere in the grievance is that any reference to mental health or to disability; although the claimant does allege that he has been treated "*unfairly and unequally by Mr Franklin*" which he supposes must be "*unlawful under the Equality Act*". In evidence the claimant confirmed that he was not suggesting that he had been treated unequally by reference to any of the protected characteristics; it was simply that he believed other employees have been treated differently regarding requests for leave of absence.

The Claimant's Grievance

9 The respondent's grievance procedure requires a written grievance to be submitted to the employee's line manager or to a more senior manager at the relevant workplace. In this case however the claimant submitted his written grievance to his trade union and it appears that the trade union sent it straight to HR at the respondent's plant in Halewood, Merseyside. On 30 November 2016, the claimant contacted HR and was told that the grievance had been assigned to Steve Chiswell – Production Manager FA1. The claimant was given Mr Chiswell's contact details and advised to make direct contact. The claimant failed to do so.

10 Erroneously, in June 2017, HR closed the claimant's grievance believing the same to have been resolved. The error having then been corrected, on 10 July 2017, Mr Chiswell wrote to the claimant inviting him to a grievance meeting on 16 August 2017. For reasons which have not been fully explained the meeting

did not go ahead. We note however, that in August 2017 the claimant was absent from the workplace due to ill health which may be the reason.

11 The outstanding grievance was then picked up in February 2018; the claimant was invited to attend a meeting with Mr Chiswell on 14 February 2018; but the meeting did not take place as the claimant failed to attend.

12 A grievance meeting eventually took place on 10 May 2018. The grievance was heard by Mr Mark White - Production Manager. The claimant attended accompanied by a trade union representative. After that meeting, Mr White undertook some investigations which included a meeting with Mr Franklin on 27 July 2018. On 6 August 2018, the claimant was invited to a grievance feedback meeting which has been fixed for 17 August 2018. Again, for reasons which are unclear, the meeting did not take place until 12 October 2018 when the claimant was informed that his grievance would not be upheld. This decision was confirmed in writing by letter the same day. The claimant was advised of his right to appeal the decision - which he chose not to pursue. Throughout the process, the claimant had been supported by trade union representation.

The Process Leading to the Claimant's Dismissal

13 On 31 October 2016, the claimant commenced a period of sickness absence with a GP diagnosis of "*work-related stress*". It is the claimant's case that the immediate cause of this stress was the respondent's delay in processing his outstanding grievance. And that the longer that delay continued the worse his condition became. However, a direct link between the grievance and the claimant's stress has not been established by medical evidence.

14 On 11 November 2016, the claimant attended an OH appointment because of his ongoing absence from work. The claimant was certified as unfit for work due to the need for time for his mental health medication to take effect. At the OH appointment, the claimant raised the fact that it was suffering from a musculoskeletal condition affecting his shoulders; he told the OH practitioner that he was under medical investigation for this complaint.

15 On 1 December 2016, claimant again attended OH. This time he was certified as fit to return to work on full hours. However, the OH practitioner recommended an early resolution of his ongoing concerns regarding his manager (presumably a reference to Mr Franklin). It is unclear whether anything specific was done in pursuit of this recommendation. But, the claimant did not return to work. At the OH appointment the claimant again confirmed that he was under medical investigation for the musculoskeletal problems with his shoulders and confirmed that he had been receiving in-house physiotherapy.

16 On 20 July 2017, the claimant attended a further OH appointment. He was certified as fit for a phased return to work. The OH report referred to the musculoskeletal condition affecting both shoulders and imposed a temporary prohibition on the claimant working above shoulder height. The claimant returned to work and was engaged on a temporary role in Zone 6 on electrical checks.

17 On 31 August 2017, the claimant attended a follow-up OH appointment. The OH report referenced musculoskeletal conditions affecting the claimant's shoulders and knees; and also a medical condition affecting his skin for which it was necessary for him to apply ointment on a daily basis. The report applied two temporary restrictions on the claimant's work practice: -

(a) The opportunity to sit down for 5 - 10 minutes every hour and;
(b) No work above shoulder height.

18 It was necessary for the respondent to attempt to find a role for the claimant which accommodated these temporary restrictions. The respondent has a documented procedure for such situations – the "*Restricted Worker Procedure*" (RWP); operated in co-operation with the individual employee and the trade union.

