EMPLOYMENT TRIBUNALS

Claimant: **Mr D Dahya**

Respondent: **Exception PCB Solutions Limited**

Heard at: **Bristol** **On:** **19 and 20 September 2018**

Before: **Employment Judge O'Rourke**
Mr Patel
Mr Adam

Representation
Claimant: Mr Bishop – litigation friend
Respondent: Ms Keogh - counsel

JUDGMENT

The Claimant's claims of unfair dismissal and disability discrimination fail and are dismissed.

REASONS

(having been requested subject to Rule 62(3) of the Employment Tribunal's Rules of Procedure 2013)

Background and Issues

1. The Claimant had been employed as a factory operative by the Respondent for approximately thirty-four years, until his dismissal on 10 May 2017, on grounds of capability, with effective date of termination being 4 August 2017. As a consequence, he brings claims of unfair dismissal and disability discrimination.

2. There have been two case management hearings in this matter, setting out the issues, but these became refined at the outset of this hearing, as follows:

    a. Unfair Dismissal. The Claimant did not dispute the reason for dismissal, or the procedure adopted. However, he did not consider his dismissal justified, as, based on medical evidence accepted by

the Respondent, an alternative shift pattern should have been offered to him.

b. Discrimination Arising (s.18). The only issue in dispute in this claim is whether the Respondent could rely on the statutory defence, as to their decision to refuse the Claimant's request for an alternative shift pattern being a proportionate means of achieving a legitimate aim. Disability is conceded, as to the Claimant's diagnosed depression.

c. Failure to make Reasonable Adjustment. It was agreed at the outset of the Hearing that the PCP, which did cause a substantial disadvantage for the Claimant, was the Respondent's requirement that he work the/a rotational shift pattern. The only issue was whether the requested adjustment, that the Claimant work fixed day shifts, with suggested hours of 8.00 a.m. to 4.30 p.m. each week, was reasonable.

The Law

3. We were referred to ss.15 and 20-22 of the Equality Act 2010.

4. Both representatives referred us to a range of case law, the most relevant of which we consider below:

   a. **Tarbuck v Sainsburys Supermarkets Ltd [2006] IRLR 664 UKEAT** which indicated that, in disability discrimination cases, there was no requirement on an employer to create a new job for a disabled person.

   b. **Fareham College Corporation v Walters [2009] IRLR 991 UKEAT**. Mr Bishop referred us to this case, in which the EAT upheld a decision of a tribunal that reasonable adjustments had not been made. However, it's clear from the judgment that the EAT considered that the Tribunal had come to a judgment based on all the relevant facts and that therefore there was no error of law. We see no legal principle being established by this case and of course, its facts are different to the one before us.

   c. First instance decisions of **Caen v RBS Insurance Services Ltd ET/1801133/09** and **Ware v British Gas Trading Ltd ET/1606202/10**. These cases of course set no precedent and by their nature, will be dependent on their individual facts, upon which another tribunal may have decided differently.

The Facts

5. We heard evidence from the Claimant and for the Respondent, from Mr Hass, then head of department and who dismissed the Claimant, Ms Bird, the HR manager, who advised throughout and Mr P Kirwan, a director, who heard the Claimant's appeal.

6. The Respondent company employed one hundred persons at the time, manufacturing printed circuit boards. Sixty of those staff were involved in production, divided into various teams, reflecting various stages of the process. The Claimant was employed in the drilling team. The forty other members of staff were in office functions, such as sales and design.

7. Generally, the facts in this matter are not in dispute. The Claimant accepts that he had had lengthy periods of sick leave, commencing in 2013 and continuing to his dismissal. Not all of the reasons for this absence were disability-related, to include joint and gastric problems, all as set out in his GP's reports and medical notes. His GP indicated that these illnesses may be age-related (the Claimant is currently 66 years of age). By May 2017, he had been absent for 491 days, in the past two and a half years [197]. He accepted that under the Respondent's absence policy [88-98], he could have been dismissed at an earlier point. The Respondent was adamant throughout, however that this absence was not the reason for dismissal, but that it was instead his refusal/inability to work their required shift pattern.

8. His contract of employment [71] set out a range of possible shifts, of which he worked two, the 'core shift' (8.00 am to 4.30 pm) and the 'mid shift' (4.00 pm to 12.30 am), rotating weekly.

