Neutral Citation Number: [2023] EAT 118

Case No: EA-2019-001084-NLD

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 September 2023

**Before** :

**HIS HONOUR JUDGE SHANKS**

**MS V BRANNEY**
**MRS R WHEELDON**

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**Between :**

**Matthew Riley**

**Appellant**

**- and –**

**Direct Line Insurance Group PLC**

**Respondent**

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**John Platts-Mills** (instructed via Advocate) for the **Appellant**
**Jonathan Cook** (instructed by Pinsent Masons) for the **Respondent**

Hearing date: 25 July 2023

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# JUDGMENT

## SUMMARY

### UNFAIR DISMISSAL, DISABILITY DISCRIMINATION

The Appellant was disabled by reason of ASD. Following an extended period of inability to work and an unsuccessful attempt at returning to work his employment was terminated, which entitled him to be paid 80% of his salary under a PHI scheme till retirement.

The ET found that the termination was not a dismissal as it was consensual. Although there had been two failures to make reasonable adjustments in connection with the attempted return to work, the claims in respect thereof were out of time and the ET refused to extend time on the just and equitable ground.

On appeal the EAT found:

(1) that the ET had not failed to make reasonable adjustments in the way he was cross-examined and there had been no substantive unfairness in the hearing;

(2) that the ET had been entitled to find that there was a consensual termination of his employment notwithstanding the terms of a subsequent letter from the employers stating that he was dismissed;

(3) that the ET had properly decided not to extend time for the reasonable adjustments claims in view of his subsequent decision to agree to the termination of his employment rather than seeking to return to work.

## HIS HONOUR JUDGE SHANKS:

## Introduction

1. This was an appeal from a judgment of the employment tribunal sitting in Leeds (EJ Rogerson, Ms. H Brown and M G Corbett) which was promulgated on 11 November 2019. The judgment followed a six day hearing in September 2019. The tribunal rejected a complaint of unfair dismissal by Mr Riley against his employer, Direct Line, on the basis that there was no dismissal because the termination of his employment was consensual. Complaints of discriminatory dismissal on the basis of disability under sections 13 and 15 of the Equality Act 2010 were also rejected and the tribunal found that complaints of a failure to make reasonable adjustments were presented out of time and that it was not just and equitable to extend time.

2. At a rule 3(10) hearing at which Mr Riley was represented by David Craig KC under the ELAAS scheme HH Judge Auerbach allowed the appeal to proceed on three grounds which raise the following questions of law:

   (1) Did the tribunal make necessary reasonable adjustments to enable Mr Riley to receive a fair hearing in view of his disability?

   (2) Did the tribunal make an error of law when finding that the termination of Mr Riley's employment was consensual?

   (3) Did the tribunal fail to exercise its discretion properly when refusing to extend time?

## The background facts

3. Mr Riley was born in 1991. He was employed by Direct Line as a home claims advisor from 12 March 2012 until his contract terminated on 19 September 2018. He was enrolled on Direct Line's private health insurance scheme provided by UNUM and had taken an upgraded version of the scheme which offered support till retirement age in the event of incapacity.

4. It was accepted before the tribunal that at all material times he was disabled under the Equality Act 2010 by reason of autistic spectrum disorder and mixed anxiety and moderate depression.

5. From 2014 until October 2017 Mr Riley was absent from work with anxiety and depression which made him incapable of work. For much of this period he was paid at the rate of 80% of his normal salary under the UNUM scheme.

6. Following an assessment on 22 August 2017, a report was prepared by a rehabilitation specialist which proposed a four stage return to work plan including a period of five months adjustment before he was required to take any live calls. In a subsequent report she also recommended that noise cancelling headphones should be obtained and that management should receive training in awareness of Asperger's.

7. Following the five months of adjustment Mr Riley started to take calls on 3 April 2018. Although he was contracted to work 35 hours a week, he started on 12 hours a week. On 25 May 2018 he contacted his managers to say he could not come into work on account of his mental health. He concluded by saying: "I currently aren't able to talk on the phone or deal

with things so can you let UNUM know and once I am feeling more in control I will be in touch." His GP assessed him as unfit to work from 25 May 2019 because of ongoing anxiety and paranoia.