19 Having identified that an employee has physical restrictions, the line manager should consider whether the employee is able to continue in his/her substantive role - possibly with adjustments. If this is not possible, then the RWP commences. Although the claimant maintains that it was an act of discrimination to please him into the RWP unfairly, he did not suggest in evidence, nor did he suggest at the time, that he was physically capable of continuing in his substantive role. And there is no claim before the tribunal for a failure to make adjustments.

20 There are three stages to the RWP: -

(1) The Production Leader (PL) Stage: this involves a Production Leader (responsible for 50 – 100 Associates) reviewing available posts within a particular area of the plant to establish whether vacancies exist in a role which would accommodate the restrictions. If such a role existed; and was either vacant or currently filled by an agency or temporary worker; then the employee would be accommodated into the role for so long as the restrictions remained in place.
(2) If no such role is identified the process moves to the Manufacturing Manager (MM) Stage involving a similar search to identify a suitable role across the whole of the respondent's manufacturing area.

(3) If the search at MM Stage is unsuccessful, the process moves to the final Stage - the Plant Governance (PG) Stage; involving a search of all roles available within the Solihull Plant.

The process does not involve a search for roles outside the Solihull Plant. The employee is supported by his/her trade union throughout. In this case, the claimant was supported by Mr Paul Noonan.

21 Between 2 January 2018 and 20 February 2018, during what was Intended to be the PL Stage, the claimant trialled a total of 11 potential alternative roles. The claimant rejected them all as being unsuitable because of physical restrictions. He made no mention of mental health. In fact with Mr Noonan's help the claimant had trialled roles going beyond the claimant's production leader's area.

22 On 22 February 2018, the claimant progressed to the MM Stage conducted by Mr McGee. No further roles were identified for the claimant to trial. The PG stage commenced on 11 December 2018. Further searches were done reflecting the claimant's ongoing medical condition (see below), but nothing was identified. The PG stage was concluded on 11 April 2019.

23 On 1 March 2018, as part of the RWP, the claimant was asked to complete an Equality Act Self-declaration Questionnaire and Functional Assessment Form: he highlighted the following restrictions and requirements that caused him difficulty: -

"*Waiting and queuing*
Going up and down stairs
Low motivation
Frequent confused behaviour
Avoid people
Distractibility
Repeatedly bending
Kneeling or squatting
Going back from standing to squatting and kneeling position
Climbing or descending stairs
Ladders
Twisting from side to side
Lifting arms above shoulder height
Carrying a large suitcase
Carrying heavy objects for long periods
Skin rashes
Using lavatory frequently"

The claimant was also requested to complete a Role Suggestion Form: the only role which he identified as potentially suitable for him was a "*Checking*" role in Plant Quality. But, he suggests that even this would present difficulties because of checking the underside of vehicles - therefore working above shoulder height.

24 Throughout the process the claimant continued to attend regular OH appointments and after each appointment the list of restrictions was updated: -

(a) **8 January 2018:** For the first time there were two *permanent* restrictions:
(i) No work above shoulder height.
(ii) No kneeling or crouching.

(b) **1 March 2018:** Long-term restrictions:

(i) No kneeling or crouching.
(ii) No frequent or excessive bending.
(iii) No work above shoulder height.
(iv) No steps.
(v) Not working with intense light.
(vi) Not to work with skin allergens.

(c) **13 April 2018:** The claimant remained unfit for work due to the ongoing musculoskeletal issues previously identified.

(d) **26 April 2018:** The six permanent restrictions identified on 1 March 2018 remain and in addition the claimant requires a clear defined job task with minimal job changes.

(e) **23 May 2018:** The claimant remained unfit for work. The same permanent restrictions continued to apply.

(f) **25 July 2018:** The claimant remained unfit for work. The same permanent restrictions continued to apply.

(g) **17 December 2018:** Four permanent restrictions now apply: -

(i) No kneeling or crouching.
(ii) No work above shoulder height.
(iii) Not working with intense light.
(iv) Not to work with skin allergens.

(h) **22 January 2019:** The claimant failed to attend an OH appointment. The report then issued suggested no reason to relax the restrictions previously identified.

