EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Sinclair	**v**	**Metroline Travel Ltd**

Heard at: Watford (by CVP) **On**: 20 & 21 October 2022

Before: Employment Judge Manley
Ms P Barrett
Mr P Hough

Appearances

For the Claimant: In person
For the Respondent: Ms Nicolaou, Solicitor

RESERVED JUDGMENT

1. The claimant was a person with a disability at the material time.

2. The claimant was not less favourably treated because of that disability when he was dismissed.

3. The dismissal was not unfair.

4. The claimant has acted unreasonably in pursuing this claim and the £1,000 paid as a deposit will be paid to the respondent.

REASONS

Introduction and Issues

1. The claimant has brought several claims in the Employment Tribunal. At a preliminary hearing on 24 February 2022 it was recorded that the claims lodged under case no. 2202082/21 were dismissed on withdrawal. It was also recorded that any claims for notice pay and arrears of pay were also dismissed upon withdrawal. The remaining matters therefore were those under the case numbers set out above and the issues were set out in the

summary sent to the parties after that preliminary hearing judgment. They are as follows:-

"The issues between the parties which potentially fall to be determined by the Tribunal are as follows (albeit the issues going forward will depend on whether the claimant pays any of the deposits ordered):

Time limits / limitation issues

1.1 Were all of the claimant's complaints presented within the time limits set out in the Equality Act 2010 ("EQA")? Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "just and equitable" basis; when the treatment complained about occurred; etc.

Unfair dismissal

1.2 What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's capability.

1.3 If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

Remedy for unfair dismissal

If the claimant was unfairly dismissed and the remedy is compensation:

1.4 If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would [still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway]? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; [W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604];

1.4.1 *would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?*

1.4.2 *did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the*

amount of any compensatory award, pursuant to ERA section 123(6)?

Disability

1.5 Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the following condition(s): asthma and/or anxiety/depression?

EQA, section 13: direct discrimination because of disability

1.6 Has the respondent subjected the claimant to the following treatment:

1.6.1 *dismissing him.*

1.7 Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

1.8 If so, was this because of the claimant's disability and/or because of the protected characteristic of disability more generally?

Remedy

1.9 If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded. Specific remedy issues that may arise and that have not already been mentioned include:

1.9.1 *if it is possible that the claimant would still have been dismissed at some relevant stage even if there had been no discrimination, what reduction, if any, should be made to any award as a result?*

1.9.2 *did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?*

1.9.3 *did the claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any award and if so, by what percentage (again up to a maximum of 25%), pursuant to section 207A?"*

2. The claimant did pay the deposits which were ordered. It was agreed at the outset that, as the issues all related to the dismissal, there were no time limitation questions. It is also perhaps worth mentioning, at this stage, that the claimant appeared to have some difficulty recognising that this hearing was dealing with the issue of his dismissal but he was reminded of it a number of times during the course of the hearing.

The hearing

3. Apart from a few minor technical issues at the commencement of the hearing, it proceeded relatively smoothly although there was insufficient time for the Tribunal to deliberate and give its judgment during the course of the hearing. There were some initial difficulties about the bundle. The Tribunal had been sent a copy of the respondent's bundle but that had been updated so we needed to get the most up to date version which extended to 273 pages. The claimant then pointed out that he had also sent some bundles of documents to the Tribunal and it was rather unclear how those might be different from those sent by the respondent. The claimant was anxious that we should have sight of those documents and we were therefore sent two bundles of documents by the claimant. These appear to be identical and extended to 285 pages, although a large number of them were not numbered. It appears that the vast majority of the documents were already before us in the respondent's bundle but the claimant did use his own bundle from time to time and particularly when he was asking questions of the respondent's witnesses.

4. Having sorted all those matters out and pre-read the witness statements and the relevant documents, we then commenced hearing from the claimant after lunch on the first day.