8. On 22 August 2018 Direct Line consulted UNUM about Mr Riley's position and they said that the medical reports indicated that he was unable to perform "his insured role" and concluded: "It is difficult to see that Mr Riley would recover sufficiently to perform his role in the near or medium future." Direct Line management were apparently under the impression that UNUM's benefits while someone was employed only lasted five years. On 28 August 2018 they called him to a meeting to discuss "ongoing phased return to work, how it was going and the options going forward."

9. At the meeting on 31 August 2018 (the minutes of which were agreed) Mr Riley was told:

> **UNUM do a scheme call[ed] [P]ay [D]irect and because they do not see you being able to return to work in the medium term, this … scheme … would continue to support you financially and we (Direct Line Group) take a step back. You would cease employment with Direct Line and UNUM would pick up the payments. You would get paid what you get now but UNUM would pay you rather than us.**

His immediate response was:

> **My only issue with this is will it take me up to state pension age?**

It was agreed that this would be investigated by HR (though the tribunal found that Mr Riley was already aware of the extent of the benefit available and was more knowledgeable than the managers as to its scope if his contract was terminated). Mr Riley was asked for his thoughts. He stated:

> **It all makes sense. I know really this is where it's been heading for the last four years. This ties it all up as I do not have to think about how I am going to get back into work and what a phased back to work will look like and when I am going to be able to come to work and the hours.**

The tribunal found that the meeting was supportive and designed to help Mr Riley make the right decisions for the future. They rejected his evidence that he did not understand what he was being told and found that he was not put under any pressure to take the option of termination.

10. Following further exchanges in which Mr Riley indicated he had spoken to UNUM and expressed concern about his payments continuing in a seamless way when his contract of employment ended there was a telephone conversation on 6 September 2018 which was followed by an email from Direct Line. The email stated:

> 1. **We had a meeting with you last week and made you aware of Pay Direct. I will forward you the minutes from this meeting as soon as possible.**
> 2. **You need to consider this and make an informed decision, I understand you have been in touch with UNUM to clarify some queries you had.**
> 3. **If you wish to take on Pay Direct and you confirm this we will invite you to a formal meeting and end your employment with Direct Line Group.**
> 4. **We will pay you in lieu of notice and you would then move over to Pay Direct with UNUM.**
> 5. **…**
> 6. **We would like to reassure you that you will not loose a months pay …**

> **7. If you confirm your agreement we would invite you to a face to face meeting to confirm the outcome, so, if you are happy to move to Pay Direct please can you confirm this to me and I will start to schedule a final meeting with you …**

Mr Riley responded the same afternoon:

> **As per our discussion today please accept this email acceptance for Pay Direct.**
>
> **I understand that this now needs to go to … HR and then you will be back in touch …**

11. On 13 September 2018 Mr Riley was told that UNUM had confirmed that he would receive payments under the scheme until state pension age. Within two hours he provided his dates for a final meeting which he knew would be required to end his employment. The following day he was invited to a final meeting on 19 September 2018. The letter clearly stated that the meeting was to discuss his "proposed move to pay direct scheme overseen by UNUM". The minutes record him being told that UNUM would pay him direct and that his employment would end. His response was that he would need it in writing that he was no longer employed. When asked if he had any questions he asked only about the transition regarding his pay and finally he stated:

> **I understand and agree with it all, so that's fine.**

12. By letter dated 25 September 2018 he was informed that the outcome of the meeting was that he was dismissed with effect from 19 September 2018 on grounds of capability due to ill health, of which details are given. The letter reminded him of his right of appeal. It is right to say that on its face the letter is entirely consistent with a straightforward dismissal by Direct Line.

## The employment tribunal proceedings

13. Mr Riley issued his claim on 12 November 2018. Direct Line's initial response was that his dismissal was fair; however, by amended grounds of resistance dated 14 February 2019 they raised an alternative case to the effect that he was not dismissed but that his employment terminated by mutual agreement.

