EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Carter	**v**	Ocado Central Services Limited

Heard at: Watford **On:** 23 and 24 July 2018
26 July 2018 (in chambers)

Before: Employment Judge R Lewis

Members: Mrs A Brown and Ms H Edwards

Appearances
For the Claimant: Ms C Jennings, Counsel.
For the Respondent: Mr N de Silva, Counsel.

RESERVED JUDGMENT

1. The claimant was fairly dismissed by the respondent and his complaint of unfair dismissal fails.

2. The claimant's claims of disability discrimination, howsoever formulated, fail and are dismissed.

3. The remedy hearing provisionally listed for 1 February 2019 is cancelled.

REASONS

1. This was the hearing of a claim of unfair dismissal and disability discrimination received by the Tribunal on 6 July 2017.

2. On 15 December 2017 there had been a preliminary hearing conducted by telephone before Employment Judge Tuck (order sent 6 January 2018) at which both parties had been represented by counsel, but not by the counsel who appeared at this hearing. Judge Tuck's list of issues was definitive [43 to 45].

3. At this hearing, there was an agreed bundle of some 600 pages.

4. By consent, this hearing dealt with liability and any potential issue of Polkey only. By consent the respondent was heard first. The respondent called three witnesses. They were: Mr Ian Pattle, General Manager, who gave evidence about the general systems operated by the respondent; Mr Sean Holloway, Team Manager, who had dismissed the claimant; and Mr Vaun Thompson, Operations Manager, who had rejected the claimant's appeal against dismissal.

5. The claimant was the only witness on his own behalf. There was a helpful chronology and cast list, and Mr de Silva provided both opening and closing submissions in writing. The claimant provided a short opening note and a concise reading list, which was largely agreed.

6. We were referred to a number of authorities, of which we found the most helpful to be Wade v Sheffield Hallam University UKEAT/0194/12 and Pnaiser v NHS England [2016] IRLR 170. We were grateful to both counsel for a concise professional approach, which enabled the Tribunal to conclude the public hearing at the end of the second listed day.

General introduction

7. The claimant, who was born in 1955, had a lengthy career in retail, and in particular in retail management. He began work for the respondent in 2012 as a Customer Service Team Member (CSTM). Essentially, he drove and delivered goods to customers. He was based at Hatfield.

8. In 2014 the claimant began to experience back pain, which was eventually diagnosed as a degenerative disc condition, and was at this hearing conceded to be a disability. (He was also diabetic, and the Tribunal was not concerned with any issue arising out of his diabetes.)

9. It is useful to approach the case in two phases, before and after 15 December 2015. After the claimant's condition developed, and before 15 December 2015, the claimant asked for and was refused a number of adjustments to the way in which he worked as a CSTM; there was also some discussion of alternative employment. On 15 December 2015, the claimant went off sick, from which he never returned before his dismissal on 7 April 2017. During that period, he sought adjustments which would enable him to return to a re-deployed role. None of those attempts met with success, and the claimant was in due course dismissed, the stated reason being capability.

10. Day A was 4 July 2017 and Day B was 6 July 2017. On the face of it any complaint of discrimination arising on or before 5 April 2017 was out of time. This encompassed all the events before us except the claimant's unsuccessful appeal against dismissal.

11. We note the following matters of general approach:-

11.1 As is common in the work of the Tribunal, evidence touched on a wide range of matters. Where we make no finding about a matter which was referred to, or where our finding does not pursue the point to the depth to which the parties went, that is not oversight or omission but a reflection of the extent to which the point was truly of assistance to the Tribunal.

11.2 Although (as happens frequently) the claim was pleaded under sections 13 and 15 Equality Act as well as sections 20 and 21, this was at heart a claim about reasonable adjustment and about the management of long term absence. Those were the focus of the hearing.

11.3 Ms Jennings began her closing remarks by stating that the case is factually complex and requires detailed analysis of the history. While Mr de Silva did not expressly disagree, his closing submission adopted a more broad brush approach, which seemed to us the more helpful approach in our task, and which we prefer.

