



EMPLOYMENT TRIBUNALS

Claimant: Mr R Chaloner

Respondent: Co-operative Group Ltd

Heard at: Southampton **On:** 12-13 December

Before: Employment Judge Reed
Members Mr D P Jenkins
Mr N Knight

Representation:

Claimant: Mr Bryden, counsel
Respondent: Miss Bowen, counsel

JUDGMENT having been sent to the parties on 5 January 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. In this case the claimant Mr Chandler made two complaints against his former employer, the Co-operative Group Ltd (“the Company”). Firstly he said he had been unfairly dismissed. Secondly he said he had been unlawfully discriminated against on the ground of disability. It was conceded by the Company that Mr Chaloner was disabled, by reason of a heart condition, but the claims were otherwise resisted.
2. We hear evidence from Mr Chaloner himself. For the Company we heard from Mr Hayes, store manager, Mr Page, (former) team leader and Mr Shadwell, area manager. Our attention was directed to a number of documents. We reached the following findings.
3. Mr Chaloner was employed by the Company from 1996. At the time of the events in question he was employed by the Company as Team Manager at its store in Upper Shoreham.

4. In 2014 he had certain issues with his heart, and a bypass operation. He returned to work in January 2015.
5. On 14 March 2015 there was a meeting between himself and management for the Company at which the conditions that would apply to him upon his return were canvassed with him. It was agreed that there would be a phased return to work and that his hours would be reduced. There was also a discussion about whether any further steps were required at that stage. At page 290 of the bundle of documents is a note of that conversation, which we accepted as accurate and which records that Mr Shadwell said to Mr Chaloner "Do we need Occupational Health or should we wait until you sign off?" to which Mr Chaloner replied "I'm happy with your judgment if you are happy with mine." The thrust of the conversation was that Mr Chaloner indicated precisely what it was that he required the Company to do to accommodate his disability and the Company agreed to do what he asked.
6. There was a further meeting on 16 May between Mr Chaloner and his then manager Mr Hayes, at which the possibility was raised by Mr Chaloner of him returning to work on a five day week but he remained on four days throughout.
7. On 26 September 2015 Mr Chaloner told us that he had a discussion with his then manager Mr Szurami. We were prepared to accept the broad thrust of his evidence on the subject matter of that discussion and that the possibility was canvassed with Mr Chaloner that he might want to go back to a five day week and indeed that he might wish to be effectively demoted. We did not accept that there was any sort of pressure placed on Mr Chaloner to go down either route. He indicated he was not interested in either and the matter was at that stage left.
8. Towards the end of October 2015 Mr Hayes arrived as manager at the Upper Shoreham store and two changes were introduced as a consequence.
9. Each week the Company had three "ambient" deliveries, of non-perishable goods, on the evenings of Tuesday, Thursday and Saturday. These deliveries could be heavy and it had been the practice of the Company to have two of their managers present at the time of delivery. However, Mr Hayes decided that it was not necessary to have two managers there on a Thursday because the delivery on that day was so much smaller than the other two days.
10. The second change related to the way shelves were filled. The Company had a system whereby if there were gaps or spaces on shelves, it would be apparent if there were goods in the storeroom that could be put out. There was a target set for such "refilling". There had developed a practice within the store whereby the Company's system would be manipulated to indicate falsely that there were no goods in the storeroom available to fill such a gap, so that the store would not seem to be failing judged against that target. Mr Hayes wished to see that deception brought to an end. There would now be an accurate record of the extent to which shelves were not being properly restocked.

11. Mr Chaloner suggested to us that in the course of raising that issue with the employees Mr Hayes had indicated that disciplinary sanctions would be likely to follow if the employees did not achieve the target. There was a straightforward conflict of evidence between the parties on that subject and we accepted the evidence of Mr Hayes that nothing to that effect was said. On the other hand, it was clear that Mr Chaloner took seriously his responsibilities in that respect despite not having been expressly warned of any particular consequences if the target in question was not met.
12. At about the same time Mr Chaloner was told by a third party that Mr Hayes had indicated that he wanted him (Mr Chaloner) out of the business.
13. There was a meeting on 2 November between Mr Chaloner and Mr Shadwell the note of which is at page 314 of the bundle. Mr Chaloner was asked what adjustments still needed to be put in place to address his disability and Mr Chaloner said that he listened to his body and did not think there was anything else that needed to be looked at. Mr Shadwell says "So no adjustments needed, business as usual?", to which Mr Chaloner replies that he will not pull heavy cages but does not indicate that that was something he was in the practice of doing.
14. On 5 November Mr Chaloner was scheduled to undertake an ambient shift. There was not another manager present with him at the time. It was his evidence, which we accepted, that in the course of that shift he was undertaking lifting of the sort that he should not have, given his heart condition and furthermore that he stayed relatively late, to 10.38pm.
15. On 25 November he tendered his resignation. There were two further ambient shifts for him, on 3 and 10 December, where again we accepted that he had undertaken heavy lifting and had worked later than would otherwise have been the case. His resignation letter was treated as a grievance and that matter was fully canvassed with the Company.
16. Under s20 of the Equality Act 2010 where a provision, criterion or practice ("PCP") of an employer puts an employee at a substantial disadvantage, the employer is required to take such steps as it is reasonable to have to take to avoid the disadvantage.
17. Under s95 of the Employment Rights Act 1996 an employee is dismissed if he terminates his contract in circumstances in which he is entitled to do so without notice by reason of the employer's conduct. It is well established that that conduct must amount to a fundamental breach of contract.
18. We firstly address the claims of disability discrimination.
19. As we have said, it was accepted by the Company that Mr Chaloner was disabled by reason of his heart condition. There were three respects in which he contended the Company had failed to make "reasonable adjustments" but before addressing them specifically, it is perhaps worth saying something about Mr Chaloner's attitude and work ethic, which impacted on his claims.

