EMPLOYMENT TRIBUNALS

Claimant		Respondent
ADRIAN JOYCE	**v.**	**DHL SERVICES LIMITED**

OPEN PRELIMINARY HEARING

Heard at: **Birmingham** on: **14 May 2019**

Before: **Employment Judge McCluggage**

Appearance:

For the Claimant: Ms Durham (consultant)

For the Respondent: Mr Yates (solicitor)

JUDGMENT

1) The Claimant was not dismissed. The claim of unfair dismissal is not well founded and is dismissed.

2) The Claimant was disabled within the meaning of the Equality Act 2010 at relevant times by reason of a physical impairment affecting his foot and ankle.

Employment Judge McCluggage
Date: 14 May 2019

Reasons

1. By his ET1 received by the tribunal on 18 June 2018 the Claimant seeks compensation for unfair dismissal and disability discrimination. The claims were set out with clarity in the order of Employment Judge Cox dated 15 January 2019. The basis of the disability discrimination claim was particularised and the tribunal ordered determination of 2 preliminary issues:

   i. Was the Claimant dismissed?
   ii. Whether the Claimant was a disabled person at the relevant time.

2. I received into evidence an agreed bundle of documents and witness statements from the Claimant and Mr Dean Silcox, an Operations Manager employed by the Respondent. The Claimant also exhibited a letter from his treating neurologist Dr Srinivasan dated 27.3.18 though that had not been included within the bundle. I heard oral evidence from the Claimant and Mr Silcox. Both parties made submissions.

Was there a dismissal?

3. The Claimant was employed from 9 April 2012 at the Respondent's Tyrefoot site. Prior to material events he had been promoted to Team Leader in the warehouse, which was a job with physical elements.

4. It is not disputed between the parties that the Claimant had a long standing left foot/ankle condition which had at least in recent years manifested as what is colloquially known as a 'drop foot' condition, that is, there was a lack of dorsiflexion from whatever pathological cause in the foot and ankle.

5. The Claimant underwent surgery on May 2016 in respect of his pre-existing condition, but it appears that this may have unintentionally caused the drop foot condition. I did not need to make any findings as to medical causation of his condition. The Claimant was off work for some months thereafter and was physically unable to do his usual duties upon his return.

6. In consequence he was seconded to work in the Gatehouse, on his usual pay, but undertaking sedentary employment and without supervisory responsibilities.

7. The Claimant was off sick with stress/depression between September 2017 and January 2018.

8. While working in the Gatehouse, the Claimant underwent numerous sickness capability meetings (20.3.17, 19.4.17, 13.9.17, 17.11.17, 31.1.18 and 2.2.18) and three occupational health examinations (13.12.16, 22.5.17, 20.1.17).

9. The upshot of these meetings was that the Respondent did not feel able to make reasonable adjustments effective to enable the Claimant to return to his Team Leader position in the

warehouse or to make other redeployments as a Team Leader. I did not investigate those matters further and did not permit cross-examination upon the same, as they would be issues for a tribunal determining substantive issues at a final hearing.

10. The Respondent made clear its position that the Claimant would not be able to continue on a Team Leader basis within the Gatehouse on an indefinite basis: see eg capability meeting 2 March 2017.

11. The Claimant represented on a number of occasions his unhappiness at the prospect of any salary reduction were there to be a change in position on a number of occasions, for example, at the meeting 22 May 2017. He did acknowledge that this was an option.

12. It became apparent that the capability meetings progressed without a mutually satisfactory alternative to the Claimant working as a Team Leader in the warehouse. The Respondent's stated position was that if there was no other option, the Claimant would be offered an alternative role in the Gatehouse but on regular pay commensurate with the job, but that dismissal could be the alternative. This was expressly said by David Murphy at the meeting on 17 November 2017. The Claimant expressed his concern about a drop of 20% in salary.

13. By the time of the meeting on 2 February 2018, the position was formalised, with the manager at the meeting, David Murphy, offering the Claimant a role in the Gatehouse on a warehouse operative's salary though his pay would be protected until 1 March 2018. As Mr Murphy put it, "the other option in worst case scenario is dismissal on the ground of capability." That meeting was adjourned from 14:24hrs to 14:51hrs for the Claimant to think it over. It was not suggested by the Claimant in his evidence that he was forced to make a decision there and then. The meeting minute makes apparent that he was asked if he wanted more time.