11.4 Although Judge Tuck's list of issues identified limitation as an issue, we heard no evidence from either side on the point. The list of issues also included the question of the respondent's knowledge of disability, a matter on which likewise there was scant evidence or submission. (We appreciate the time constraints which were properly observed on both sides.)

11.5 We record our concern as to the extent to which the claimant truly understood the nature of the case which he advanced and the difficulties which it faced. Despite the agreement of counsel that no issue arose from the claimant's diabetes, he made some reference to discrimination "due to my disabilities" in the plural in his witness evidence [WS 20]. The claimant's schedule of loss claimed loss of income from April 2016, but when asked when he thought he might have returned to work if reasonable adjustments had been made, his evidence was that that might have been in October or November 2016. Answers which the claimant gave to Mr de Silva suggested that he had not understood the balancing exercises involved in reasonable adjustment or in the issue of justifiability.

11.6 The bundle was substantial. In particular it contained detailed typed notes of some 23 meetings held between members of management and the claimant, eleven of them before 12 December 2015 and the rest after that date. We have not thought it helpful or necessary to conduct a detailed fact find about the contents of each meeting, or an analysis of the development of issues raised in the meetings. We accept the general accuracy of the notes (which the claimant did not challenge) and that they were summaries, not full transcripts.

11.7 Ms Jennings asked us to consider a number of email trails in detail. We read email in this case, as in many, with a number of cautions in

mind. It is not a medium which encourages reflection or thoughtful response, particularly in a workplace setting. It is not unusual for the Tribunal to be shown incomplete email trails. We note, as Ms Jennings encouraged us to do, that a repeated theme of the email trails which we saw was that the claimant voiced concern about not receiving feedback, late feedback, unanswered emails, emails answered long after an answer was due, and long after an answer could have been of any use to the claimant.

Disability and knowledge

12. Judge Tuck's order recorded the respondent's admission that the claimant "was at all material times disabled by reason of a degenerative disc condition". Issue 8.5, following the language of the Equality Act 2010 asked, "Did the respondent not know, could the respondent not be reasonably expected to know that the claimant had a disability …." [45].

13. Our findings on this point are the following. The claimant was called to a number of absence meeting discussions in 2013. Our reading of the notes of the 2013 meeting notes was that the claimant attributed his absences to type 2 diabetes. It was common ground that the respondent in due course made arrangements for the claimant's shift pattern to be stabilised to work mornings only, as a means of assisting management of his diabetes.

14. At a meeting on 27 October 2014 the claimant attributed absence to spinal injury [138]. With the benefit of the respondent's private health cover, the claimant was seen by a consultant surgeon, who in December 2014 wrote a short letter, addressed To whom it may concern, stating:

> "Mr Carter developed significant back pain, secondary to a combination of degenerative disc disease and instability … His condition will be aggravated by heavy lifting and excessive bending and I strongly advise him against these activities." [143a]

The claimant gave a copy of this letter to a then team manager, Mr St Pierre.

15. At an absence meeting on 8 April 2015 with Mr Forey, at which the claimant was represented by Mr Alexander of USDAW, the claimant spoke at length about the risk to his spine caused by lifting and carrying goods up and down stairs, and that he was told that his back condition could be treated either by injection every few months, or by surgery, but that surgery had a prolonged recovery period, and, he understood, a risk of paralysis. At that meeting, and for the first time, he raised the issue of amended duties. Mr Alexander expressly and clearly raised the issue of disability [149-155].

16. It seems to us that the test of knowledge was met by the conclusion of the meeting on 8 April 2015, and that the duty of reasonable adjustment arose then. By that date the respondent was on notice of a degenerative condition, which the claimant through his Trade Union presented as a

disability, and was on notice that the claimant was required to manage the condition either by medication or surgery. It knew and understood that the claimant was then around 60 years of age and diabetic.

Systems and procedures

17. Mr Pattle's evidence was helpful. It was not challenged. As we understood it, and paraphrasing, the claimant worked at the Hatfield Customer Fulfilment Centre (CFC), which linked with a number of other centres, called within the respondent hubs and spokes. In any shift, the respondent may despatch up to 190 delivery vans from Hatfield.