20. Mr Chaloner is clearly a very conscientious worker. We accepted his evidence that he did genuinely feel under pressure to carry out his duties in a particular way.
21. Our broad conclusion, however, is that he did not though come to that conclusion on the basis of anything done by the Company but rather his own sense of "duty". He seemed to have drawn inferences from his treatment by the Company that were unjustified but which gave rise to a genuine but incorrect belief on his part that a failure to achieve a particular standard would have unpleasant consequences for him, whether by disciplinary action or otherwise.
22. The result was that, at least from time to time, Mr Chaloner was in the habit of undertaking tasks that, because of his disability, he should not have done. That did not come about as a consequence of anything he was told by the Company. Nor was this a case where he was bringing to the attention of the Company that he was in the habit of "over-extending" himself in this way. As he said himself, he "struggled on". The Company cannot be criticised where Mr Chaloner was taking on inappropriate duties that were not being required of him and failing to alert the Company to that state of affairs.
23. There were three PCPs that he said put him at a substantial disadvantage. The first was the fact he was required to work on the ambient shift and in the course of that shift required to undertake loading, unloading, unpacking and carrying heavy items – work which, because of his heart condition, he should not have been obliged to undertake.
24. We accepted he did indeed do that work but the requirement was not a PCP of the respondents. It was something he took upon himself. He was never led to understand that was something he should do. He was a manager and had the authority to delegate the work. He chose not to.
25. The second alleged PCP was a requirement to work such that he could not take breaks. There was no such PCP. Mr Chaloner was the manager at the time. It was for him to organise the work that was carried out both by himself and those who reported to him. He could take his breaks whenever he wanted. What we understood him to be saying was that he did not feel the work would be carried out to the standard that he thought was appropriate and which he believed the Company required if he took his breaks as he should have done. That was a function of his own diligence but was not a PCP that was applied to him by the Company.
26. The final alleged PCP was a requirement to work late. We accepted that he had indeed worked late from time to time. He did so to make sure that the shelves were full, in order to achieve the target that he understood the Company required. The same observations apply here as they do to the earlier matters. He was never told that he would be subject to disciplinary action if he failed to achieve that target. The target was precisely that. All he was obliged to do was undertake his work within his ordinary hours. If the target was missed, frankly it was not his problem. There was certainly no suggestion that any sort of action would be taken against him. We concluded that there was no PCP of the type suggested by him.

27. It follows that the claims of disability discrimination fail and are dismissed. For the sake of completeness we should add that even if they had been meritorious, the claim was presented out of time in respect of them.
28. We then turn to the claim of unfair dismissal. Mr Chaloner said that the behaviour of the Company amounted to a fundamental breach of the implied term within his contract pursuant to which the parties will not, without good cause, act in such a way as to destroy or seriously undermine the relationship of trust and confidence between them. He asserted that his resignation could therefore be construed as a dismissal.
29. Mr Chaloner claimed, in paragraph 21 of his supplemental grounds of claim, that there were seven respects in which he had been mistreated by the Company, amounting to a fundamental breach.
30. The first such respect was the failure to make reasonable adjustments. As we have already mentioned, we did not believe there had been any such failure.
31. The second respect was a failure to ensure he had adequate rest breaks. Again, we have made our position clear in relation to that matter. We did not believe there had been any such failure.
32. Thirdly, Mr Chaloner said there had been a failure to carry out a risk assessment upon his return to work following surgery. It is right that there was no formal assessment undertaken at that time and the reason was clear. Mr Chaloner, at the meeting in March, laid down precisely what he needed by way of adjustments to accommodate his condition. The Company did exactly as he wished. It was reasonable for the Company to believe that Mr Chaloner was sufficiently familiar with his condition and the appropriate restrictions such that compliance with his requests would be adequate, without the need to carry out a formal assessment.
33. Fourthly. Mr Chaloner claimed he was threatened with disciplinary proceedings. We concluded that he was not.
34. Fifthly, he claimed that Mr Szurami said that management wanted him to step down from his management role. It is undoubtedly the case that at the meeting in question Mr Szurami canvassed the possibility of Mr Chaloner stepping down. In fact what Mr Chaloner says in his witness statement is "I felt Mr Szurami's conversation with me during this meeting was like a discussion to see if I would be willing to step down to a Team Leader role." That seemed to us as a perfectly proper reflection of what had happened, as indeed it did later with Mr Shadwell. Both gentlemen simply canvassed possibilities with Mr Chaloner which he rejected as he was perfectly entitled to do. We did not believe that was behaviour for which the Company could be criticised or which might have contributed to a fundamental breach of contract.
35. The sixth complaint made by Mr Chaloner was that he was put under pressure to work five days a week. He was not. That possibility was canvassed with him, he rejected it and that was the end of the matter.

36. Finally, it was alleged that Mr Hayes made a comment to a colleague of Mr Chaloner's, Paula Shepherd, that he wanted Mr Chaloner out of the store. The only evidence Mr Chaloner could give of that matter was very much hearsay and we simply accepted the evidence of Mr Hayes to the effect that he had not said any such thing.
37. In all those circumstances we were bound to find that there was not a fundamental breach of contract on the part of the Company. Mr Chaloner's resignation could not be construed as a dismissal and his claim of unfair dismissal therefore failed.

Employment Judge Reed
9th February 2017

REASONS SENT TO THE PARTIES ON

9th February 2017

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FOR THE TRIBUNAL OFFICE