14. On 9 August 2019 there was a telephone case management hearing before EJ D N Jones attended by Mr Riley and a solicitor for Direct Line to consider suitable adjustments to enable him fully to participate in the hearing on account of his autism. The judge ordered:

> **Cross examination of the claimant shall be by way of oral and written questions. Counsel for the respondent shall write down each question to be asked and hand the written copy to the claimant before it is answered. This procedure may be varied or adjusted by the Tribunal.**

15. The final hearing took place over six days in September 2019. Mr Riley was cross-examined in the normal way over the first two days of the hearing but he was not provided with written copies of the questions as contemplated by EJ Jones's order. It is this omission which forms the ground for the first issue on the appeal.

## (1) Adjustments at the final hearing before the tribunal

16. It is well established that an employment tribunal is under a duty to make reasonable adjustments to accommodate a party's disabilities and that the EAT will interfere if it determines that a failure to make such adjustments has rendered a hearing substantively unfair (see: ***Heal v University of Oxford*** [2020] ICR 1294 and ***Buckle v Ashford and St Peter's Hospital NHS Hospital Trust*** (EAT 18.6.21)).

17. What happened at the hearing has been the subject of written evidence from Mr Riley, James Arnold (counsel for Direct Line) and the three members of the tribunal. Mr Arnold and the members of the tribunal all state that there was a discussion about reasonable adjustments before Mr Riley's cross-examination began and that he stated that he did not need to have the questions written down if they were straightforward but that it was agreed that, if he indicated that he did not understand a question or needed to have it written down before answering it, he would say so and Mr Arnold would write it down before he answered it. Mr Riley's statement, which is based on the instructions he gave to Mr Craig KC shortly before the rule 3(10) hearing before Judge Auerbach on 9 November 2022, says that he does not recall any such discussion and that in any event he finds it difficult to say (or even know) whether he needs something at the time. Given the clear terms of the statements of Mr Arnold and the members of the tribunal which are supported by contemporaneous notes and that Mr Riley says he does not remember and only addressed the issue three years after the event, we are satisfied that the evidence of Mr Arnold and the tribunal members about what happened is correct.

18. Mr Platts-Mills says that it was not open to the tribunal to depart from EJ Jones's direction about the form of Mr Riley's cross-examination and that they overlooked relevant guidance to the effect that adjustments relating to the form of cross-examination should be decided on in advance of a full hearing and that autistic people often have difficulties with unexpected or sudden change and may have difficulty dealing with hypothetical questions, including those about adjustments that would be helpful or envisaging how they would feel if certain adjustments were made. He says that in the circumstances the tribunal failed to make reasonable adjustments and that the final hearing was therefore substantively unfair.

19. We do not accept that the tribunal was bound by the direction made by EJ Jones. The process envisaged in that direction would have been rather cumbersome and may have created its own difficulties for Mr Riley and the order expressly contemplated variation or adjustment by the tribunal at the final hearing.

20. The tribunal plainly had the question of reasonable adjustments well in mind. It is true to say they do not expressly refer to the guidance, but we are not convinced that the approach taken involved a breach of their duty to make reasonable adjustments in practice. We considered in detail the guidance that autistic people often have difficulties with unexpected or sudden change and may have difficulty dealing with hypothetical questions but we are satisfied that the tribunal was reasonable in acting on the wishes expressed by Mr Riley on the day of the hearing. Following the preliminary hearing Mr Riley would have been well aware of what was involved in the process of cross-examination and he had had plenty of time to consider his needs before the final hearing. In our view it was reasonable for the tribunal, who were able to engage directly with Mr Riley on the day and form their own view about his abilities, to trust his views regarding his own needs.

21. In any event, we are not persuaded that Mr Riley in fact suffered any substantive unfairness as a consequence of the course the tribunal took. Mr Platts-Mills did not identify any specific prejudice arising from the lack of written questions and we note the tribunal's views as to the quality of his evidence in para 11 of the judgment and in EJ Rogerson's statement dated 22 February 2023 for the EAT. We also note that the tribunal's factual conclusions

were largely based on communications passing between the parties which were recorded in contemporaneous notes or contained in emails.