14. The Claimant handed over a handwritten letter after the adjournment saying that:

    "In terms of employment staying employed is important not only in financial terms but also welare and mentally. So I accept the offer to a role that accommodates my disability however I still feel the overall reduction in salary is somewhat unfair and this is something I will have to seek further advice on. I agree to moving to the Gate House and reluctantly I'll have to agree to the drop in salary effective from 1-3-2018"

15. The Claimant continued working in the Gate House and his salary was reduced in accordance with this ostensible agreement.

16. The outcome of the meeting was summarised in a letter dated 8 February 2018 by Mr Murphy.

17. The Claimant thereafter appealed the decision of the meeting. The appeal was heard by Mr Silcox. The Claimant's union representative stated at the appeal hearing that the main problem for the Claimant was the lack of salary protection in the new role. Mr Silcox did not agree that salary protection was an appropriate ongoing adjustment.

18. While it was apparent to me from the documentation that the Claimant was unhappy about the salary cut from 1 March, there was no mention of his working under protest or that he felt he was contractually entitled to his previous salary.

19. The Claimant's case was based on authorities beginning with Hogg v. Dover Council [1990] ICR 39. This case was authority for the proposition that in circumstances where an employee was demoted and his salary halved in breach of contract, this would constitute a constructive dismissal as the previous contract of employment had been entirely taken away. In the alternative, the Employment Appeal Tribunal found that there had been fundamental changes to the employee's contract which he had not accepted. On the facts of that case, the claimant had through solicitors alleged he was dismissed and worked the new job subject to that. On those facts the court found that the employee had not affirmed the repudiatory breach or varied his contract by agreement.

20. The familiar principles of what is usually called a 'constructive dismissal', that is, a dismissal as defined by section 95 of the Employment Rights Act 1995, can be summarised as followed:

    i. There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.

    ii. That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law.

    iii. He must leave in response to the breach and not for some other, unconnected reason.

    iv. He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.

21. The question in a case like the present turns on whether there has been a breach of contract or rather a contractually effective variation. Where a contract is withdrawn and replaced by a less favourable contract which the employee works, there can in principle be a dismissal and re-employment, such as in Extrusions Ltd v Yates [1996] IRLR 327.

22. However, my conclusion is that on the facts of this case there was an effective variation of the contract rather than a dismissal and re-employment. The change in pay would undoubtedly have constituted a repudiatory breach of contract if imposed absence agreement. However, in my view what happed in substance was that the Claimant has made a decision to take the offer of the new job rather than go further down the capability route further. That situation is distinct analytically from a position where a new set of terms of and conditions is unilaterally imposed upon an employee who is then expected to work them. The proposed change was one left for the Claimant to make his mind up about before the process progressed. While it is true that the end result of such a capability process would have appeared bleak from the

Claimant's perspective, he nonetheless in my judgement had a choice. He agreed reluctantly, but not under protest, and I concluded that his agreement was real and effective. No question of 'duress' arose, and no legal submissions were made to me as to how duress might vitiate the Claimant's agreement in such circumstances.

23. Hence there was no dismissal and the claim for unfair dismissal must accordingly fail.

Disability Discrimination

24. I heard evidence from the Claimant and found the following facts concerning his impairment:

    a. The Claimant suffered from left foot problems from at least 2006.

    b. Matters became significantly worse after the surgery in May 2016 and development of drop foot.

    c. This was described by Dr Srinivasan as and I accepted, in absence of evidence to the contrary, that he suffered from an active denervation in various muscles in his left lower limb suggestive of a preganglionic left L5 pathology.

    d. Evidence provided to the employer was that there was to be no early resolution to his problems. They had evidently lasted for longer than a year or were likely to do so by the time of material decisions in 2017 and 2018 as regards adjustment and redeployment considerations.

    e. In practice, the lack of dorsiflexion meant that his left foot would tend to drag.

    f. It primarily manifested symptomatically in difficulty walking.

    g. A rough estimate would be that he could not easily walk for more than 20 minutes as he told the occupational physician on 19 December 2017 (see page 83 of bundle), though he might have to stop before then as he told me in oral evidence. As he said at paragraph 5 of his witness statement, after 5-10 minutes of walking he would feel stiffness and swelling along with pins and needles.

    h. It was difficult to walk over round ground.