9. Following a return from sick leave in June 2015, the Respondent agreed [114A] to adjust his hours to just the 'core' shift.

10. In July 2015, the Respondent entered into a consultation with its employees as to the production department moving to full 24-hour-a-day operation, changing the shift pattern to a 'core' of 6 am to 2.30 pm, 'mid' to 2.00 pm to 10.30 pm and 'night' to 10.00 pm to 6.30 am. The options were either to work on the core and mid shift, rotating weekly, or permanently on the night shift [120]. The consultation was both collective and individual. Collectively, the workforce agreed to the change. In his individual consultation [122], the Claimant requested, on health grounds that he be permitted to work 08.00 am to 4.30 pm and 12.00 pm to 8.30 pm, which was agreed.

11. The Claimant worked to that shift pattern, but, as recorded, he continued to take periods of sick leave. On return from one such period, due to swollen ankles, in November 2016, he requested the adjustment that he be able to sit, at least some of the time, during his shift [152 and 155]. He agreed in evidence that that effectively resulted in him working solely on one of the eight machines in the drilling cell (the XRI machine) and therefore being unable to assist his fellow team-member, Ms Dockery, with operation of the other seven machines.

12. In December 2016, Mr Hass informed the Claimant that he needed him to return to rotational shift work (i.e. 'core' and 'mid'). A month later, after further sickness absence, at a return to work meeting on 1 February 2017 [172], Mr Hass reiterated that he needed the Claimant to return to rotational shifts, as Ms Dockery was '*on her own on the late* (mid) *shift and she needs support'*. The Claimant agreed to return to rotational shifts, of

7.00 am to 3.30 pm and 12.00 pm to 8.30 pm., confirmed subsequently by the Respondent in a letter of 2 February [174].

13. On 20 February, the Claimant brought a grievance [175A], stating that the rotational shift pattern was '*affecting my health, as I feel it is deteriorating'*. There was a generally unrelated grievance also on 6 March [176], complaining as to how he'd been spoken to a by a manager, which he agreed was resolved by way of apology and is not therefore considered further.

14. While attempting to arrange the grievance hearing, the Respondent requested a further medical report from the Claimant's GP (due to further sickness absence and also to get advice about the effect the shift pattern might have on his health) [186]. The GP replied on 25 April [190], stating '*I think the solution here lies in him being offered a regular shift pattern which does not interfere with his sleep (he is of course 65 years old). It is unfortunate that it does not fit with the pattern that is expected from his colleagues, but he is of course 65 years old.'*

15. On 5 May, the Claimant was warned of a formal absence review, a possible outcome of which may be his dismissal. The meeting was held on 10 May [195], the conclusion of which was that the Respondent could not offer any further adjustments to support his needs, '*that also meets the needs of the business'*. The GP's recommended 'solution' was noted, but Mr Hass decided that he could not be offered that shift pattern. It was also concluded that there was no alternative to his dismissal and that no alternative work was available. The Claimant was asked to suggest any adjustments that could be made to support a return to work and said on four occasions that only a return to a fixed shift pattern of 8.00 to 4.30 pm (as advised by his doctor for health reasons) would suffice. He did state that he was '*willing to do any job in the factory'* [198]. That outcome was confirmed by letter [201] and [203].

16. He appealed against that decision, to Mr Kirwan, simply disagreeing with the refusal of his requested shift pattern, reliant on his GP's suggested 'solution'. He didn't attend the hearing of his appeal, the outcome of which was to uphold the dismissal decision [208-209]. No challenge was made to the appeal process.

<u>Unfair Dismissal</u>

17. As stated in the list of issues above, the only area in dispute is as to whether or not dismissal in this case was within the range of responses of the reasonable employer. This is self-evidently a broad test. We find that dismissal in this case falls squarely within that range, for the following reasons:

    a. The Claimant accepted that he was unable to work the Respondent's required shift pattern and that indeed doing so could worsen his health, as supported by the medical evidence and which was not disputed by the Respondent.

b. The Respondent stated that they had considered the possibility of alternative employment, but had none to offer the Claimant. All three Respondent witnesses were questioned on this point and confirmed that the only available jobs were those in production, on the variable shift pattern, or in office-type roles, for which, the Claimant did not dispute, he was untrained, inexperienced and unsuited. There was a storeman's role (but which in any event was not vacant at the time), but even this was considered too physically demanding for him. The Claimant did not himself suggest any alternative role that he could have filled, beyond stating that he was '*willing to do any job in the factory*'.

c. The Respondent had considered and did not dispute all the available medical evidence supporting their conclusion.

d. There was no alternative sanction to dismissal, as issuing a warning would not have changed the situation, due to the Claimant's on-going medical condition.

