



# EMPLOYMENT TRIBUNALS

## Claimant

Mr Rati Mistry

## Respondent

Royal Mail Group Limited

v

**Heard at:** Norwich

**On:** 14, 15, 16 and 17 October 2024

**Before:** Employment Judge Postle

**Members:** G Page and S Williams

## Appearances

**For the Claimant:** Mr Beaton, Counsel

**For the Respondent:** Mr S Peacock, Solicitor

## JUDGMENT

1. The Claimant's claims that he was directly and indirectly discriminated because of his age are not well founded.
2. The Claimant's claim that he was discriminated arising from his disability is not well founded.

## REASONS

### The Issues

1. The issues in this case being refined during the course of the Hearing from those originally envisaged at the Case Management Hearing, specifically page 39.
2. In particular the claim for ordinary unfair dismissal was withdrawn.
3. That left the following issues live:
  - 3.1. Section 15, Equality Act 2010, the inability to attend meetings at short notice in relation to an Occupational Health appointment on 27 April 2023. The unfavourable treatment relied upon was Mr

Tiwari criticising the Claimant for failing to attend that appointment and further the delaying by the Respondents of processing the Claimant's Ill Health Retirement.

- 3.2. In respect of the direct discrimination claim, that is refined only in respect of pushing the Claimant to retirement in respect of a telephone call made by Mr Tiwari on 7 November 2022, in respect of pushing the Claimant to Ill Health Retirement between the period of November 2022 to 24 May 2023.
- 3.3. The indirect age discrimination claim remains as previous, in particular:
  - 3.3.1. the first PCP being the alteration and implementation of the Respondent's Ill Health Retirement Policy. The disadvantage the Claimant was placed at is the lump sum payment was reduced from 34 weeks to 16.
  - 3.3.2. the second PCP being the Policy of delaying the processing of the Claimant's Ill Health Retirement whilst negotiations were ongoing with the Trade Union, the disadvantage the Claimant was placed at is that his lump sum was reduced from 34 weeks to 16 weeks.
- 3.4. There is also a limitation issue in respect of the fact that the Claimant entered into ACAS Early Conciliation on 7 September 2023, the Certificate being issued on 10 October 2023, the Claimant presents his claim on 9 November 2023 therefore any acts or omissions relied upon prior to 8 June 2023 are potentially out of time.
4. Section 123 of the Equality Act 2010 gives the Tribunal discretion where in the opinion of the Tribunal there are grounds to exercise that discretion on the just and equitable principle.
5. In this case we are dealing with a man in his seventies who had life threatening hospitalisation, certainly on one occasion, in respect of Sepsis. Thereafter he was in and out of hospital which had an adverse effect on his mental wellbeing.
6. Clearly, this is a case on the facts the Tribunal are able to exercise its discretion to extend time and allow those elements of the Claimant preceding 8 June 2023 to be considered and determined.

## **Evidence**

7. In this Tribunal we heard evidence from the Claimant and his daughter-in-law, both giving their evidence through prepared Witness Statements.
8. For the Respondents we heard evidence from: Mr James Tully, Network Window Operational Lead; Mr Jason Wilson, Senior Employment Policy

Manager; and Mr Raj Tiwari, the Claimant's Line Manager. All giving their evidence through prepared Witness Statements.

9. The Tribunal also had the benefit of a Bundle of documents consisting of 287 pages.
10. Further, there was the helpful opening speeches and writing provided by both Mr Beaton Counsel for the Claimant and Mr Peacock Solicitor for the Respondent. As they are in writing and no disrespect is intended, it is not necessary for the Tribunal to rehearse those submissions.

### **Disability**

11. The Claimant's disability is Sepsis in both knees from August 2022 and that is accepted by the Respondent, as well as the knowledge.

