Case Number: 1400552/2019

EMPLOYMENT TRIBUNALS

Claimant: **Mr J Ross**

Respondent: **Argos Ltd t/a Sainsbury's Argos**

Heard at: **Bristol** **On: 16th, 17th and 18th December 2019**

Before: **Employment Judge Hargrove**

Representation
Claimant: **In Person**
Respondent: **Mr S Liberadzki, Of Counsel**

JUDGMENT

1. The Judgment of the Tribunal is that the claimant's complaint of unfair dismissal is not well founded.

REASONS

1. The claimant was employed as a Warehouse Operator by the respondent from 18th January 1995 until his dismissal allegedly for capability on 18th October 2018. By the time of his dismissal, the claimant had elected to work only Wednesdays to Fridays on the morning shift.

   (1) On 27th June 2014, the claimant signed a new contract of employment. This coincided with the introduction of a new performance management scheme by the employer enabling a check on the productivity of operators and others within Argos. A PI score was to be ascribed to a series of tasks with timings. These were called the direct tasks. Hand held devices were issued to operators to enable them to read and down load a code on the product being loaded or unloaded and thus for the respondent to monitor the operators' performance.

   (2) The monitoring standard expected was designed to operate at a general score of 100 but at Argos it was fixed at 85. There were, however, a small number of tasks to which no scores were ascribed such as hygiene and cleaning.

Subject to the operators working all the shift hours which they were supposed to work, an indirect score was given for those tasks automatically of 85.

(3) This scheme was introduced in consultation with the Trade Union and throughout the workforce in the warehouse who signed up to the new contract, bar a Mr Williams who was allowed to continue under his old contract without PIs. There was another employee with a disability who was permanently signed to clerical tasks as a reasonable adjustment and who was also not subject to PIs. I accept that the claimant only signed up to the new contract reluctantly, believing that the introduction of the PI system would threaten health and safety.

(4) There were lump sum payments made to the workforce in exchange for working the new contract and achieving the required level of performance. The scheme was phased in with scores being recorded, initially with no formal notices to be issued to back them up and at a PI level of 80 over a six month period. There was then a period when formal notices were issued and finally, from March 2017, the full scheme was implemented with formal performance notices at stages 3 – 7 which could lead to a dismissal. The full process could take a minimum of twelve weeks between the introduction of a first performance notice and dismissal.

(5) In 2016 a dispute arose concerning the safety of use of pallet trucks to unload double stacked pallets. The claimant claims that a health and safety representative Mr Rob Dibble (RD) said that it was unsafe because the pallet trucks had no back guards and accordingly the top pallet could tip over and land on the driver. In an email to staff from the Operations Manager, Mr Walsh, dated 8th December 2016, briefed to the staff by Ian Bartram (IB), a Team Manager, staff were informed that it was safe practice according to the manufacturer. The claimant and a colleague, Andy Horsman, who is also a witness for the claimant, continued to refuse to follow the practice.

(6) Subsequently the respondent introduced new Crown trucks to perform the task but the claimant claims that the team manager, IB, subsequently treated him and Mr Horsman less favourably than other operators. Mr Dibble and Mr Horsman gave evidence supporting the claimant on this aspect of the case.

(7) On 16th April 2017, James Cutler, JC, another Team Manager, invited the claimant to a stage 3 meeting under the PI process. There is a conversation history at pages 17 – 19 of the bundle, covering the period from December 2016, week fifty, to 6th April 2017, week twelve. At the subsequent meeting, on 27th April 2017, the claimant accompanied by his Trade Union representative, Andy Gill, presented a written statement to JC which is at pages 23 – 24, in which he complained in general about the application of the PI system, queried how he got to stage 3, and produced three detailed examples of how IB was misusing PI scores for other operators giving them a benefit which made his performance look worse. Having investigated these examples, JC found that the claimant's examples were factually correct and he informed the claimant that the stage 3 process would not be taken further and it was not. The claimant requested a formal outcome of the stage 3 process.

(8) On 6th July 2017, JC had a meeting with the claimant also attended by Mr Gill and Mr Horsman with a note taker (pages 27 – 28). The claimant presented a list of questions (page 29). JC sent out a short outcome letter on 13 July. That was the first written notification informing the claimant that he was at stage 1 in the process (page 30). The claimant asked for more details in

writing. Also on 13th July, the claimant presented a grievance that IB had been treating him less favourably than his colleagues.

(9) On 31st July 2017, JC sent a more detailed explanation for his conclusions (page 39). The grievance was heard by Andy Coogan, a Shift Manager (AC). Initially, on 3rd August 2017, the claimant provided a written statement to him (pages 46 – 48). In essence, the claimant presented two complaints against IB: First, he and Horsman had been allocated far more containers than colleagues, detrimentally affecting their PI scores and secondly, he repeated the three examples of the misscoring of other operators found by JC to be true.

