



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr David Waltham

v

Morrison Data Services Limited

Heard at: Norwich

On: 31 January 2023
1 and 2 February 2023

Before: Employment Judge Postle

Members: Mrs Salmon and Mr Kidd

Appearances

For the Claimants: Mr Frame, Solicitor

For the Respondent: Miss Henning, Solicitor

JUDGMENT

The unanimous Judgment of the Tribunal is:

1. The Claimant was not unfairly dismissed.
2. The Claimant was not disabled within the meaning of s.6 of the Equality Act 2010.
3. Even if the Claimant were a disabled person, the Claimant's claim for failure to make reasonable adjustments is not well founded.

REASONS

1. The Claimant brings a claim to the Tribunal under the Employment Rights Act 1996 for what is known as ordinary unfair dismissal; the Respondents defend that claim with the potentially fair reason to dismiss being advanced as capability. The Claimant also has a claim under the Equality Act 2010 for the protected characteristic of disability, particularly a claim for failure to make reasonable adjustments under s.20. The Claimant's alleged disability is osteoarthritis, which the Respondents do not concede.

Further, the issue of knowledge, constructive or actual, is also not conceded.

2. There was other claims for holiday and notice pay, they appear now to be withdrawn.
3. In this Tribunal we have heard evidence from the Claimant through a prepared witness statement. For the Respondent we heard evidence from: Ms Jordan, the former HR personnel; Mr Carpenter the Dismissing Officer and Line Manager of the Claimant; and Mr Webb, the Regional Operations Manager who dealt with the Appeal. All giving their evidence through prepared witness statements.
4. The Tribunal also had the benefit of a Bundle of documents consisting of 170 pages. In addition to that the Tribunal had an opening note from the Claimant's Solicitor and written closing submissions from both the Claimant's Solicitor and the Respondent's Solicitor. As they are in writing, no disrespect is intended, but I will not rehearse the contents of those written submissions.

The Facts

5. The Claimant was originally employed from 2011 as a Meter Reader with EON and latterly at his time at EON part of an Occupational Health Referral form showed that he was on reduced workload (80%) and had been doing work involving more travelling and less walking on site. This apparently had been in place for approximately two years. Particularly, the reduction in the last year was to read most meters. The Claimant was engaged with a meter reading qualification. However, the Report went on to say that this was not sustainable on a permanent basis (at page 63 of the Hearing Bundle).
6. Unfortunately, it appears that following the transfer the Claimant did not immediately offer or provide the Occupational Health Report obtained by EON, to his new employers following what was then a TUPE transfer on 1 September 2020 to the Respondents.
7. The Respondent is not an energy supplier like EON, it is merely contracted to read meters as provided by various contractors of different energy suppliers. This meant the Respondents had very little scope for alternative employment for its employees, other than cyclic meter reading and on average 20 – 30 half hourly meter readings, plus a small amount of other meter readings which would not be stand alone employment.
8. Prior to the transfer taking place on 1 September 2020, there had been a Meet and Greet day with the employees of EON and the Respondents and that appears to have taken place on 25 August 2020, which was to be followed by two days of training. Which we understand the Claimant attended.

9. There then appears to have been a Telephone Consultation Meeting with the Claimant on 3 September 2020 (pages 84 – 85), at which the Claimant raised his health concerns and discussed reasonable adjustments that he had; these being: wide fitting shoes and he wanted to read meters in small / medium enterprises such as was in place with his former employers, EON. He was informed that the job as a Meter Reader required the employee to read all aspects of meter reading, cyclic working and training would be provided. The Claimant was advised they would look at Occupational Health and the HR Advisor would be in contact with the Claimant.
10. Following the Meet and Greet and sometime between 25 August and 3 September 2020, it appears the Claimant telephoned the Respondents to confirm that he would not be attending work and was not able to do the job as prescribed by the Respondents. The Claimant was in fact signed off work by his GP (page 142) as unfit for work due to osteoarthritis of the hip, but makes no mention of any adjustments. That certificate was to the 30 September 2020 and thereafter a number of Doctor's Certificates were provided right up until the time the Claimant was dismissed. None of which appear to suggest any reasonable adjustments; not that the Tribunal have seen in the Bundle.
11. Thereafter, the Claimant produced the ongoing Certificates and whilst there is no documentary evidence from either the Claimant or the Respondents of contact during the period from September to 9 December 2020, the Tribunal think it is unlikely there would have been no contact, whether from the Claimant's Line Manager or from HR at the time Tina Waterhouse who was covering the case. It should be noted that on the Occupational Health Referral form by the Respondents in December, it does record,

"Additional Support at Work – David has had access to the Employee Assistance Programme and continues to be supported by his Line Manager with regular contact and welfare conversations."