### **Findings Facts**

12. The Claimant is aged 75 at April 2023.
13. The Claimant commenced his employment with the Respondent in 2005. He was employed at the Respondent's Norwich Mail Centre at Operational Postal Grade (OPG) as a part time Indoor Processor, working weekend shifts.
14. In August 2022, the Claimant became ill with Sepsis and underwent serious surgery which led to a three month period of hospitalisation and at that stage it appeared the Claimant was unfit for work in his role with the Respondents. The Claimant's Line Manager, Mr Tiwari, also a good friend of the Claimant having socialised and visited the Claimant on many occasions at his home. Throughout the period Mr Tiwari was keeping in regular contact with the Claimant and his family and where possible visiting the Claimant in hospital and then at his home.
15. During one of those visits or a telephone call, Mr Tiwari did raise the issue that Royal Mail were running a scooping exercise because there had been a decline generally in mail; that is a voluntary redundancy exercise open to all employees. Mr Tiwari asked the Claimant if he was interested as he did not want the Claimant to lose out simply because he was absent from work. He explained that if there was a good offer he could accept it and if not, he could reject it. It would appear this conversation, or a subsequent one, took place at the Claimant's home. Mr Tiwari downloaded the People App with the Claimant's approval on his telephone and completed the application for Voluntary Redundancy as the Claimant had shown interest.
16. Ultimately nothing came of it, no offer was made. Nothing further was raised in this respect.
17. On 23 December 2022, Mr Tiwari visited the Claimant at home, the Claimant and his daughter-in-law were present. A discussion took place about the future. Mr Tiwari raised the possibility of Ill Health Retirement

and the benefits available at the time, namely 34 weeks' pay lump sum, as nothing appeared to have come of the Voluntary Redundancy process.

18. Following that meeting Mr Tiwari emails the Claimant on 11 January 2023 to summarise the situation, (page 125). From that it would appear the Claimant had provided his consent to consider Ill Health Retirement which involves a Referral to Occupational Health. The Tribunal are satisfied on the balance of probabilities that the email was sent to the Claimant. Further, an Occupational Health Referral was then made, of which at the time there was no objection. The Occupational Health Referral was thereafter made for consideration for Ill Health Retirement. It is clear at the outset of such a meeting with Occupational Health they make it clear to the employee that the purpose of the Occupational Health meeting is to consider Ill Health Retirement. This is explained and if an employee at that point says no, then the Referral does not take place and the meeting is terminated.
19. The Occupational Health meeting does take place with the Claimant and there is a Report dated 24 January 2023. That makes it clear leaving the business through Ill Health Retirement the criteria is not met at this stage, due to possible surgery and rehabilitation and therefore may get him to a point whereby he can resume his contractual duties within the next nine months.
20. Thereafter there is continued contact with the Claimant, his family and Mr Tiwari. There is a further period of hospitalisation in March 2023. At that point further consideration is given for a further Referral to Occupational Health with a view to Ill Health Retirement and arrangements were made for this in April 2023. The Tribunal accept there may have been some confusion over the date of the Referral, certainly there was one on 27 April when the Claimant was telephoned by Occupational Health and although he initially took the call, he was unable to continue as he had another hospital appointment on that date.
21. As a result of the Occupational Health appointment not taking place, Mr Tiwari having taken advice from HR, sent the Claimant a standard letter (page 281) about not attending the Occupational Health appointment. The letter came about as Mr Tiwari believed the Claimant was not co-operating with the Respondent and delaying the process himself, as confirmed by his email of 28 April 2023 (page 135).
22. The letter to the Claimant suggested a meeting to discuss the Occupational Health Referral and to discuss absence from work. The meeting was to be informal and the Claimant was advised he could bring his Trade Union Representative.
23. The meeting does take place on 24 April 2023, at the Claimant's house. In attendance were: Mr Robert Betts, the Late Shift Manager; Mr Ian Longman the Trade Union Representative; Mr Tiwari; and of course the Claimant. The Minutes of that meeting were subsequently agreed by all parties (pages 140 – 141).