(10) In particular, the claimant gave a list of witnesses whom he sought to be interviewed (page 48). AC conducted an investigation and took notes of interviews with some of the witnesses. These are identified at paragraph 4.1 of his witness statement.

(11) On 7th September 2017 AC met the claimant and there is a note at pages 89 – 94.

(12) On 12th September 2017 AC sent his grievance outcome letter (pages 97 – 98). In essence, AC rejected the grievance, in particular that of bullying against IB. The claimant was notified of his right of appeal. The claimant appealed and his appeal was heard by Tim Clubb (TC), a General Manager, on the 13th October 2017. JC attended and the notes of interview are at pages 117 – 128.

(13) The appeal outcome was notified on 20th October and TC rejected the grievance.

(14) On 15th November 2017, the claimant went off sick and sick notes thereafter identify as the reason stress at work. He did not return to work thereafter.

(15) On 4th January 2018, the claimant sought to raise a grievance against TC. During his absence with sickness the claimant was interviewed by JC who obtained an Occupational Health report from a doctor physician dated 12th February 2018 (pages 131 – 132). Following an interview on 5th February 2018, Alan Williams took over from JC the task of managing the claimant's sickness absence in July 2018. The sick notes continued after that date and the last two covered the period from 19th July 2018 expiring on 30th September. The final one dated 1st October 2018 covered a period of two months until the end of November 2018.

(16) There were capability meetings with the claimant on August, and 17th September, and a further meeting was scheduled but did not in the end take place because there was no note taker, and the final capability meeting, which resulted in the claimant's dismissal, took place on the 18th October 2018 (pages 186 – 187).

(17) On 24th October 2017, the claimant was issued by AW with a dismissal letter and he was paid twelve weeks notice pay although there may be some dispute about whether it has been properly paid.

2. On the basis of this chronology there are two essential issues which the Tribunal has to decide. What was the principal reason for dismissal and was the dismissal for that reason fair or unfair? Section 98 (1) and (2) of the Employment Rights Act 1996 identify acceptable reasons for the dismissal of an employee. It is either one of a set of four reasons contained in subsection (2) or some other substantial reason

of a kind such as to justify the dismissal of an employee holding the position which the employee held, which may be described as a catchall reason

3. Amongst the admissible reasons specified in subsection (2) are capability and conduct. Capability is defined in subsection (3) as meaning, in relation to an employee, "capability, assessed by reference to skill, aptitude, health or any other physical or mental quality."

4. Mr Liberadzki has drawn my attention to a short passage in the IDS Brief on Unfair Dismissal giving examples of employees held to be lacking capability as including "an inflexible and unadaptable worker, an employee who has failed to reach the employer's standards even if those standards were higher than those of similar employers, and workers who could not meet management's raised standards, and an employee who although efficient was difficult and abrasive so affecting the quality of the staff working generally". These indicate the quite wide meaning to be ascribed to the word 'capability' in this context. It is for the respondent to prove on the balance of probabilities what the reason or principal reason was for the dismissal. In this case it is capability, although it has been suggested that there might have been an alternative reason for dismissal relating to the alleged breakdown in relationships between the claimant and managers of the respondent and amounting to some other substantial reason.

5. If the respondent satisfies that test, the Tribunal has then to go on to decide whether or not dismissal for that reason was fair or unfair as defined in Section 98(4) of the Act. The determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer:

    (a) Depends on whether in the circumstances including the size and administrative resources of the employer's undertaking the employer acted reasonably or unreasonably in treating as a sufficient reason for dismissing the employee.

    (b) Shall be determined in accordance with equity and the substantial merits of the case."

6. As to the reason for dismissal, notwithstanding the conclusions in the Occupational Health report of February 2018, which found that the claimant was fit and healthy essentially and not suffering from any mental health condition, the respondent continued to treat the claimant thereafter as unfit for work and adopted the capability procedure.

7. The respondent could have pursued the matter as a conduct issue, arising from the alleged unauthorised absences, in which event a different procedure would have had to have been followed if any dismissal for that reason were to be fair. The report identified however, that the source of the problem was the claimant's perception that he had been unfairly treated by IB in the way in which he allocated him and Mr Horsman allocated container work and, as he saw it, manipulated the scores of other operators, thus giving them an artificially greater score than was justified and leaving the claimant exposed to the PI process at level 3 which could eventually lead to his dismissal.

