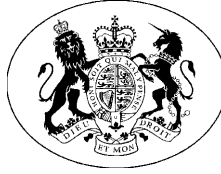


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# THE EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr P Coward**

**v**

**Royal Mail Group Limited**

**Heard at:** London Central

**On:** 30 November 2017

**Before:** Employment Judge P Stewart

**Representation:**

**Claimant:** Ms A Farah, Solicitor

**Respondent:** Mr J McArdle, Legal Executive

## JUDGMENT

The Judgment of the Tribunal is as follows:

1. The Tribunal has jurisdiction to consider only the following acts or omissions said to have occurred before the 16<sup>th</sup> December 2016:
  - a. Direct discrimination on the grounds of disability in that the Respondent failed to deal with the Claimant's grievance in a timely manner;
  - b. Discrimination arising from disability in that the Respondent treated the Claimant unfavourably because of something arising in consequence of his disability by:
    - i. Failing to monitor the Claimant's progress and hold regular one to one meetings with him in line with Occupational Health recommendations.
    - ii. Failing to offer the Claimant training in relation to jobs that he could undertake in the sorting office.
  - c. Failure to make reasonable adjustments in that the Respondent applied a provision, criterion or practice of not providing a clear description of a disabled employee's job role when that disabled employee was performing amended duties as recommended by Occupational Health.

2. Further and in the alternative, the following allegation of harassment is struck out as having no reasonable prospects of success, the allegation being that the Claimant suffered harassment by the Respondent recommending Ill Health Retirement but not explaining the same to the Claimant.

## **REASONS**

1. The Claimant is employed by the Respondent as an Operational Postal Grade Worker at the West Brompton/Earls Court Sorting Office. It is accepted that he is a disabled person within the meaning of Section 6 (a) and (b) of the Equality Act 2010 in respect of osteoarthritis, which affects his hips.
2. At a Case Management Discussion/Preliminary Hearing conducted by Employment Judge Grewal on 10<sup>th</sup> October 2017, the Employment Judge was able to record that a List of Issues had been agreed in respect of the allegations of direct discrimination and harassment claims. Although there was a claim under Section 15 of the Equality Act 2010, she indicated that it was not easy to understand the basis of that claim. Accordingly, she ordered the Claimant to provide further particulars of that claim.
3. Because time was an issue, it was agreed that there would be a preliminary hearing to take place today to determine the following: -
  - 3.1. Whether the Tribunal had jurisdiction to consider complaints about any acts or omissions that occurred before the 16<sup>th</sup> December 2016 (that included considering whether they are capable of amounting to an act extending over a period with the only complaint was whether it was presented in time and whether it would be just and equitable to consider any complaints that were not presented in time);
  - 3.2. The Respondent's application (if any made) to strike off any claims on the grounds that they have no reasonable prospect of success; and
  - 3.3. The Respondent's application for a deposit order (if any made) in respect of any allegation on the grounds that it has little reasonable prospect of success.
4. There has been no application made either to strike out the claims or for a deposit order. Therefore, I am considering today whether there is jurisdiction to consider complaints made about acts and admissions that occurred before the 16<sup>th</sup> December 2016.
5. The claim itself was presented on the 15<sup>th</sup> May of 2017. With the mandatory involvement of ACAS, the parties are agreed that the 16<sup>th</sup> December 2016 represents the cut-off date: acts or omissions concluded before that date are out of time.

6. I have heard evidence from Mr Coward. He presented a witness statement. It is noticeable that, within that statement, he does not put forward any facts on which to found a submission as to why it might be just and equitable for the Tribunal to extend time in accordance with Section 123 of the Equality Act 2010. I am reminded of the dicta of Lord Justice Old in *Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434*, to wit:

“It is also of importance to note that the time limits are exercised strictly in employment in industrial cases. When Tribunals consider that discretion to consider a claim out of time on just and equitable grounds, there is no presumption that this should do so unless they can justify failure to exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.”