24. It clear from the outset the discussion centres around why the Claimant was not consenting to Ill Health Retirement. During this meeting there was further discussion about the Claimant's further surgery on his right knee scheduled for June and it was envisaged there would be an eight to ten weeks rehabilitation / recovery. The Claimant said at that stage he was not ready for Ill Health Retirement.
25. What is clear is a discussion did arise, whom instigated it matters not, that the Respondent's and the CWU Union were in negotiations about the amount of the lump sum payment for Ill Health Retirement which could lead to a reduction in the number of weeks paid, particularly 34 weeks to 16 plus pay in lieu of notice.
26. It would appear on receiving that information, the Claimant has a change of heart and gives his consent to Ill Health Retirement.
27. Following this, Mr Tiwari emails HR on 25 May 2023 to advise the Claimant had now provided his consent for Ill Health Retirement and wants in effect an Occupational Health Referral (page 144). Further information is requested by HR and Mr Tiwari replies on 25 May 2023 (page 142) advising further surgery was due in June with a rehabilitation time of ten to twelve weeks. HR's response on 25 May 2023 confirms that a Referral is not approved and makes reference to "Nigel's Note" which appears to relate to the criteria of holding back Ill Health Retirements on a costs basis. Further email from Mr Tiwari confirmed the Claimant had now exhausted his contractual sick pay.
28. Following the above, the family emails on 16 June 2023 (page 146) questioning the delay for the Referral to Occupational Health and raises concern about the reduction in the lump sum, namely 34 weeks to 16. Mr Tiwari responds the following day confirming business conditions have changed and any Referral is on hold at present.
29. There are various updates following the Claimant's surgery (page 147) on 30 June 2023 and again questioning the delay for Ill Health Retirement. Mr Tiwari responds on 30 June 2023 confirming HR had been updated following the surgery and he was awaiting further instructions from HR.
30. On 1 August 2023, following an agreement with the CWU, lump sum payments have now been reduced from 34 weeks to 16 for Ill Health Retirements.
31. It is also the case that when the employee has reached state pensionable age, they are only entitled to a lump sum payment on Ill Health Retirement as any other benefit payable ceases.
32. On 7 July 2023 (page 149), Mr Tiwari emails the Claimant with an update. There is no response until the Claimant's Grievance on 13 September

2023 prepared by the daughter-in-law and that is responded to in detail by Mr Tiwari on 18 October 2023 (pages 154 – 155).

33. Around 18 October 2023, as there appeared to be no improvement in the Claimant's condition and he had now been absent for over 14 months and it was now nine months since the last Occupational Health Referral, a new Referral is made to consider Ill Health Retirement. This was authorised by HR at this stage. An Occupational Health appointment takes place on 15 November 2023, to which the Claimant attends. At that stage he was assessed as unable to work again and the Claimant could leave the business due to ill health, which was to be processed following two meetings of 7 and 13 December 2023.

### **The Law**

34. Equality Act 2010, Section 13 – direct discrimination (age), provides:

13. Direct Discrimination

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
- (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

35. In relation to comparators, there must be no material difference between the circumstances relating to each case.

36. In relation to justification, the correct approach appears to be if the direct age discrimination seeks to achieve a legitimate aim of a public interest nature such as one related to an employment policy, the labour market or training, further examination should be considered in circumstances of the employment as to whether the means chosen are both appropriate and necessary.

37. Equality Act 2010, Section 19 – indirect discrimination (age), provides:

19. Indirect Discrimination

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if-
  - (a) A applies, or would apply, it to persons with whom B does not share the characteristic,