That would point to the fact that it is likely that some, the Tribunal accept not many, took place in that period.

12. Furthermore, it is unlikely that the Claimant would be in a hurry to chase matters at that stage because he was benefitting from full company sick pay at the time.
13. On 9 December 2020, following the Claimant's absence by there or about three months, Ms Waterhouse of HR makes a Referral to Occupational Health which requires the Claimant's consent (page 87) and the Referral says,

"The job role, routine work activities, David is a lone worker and undertakes an active role which involves walking, bending, kneeling and walking upstairs, David is required to drive to properties to read both gas and electric meters and he is also required to engage with members of

the public. The role is very self driven in which David is expected to plan his weeks effectively and work flexible between 8am and 8pm to meet business requirements.”

14. It then goes on to say,

“... the reason for the referral, currently absent from work with health problems. Health history: David is suffering from osteoarthritis in both hips, fingers and toes, his wear and tear on his right hip, suffers from bunions, has tennis elbow, had an operation three years ago and cannot do anything too repetitious.”

15. The Referral then provides details of his sick certificates and what they record. In the relevant background it says that the Respondents,

“... are prepared to consider any adjustments suggested in order to support David”.

16. The Referral then lists the questions that the Occupational Health Advisor is required to answer.

17. The Claimant’s consent is required for such an Occupational Health Referral and that is not forthcoming by the Claimant in February. The Claimant is written to on 15 February 2021,

“Can you please complete the enclosed consent form to enable you to be referred to Occupational Health. If you have any questions please contact...”

18. On 25 February 2021, Mr Carpenter the Line Manager, spoke to the Claimant, which is confirmed by an email not between Mr Carpenter and the Claimant but between Mr Carpenter and HR, in which the conversation appears to be on the lines of,

“I have just managed to get hold of David, I have asked him if he received the Occupational Health paperwork in the post, to which he replied “yes”. He has refused to fill it in as it was an independent company that would be carrying out the assessment. It was explained to him that we always use an independent company and we do not do it in house. He said he had one done some two years ago and we should be using that one. Again, I explained that we need to do a new one as a lot can change in two years and he no longer works for EON. He explained his current sick note expires at the end of March and he is not prepared to do anything until then”.

19. The email goes on. At that stage the Claimant still has not provided his alternative evidence, or any medical evidence whether from his GP or a previous Occupational Health Assessment with EON.

20. On 26 April 2021, there is a welfare call and the minutes of that are at pages 94 – 95. The Claimant was represented at that meeting by his Trade Union Regional Organiser and it was made clear to the Claimant

they required an updated Occupational Health Assessment from the Respondent's providers, in order to see what could be done to support the Claimant.

21. The Claimant refers again to a previous Occupational Health Report. The Respondent advises they need their own, updated, Occupational Health Report and the Claimant responds that he will think about it and respond in the next week.
22. The Respondents submit a further consent form by Recorded Delivery on 29 April 2021. The Claimant does not return the consent form and seemingly does not return it, we think, until the end of May. That appears to be mislaid by the Respondent and another one is then provided. There is then a welfare meeting for 4 June 2021, to take place by telephone. Again, the Claimant was represented by his Trade Union Regional Organiser Representative. The Claimant agrees to sign, at that meeting, a new consent form which is hand delivered. There was discussions about his condition, but the Claimant makes it clear he does not want to discuss his condition on the telephone. He only wants to discuss adjustments to his role. He does say that driving and travelling is not a problem, but bending and walking is a problem. He accepts that short bursts are okay.
23. At that stage he had not seen his GP since November 2019.
24. The Occupational Health Referral is made by Ms Jordan using the same, or an amended, Referral sheet as we have seen in the Bundle, which was originally prepared for December 2020. We see no reason why that would have been amended by Ms Jordan. The Occupational Health Report becomes available on 1 July 2021 and that is at pages 108 – 110. In summary that records,

“The Claimant reports multiple areas of osteoarthritic changes in a number of joints around his body, he says he advises that his osteoarthritis is in both hips, the right worse than the left, and wear and tear changes in his fingers and toes. He reports bunions on both his feet and has to wear wide fitting shoes for comfort. He underwent surgery for tennis elbow three years ago which can still be uncomfortable with repetitive activity.”
25. The Claimant advised the Occupational Health that he underwent TUPE transfer to the Respondents and had reasonable adjustments in place with EON, but that they are not currently agreed with the Respondents, to help him with various symptoms caused by his general osteoarthritis presentation. He says the Reasonable adjustments agreed with EON included a role with less requirement for sustained walking and driving, he was provided with a two week window to plan his work into batches of work, he had a strap for carrying his hand held device and wide fitting shoes were provided.