    i. He experienced numbness around his foot.

    j. His foot would swell if he was on his feet for too long.

    k. His feet and toes would go stiff if he had walked too far.

    l. There were some balance issues after standing or walking too long.

    m. He could only wear loose fitting trainers.

n. There was pronounced muscle wasting in his left calf.

o. He had some difficulty with stairs and used a rail at home, though that had been fitted years before for his mother's benefit.

p. He could not drive a manual car.

q. While there was no direct evidence concerning what happened when he went shopping, he did most of his shopping now online, as per paragraph 8 of his witness statement.

r. He would prop himself up against a wall when getting dressing.

s. He has at times suffered sharp shooting pain in his leg, though this probably post-dates the material decisions.

t. He did not take analgesia.

u. His symptoms were incompatible with his pursuing warehouse work, in relation to standing for significant periods and walking for extended periods around a warehouse.

25. The statutory definition of 'disability' under the Equality Act 2010 is as follows:

Section 6 of the Equality Act 2010 provides that a person (P) has a disability if—

> *"(a) P has a physical or mental impairment, and*
>
> *(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."*

Schedule 1 of the Equality Act 2010 sets out Supplementary Provisions in relation to Disability.

Paragraph 2 of Schedule 1 provides the effect of an impairment is long-term if:-

> *"(a) it has lasted for at least 12 months,*
>
> *(b) it is likely to last for at least 12 months, or*
>
> *(c) it is likely to last for the rest of the life of the person affected."*

Paragraph 5 of Schedule 1 provides that:-

> *"(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if:-*
>
> > *(a) measures are being taken to treat or correct it, and*
> >
> > *(b) but for that, it would be likely to have that effect.*

(2) "Measures" includes, in particular, medical treatment and the use of prosthesis or other aid."

26. I have taken into account the guidance given in Goodwin v. The Patent Office [1999] ICR 302 which encourages tribunals to consider the requirements of the Equality Act in a structured fashion, addressing the questions of the impairment, the adverse effect condition, the substantial condition and the long-term condition. One should address a claimant's *ability* to carry out activities, not merely whether such activities can be carried out at all. As has now been legislated, substantial means more than minor or trivial.

27. There is no dispute about the nature of the impairment in this case – it is the physical impairment of the drop foot condition affecting the Claimant's left lower limb.

28. There is equally no dispute that the impairment causes mobility problems for the Claimant and thus there is an adverse effect.

29. There was further no dispute about whether the impairment and adverse effect was long-term.

30. The real question, as Mr Yates made clear during submissions, was whether the adverse effect causes was "substantial", in other words, more than minor or trivial in respect of its impact on day to day activities.

31. Mr Yates made reference to the Guidance, without actually referring me to the document itself. I did refer to it expressly when considering my conclusions. For avoidance of doubt, I have consulted the "Guidance on matters to be taken into account in determining questions relating to the definition of disability" published by the Office for Disability issues. In the Appendix various illustrative and non-exhaustive factors are listed as examples of what may or may not constitute a substantial adverse effect on normal day to day activities. Difficulty waiting or queuing because of fatigue when standing for prolonged periods is described as a factor reasonable to consider, as is difficulty with stairs. On the other hand, "experiencing some tiredness or minor discomfort as a result of walking unaided for a distance of about 1.5 kilometres or one mile" would not be. The wording shows why it is so important to make express reference to the Guidance rather than speak to it in the abstract, as it was not noted in submissions that "tiredness or minor discomfort" was the descriptive factor relevant to being able to walk one mile.

32. What a tribunal must do is look at the different aspects of adverse effect in the round in respect of the relevant impairment. My conclusion is that while the Claimant was and is able to walk up to 20 minutes, it is difficult and painful to do so, and he may suffer swelling about his foot in consequence. That in combination with difficulty on stairs, uneven ground and standing passes the threshold of being a substantial rather than minor or trivial effect. I acknowledge that this was not a clear-cut case.

33. I have not taken working in a warehouse as a day to day activity per se, but did think that if a job of that sort was said to have required the Claimant to wear a special boot or to use a wheelchair that it was supportive of a genuine and significant level of pain and loss of amenity after standing or walking.

34. Thus the Claimant is “disabled” within the meaning of the Equality Act 2010.

Employment Judge McCluggage

Date: 15 May 2019