25 On 11 December 2018, the claimant sent an email to Lucy Davies in HR. He suggests in his email that he had been physically unable to carry out duties in the 11 trial roles in F1 because he remained concerned about continuing in that location whilst his grievance was outstanding. He complained about the ongoing delay in processing the grievance and goes on to state that he will perform any role and work with his physical restrictions. However, there is then a paragraph in the email in which the claimant sets out his physical restrictions consistent with the OH reports. Although the claimant references both his mental health difficulties and his physical restrictions there is no suggestion in the that the respondent has treated him unfavourably because of these conditions.

26 The RWP having been exhausted, the respondent arranged a Capability Report from OH. This was undertaken by Dr Cornelius Grobler - Consultant Occupational Physician on 1 May 2019. Dr Grobler had available to him a report from the claimant's GP dated 1 August 2018; and the claimant had the opportunity to read and correct the report before it was sent to the respondent.

27 The claimant told Dr Grobler that his physical symptoms had diminished. But Dr Grobler observed that the claimant had been absent from work for 12 months (with mental health problems) and that physical problems were likely to recur once he returned to the workplace. Dr Grobler advised that the claimant was fit for work provided that appropriate adjustments could be accommodated. The four restrictions identified on 17 December 2018 still applied.

28 On 14 June 2019, the respondent wrote to the claimant advising him that, following a plant-wide search under the RWP, no suitable roles had been identified for him. And that, in the light of the Capability Report received from Dr Grobler, the claimant was now invited to a Capability Review Meeting to be conducted by Mr Cadwallader. The claimant was advised in the letter that one possible outcome of the meeting could be the termination of his employment.

29 The Capability Review Meeting was held on 18 June 2019: it was conducted by Mr Cadwallader; the claimant attended with two trade union representatives. At the meeting, the claimant explained that he did not accept the restrictions which had been identified by OH; and he was happy to continue working in any available substantive role. Mr Cadwallader was concerned that, if the claimant was brought back to work in a role which could not accommodate restrictions identified by OH, the respondent would be responsible for any injury or exacerbation of existing injury suffered by the claimant. The meeting was somewhat circular in nature, the claimant indicating that he simply did not accept the OH advice. The claimant explained that he believed that his failure in so many trialled options was connected to his mental health and not simply to his physical restrictions. He informed Mr Cadwallader that his mental health was now

greatly improved, and he would like to trial some of the roles again. There was nothing in any OH report to suggest that the claimant was restricted by reason of his mental health problems.

30 Mr Cadwallader reached the conclusion that all options had been exhausted. The claimant's physical restrictions could not be accommodated despite an extensive search for a suitable role. Accordingly, he informed the claimant of his decision that the claimant's employment would be terminated on the grounds of capability. The claimant would be paid in lieu of his notice; but was not required to work the same. The claimant was told of his right of appeal: his trade union representative intimated immediately that an appeal would be pursued. Mr Cadwallader's decision was confirmed in writing the same day.

31 On 15 July 2019, Mr Bell conducted the claimant's appeal meeting. At this meeting the claimant stated that he did not agree with the OH restrictions but only on the basis that they should be *temporary* rather than *permanent*. He also asserted that his physical limitations had been amplified by his mental health problems and that as the latter had now improved so the physical limitations would also improve. Mr Bell responded that none of this was supported by any medical evidence: there was nothing to suggest that the physical limitations had been amplified as suggested; and nothing to suggest that they had now diminished. The claimant referred to a "*Ferry"* role which he felt he was capable of. He acknowledged that there was no current vacancy; but suggested that the incumbent should be "*bumped*" from the role to accommodate him. The claimant confirmed that he had no knowledge as to whether the incumbent might themselves be a restricted worker. He then stated that, in any event, he did not want the role. On the evidence available to him, Mr Bell concurred with Mr Cadwallader's decision: there were no suitable roles available which could accommodate the claimant's physical restrictions. Accordingly, Mr Bell upheld the decision to dismiss.