26. He indicated to the Occupational Health Advisor that he had not been offered any work equipment to date and had not discussed any reasonable adjustments with his Line Manager. He states that he feels he is fit to return to work on adapted duties and he is keen to discuss this with his Line Manager.

27. The Report further stated,

“David reported functionability as:

- Walking – no specific current limit;
- Driving – able to achieve;
- Crouching – able to achieve;
- Kneeling – able to achieve;

David reports that he attends periodic physio for lower back pain which he finds helps settle any symptoms that may occur.

28. Assessment and opinions contained in the Occupational Health Report, reported,

“From David’s subjective assessment today, I recommend he is fit to return to work. I suggest the following options should be considered as reasonable adjustments:

- Access to any footwear that may provide him with a wide fitting option for his bunions;
- If the hand held device has an option of a strap, to reduce the requirement for sustained gripping and holding the device between use;
- In terms of work duties and scheduling, that needs to be a direct conversation between David and his Line Manager;
- I do recommend David is likely to require a phased return to work plan due to his length of absence, I suggest a simple increase of hours over a four week period to allow him time to build up full work fitness: week 1 - 25% of hours, week 2 - 50% of hours, week 3 - 75% and week 4 full time hours;

David did mention he has interest in discussing options for part time work in the future, but obviously that is a business decision for the Line Manager.”

29. The Report went on to conclude in terms of the Equality Act 2010, whilst it is a legal one and not a medical one, to provide guidance in this matter, the Occupation Health’s view was that having considered the definition of disability David is unlikely to be considered within the scope of the Act, this is because,

“David reports no limitation in his ability to perform or that significantly impacts on his ability to undertake normal day to day activities.”

30. Although the Claimant said he disagreed with the Occupational Health Report, he never actually sets out in detail what it is that he disagrees over in the Occupational Health Report. All he says in an email to them, that he disagrees with the Report.
31. Furthermore, the Report requires the Claimant's consent for the release of the Report and so if he vehemently disagreed with the Report it is surprising that he gave his consent for the Report to be released.
32. The Claimant is then invited to a Capability Meeting by letter of 2 July 2021 (page 111) and that is for the specific purpose to review the Claimant's ongoing absence since August 2020. In that letter the Claimant is advised that one potential outcome is a termination of his employment on the grounds of ill health. The Claimant is also advised of his right to be accompanied by his Trade Union Representative.
33. The meeting takes place ultimately on 16 July 2021. In attendance was the Claimant, Mr Carpenter his Line Manager, the GMB Trade Union Regional Organiser Representative and Ms Jordan from HR.
34. The meeting, from the minutes, discussed the Claimant's condition, the Occupational Health Report and its recommendations. There were discussions about the Claimant not agreeing the contents of the Report and why. There were discussions about the work he formerly did for EON and whether the Claimant would return on a part time basis with part time hours, but that would be it was made clear for meter reading. There was in fact no alternative, given the nature of the Respondent's business.
35. The Claimant, in accordance with the Occupational Health advice, was given an opportunity to return on a phased return. He declined saying he simply could not do the role for which the Claimant was being asked to perform.
36. The only adjustments that the Respondents could offer was a phased return, a reduction in hours, wider shoes and a strap for the hand held meter reader.
37. Given the nature of the role, it is clear that there were no other feasible adjustments to the Claimant's role that could be put in place, given the fact the Respondent's business was contracted to read meters only. They were not an energy supplier. There was a discussion about alternative roles and the Claimant confirmed he had looked at the Respondent's in house vacancies, but there was nothing in his area.
38. The meeting was adjourned to consider the outcome and also for the Claimant to consider any other alternatives that might be available within the Respondents.
39. The meeting was reconvened the following week and again the Claimant was asked if he had looked at any alternatives, the Claimant indicated that

none were suitable. To repeat, given the nature of the Respondent's business, they could not accommodate the reasonable adjustments offered by EON as they were not only, not cost effective, but the business model that the Respondent's relied upon and the system operated by them, cannot separate out specific work types. Even if the Respondent could, that would not be sufficient to support either a full time post, or a part time post. Even EON had commented in the first page of the Occupational Health Referral, which we have seen, is that the Claimant's reduced role was not sustainable long term. This rather suggests that had the Claimant remained at EON, he might well have been dismissed by them if alternatives could not have been found.