18. Discrimination Arising. As stated, the only issue is whether the refusal of the Claimant's request for a fixed daytime shift (preferably 8 – 4.30) was a proportionate means of achieving a legitimate aim. The Respondent's aim was to have all production working on a rotational shift pattern, in order to provide 24-hour production, in particular to maximise flexibility in response to short-term orders, which they identified as a key competitive advantage. Mr Hass said it was needed to '*stay competitive within the PCB market and offer fast lead times to meet customer demands'*. The Claimant, in cross-examination, did not dispute this aim, or its legitimacy and this point was also conceded by Mr Bishop in closing submissions. The only issue in dispute therefore is whether the refusal of the Claimant's request was proportionate, in seeking to achieve that aim. We find that it was, for the following reasons:

a. The Respondent is not a large company and following unsupported assertions being raised by the Claimant in this hearing as to their (favourable) financial resources, oral evidence from the Respondent witnesses, which we had no reason to doubt, was that the Company was and still is running at a loss.

b. Granting the Claimant's request, the Claimant accepted, would have meant that Ms Dockery worked on her own for two hours on the 'core' shift and entirely on her own for the 'mid' shift. Mr Hass said in his statement '*due to the nature of our business we need to tightly control our manufacturing lead time. The PCB is very complex and products go through a range of manufacturing processes. A delay for just a few hours in any of the departments can lead to a late delivery, reducing our revenue and customer satisfaction … If* (the Claimant) *was allowed to work 8 am to 4.30 pm we would only have one operator in drilling for two hours each day one week and for six hours the other week. The one operator would not be able to keep all machines running, which means that we would lose, on average, 80 machine hours per week (four hours x four unmanned CNC machines x five days a week)*.' This

was put to the Claimant and he did not dispute that his absence from these shifts would reduce productivity.

c. The only alternatives for the Respondent would have been to move another employee to cover the 'mid' shift, which nobody, we accept on the evidence, was willing to do, or to recruit another employee to cover the Claimant's absence from those shifts. The Respondent could not force another employee to change to the 'mid' shift and recruiting another employee would have increased their costs.

d. We reiterate the points made above as to investigation into and non-existence of alternative employment. The case of **Tarbuck** indicates that there is no requirement on an employer to create a new role for a disabled employee

19. Reasonable Adjustment. Past legislation (the Disability Discrimination Act) and the EHRC has provided guidance as to the factors that may be relevant in considering whether a proposed adjustment is reasonable, or not. These can include:

a. the extent to which taking the step would prevent the effect in relation to which the duty is imposed; the medical evidence, not disputed by the Respondent, was that agreeing to the shift change may have resulted in his medical condition stabilising. However, we note in this respect the Claimant's age and the fact that despite working similar such shift hours in the past, he had still suffered lengthy periods of absence. There is a strong suggestion in the final GP's report that many of the Claimant's medical problems are age-related and therefore very unlikely to improve.

b. the extent to which it is practicable for the employer to take the step: in this respect we refer to our findings as to the proportionate means test under s.15 above and conclude that it was not practicable for the Respondent to do so in this case.

c. the financial and other costs which would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of their activities: we are satisfied on the evidence of the Respondent's witnesses that there would have been a significant cost to implementing this request and by its nature it was disruptive, as not matching Ms Dockery's shift pattern.

d. the extent of the employer's financial and other resources; as already stated above, in respect of s.15, we accept the Respondent's evidence as to their then and current financial position and as stated they are not a large company, operating in a competitive environment and therefore needing to maintain a competitive edge, by meeting short-term orders.

20. None of these factors were subject to compelling challenge by the Claimant. He disagreed with the Respondent's conclusions, but was unable to fault their rationale. For these reasons, therefore, we conclude that the refusal of the requested adjustment was reasonable.

Conclusion

21. For these reasons, therefore, we find that the Claimant's claims of unfair dismissal and disability discrimination fail and are dismissed.

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Employment Judge C H O'Rourke

Date 20 September 2018