7. Given that the Claimant has not attempted to persuade me to extend time on the basis that it is just and equitable so to do, I am therefore left with the task of deciding the claims made by the Claimant that appear to pre-date 16 December 2016 form part of some continuing act.
8. The claims in respect of direct discrimination involve assertions that the Respondent treated the Claimant less favourably than it would have treated or would have treated an appropriate comparator by: -
- 8.1. Failing to provide him with Saturday work, which meant he did not qualify for a Saturday allowance.
- 8.2. Making the Claimant work 7 Saturdays in a row rather than one in four.
- 8.3. Failing to deal with his grievance in a timely manner.
- 8.4. Failing to put the Claimant's name on the signing on sheets in March 2016.
- 8.5. By failing to give the Claimant sufficient notice to attend a meeting on the 21<sup>st</sup> October 2016.
9. The Claimant's allegations in respect of 8.1, 8.2 and 8.4 above relate to the period of time prior to him ceasing work at the end of March 2016: some 8½ months before the 16<sup>th</sup> December 2016. I do not consider them to be continuing acts. Therefore, I rule them to be out of time.
10. The allegation at 8.3 above - failing to deal with his grievance in a timely manner – relates to a grievance that the Claimant made initially in April 2016. The process by which the Respondent dealt with the grievance produced a decision on stage 3 of the grievance in April 2017. On the face of it, any allegation of failure to deal with a grievance in a timely manner must be a claim which extends over a period of time. Of course, it will be for the Tribunal at the full merits hearing to decide what dealing with the Claimant's grievance “in a timely manner” actually means and whether they agree with the Claimant that the Respondent failed to deal with his grievance in such a manner and that such failure amounted to direct discrimination. However, I am unable at a preliminary hearing to deal with it.
11. There is a further claim that the Claimant had been given insufficient notice to attend the meeting on the 21<sup>st</sup> October 2016. It strikes me that this is an allegation which sits by itself. I am not satisfied that it formed a continuing act

either by itself or along with any of the other allegations that are made of direct discrimination. As it is outside the period of 3 months as extended by the referral to ACAS, it is out of time.

12. So, for direct discrimination, my conclusion is that the allegation of failing to deal with grievance in a timely manner is the only continuing act.
13. Discrimination arising from disability contrary to Section 15 of the Equality Act constitutes number 9 in the agreed List of Issues. Did the Respondent treat the Claimant unfavourably because of something arising in consequence of the Claimant's disability by: -
  - 13.1. Failing to monitor the Claimant's progress and hold regular one to one meetings with him in line with Occupational Health recommendations.
  - 13.2. Failing to offer the Claimant training in relation to jobs that he could undertake in the sorting office.
  - 13.3. Failing to allow the Claimant paid time off for appointments.
14. At the start of the hearing, Ms Farah for the Claimant pointed out that certain allegations had been withdrawn, one of them being the allegation of direct disability discrimination in respect of the failure to allocate work to the Claimant on a Saturday and, thereafter, making the Claimant work seven Saturdays in a row. In respect of failure to make reasonable adjustments, the pleaded case that there was a provision, criterion or practice by the Respondent of not allowing time off during working hours for medical appointments, that too was withdrawn. So, the failure to allow the Claimant paid time off for medical appointments, at 9.3 in the List of Issues, is also withdrawn.
15. In respect of 9.1, the Claimant's evidence was that he accepted that his progress had been monitored. He asserted in evidence that he was monitored sometimes but what was happening was that he still did not have a duty assigned to him. He accepted that the Respondent had monitored him, but he had not been given a specific duty. In the light of that evidence, I am somewhat sceptical as to whether the Claimant can really proceed with the allegation that the Respondent was failing to monitor his progress.
16. Mr McArdle has advanced the proposition that, because the Claimant was sick and unable to work after the end of March 2016, there could not be conduct which extends into the period leading up to and beyond the 16<sup>th</sup> December of that year. I am not persuaded on that. I remind myself of the dicta of Mummery LJ in *Commissioner of Police for the Metropolis v Hendricks* [2003] IRLR 96 (CA.) This was a case where the claimant was seeking to adduce evidence of alleged harassment over 11 years. Mummery LJ at paragraph 48 said:

On the evidential material before it, the tribunal was entitled to make a preliminary decision that it has jurisdiction to consider the allegations of discrimination made by Miss Hendricks. The fact that she was off sick from March 1999 and was absent from the working environment does not necessarily rule out the possibility of continuing discrimination against her, for which the commissioner may be held legally responsible. Miss Hendricks has not resigned nor has she been dismissed from the service. She remains a serving

officer entitled to the protection of Part II of the discrimination Acts. Her complaints are not confined to less favourable treatment of her in the working environment from which she was absent after March 1999. They extend to less favourable treatment of Miss Hendricks in the contact made with her by those in the service (and also in the lack of contact made with her) in the course of her continuing relationship with the Metropolitan Police Service: she is still a serving officer, despite her physical absence from the workplace. She is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period". I regard this as a legally more precise way of characterising her case than the use of expressions such as "institutionalised racism", "a prevailing way of life", a "generalised policy of discrimination", or "climate" or "culture" of unlawful discrimination.