8. The claimant refused, and continued to refuse during the hearing, to accept that his grievances had been properly investigated and insisted that if they had been, his complaint of bullying by IB would have been upheld. This eventually led to the claimant refusing to return to work on PI terms or under the management of IB, and to his dismissal.

9. There is no doubt in my mind that while the respondent could have chosen other reasons for dismissal, falling within Section 98 of the Act, they did in fact select capability and did dismiss for that reason.

10. I now pass onto the essential issue in the case, which is whether or not the dismissal for that reason was fair or unfair applying subsection (4) of the Employment Rights Act.

11. In assessing the fairness or otherwise of a dismissal for capability, there are guideline cases which identify steps which a reasonable employer should take in to a long term absence case which this is or may be – it is not a series of short-term absences - the claimant was continuously absent for a period of eleven months from 15th November 2017 to the date of his dismissal on 18th October 2018 and his sick pay expired contractually in February 2018 – a key to testing fairness is whether the employer can be expected to wait any longer (Spencer v Paragon Wallpapers [1977] ICR page 301). The employer should investigate the relevant factors including whether other staff are available to carry out the claimant's work, the nature of the claimant's illness, the likely length of absence, the costs to the employer and in particular its size.

12. A further key to a fair procedure lies in consultation with the employee to establish the true position and to consider alternatives to dismissal, including redeployment to alternative positions within the respondent's business or an associated business.

13. In this connection it is to be noted that the Argos distribution centre where the claimant worked is part of a much larger organisation which included Sainsbury's and Argos stores with branches within twenty miles of where the claimant lived in Bridgewater.

14. In addition, there should, certainly in an ill health capability dismissal, be a proper medical investigation to discover the true position about which the claimant complains (East Linsey District Council v Daubney [1977] ICR 566). in a case where the employer may be responsible for the illness leading to the dismissal, that is a factor which may have to be taken into account in assessing the fairness of the dismissal. In such circumstances the employer may be expected to go the extra mile (Royal Bank of Scotland v McAdie [2008] ICR 1087 Court of Appeal). There are a series of factual findings which I have to make in assessing the fairness of this dismissal. The first in chronological order relates to the adequacy of the investigation into the claimant's general complaint of bullying by IB and in particular its rejection. An initial investigation was undertaken by JC following the written submission put by the claimant at the original stage 3 hearing. JC's initial response did not explain in detail his findings, but he did in more detail in his letter of 31st July 2017. It is clear that he did not find bullying, but he did find errors in the way various of the team managers, there were some twenty-five in number, were scoring operatives in particular those who were assisting other teams in direct work with automatic indirect codes of 85. This would have the effect that the members of the team would achieve artificially high scores which would, I accept, highlight any failures by the claimant or Mr Horsman who were apparently given a disproportionate proportion of non palletised containers which they claim took much longer to unload although that matter is the subject of some dispute because the unloading of non palletised containers was the subject of a separate score measure. It is noteworthy that at that stage however, the claimant did not complain about the allocation of containers at all. In any event, JC immediately, or within a day or so after the meeting on 27th April 2017, discontinued the stage 3 process against the claimant and engaged in a process of retraining the team managers.

15. Furthermore, and in my view, it is significant, the claimant does not further complain that the original complaints continued after he had brought the problem to JC's attention in April 2017. The claimant complains that IB's bullying continued in other ways after that date but he did not raise that as an issue during the subsequent quite long running grievance process. It is thus noteworthy that the essential matters about which the claimant originally complained came to an end in April 2017, eighteen months before his dismissal.

16. The essence of the claimant's case is that there was a failure properly to investigate by AC in the period July – September 2017, and JC at the appeal stage in the period up to October 2017, his specific allegation of historic bullying by IB. I have considered his grounds of complaint in this respect. They are that AC only looked at seven of the twelve weeks' scores between December and 6th April 2017, and that he failed to interview all of the people named in his written submission - seven out of seventeen. AC claims that he interviewed at least one from each group; that during his investigation there was industrial action for some weeks, and that he considered it sufficient to enable him to reach a conclusion, having interviewed also IB who adamantly denied the allegation against him. It is not to be expected that an employer should investigate grievances to the standard of a criminal investigation by the police. I reject the claimant's complaint that AC did not adequately investigate his grievance in this respect.

17. The outcome letter of 12th September 2017 gives detailed reasons for rejecting the grievance. Although TC has not given evidence to this Tribunal. there are notes of the grievance appeal hearing of the 11th October 2017 which took place between 10.08 am and 12.21 pm with a 45 minute break. He also interviewed JC and gave detailed reasons for rejecting the appeal. (letter of 20th October pages 122 – 123). I reject the claimant's complaints about the grievance process undertaken by AC and JC. I find that the process was carried out in good faith and did not amount to a cover up, and the claimant's continued attempts to raise matters by way of a renewed grievance against JC and in letters to Phil Hull, a Distribution Director and via Andrew Gill to John Clarke, the Regional Operations Manager merely demonstrate the claimant's intractable refusal to accept the failure of his grievance.