18. We quote and adopt from Mr Pattle:

> "Ocado offers one hour delivery slots to customers based on real time route planning. The business uses a set of highly sophisticated in-house built applications to calculate the routes. In a typical week, we plan up to 15,000 routes for over 250,000 customer orders …
>
> The role of a CSTM involves driving a 3.5 ton delivery van (approximately 150 miles per shift) and lifting totes (transport boxes) of approximately 17kgs in weight, with up to 80 totes per route. The CSTMs will deliver to around 22 customers per shift (although this can fluctuate up and down depending on the nature of the route). The routes are received by the CFC at the start of each shift and they are assigned randomly to the CSTMs who will be on that shift. Time is of the essence in order to meet the one hour time slots." [WS 4, 8 and 9, emphasis added].

19. Mr Pattle described the IT support necessary to manage routing. We accept that manual override of individual route plans was theoretically possible, but burdensome and demanding of time and resource. We also accept that the routing system just described was modified in the case of new starters (who would take some weeks to learn the systems) and might be modified in the case of a returner from absence, or a personal circumstance, including pregnancy.

20. Mr Holloway's role, as team manager, included management of the CSTMs and their shifts, including management of spare drivers who would be available on each shift to cover contingencies such as sick leave or vehicle breakdown.

21. The respondent had a number of sophisticated management procedures, of which the most material to the case was the attendance management procedure [56] which in particular provided for a three-stage procedure [60].

22. The claimant's CV showed a career spent in retail since 1972 (with a gap between 1984 and 1990 in another sector). It included working for large chains, managing small outlets, and staff management [332]. We heard no evidence to suggest that he was anything other than a valued colleague and efficient performer. He volunteered to the Tribunal, no doubt accurately, that he struggled with IT, as, "he had grown up without computers".

Adjusting the CSTM role

23. Issues 8.3.1 and 8.3.3 [44] were whether the claimant required reasonable adjustments of, "Providing a spare driver, when available, to join the claimant on his route to assist him with the lifting of heavier bags and totes and/or climbing up the stairs when required … Allowing the claimant to drive routes … outside of London."

24. Although no time period was expressed in the list of issues, Ms Jennings in closing confined those issues to the period before 15 December 2015. We understood her to follow the evidence, which was that once he had commenced his final long-term absence, the adjustments which the claimant sought were re-deployment to a role other than CSTM. This was an important modification of the claimant's case, which correctly followed the evidence, and we were grateful to Ms Jennings for undertaking it.

25. While we accept that on 15 December 2015 it could not be predicted that the claimant would remain absent for 16 months until dismissal, we find that these issues had crystallised by that date, and that both the claimant and USDAW understood the claimant's need for adjusted duties, and the respondent's refusal to offer them. We heard no evidence as to why they had not been the subject of a separate complaint, and no submission as to whether or not it was just and equitable to extend time to hear them. It seemed to us right to approach the case on the basis that the nature of the adjustment in issue changed significantly after 15 December 2015, and that it has not been shown to be just and equitable to extend time to deal with events before that date. However, as that point arose out of the evidence which we heard, and as we have heard all the evidence, it seems to us in the interests of justice to set out our findings on this point, subject to our overarching conclusion that these claims fail because the Tribunal has found that it has no jurisdiction to consider them, on limitation grounds.

26. We summarise the point. The claimant was medically advised by the end of 2014 that heavy lifting and excessive bending were contra indicated. As early as 8 April 2015 [151] he asked for light duties, which he said involved working with a second driver, and delivering to a route without stairs, and a route out of London (where the higher proportion of flats increased the chances of stairs).

27. As the submission developed, it was the claimant's case that the above or a combination of a number of steps might reduce the impact on his back condition of the essential duties of delivering shopping:-

    27.1 To be accompanied by a spare driver, when available, to help him;

    27.2 To avoid lifting heavier bags;

27.3 To work outside London. The claimant contended that deliveries in London included more deliveries of water and alcohol than those outside London, and therefore were heavier.

27.4 The claimant contended that deliveries in London were more likely to be to flats in buildings without stairs, which involved lifting and carrying upstairs.