## (2) Consensual termination

### *Legal framework*

22. In order to bring a claim for unfair dismissal there must be a "dismissal" for the purposes of section 95 of the Employment Rights Act 1996. The relevant provision in this case is section 95(1)(a) which provides that there is a dismissal if " … the contract under which [the employee] is employed is terminated by the employer (whether with or without notice)".

23. The authorities establish the following relevant propositions of law:

(1) Whatever the respective actions of the employer and employee at the time when the contract is terminated, at the end of the day the question always remains the same: "Who really terminated the contract?" (see: Sir John Donaldson MR in ***Martin v MBS Fastenings*** [1983] IRLR 198). The issue is one of causation.

(2) Termination of the contract of employment by the freely given mutual consent of both the employer and the employee is not a dismissal under section 95(1)(a) (see: ***Birch v University of Liverpool*** [1985] IRLR 165).

(3) The question how the contract was terminated is ultimately one of fact and degree and the tribunal must look at the realities rather than the form of the relevant transactions.

(4) Because of the consequences for the employee that flow from a finding of consensual termination the tribunal must be astute to find clear evidence that a termination was indeed free and consensual. Such a conclusion cannot apply if there is deceit, coercion or undue pressure, in particular if the employee is under direct threat of dismissal by the employer. Conversely, where there has been negotiation and discussion and an opportunity for the employee to seek legal advice, a consensual termination may properly be inferred.

(5) There is a distinction between an employee consenting to the termination of his employment and consenting to being dismissed by his employer. The latter analysis has often been considered appropriate in cases where employees volunteer for redundancy (probably as a matter of fairness because entitlement to a statutory redundancy payment itself requires a "dismissal") but the existence or non-existence of a redundancy situation is not determinative.

### *The tribunal's decision*

24. The tribunal found that the termination of Mr Riley's employment was consensually agreed for the reasons set out at paras 74-77 of their judgment. They rejected his case that he had been in some way "tricked" and did not understand what he was being told at meetings. They found that he proactively pursued the option of UNUM scheme and agreed to the termination of his employment because he wanted to take advantage of it. They found that he made an informed decision and that no pressure was placed on him. They noted that the termination letter spoke in terms of dismissal but said that they accepted the submission of

Mr Arnold that it was the substance of the matter and not the words used that mattered and that Mr Riley understood that it was a termination by agreement even though the word dismissal was used. They concluded:

> **Although Mr Arnold has very clearly and carefully set out a number of authorities on this issue in his written closing submissions, we do not address them here because our findings of fact are clear and support our conclusion that there was a mutual termination of the contract of employment on 19 September 2018 not a dismissal.**

### *Did the tribunal's conclusion involve an error of law?*

25. Mr Platts-Mills says that the tribunal not only failed to identify and set out the relevant law but failed to address the essential questions of who really terminated the employment and whether any consent was indeed a "free, mutual consent". He says the tribunal ignored the requirement for clear evidence of a consensual termination and relied in this connection on the terms of their pleaded case (including its reference to the letter of 25 September 2018) and the fact that the allegation of a consensual termination was only raised by amendment. He says that in para 75 of the judgment they wrongly proceeded on the basis that because the termination was mutually beneficial it was not a dismissal and that they overlooked the fact that the process was initiated by Direct Line when they called the meeting of 31 August 2018. He relies on the distinction between a mutually agreed termination and an employee consenting to be dismissed which was not expressly considered by the tribunal. He also says that they overlooked the impact of Mr Riley's disability on the question whether there was free consent on his part.

26. It is right that the tribunal did not set out any relevant law but we are not persuaded that they failed to ask themselves the right questions. The question whether there was freely given mutual consent to a termination (and therefore no dismissal) was, as the tribunal said, essentially one of fact. There was ample evidence for the conclusion reached and the tribunal considered in detail whether Mr Riley's consent was freely given.