32 Mention should be made of a medico-legal report which the claimant adduced in evidence before us but which was never made available to the respondent. The report is curious: it has been prepared by Dr J L Robson MBBS D.Obst.RCOG; and is dated 11 February 2019. The report provides no information as to Dr Robson's current status but appears to suggest that is specialism is Obstetrics. The report was prepared at the request of solicitors instructed by the claimant but who are not on record in this case. We understand that the solicitors are acting on the claimant's behalf in connection with a personal injury claim. In any event, the report confirms that the claimant does have the physical restrictions identified by OH - although Dr Robson is confident that they may subside within two years.

The Law

33 **The Equality Act 2010 (EqA)**

Section 13: Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Section 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 in consequence 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.

Section 27: Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

Section 39: Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—

(*a*) as to B's terms of employment;

(*b*) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(*c*) by dismissing B;
(*d*) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

Section 123: Time limits

(1) Proceedings on a complaint within section 120 may not be brought after the end of—

(*a*) the period of 3 months starting with the date of the act to which the complaint relates, or
(*b*) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(*a*) conduct extending over a period is to be treated as done at the end of the period;
(*b*) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(*a*) when P does an act inconsistent with doing it, or
(*b*) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Section 136: Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

34 **The Employment Rights Act 1996 (ERA)**

Section 94: The Right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98: General Fairness

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(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.

35 **Decided Cases**

Nagarajan v London Regional Transport **[1999] IRLR 572 (HL)**
Villalba v Merrill Lynch & Co **[2006] IRLR 437 (EAT)**

If a protected characteristic or protected acts had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence.

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

Adedeji v UH Birmingham NHS Trust **[2021] EWCA Civ 23 (CA)**,

The best approach for a tribunal in considering the exercise of the discretion under Section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular the length of, and the reasons for, the delay.

Wilson –v- Post Office **[2000] IRLR 834 (CA)**

Categorisation of the true reason for a dismissal under Section 98(1) and (2) ERA is a question of legal analysis the and a matter for the tribunal to determine.

Taylor –v- Alidair Limited **[1978] IRLR 82 (CA)**

In a capability dismissal the correct test of fairness is whether the employer honestly and reasonably held the belief that the employee was not competent and whether there was a reasonable ground for that belief.

Lynock –v- Cereal Packaging Limited **[1988] IRLR 510 (EAT)**

in determining whether to dismiss an employee with a poor record of sickness absence and employers approach should be based on sympathy understanding and compassion. Factors which may prove important include: the nature of the illness; the likelihood of the illness recurring; or of some other illness arising; the length of the various absences and the periods of good health between them; the need of the employer to have its work done; the impact of the absences on those who work with the employee; the adoption and exercise of a policy in connection with absence due to sickness; the importance of a personal assessment in the ultimate decision; and the extent to which the difficulty of the situation and the position of the employer have been explained to the employee. A disciplinary approach, involving warnings, is not appropriate in a case of intermittent sickness absence - but the employee should be cautioned that the stage has been reached when it has become impossible to continue with the employment.

Polkey –v- AE Dayton Services Ltd. **[1987] IRLR 503 (HL)**

In a case of incapacity, an employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to improve and show that she can do the job.

Monmouthshire County Council v Harris **UKEAT 0332/14 (EAT)**

In an absence-related capability case, the Tribunal's reasoning needed to demonstrate that it had considered:

(a) Whether the respondent could have been expected to wait longer;
(b) The question of adequacy of any consultation with the Claimant; and
(c) The obtaining of proper medical advice.

S v Dundee City Council **[2014] IRLR 131, Ct Sess (Inner House)**

The tribunal must expressly address a number of relevant factors in all the circumstances of the individual case. Such factors include:
(a) Whether other staff are available to carry out the absent employee's work;
(b) The nature of the employee's illness;

(c) The likely length of his or her absence;
(d) The cost of continuing to employ the employee;
(e) The size of the employing organisation; and
(f) (balanced against these factors), the unsatisfactory situation of having an employee on lengthy sick leave.

East Lindsey District Council v Daubney **1977 ICR 566, (EAT)**

Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position.

Iceland Frozen Foods v Jones **[1982] IRLR 439 (EAT)**
Post Office –v- Foley & HSBC Bank plc –v- Madden **[2000] IRLR 827 (CA)**

It is not for the tribunal to substitute its own view but to consider whether the respondent's decision came within a range of reasonable responses by a reasonable employer acting reasonably.