28. The respondent replied that while each shift had spare driver capacity, it would not be possible to configure a system around the availability of a spare driver; that for a spare driver to be permanently available would double the cost of each shift; and that to make a spare driver occasionally available could not be guaranteed to match availability of a spare driver with the claimant's need. The respondent's evidence was that it did not accept that deliveries in London were generally heavier than elsewhere. The respondent contended further it had no means of identifying buildings without lift; and that buildings with stair access are as likely to be found outside London (Cambridge and St Albans were mentioned as examples) as in London.

29. We accept that the role of CSTM required delivery of heavy shopping to all sorts of venues, including those with stair access. We accept that loads might exceed 15kgs.

30. The claimant's case on reasonable adjustment of his driving duties seemed to us to have two fundamental flaws, into which, even at this hearing long after the event, the claimant seemed to show little insight.

31. The first was that each item of adjustment alone was by definition inadequate: the reality was that the claimant sought all of them. There was in logic no benefit to the claimant of carrying lighter loads if he had to carry them up stairs. It made no difference where he was delivering (whether in London, smaller towns, or rural areas) if he had to deliver to a top floor without a lift.

32. The second was that his daily needs were unpredictable. As Mr Pattle described it, the routings which were sent to the Hatfield CFC were just that: daily route maps, which did not record each customer's access arrangements. The only way of ensuring that the adjustment of a spare driver was in fact effective was to provide the spare driver for every shift which the claimant worked.

33. We find that the inescapable logic of the claimant's case was that he was in reality asking for a personal bespoke working arrangement, which would have to be reconfigured every day in advance of that day's work, and which was in any event dependent on variables which were neither predictable nor within the respondent's control.

34. We have found that the parts of the claim of disability discrimination which relate to events before 15 December 2015 fail because they have been presented out of time, and it has not been shown to be just and equitable to

extend time. If we had had to decide this part of the claim on its merits we would find that we do not accept that the adjustments contended for by the claimant were reasonable for the following broad reasons:-

34.1 We accept that the claimant's health condition was inherently unpredictable, so that any adjustment was required to be permanent;

34.2 We accept that the respondent's IT system for customer orders did not account for accessibility to premises;

34.3 We accept that the respondent was not under an obligation to provide a spare driver;

34.4 We accept the respondent's evidence that there was no logical distinction between deliveries in London and outside London;

34.5 We accept that the respondent's system was highly computerised/automated, and that to introduce a system of permanent daily individual manual override for a single driver would be disproportionately burdensome.

34.6 The logic of the claimant's case was that all of the adjustments would need to operate cumulatively all the time, enhancing our conclusions above.

Re-deployment adjustments

35. We next turn to issues 8.3.2 and 8.3.4 which are described in the list of issues as follows:

> "Allowing the claimant to become a "fetch driver": ….. Allowing the claimant to take a back office job."

36. We understand these two adjustments to be claimed without limitation of time, ie across the period when the claimant was at work and subsequently. We accept that in each case there were requests, repeatedly and intermittently, for the same form of adjustment.

37. The role of fetch driver was that of transporting non-food items from a depot to a location such as a CFC, from which they could be delivered to customers. As this role involved driving only between Ocado sites, it would avoid the problem of accessing customers' homes and using stairs.

38. We accept the respondent's evidence that re-deploying the claimant into the role of fetch driver was not a reasonable adjustment for the following reasons, operating cumulatively, from which it follows that issue 8.3.2 fails.

38.1 The goods had to be moved manually. The respondent's evidence was that the items were placed on dollies, which were pushed on wheels, and which could sometimes contain several hundred kilos.

The claimant did himself little credit by suggesting in evidence that he could have undertaken that task because the pushing was done from the shoulder without engaging his injured back;

38.2 When the claimant first raised the issue of fetch driving, which was before December 2015, the respondent did not employ fetch drivers, and provided their service through agency workers only. It would not at that time have been a reasonable adjustment to require the claimant to give up his employment status to become an agency worker, with all the insecurities involved;

38.3 It would not at that time have been a reasonable adjustment for the respondent to use agency workers nationally for its fetch service, and employ the claimant as its only employed fetch driver. That would have replicated the unreasonableness of creating a bespoke system for the claimant alone;