27. We do not consider that the terms of Direct Line's pleading and the fact that their case that there was no dismissal was only introduced by way of amendment are of any significance. Although it is right to say that in the ***Optare*** case the Union (who were the successful party) argued that the causation question could properly be expressed as being "Who was responsible for instigating the process resulting in the termination of the employment?" we do not consider that the fact that it was the employer who called the meeting of 31 August 2018 was of itself determinative of the issue against them: the tribunal rightly considered the whole context and the actions of the parties thereafter in deciding that the termination was mutually agreed. We do not read para 75 of the judgment as meaning that the tribunal reached a finding that the termination was consensual just because it was mutually beneficial to the parties; rather they were giving an explanation for the motivation of the respective parties for agreeing to the termination, which was part of the overall evidence supporting the conclusion that they did indeed agree.

28. It is right to say that the tribunal do not allude to the distinction between agreeing a termination and agreeing to be dismissed. However, it is plain that the tribunal had the letter of 25 September 2018 (which was on its face consistent with an agreed dismissal) well in mind when deciding as they did. They found that the termination was agreed on 19 September 2018, before the letter was written, and they refer to the requirement to have regard to the substance not the form of words used when considering the effect of the letter in para 77 of the judgment. Mr Riley's case before the tribunal was that he did not

understand what was going on and had been tricked in some way, not that he agreed to be dismissed rather than agreeing to a termination. It was not suggested to us that this case was analogous to the redundancy cases where there may be a requirement for the employee to be dismissed in order to take the contemplated benefit of termination. We do not therefore consider that the tribunal's failure to expressly consider the distinction between a consensual termination and an agreed dismissal involved any error of law.

29. In relation to the question whether Mr Riley's consent was freely given, as we say above the tribunal considered the evidence relating to this in detail. They went to considerable lengths to emphasise their conclusions that Mr Riley was not tricked or coerced in any way and that he participated in the discussions, was given time and fully understood what he was doing. It is true that they did not expressly refer to his disability in this context but they must have had it well in mind when they rejected his evidence that he did not understand what was being said at meetings and found that he had made a fully informed decision.

30. We are satisfied that it was open to the tribunal on the evidence to find that the termination of Mr Riley's employment came about by the free mutual consent of both parties and that they made no error of law in so finding.

## (3) Extension of time

31. The tribunal found that Direct Line had failed to make two reasonable adjustments which they should have made before Mr Riley started to take calls on 3 April 2018: they did not provide him with noise cancelling headphones and there had been no management training in awareness of Asperger's. However, the tribunal also found that Mr Riley was unfit to work from 25 May 2018 and (by implication at least) that the adjustments would not have made any difference in this respect so that any claim in respect of these adjustments had to have been made within three months of that date unless time was extended on just and equitable grounds.

32. The tribunal considered whether it was appropriate to extend time to 12 November 2018 at paras 96-100 in the judgment. In summary, the tribunal found that in August 2018 Mr Riley decided that he would pursue the option of terminating his contract of employment and taking the UNUM benefit rather than trying to return to work so that, in effect, he decided not to pursue any question of reasonable adjustments. The tribunal concluded:

> **A change of mind by the claimant about an agreement made by both parties in good faith, was not a ground for a just and equitable extension of time. The other factors of the length of delay and prejudice considered in that context do not persuade the Tribunal that it is appropriate to grant an extension of time.**

33. Mr Platts-Mills's primary submission on this part of the appeal was based on his case that the tribunal were wrong to find that Mr Riley had agreed to the termination of contract of employment: we have rejected that case.

34. In the alternative, he suggested that the tribunal wrongly proceeded on the premise that because they considered his explanation for the delay unsatisfactory time should not be extended and/or that they failed to give adequate reasons for the decision not to extend time. We reject that alternative case. The tribunal were entitled to give substantial weight to their finding that Mr Riley had changed his mind between August and November 2018. In para 100 they effectively stated that they had balanced that factor against the (plainly relatively short) length of the delay and the prejudice (which would clearly have included the fact that

the tribunal had found that the adjustments should have been made but that they would not in the event have made any difference to the outcome) and had reached the view that an extension should not be granted. That was a conclusion which was plainly open to them and we do not consider that the reasoning, although brief, was inadequate.

## Conclusion

35. For all those reasons we reject all three grounds of appeal and Mr Riley's appeal is accordingly dismissed.