- (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
  - (c) it puts, or would put, B at that disadvantage, and
  - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
- 38. In relation to justification, to be proportionate the measure has to be both an appropriate means of achieving the relevant legitimate aim and reasonably necessary in order to do so.
- 39. Once the relevant legitimate aim is established it is necessary to establish whether that is in fact the aim being pursued by the measure in question. The aim has to be the actual objective pursued. It is not necessary that the aim was either articulated or even realised at the time, it may be ex post facto rationalisation.
- 40. Furthermore, the requirement to justify a PCP should not be seen as placing an unreasonable burden upon the Respondent.
- 41. Equality Act 2010, Section 15 – discrimination arising from disability, provides:
  - 15. Discrimination Arising from Disability
    - (1) A person (A) discriminates against a disabled person (B) if-
      - (a) A treats B unfavourably because of something arising in consequence of B's disability, and
      - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- 42. Therefore s.15 requires an investigation into two distinct causative issues:
  - 42.1. Did A treat B unfavourably because of an (identified) something; and
  - 42.2. Did that something arise in consequence of B's disability?
- 43. The first issue involves an examination of the putative discriminator's state of mind to determine whether the unfavourable treatment found, occurred by reason of A's attitude to the relevant something.
- 44. The second issue is an objective matter whether there is a causal link between B's disability and the relevant something.

## Conclusions

### Section 15, Equality Act 2010

45. The reason the Claimant was unable to attend the meeting of Occupational Health at short notice was because he had another appointment at the hospital which was in relation to his disability, namely Sepsis. Therefore the Claimant's disability did have a direct consequence and resulted in his inability to attend meetings at short notice. The fact he took the call is neither here nor there, it remains he could not attend because of a hospital appointment which was relevant to his disability.
46. Was there unfavourable treatment in Mr Tiwari criticising the Claimant for failing to attend the appointment on 27 April 2023 and delaying the Respondents in processing the Claimant's Ill Health Retirement?
47. The letter that Mr Tiwari sent following the Claimant's failure to attend the Occupational Health meeting, which the Tribunal accept, came about as a result of a misunderstanding by Mr Tiwari why the Claimant did not attend the Occupational Health appointment. Mr Tiwari believed the meeting had been rearranged previously to suit the Claimant and when he did not attend, Mr Tiwari sought the advice of HR and the standard letter is sent out regarding non-attendance. The letter, when objectively viewed, is not critical, many aspects of the letter are supportive and simply suggests an informal meeting to clarify the situation. This does not reach the hurdle of unfavourable treatment because of something arising from the Claimant's disability.

### Delay in processing the Claimant's Ill Health Retirement

48. The Tribunal reminds itself that it has to deal with the case before them and the case pleaded. The Claimant's admission that Nigel's Note demonstrates that the Claimant was moving onto Ill Health Retirement payment was the factor in the delay. That may be true, however, that is not the case pleaded which the Tribunal has to deal with.
49. If the Tribunal disregards Nigel's Note, there is nothing before the Tribunal to suggest the Claimant was subjected to unfavourable treatment arising from his inability to attend work.
50. Furthermore, given the Claimant's surgery in June 2023 and anticipated recovery to a point after 1 August 2023, even if there was some Policy on Ill Health Retirement, it would have made no difference in the Claimant's case as the Respondent would have to assess the Claimant's position post recovery from surgery. That would have been post 31 July 2023.

### Direct Age Discrimination

51. The issue is whether because of the Claimant's age the Respondent treated the Claimant less favourably than the Respondent treats or would treat others whose circumstances are not materially different to that of the



Claimant's. In particular, pushing the Claimant towards Ill Health Retirement in the period 7 November 2022 (said to be a telephone call with Mr Tiwari) and the meeting with Mr Tiwari, Mr Betts, Mr Longman the Trade Union Representative on 24 May 2023.