38.4 On a date which was not clear to us, but which appears to have been after 15 December 2015, fetch drivers ceased to be agency drivers, and their service was provided by the respondent employing its own drivers. The respondent required such drivers to have a specialist licence (referred to at this hearing interchangeably as LGV/HGV), which the claimant did not have. The respondent did not pay for drivers to obtain such licences;

38.5 The claimant declined to borrow the cost of HGV training from his family, stating, quite reasonably as it seemed to us, that he could not incur costs of several thousand pounds unless he was sure that a job was guaranteed;

38.6 Up to the time of his dismissal the claimant was in any event certificated unfit for driving, due to his inability to sit for long periods, and that issue was not resolved in the evidence before us, nor resolved when the question was discussed with the claimant;

38.7 In something of a tangent, the claimant suggested that if he were offered the adjusted role of HGV driver; and if he had then obtained the HGV licence; and if there were then vacancies; if his back condition still troubled him, he could drive HGVs, taking breaks to relieve his back. It did not seem to us necessary to decide that point, which was not a pleaded issue, and which logically could not arise until such time as the claimant was employed with an HGV licence and certificated fit to drive long haul.

Office jobs

39. The Tribunal heard a lot of evidence about whether it was a reasonable adjustment for the claimant to undertake office based work. As the respondent's needs changed dynamically, and seemingly on a near weekly basis, and as the claimant at all times had email contact with the

respondent, and given the large number of meetings, we have approached this point as a matter of overview, and we have particularly been assisted by Mr de Silva's concise closing submissions, notably paragraphs 18–23. The material period for consideration is that from 15 December 2015 until the claimant's dismissal some 16 months later. Occupational Health reports of 23 February 2016 [208], 18 August 2016 [308], and 14 February 2017 [386] each advised that the claimant was fit to return to a role described as sedentary or administrative.

40. We deal separately with issues 6.1.3 and 7.1, ie that there was "lack of meaningful support and assistance from the respondent in re-deploying the claimant", a matter put as both a claim of direct discrimination and s.15 discrimination.

41. We make the overarching finding that we have not been shown a reasonable adjustment which would have had the effect of overcoming the disadvantage experienced by the claimant of being unable to continue as a driver by virtue of his disability. We accept with Mr de Silva and the authority of Wade that there was no obligation to place the claimant, as a purported reasonable adjustment, into a post which he did not have the skills to carry out, either on appointment, or within a reasonable time of appointment, and after reasonable training.

42. We accept that a number of applications for re-deployment made by the claimant were for posts which were not available to him as a candidate. Those included posts which had already been filled by the time the claimant applied; a post or posts which it had been decided to withdraw from filling for organisational reasons; or a post or posts which were in some way "ring fenced". The claimant's application for example to be a team manager at Enfield, a new centre which was being opened, was not considered because the post was only available to serving team managers.

43. We accept that the claimant was not considered for posts which had a manual element which was so akin to the post from which he was certificated unfit as to render him not a realistic candidate. The Enfield posts, in which team managers would be required to undertake loading and driving duties, were clear examples.

44. We accept that some posts for which the claimant applied had specific requirements of skill or knowledge (not including Excel) which the claimant lacked; we were taken a number of times to one clear example, which was buyer of baby products. While the claimant had general experience of buying in retail, he had no specialist experience of the baby product market.

45. Mr de Silva identified roles which he described as "step up roles". These were developmental opportunities, to be undertaken by an existing post holder in addition to existing duties. They were therefore not available as the sole post to be offered to any candidate.

46. Finally, and of the greatest impact at this hearing, the claimant expressed an interest in, or applied for, a range of posts which required Excel skills, which the claimant did not have. The claimant had, in general terms, been offered Excel training (see below). He underwent an Excel test in December 2016 and again in March 2017. On both occasions his skills were found to be so modest that the respondent discounted any question of short term training, or training on the job.

47. Finally, the respondent had a customer contact centre, which we (and the claimant) were told was "always recruiting" [228]. It was a call centre dealing with customer contact, notably complaints. Although it was mentioned to the claimant, he rejected it out of hand, and declined to apply or be considered, stating that as a matter of temperament he could not carry out a role which involved listening to people (in the claimant's word) 'moaning' all the time.