Sainsbury's Supermarkets Limited –v- Hitt **[2003] IRLR 23 (CA)**

The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

36 **The ACAS Code**

Although it is not directly relevant in a case of dismissal by reason of capability, we have considered the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code") and the ACAS Guide: Discipline and Grievances at Work (2011). The Code and the Guide provide assistance in assessing the fairness or otherwise of the procedure adopted by an employer prior to dismissal.

The Claimant's Case

Direct Discrimination

37 The claimant's case is that he was disabled by reason of his mental health problems. As such he was treated less favourably than a hypothetical non-disabled employee (with identical physical restrictions) because he was placed into the RWP; he was not then redeployed; and was ultimately dismissed. The

case appears to be the because the claimant suffered with mental health problems the respondent exaggerated the physical restrictions so as to bring about his dismissal.

Discrimination for a Something Arising from Disability

38 It is common ground that the claimant's prolonged absences from work from October 2016 onwards were *something arising* from his mental health disability. It is the claimant's case that he was dismissed because of his absences from work.

39 The claimant claims unfavourable treatment because of the delays in dealing with his grievance submitted in September 2016. It is the claimant's case that the reason for these delays was his absence from the workplace due to his mental health disability. As noted above it is common ground that the prolonged absences were *something arising* from his disability.

Victimisation

40 It is the claimant's case that his initial grievance regarding leave of absence in September 2016; and his email to Lucy Davies regarding redeployment in December 2018; were protected acts under the provisions of Section 27(2) EqA. His case is that he suffered detriment as a consequence because he was placed into the RWP; he was not then redeployed; and was ultimately dismissed.

Unfair Dismissal

41 The claimant asserts that he was dismissed because of his grievances and because of his sickness absences and not because of his capability. Belatedly the claimant asserts that the respondent failed to follow a fair procedure because he was not provided with relevant forms in advance of meetings. This is not something which is pleaded or which appears in the list of issues.

The Respondent's Case

Discrimination

42 The respondent's case is that the claimant was not placed in the RWP; or ultimately dismissed because of his absences from work all of which were related to his mental health; his disability. The claimant was dismissed because of *physical restrictions* on his ability to perform the work required and available to him in the respondent's plant. It was the claimant who first raised these physical

difficulties with OH on 11 November 2016. At no stage was the claimant taken through an absence management process because of his absences from work and he was not dismissed because of those absences. An employee who was not disabled; who did not have mental health problems; but presented with the same physical restrictions, and in respect of whom OH submitted the same reports, would have gone through the same process. And, absent redeployment, would also have been dismissed.

42 The respondent concedes that the delay in dealing with the claimant's grievance was not acceptable. But, the respondent submits that the delay is easily explainable without reference to the claimants absences from work. There were a series of administrative errors - started by the way in which the grievance was lodged by the claimant's trade union; and not assisted by the fact that, on at least one occasion, the claimant simply failed to attend a grievance meeting.

Victimisation

43 It is the respondent's case that neither of the grievances are protected acts neither of them contain any allegation of breach of EqA.

44 In any event, it is absurd to suggest that it was because of raising a grievance in September 2016 that the claimant was then put into the RWP - when it was the claimant himself who raised his musculoskeletal problems during an OH appointment in December 2016.

Unfair Dismissal

45 The respondent maintains that the claimant was dismissed because there was no role available in the respondent's plant which the claimant could perform and accommodate his physical restrictions. This conclusion was reached after an extensive plant-wide search. The claimant was not dismissed because of his sickness absence record; he was not dismissed because he had mental health problems; and he was not dismissed because of his alleged grievances.

46 The respondent maintains that it followed a scrupulously fair procedure giving the claimant every opportunity to state his case and to constructively challenge the OH reports. The claimant was supported by trade union representatives at every stage and the union representatives are fully conversant with the RWP. Never did they suggest that the claimant had been wrongly placed into RWP nor were they able to identify a suitable role.

Discussion & Conclusions

47 There are two aspects to the case which it is important that we keep in mind when considering our conclusions. Firstly, the claimant was a disabled person by reason of his mental health conditions only - and not because of his physical restrictions. Secondly, there is no claim before the tribunal for a failure to make adjustments.