18. I next turn to the more general consultation issues. JC recorded notes of contacts with the claimant during his sickness absence beginning on 15th November 2017 and up to the end of July 2018 (pages 158 – 174). There is an important entry relied upon by the claimant at page 174 with which I will deal later under the heading of alternatives to dismissal. It was JC who initiated the Occupational Health report from Dr John Reynolds dated 12th February 2017 which I have summarised above. An important issue arises from this report. The claimant complains that it was out of date by the time a decision was made to dismiss by AW in October 2018. He relies upon the continued GP sick notes referring to stress at work. Since the claimant had not been at work for eleven months at that stage, it is difficult to conclude that the claimant was still stressed and the stress had got worse and there is no other medical evidence produced by the claimant to support this contention. The claimant did not say during the consultation process that he was unfit to return to work at any task, other than working under PIs or, more particularly, under the management of IB who, it transpired, was temporarily seconded from the warehouse between March and the summer of 2018. Accordingly, I reject the claimant's contention that the respondent should have obtained more up-to-date medical evidence before proceeding.

19. I now turn to the more difficult issue of whether reasonable attempts were made to redeploy the claimant to other employment, not offending against his requirement of no PIs and no management by IB.

20. The first issue raised by the claimant in his otherwise well argued written submission is that he was not moved to a department which dealt with cross docking where employees were subjected to automatic scores of 85. However, it is the respondent's case that employees working there were regularly seconded for up to one day to tasks which did require or attract a PI score, and therefore it was reasonable to assume that the claimant would not have accepted that either, although he disputes that.

21. The second proposal, made by Mr Dibble at the welfare meeting with JC on 28th February 2018, was that the claimant should return on a three month PI amnesty, presumably to be followed by him resuming PI work. I am not impressed by the claimant's claim that he refused it because it was not put in writing for him to consider, and I note that the claimant said to JC on 28th March 2018 that he was not willing to come back to work if IB was managing him. I also note that a six week phased return was offered by John Clarke with input from Occupational Health and the management team on 21st June 2018. The letter was addressed to Mr Gill who the respondent reasonably believed was acting on the claimant's behalf. If it was not passed on to the claimant, but the respondent cannot be blamed for that. I do not accept that the claimant would have accepted any arrangement which carried a risk that the claimant would have been managed by IB. Essentially, what the claimant was asking for was a return to work in the warehouse department either on his pre 2014 contract without PIs or, in any event, not under the management of IB. I find that it was reasonable to reject that proposition because it would require the making of an exception for the claimant against the fact that all staff were subject to PIs in the warehouse with the exception of the two I have identified above. Such an exception would have had the risk of tending to undermine the policy itself if exceptions other than the two I have mentioned were made.

22. Finally, there is the issue of the offer of employment or alternative employment at other stores in the Bridgewater area. This first arose during the conversation between JC and the claimant on 8th July 2018. There is an issue whether the claimant was told that if he took the job there would be a new contract and he would lose his length of service which was of course significant since he had been employed since 1995. JC denies that he said that to the claimant. He says to the contrary that he had taken advice from Aaron Turner an HR Advisor and had been told that the claimant did have the right to retain it and he also claims that he notified the claimant. I have doubts about that, although I do not accuse him of lying. I think a simple reading of the note at page 174 shows that the claimant was at that time under the impression that if he took such a job he would lose his service. The note does not record that JC disabused the claimant of that error. The essential question is whether the claimant would, if notified of the correct position, have accepted it.

23. I find that in probability he would not, because when a similar offer was made at the meeting with AW the final capability meeting on 18th October 2018, of a job at the Bridgewater branch of Argos on 15 hours on five days per week the claimant is recorded as saying "not interested". He did not say that he was refusing because he would lose service and I find that is a significant omission, if it was in fact the reason.

24. The meeting continued with a further reference to the claimant returning to work at the warehouse with no PIs. This is consistent with the claimant's attitude throughout this process with adjustments in terms of no PIs and no management by IB. I conclude by stating that there is nothing in the claimant's complaint that he was not notified in every letter inviting him to meetings with AW that he was under risk of dismissal. He was notified in one of the letters and it must have been obvious to him that dismissal was on the cards in the light of the lengthy period he had had off work.

Employment Judge Hargrove

Date: 24 January 2020

Judgment and Reasons sent to Parties: 28 January 2020

FOR THE TRIBUNAL OFFICE