48. We were not invited to consider any role to which one of the above considerations did not apply. We accept Mr de Silva's submission that it was not a reasonable adjustment to offer the claimant a post in which he could not achieve and in which he appeared doomed to fail.

49. Issue 8.3.4 fails because

<u>Meaningful support and assistance</u>

50. Issue 6.1.3, which was also incorporated in issue 7.1, was that until the claimant's dismissal "there was a lack of meaningful support and assistance from the respondent in re-deploying the claimant into another role within the company". It is relied upon as a claim both of direct discrimination and a claim under s.15.

51. This claim was a source of difficulty for the Tribunal for a number of reasons. One was the lack of focus of the general allegation. Another was the imprecision of the word "meaningful". We accept that it implies open-minded analysis in good faith with a view to achieving re-deployment. It does not, in our view, go further than that. It does not require the respondent to offer redeployment which it reasonably believes cannot succeed. It does not require the respondent to subordinate its managerial judgment to the wishes of the claimant.

52. Ms Jennings drew to our attention a number email trails within the bundle, in which it appeared that the claimant had made unanswered requests for feedback on job applications; sent emails which had not been answered or dealt with, or experienced inordinate delay in routine office correspondence.

53. We decline to analyse the email trails to the depth which Ms Jennings requested us to do, for reasons indicated above.

54. We accept that they appear to indicate that those dealing with the claimant did not show him a sense of the urgency or importance he felt he deserved.

We also accept that the HR staff who dealt with the claimant, and acted as his points of contact, were dependant for information on operational managers, who may not have always assisted them.

55. We also accept that vacancy information was available to the claimant electronically at all times, in the same way as if he had been at work. While we can appreciate the claimant's frustration at being sent vacancy information which proved out of date, or obsolete, we do not accept that the flaws in such information were related to him as an individual, or to his medical condition, or to his absence. There was no evidence to any of that effect.

56. We find that while aspects of the claimant's grievances about the respondent's processes may have been well founded, they plainly were not detriments on grounds of disability, or unfavourable treatment by reason of his long-term absence. It follows that issue 6.1.3, and the related portion of issue 7.1, fail.

Excel

57. A recurrent issue before us related to the claimant's Excel skills, and efforts made to improve them. We remind ourselves of how this issue arose.

58. The claimant had begun long term absence on 15 December 2015, and was the subject of an Occupational Health report on 23 February 2016 [208]. It reported that he was not fit to be a CSTM and should be re-deployed to a "less physical or sedentary role" [210]. There was discussion of re-deployment at a meeting on 16 March 2016 with Mr Vail, at which the claimant commented that many of the company vacancies, "are high computer based, which is not for me" [227]. Ms Emery of HR, who appears to have been most diligent in supporting the claimant, raised the question of Excel training [227]. There was discussion of how such training could be arranged, but the Excel issue did not seem to feature heavily in the next meeting with Mr Vail on 3 May [242].

59. Subsequently, arrangements were made, with Ms Emery's assistance, for the claimant to undertake an Excel training course. This was beset by accidents. The claimant attended the course in June 2016, but no log-in had been arranged for him, and he could not participate; a date in August failed to be met because the claimant's car broke down. A training date in September was not viable because it clashed with a medical appointment. The claimant eventually attended the training in October 2016. We understand his frustration at these delays.

60. The claimant asked to be sent training materials which he could work on at home. There was an inexplicable delay, seemingly of months, in the respondent posting this material out to him. We are wholly with the claimant in his frustration about the delay.

61. The claimant was also encouraged to use IT available to him at home or elsewhere (eg in a public resource) to develop Excel skills, but appears to have taken little opportunity to do so. He underwent an Excel test in December 2016 and his skill level was assessed to be low. As explained in our discussion to follow on unfair dismissal, Mr Holloway arranged for another test to be undertaken before the claimant's dismissal was confirmed, at which the claimant's skill level was found to be no better.