Direct Discrimination

48 In our judgement the suggestion by the claimant that he was placed into RWP because of his mental health disability is totally without merit. The claimant was placed into RWP because of physical restrictions which he himself initially drew to the attention of OH. At no stage was the claimant subject to any less favourable treatment because of his mental health disability or because of his related absences from work.

Discrimination for Something Arising from Disability

49 It is common ground between the parties that the claimant's lengthy absences from work from November 2016 onwards were something arising from his mental health disability. But the claimant was no stage treated unfavourably because of these absences: he was never subject to any absence management procedure; he was never issued with warnings regarding his absences; and he was not dismissed because of his absences. It so happened that, whilst absent because of his mental health, the claimant attended OH and he disclosed musculoskeletal problems. This disclosure led to physical restrictions being imposed and it was these restrictions which ultimately led to the claimant's dismissal.

50 For the reasons advanced by the respondent, we accept that the delay in dealing with the claimant's grievance was wholly unrelated to his absences from the workplace.

Victimisation

51 We have carefully scrutinised the claimant's putative grievance dated 16 September 2016 and his email to Ms Davies dated 11 December 2018. Neither of these communications contain anything which could reasonably be interpreted as an allegation of breach of EqA. In our judgement, these communications are not protected acts for the purposes of Section 27(2) EqA.

52 In any event, the claimant being placed into RWP and ultimately being dismissed were wholly unrelated to the putative grievances. Even if the

communications referred to above were protected acts the victimisation claim is still without merit.

53 Regarding the discrimination claims as a whole, the claimant has not established before us any events from which we could properly infer any type of discrimination. Accordingly, the discrimination claims will be dismissed.

Jurisdiction

54 For the sake of completeness, we have considered the respondent's submissions that part of the discrimination claim is statute barred. However, we conclude that the process of placing the claimant into the RWP; conducting the search for available roles; monitoring the claimant's physical health; and ultimately dismissing the claimant, was an ongoing process; a continuing act. We have found that it was not in any way discriminatory; but, had we found otherwise, we would have concluded that it was not statue barred and that we did have jurisdiction to consider it.

Unfair Dismissal

55 The respondent has established to our satisfaction that the sole reason for the claimant's dismissal was its conclusion that, due to physical restrictions (and not due to his disability), the claimant was incapable of carrying out any available role in the respondent's plant. The claimant was therefore dismissed for a reason relating to his capability; which is a potentially fair reason under Section 98(1) & (2) ERA.

56 Mr Cadwallader and later Mr Bell reached their conclusions as to the claimant's capability following an extensive process. Firstly investigating the claimant's physical health - with many OH reports and ultimately Dr Grobler's Capability Report dated 1 May 2019. There had also been a review of available roles within the plant - conducted by managers at three different levels and with extensive trade union involvement. The claimant had trialled 11 possible roles and he had rejected them all as unsuitable.

57 In our judgement, the respondent followed a scrupulously fair procedure. At every stage discussing the medical evidence with the claimant and giving him an opportunity to contribute. It was only at the Capability Review Meeting with Mr Cadwallader and then at the appeal with Mr Bell that the claimant sought to challenge the conclusions reached by OH as to his physical restrictions. The claimant did so without any foundation: he did not, for example, produce any medical evidence of his own. When the claimant later produced the report of Dr Robson for the purposes of this hearing, it essentially confirmed Dr Grobler's conclusions in any event.

58 The only point advanced by the claimant in support of his unfair dismissal claim which has given us some pause for thought is the fact that the search for available roles did not extend beyond the Solihull Plant. There is of course no evidence upon which we could conclude that a more extensive search might have identified a suitable role. But, in any event, the RWP is a collectively negotiated procedure with extensive trade union input. It is that procedure which the respondent's managers were following. The claimant, through his trade union representatives, understood the procedure; the procedure does not provide for a search beyond the plant which an employee is ordinarily located. There was no request from the claimant or from the trade union in this case for a more extensive search. In the circumstances, our judgement is that it was within the range of reasonable responses in this case for the respondent's managers to restrict their search to the Solihull Plant in accordance with the RWP.

59 Accordingly, and for these reasons, we find that the claimant was fairly dismissed. His claim for unfair dismissal is not well-founded and is dismissed.

Employment Judge Gaskell
25 March 2021