52. The plain facts are, he was not pushed to Ill Health Retirement because of his age. The Claimant had consented to an Occupational Health Referral to be considered for Ill Health Retirement. That is clear from the email that Mr Tiwari sends to the Claimant on 11 January 2023 (page 125). The Tribunal are satisfied on the balance of probabilities that the email was sent and if the Claimant had not consented to such a Referral, one would have expected either the Claimant or his daughter-in-law who had been helping her father-in-law to have raised an objection.
53. Furthermore, it is quite clear that Occupational Health meetings will at the outset of the meeting check whether an employee has agreed to a Referral specifically to consider Ill Health Retirement. If not, the Occupational Health Assessment simply ceases at that stage and the appointment is terminated.
54. Furthermore, the Occupational Health Report dated January 2023 makes it clear the criteria for Ill Health Retirement was not met because it was entirely possible that the Claimant would have surgery and recover to a point where he could resume his duties within a period of nine months, i.e. to be reconsidered in nine months during October / November 2023.
55. There is therefore no evidence before the Tribunal that between January and May the Claimant was being pushed towards Ill Health Retirement. By April 2023 the Claimant had not recovered, therefore at that stage consideration for a second Occupational Health Referral appointment was made. There was then a misunderstanding and miscommunication over the date which led to the Claimant, although taking the call initially, could not continue as he had another hospital appointment that day. It was felt at that stage that the Claimant might be avoiding the issue.
56. There then takes place the meeting on 24 May 2023, with the Claimant's Trade Union Representative in attendance and at that point the Claimant is still not willing to consider Ill Health Retirement because further surgery was to take place in June 2023 with an eight to ten week rehabilitation period and there was a possibility the Claimant could recover. They clearly wanted to delay.
57. However, it was at that meeting when the Claimant was informed that the CWU negotiating with Royal Mail over the possible reduction in lump sum awards from 34 weeks to 16 weeks, the Claimant had a change of heart and said he would consent to Referral to Occupational Health with a view to Ill Health Retirement.
58. In those circumstances there is absolutely no prima facie evidence that the Claimant, because of his age, was treated less favourably by being pushed into Ill Health Retirement.

59. Clearly a hypothetical comparator in circumstances not materially different, i.e. a younger employee on long term absence with a disabling condition would have been treated exactly the same.

Voluntary Redundancy

60. The other aspect of this claim is the pushing of the Claimant towards Voluntary Redundancy during a telephone call on 7 November 2022 with Mr Tiwari.
61. The evidence before the Tribunal is in the email of 11 January 2023 that summarises a scoping exercise that Royal Mail were undertaking at the time. That was open to all employees due to a reduction generally in the volume of mail.
62. Clearly given the Claimant was off work, Mr Tiwari did not want the Claimant to miss the possibility and so raised it with him. The Claimant was interested and Mr Tiwari downloaded the app on his telephone with his consent, completed the form and submitted it on his behalf to see whether there was a good offer or a bad offer, for the Claimant to consider the way forward. Ultimately, nothing came of it, that was it, no more and no less. Clearly that is not less favourable treatment because of the Claimant's age.
63. There is no prima facie evidence of discrimination. Furthermore, a younger comparator in the same circumstances would have been treated exactly the same.

Indirect Discrimination

64. The first PCP advanced, being the alteration and implementation of the Respondent's Ill Health Retirement Policy, the disadvantage being that the Claimant's lump sum payment was reduced from 34 weeks to 16 weeks.
65. The second PCP advanced, is whether the Respondent applied the PCP of delaying the processing of the Claimant's Ill Health Retirement whilst negotiations were ongoing with the Trade Union.
66. Here the Tribunal take the view that had Nigel's Note been disclosed prior to the Full Merits Hearing and indeed the Claimant's Representative could have applied for specific disclosure prior to the Full Merits Hearing for this document, then the Respondents could have responded to the Claimant's argument now being advanced during submissions, though not the pleaded case.
67. The Tribunal repeat, we have to determine the pleaded case.
68. Again, the Claimant has not established a group disadvantage, therefore there is no prima facie case and the burden does not shift to the Respondents to show that the PCP was objectively justified. If the Claimant could establish a delay, the reason for that was the Respondents

did not consider it appropriate to authorise an Occupational Health Referral pending the results of surgery on the Claimant's right knee and the rehabilitation which could have resulted in the Claimant being assessed medically fit to return to work. That would have occurred post 1 August 2023.

69. That clearly would be a proportionate means of achieving a legitimate aim. I.e. implementing dismissal as a last resort in circumstances where there was a possibility that the Claimant may recover following surgery and a further medical assessment.

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Employment Judge Postle

Date: 18/12/2024

Sent to the parties on: 23/12/2024

N Gotecha  
For the Tribunal Office.

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