62. We find that while the respondent can be criticised for aspects of the above, we can see no evidence which relates any such short comings either to the claimant's disability or to his absence. If we are asked to rule that the respondent's requirements of Excel proficiency were justifiable, we do so. We accept Mr de Silva's submission that there is no duty of reasonable adjustment which would encompass placing a disabled employee in a post in which he was bound to fail. To the extent that any issue about Excel training forms part of issue 8.3.4, it fails.

Escalation

63. Issues 6.1.1 and 6.1.2, repeated in issue 7.1, were that the claimant's escalation from stage 1 to stage 2 to stage 3 of the absence management procedure and the long-term absence procedure were acts of direct discrimination and s.15 discrimination.

64. The attendance management procedure is long and detailed. In the category of attendance management it provides for a three stage procedure, and for timed triggers [60-62].

65. The focus of discussion before us was on the long-term sickness management procedure [63-64]. We accept that it identifies phase 1 as "this initial meeting" and we accept the respondent's proposition that that language indicates precisely what it says, ie an initial analysis to be followed by development in the other phases.

66. The procedure does not set any duration to phase 2, which is clearly the phase at which the employee's health and employment are seriously considered. Movement from phase 2 to phase 3 arises:

> "if ….. we have been unable to establish when or whether you may be able to return to work in the foreseeable future either to your original role (with or without reasonable adjustments) or an alternative role. It may be that we have to consider your continued employment with Ocado and therefore your employment will be at risk of termination." [63]

67. There was no evidence that the decisions to escalate from phase 1 to phase 2 and then from phase 2 to phase 3 were because of the claimant's disability. They were plainly in accordance with the procedure, and because of his long-term absence, and should properly have proceeded as claims only under s.15.

68. We accept that the escalations of the procedure constituted unfavourable treatment because of something arising from disability, namely long-term absence. We then must ask whether each was a proportionate means of achieving a legitimate aim, the legitimate aim being broadly, effective and economic management of staff, balancing corporate and individual need.

69. We accept Mr de Silva's submission that phase 1 is no more than a triage, and a necessary pre-condition to the proper analysis at phase 2. We accept the respondent's evidence that the claimant remained in phase 2 for about 6 months in 2016, during which time there were two occupational health reports certificating his unfitness to return to his substantive role, and in the course of which he had a number of meetings with managers. We accept that the movement to phase 3 was a proportionate means of achieving a resolution for closure. We find, for avoidance of doubt, that movement from phase to phase was unfavourable treatment because of long term absence, not because of disability, and that the s.13 claim fails. Issues 6.1.1, 6.1.2, and the related portions of issue 7.1 fail.

70. It follows from the above that all the issues of disability discrimination identified by Judge Tuck have failed.

<u>Unfair dismissal and discrimination in dismissal</u>

71. We now turn to the issue of unfair dismissal and to issue 6.1.4..

72. Mr Holloway was an experienced team manager who first managed the claimant's absence on 16 July 2015 in accordance with the absence management procedure; he had a further meeting with him on 1 September 2015.

73. Mr Holloway's evidence was that Mr Vail dealt with the claimant under the long-term sickness procedure from January 2016 onwards. We noted that Mr Vail met the claimant to discuss the issues around his absence on 13 March 2016 [224]; 1 May 2016 [242]; 23 June 2016 [278]; and on 26 July 2016 [296].

74. The matter was referred back to Mr Holloway after Mr Vail left the company in about autumn 2016. Mr Holloway understood that the matter proceeded then under phase 3 only. Mr Holloway conducted a meeting with the claimant on 11 January 2017 [368]. The claimant was accompanied by Mr Mansel-Young of USDAW, and Mr Holloway was supported by Ms Emery, who was present as note taker and advisor. She had had considerable involvement in dealing with the claimant. The minutes show the meeting lasted about 90 minutes, with a 30 minute break.

75. There was discussion of the medical position, and of the claimant's attempts to find alternative employment. Mr Holloway took the view that up to date occupational health information was needed and he concluded the meeting with the following positive comments:

> "If there is anything you want to apply for then let me know. Keep practising on the PC as a lot of positions are PC based ….. Have you thought about the contact centre?" [375]

The claimant declined to consider the contact centre.