17. In this case, the Claimant is alleging a failure to comply with the OH recommendations. He would appear to have difficulty in supporting his claim of failure to monitor his progress but he does support his claim that there was a failure to hold regular one to one meetings. In that regard, it seems to me that he should not be denied from pursuing his claim albeit that it is ostensibly out of time.
18. In respect of the allegation that the Respondent failed to offer the Claimant training in relation to jobs that he could undertake in the Sorting Office, that failure ostensibly could only apply before he went off sick at the end of March 2016. However, it remains the case that one of the recommendations that Occupational Health had made was to find the Claimant more sedentary work. Had that recommendation been followed, the Claimant's case is that he would have not been off sick. In the circumstances, I consider that the was a continuing act.
19. I move on to the Sections 20/21 reasonable adjustments in the List of Issues. The way the Claimant has advanced his argument in the further particulars is that there was provision, criterion or practice applied by the Respondent that when a disabled employee was on amended duties as recommended by Occupational Health, the Respondent did not give that employee a clear description of their amended job role. With the Respondent not implementing all the recommendations as outlined by Occupational Health, the application of such a PCP put the Claimant at a substantial disadvantage in comparison with those who were not disabled. The disadvantage is said to be that the Claimant suffered stress. This had a further debilitating effect and formed a reason additional to his Osteoarthritis for him being unable to work. If I understand it correctly, the Claimant being given a clear description of his amended role was included within the recommendations of the Occupational Health Reports of March, May and September 2015 and of May and August 2016. That being the case and, remembering the guidance given by Mummery LJ in Hendricks, I conclude that there can be a continuing effect on a claimant of acts which have led to that person being off work.
20. Moving to Section 26 and harassment, the issue is: did the Respondent engage in unwanted conduct related to the Claimant's disability which had the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The alleged harassment identified by the Claimant is as follows: -

14.1 On the 17<sup>th</sup> April 2015 and the 7<sup>th</sup> September 2015, the Respondent convened two attendance review meetings.

14.2 On the 26<sup>th</sup> May 2016, Mr Horton walked out of a meeting with the Claimant when he raised issues relating to his disability.

14.3 The Respondent had recommended IHR but did not explain this to the Claimant, then asked to have another meeting with the Claimant.

21. In respect of the allegation that the Respondent had convened two attendance review meetings. The second of these - on the 5<sup>th</sup> September 2015 pre-dated by more than a year the cut-off point. It seems to me that these are isolated incidents. I am not satisfied that they constitute conduct extending over a period. Similarly, in respect of the 26<sup>th</sup> May 2016 incident - Mr Horton, a manager, walking out of a meeting with the Claimant when the Claimant raised issues relating to his disability, it strikes me that that is an isolated incident which is quite simply out of time by some 6 months.
22. In respect of the third allegation, the Claimant was not able to provide evidence that there had been a recommendation by the Respondent of IHR (Ill Health Retirement). The issue was first raised by Occupational Health and while Occupational Health had discussions with management as to whether or not the Claimant ought to have a formal review of the ill health, it is clear that management was not in favour of pursuing that course. Management were engaged in dealing with the Claimant's grievance and not in dealing with ill health retirement, in respect of which there existed another separate procedure.
23. Given the state of the evidence, I am not satisfied that there was any recommendation by the Respondent for ill health retirement. Therefore, it seems to me that it is not a matter upon which the Tribunal hearing this case needs to be troubled with and I exercise the power given to me under Rule 37 to strike out that allegation on the basis it stands no reasonable prospect of success.
24. To recap: I am permitting this claim to go ahead in respect of the allegation of direct discrimination that the Respondent failed to deal with the Claimant's grievance in a timely manner. I am allowing the following allegations to proceed: discrimination arising from disability, in that the Respondent treated him unfavourably because of something arising in consequence of his disability by:
  - 24.1. Failing to monitor the Claimant's progress and hold regular one to one meetings with him in line with Occupational Health recommendations.
  - 24.2. Failing to offer the Claimant training in relation to jobs that he could undertake in the sorting office.
25. I am also permitting the claim to proceed in respect of the allegation that the Respondent had failed to make reasonable adjustments in that it applied a provision, criterion or practice which could have been avoided had they followed the recommendations of the OH Reports in 2015 and 2016.

26. I am not satisfied that the first two pleaded harassment claims constitute conduct extending over a period which terminated after the cut-off point of 16<sup>th</sup> December 2016. In respect of the third, that relating to the recommendation of IHR, I am satisfied on the evidence that such a claim stands no reasonable prospect of success and therefore I strike it out.

Employment Judge P Stewart on 10 December 2017