40. The Respondents, therefore, took the reluctant decision given the Claimant unfortunately indicating that he was not prepared to return on a trial basis, part time phased return, the Claimant's employment was terminated. That was confirmed in a letter to the Claimant dated 23 July 2021 and full details were given of the reasoning for the Claimant's dismissal (pages 123 – 126). The letter also contained the Claimant's right of Appeal. The Claimant appealed and the grounds for that were set out at pages 127 and 128. The Appeal was heard by Mr Webb the Regional Operations Manager and the Claimant again was represented by his Trade Union Regional Organiser.
41. The Appeal took place on 6 August 2021, minutes of that are at pages 130 – 135. Each of the Claimant's grounds of Appeal were clearly addressed. The Claimant's position had not changed. The Respondent had requested any further evidence from the Claimant he wished to consider and they would provide their outcome to the Appeal by 16 August 2021. The Claimant did in fact send the front page of the EON Referral (page 63), no further information was provided other than confirmation of his email that he objected to the Occupational Health Report's contents; although he did not set out the reasons why.
42. The Appeal was not upheld and detailed reasoning for that was sent to the Claimant in a letter of 20 August 2021 (pages 137 – 141).

The Law

DISABILITY

43. In deciding whether someone satisfies the statutory definition of disability, the Employment Appeal Tribunal set out four sequential questions that we should look at. They are:
 - 43.1 Did the Claimant have a mental and / or physical impairment?
 - 43.2 Did the impairment affect the Claimant's ability to carry out normal (and I emphasise the word 'normal') day to day activities?
 - 43.3 Was the adverse condition substantial?
 - 43.4 Was the adverse condition long term?

44. Those four questions should be posed sequentially and not together.
45. Although 'normal' work related activities should be taken into account, the test for determining whether an individual has a disability relates to that person's ability - and we emphasise this again – to carry out normal day to day activities. Not whether they can carry out specialist work, for example walking eight miles per day to read meters. Impairment must have a substantial adverse effect on a person's ability to carry out normal day to day activities. Substantial means more than minor or trivial.
46. In reaching our decision on this, the Tribunal take into account the codes on disabilities and they are guidance; it does not impose a legal obligation. In this case, although the Claimant was Ordered a number of times to provide medical evidence, or GP notes, that he wished to rely upon, the only evidence that the Claimant has produced in these proceedings that we have in the Bundle is:
- an appointment letter of 2012 for podiatry surgery;
 - an appointment letter for an ECG in 2013;
 - a Report about his bunions in June 2014;
 - the outcome of x-rays in October 2014 which show moderate to severe arthritis in the right hip;
 - an appointment letter in 2014 for an orthopaedic clinic;
 - a letter in November 2014 stating the outcome of right hip being early arthritis prevailing;
 - an appointment letter in 2015 for an investigation operation;
 - an injection in one of the Claimant's joints (possibly hip) in 2015; and
 - a GP letter which appears to be in July 2022 confirming an x-ray to right hip, several consultations over the years, physio, acupuncture and pain relief.
47. And of course we have the fit notes from the Claimant's GP from July 2020 to July 2021.
48. That is the sum total of the medical evidence the Claimant chose to provide for best reasons known to himself. It does seem inconceivable that there would not be more medical evidence available, or provided by his GP which may, or may not, help the Tribunal in reaching a decision as to whether the Claimant has a disability.
49. It has to be said, the evidence that has been provided in support of the Claimant's disability has not assisted the Tribunal in considering whether the Claimant meets the statutory definition. The Tribunal were of the view that although the Claimant may have a physical impairment, it did not impair or affect the Claimant's ability to carry out his normal day to day activities. It might be, in his view, substantial and it might be long term. But he fails on the fact that his impairment does not affect his ability to carry out the normal day to day activities. From that point of view, the Tribunal were unanimously of the view the Claimant was not disabled.