76. The respondent obtained a report from Occupational Health on 14 February 2017 [386]. It may be summarised as finding the claimant, "currently unfit for return to his current contracted job role due to underlying health condition" [387], but that, "he should in the long-term do an administrative job role …." [388].

77. Mr Holloway invited the claimant to a follow up meeting on 27 February. Mr Mansel-Young and Ms Emery also attended, and the meeting lasted just under 90 minutes.

78. The claimant confirmed that he accepted the contents of the occupational health report, in the terms summarised in **paragraph 78** above. There was discussion again of the issue of his unsuccessful applications for other employment, and his concerns about support and Excel.

79. Mr Holloway then took a step which we regard as conspicuously fair and open-minded. He asked the claimant to undertake an updated second Excel test, in response to the claimant's remarks about his Excel practice. He was prepared to arrange it to take place immediately, but that was not feasible and it was delayed by a few days.

80. Mr Holloway's evidence to us, which we accept, was that he had by the end of the meeting on 27 February decided to dismiss the claimant, subject only to a further Excel test. The further test was an illustration of the need of patience in reaching an important conclusion, so that the claimant had visibly been given every opportunity that was open to him and matters had not been resolved.

81. Mr Holloway also pursued the claimant's concern about lack of communication, and Mr de Silva put considerable weight on a reply from Mr Richard Stewart of 23 February [391] broadly indicating that the claimant's Excel skills were inadequate for any realistic role within the respondent, and that the necessary level could not be achieved within a reasonable training period..

82. The claimant had further Excel assessment, and was invited to a resumed meeting on 10 March. The outcome of the March Excel test was no better than the December one. Mr Holloway formed the view that there had been no improvement and no prospect of improvement in the claimant's IT skills. He explained to the claimant that his decision was to dismiss him.

83. The claimant appealed, complaining of a failure to make reasonable adjustments, and of other matters [434]. The appeal was heard on 7 April by Mr Thompson supported by a member of HR, and the claimant was

again accompanied by a Trade Union representative [442]. Mr Thompson covered the range of issues which had arisen during the claimant's employment. With short breaks, the meeting lasted over three hours, and the claimant was asked to return on 18 April to be given the conclusions. Mr Thompson confirmed that he had looked through the notes of previous meetings and gave the claimant a lengthy outcome [467-470] which should be read in full.

84. Our finding is that the claimant was dismissed by reason of capability. That is a potentially fair reason within s.98 of the Employment Rights Act 1996. We must then ask if the requirements of s.98(4) has been fulfilled. In considering the question of reasonableness, we must consider whether the respondent had applied the test of reasonable responses, taken such steps as were reasonable to follow before dismissing the claimant, including consideration of suitable alternative employment.

85. We find that the respondent dismissed the claimant because through Mr Holloway and Mr Thompson it had a reasonable belief that the claimant was incapable of carrying out his contracted role. Indeed, the claimant did not dispute the point, which was supported by three medical reports, including one which was up to date, and which had been prepared for the purposes of considering dismissal.

86. We find that over a period of months before dismissal, the respondent repeatedly identified potentially suitable employment, namely in the call centre, which the claimant would not consider or even try. We find that the respondent gave the claimant reasonable support to attain the basic level of skill necessary to take up a number of potential alternatives, but that he failed to attain the necessary level.

87. In those circumstances, we find that the claimant's dismissal has been fair and his claim of unfair dismissal does not succeed.

88. We do not consider that we can reach any conclusion on Polkey, as it would be illogical to do so. If relevant to Polkey, we confirm, for complete avoidance of doubt, that we do not consider that the respondent was under an obligation to place the claimant in a job which it reasonably thought he could not do.

89. We find that the claimant was not dismissed by reason of disability, and his claim of direct discrimination in dismissal fails. We do not accept that he was dismissed because of something arising from disability (ie long term absence). We say so because we find that inability to re-absorb the claimant into its workforce was the more significant material factor. If we had found that something arising in consequence of disability was the reason for dismissal, we would have gone on to find that the test of justifiability was met, for reasons indicated above.

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Employment Judge R Lewis

Date: 30 August 2018…………………

Sent to the parties on: ....

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For the Tribunal Office