50. However, even if we were wrong and the Claimant did satisfy the definition of disability, then what would the Tribunal make on the question of reasonable adjustments?
51. An employer has a duty to make reasonable adjustments under s.20 of the Equality Act 2010 for a disabled employee, if the employer has a provision, criterion or practice (a PCP) which puts the disabled person at their substantial disadvantage in comparison with persons who are not disabled to remove that disadvantage. In considering what is reasonable, it is necessary to have regard to the extent to which taking a step would remove the disadvantage, whether it would be practical, the financial cost incurred and the extent to which the employer's activity would be disrupted, the employer's financial and other resources, the availability of assistance and the nature of the Respondent's activities.
52. There must also be the knowledge of the disability and the knowledge that the contended adjustment would remove or reduce the disadvantage for a duty to make reasonable adjustments to accommodate it to exist.
53. The test for reasonableness imports an objective standard. The question must not be looked at only from the perspective of the Claimant. The Tribunal must also take into account wider implications, including operational objectives of the employer. Whilst there is no statutory guidance for assessing the reasonableness of steps that avoid the disadvantage that a PCP might cause a disabled person, employment codes list the following factors that the Tribunal may take into account. These are:
 - 53.1 The extent to which the step would prevent the effective relation to which the duty was imposed, i.e. the effectiveness of the step;
 - 53.2 The extent to which it is practical for the employer to take that step;
 - 53.3 Financial and other costs that would be incurred by the employer in taking the step;
 - 53.4 The extent to which taking the step would disrupt any of its activities;
 - 53.5 The extent of the employer's financial and other resources;
 - 53.6 The availability of financial or other assistance in respect of taking the step; and
 - 53.7 The nature of the employer's activities and the size of the undertaking.
54. The first PCP in this case was not allowing TUPE employees to stay on the terms and conditions they had been with EON and the second one was requiring all staff to carry out work under their cyclic system.
55. There clearly was not a PCP that the Claimant had clear terms and conditions with EON that required reasonable adjustments. It does not meet the criteria for a PCP because that alleged PCP was not a specific term and condition of the Claimant's employment and the Tribunal noted that even EON said it was not sustainable in the long term. Even if it was

a PCP, how realistic was it for the Claimant to effectively do the work that he was doing with EON, in the Respondent's business? It was not reasonable.

56. It is not reasonable or expected of an employer to create a new job for an employee who is disabled. The emphasis is on reasonableness. The Claimant, in the new business of the Respondent, had to as all the other employees had to, complete numerous meter readings during the course of the day and week and there was only limited opportunity for alternative work which the Claimant may well have done at EON, but was not feasible at the Respondents. In any event, the Respondent were not able to draw down the work and plan in advance as they were apparently at EON.
57. Dealing with the second PCP, really it is to repeat what we have said in relation to the first PCP. The work that was required of Meter Readers at the Respondent's was to carry out cyclic meter reading together with sometimes small additional reading of half hourly business meters, which was not possible to do whether on a full time basis or on a part time basis readings.
58. Therefore, it was not a reasonable adjustment in any event and that claim must necessarily fail.
59. Turning to the ordinary unfair dismissal claim under the Employment Rights Act 1996. The Employment Rights Act 1996 sets out in s.98 potentially fair reasons to dismiss. One of those is under s.98(2)(a) and that is the capability of an employee. S.98(3)(a) defines capability in relation to an employee means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality. Then the Tribunal have to consider the fairness of the decision which is set out in s.98(4),

Where the employer has filled the requirements of subsection (1), the determination of the question of whether the dismissal is fair or unfair (having regard to the reasons 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.
60. That requires not the Tribunal to substitute its own view as to what we would have done, but did the Respondents, with the information they knew at the time they took the decision to dismiss, act fairly and reasonably otherwise known within the range of reasonable responses of a reasonable employer?

61. In reaching that decision the Tribunal will consider whether there has been discussions with the employer during the absence, whether they have taken medical evidence through Occupational Health or otherwise, consideration of the employee's opinion and his own condition and consideration as to whether there is any other alternative employment within the Respondent's organisation.
62. The Tribunal are satisfied, albeit in the early months it might have been sporadic, but certainly from December onwards there were ongoing discussions with the Claimant about the long term absence. There was a number of attempts to get an Occupational Health Referral moved on, the Claimant for reasons best known to himself, was not prepared or forthcoming in the early months to provide his consent, one accepts he ultimately did provide his consent but some months later. The Respondents perfectly reasonably took the advice of Occupational Health and had no reason to disbelieve the specialist advice that they received from the Occupational Health provider who were independent of the Respondent. Naturally, one would expect, whether it be the Line Manager or the Appeal Officer, to follow the advice of specialists in the Occupational Health field, unless there were clear reasons why they should not follow that advice.
63. The Respondent's Line Manager and the Appeal Officer, clearly did consider what the employee was saying, that being,

"I can't do the job as you want me to do it. I don't want to do part time, I don't want to go back on a phased return. I just want to do picking small parts of my job which I did at EON"

Which even EON had stated was not sustainable long term.

64. Even the Claimant's Trade Union Regional Organiser Representative had commented that given what the Respondents had offered, they had reached, effectively, the end of the line and after consideration of whether there was any alternative, which clearly there was not, the Respondents had no alternative in the circumstances for an employee being on long term sick absence and was unable to fulfil the job for which he was employed, to terminate his employment.
65. In those circumstances, that dismissal is fair.

Employment Judge Postle

Date: 3/3/2023

Sent to the parties on: 16/3/2023

NG - For the Tribunal Office.