5. He was then given time to prepare his questions for the respondent's witnesses who were Mr Rogers, the dismissing officer, and Mr Wright, the appeal officer. Having heard from them, we then had short written submissions and oral additions by the respondent's representative and then the claimant made his submissions orally.

The Facts

6. The Tribunal have found the following relevant facts. It is worth pointing out that the claimant made reference to a number of matters which had occurred in the year before the dismissal took effect which he clearly believed were relevant to what then occurred. The Tribunal did take note of those matters which arose out of the significant difficulties caused by the Covid pandemic. We concentrated our attentions, as we reminded the claimant we would, on the events leading up to his dismissal in June 2021. These then are the facts that the Tribunal found which are relevant to the issues which we need to determine.

7. The claimant was a bus driver and had worked for the respondent and two previous employers between 16 July 2007 and the date of his dismissal.

The respondent is one of the largest London bus companies with about 4,000 staff members. The claimant was based at the Kings Cross garage where there are almost 150 employees.

8. The respondent deals with absence under a policy entitled "managing sickness" (252-255 of the bundle). The respondent has faced challenges because of significant driver shortage for the past few years. The policy is that a driver who is absent will be asked to attend the respondent's occupational health provider and there are attempts to get drivers fit to return to work as soon as possible. The policy also envisages the possibility of the termination of employment and one paragraph reads:

> *"Unless the manager has reasonable grounds to believe that there will be an improvement in the foreseeable future, the company's decision to dismiss the employer by reason of capability due to ill health could be taken. This may take immediate effect or be delayed pending a further review, which will be at the manager's discretion."*

9. The respondent also has a re-employment policy for people who have been dismissed but then do recover. These policies have been agreed with the recognised trade unions.

10. There was already a national shortage of bus drivers when the additional burden of Covid and the associated restrictions and lockdowns took effect. There were extra problems with drivers contracting Covid or having to shield and some of the overseas drivers had left to return to their families. The respondent still had to maintain its contractual obligations to TfL after the initial lockdown when the service was reduced.

11. Mr Rogers said that the "rule of thumb" is that, after around 12 weeks of absence, the respondent expected the driver to have a foreseeable date for their return to work. The respondent's sick pay provisions provide for up to 13 weeks full pay.

12. The claimant did not have a clean disciplinary record with the respondent and, particularly in 2020, the claimant had some time away on sick leave. There were some difficulties between the claimant and the respondent in 2020 when he raised some grievances. These seem to include matters relating to himself but also related to concerns he had about safety during Covid. He was then furloughed between April and August 2020 when he returned along with other drivers. He then raised a grievance because he was concerned about the safety measures undertaken for the ferry car in which he was asked to travel. His managers tried to reassure the claimant but he remained concerned.

13. Later in August he was issued with a final written warning which the Tribunal does not have details of. This led to the claimant being on sick leave again and raising other concerns with the respondent. Some of these related to requests for him to fill out a return-to-work form and not having received payslips. When the claimant gave evidence, he made it clear that he had

very serious concerns about his and others' safety during the pandemic. Very sadly the claimant's partner lost her life to Covid on 12 December 2020.

14. The claimant's case was that that was the date when he began to be depressed. When asked by the Tribunal during these proceedings to explain the nature of his alleged disability that was the date he gave, although he also said that he believed it began earlier with concerns about work. His impact statement referred to him walking the streets and crying and that he also had suicidal thoughts. He said that he rang the mental health charity Mind in 2021 because of his suicidal thoughts and they advised him to speak to his doctor although he found that his doctor was on holiday.

15. What had happened at work was that it was believed that the claimant had been involved in an incident on his bus on 7 January 2021. Although the claimant seems to deny that he was involved in this incident, it was the contact by the Metropolitan Police and looking at the CCTV which led the respondent to believe that he had been the driver. He was asked to complete a vehicle incident report on 11 January 2021. The claimant disagreed with this process and said that it was a fraudulent document. He was rather abusive to his managers who did report his behaviour. The claimant complained to the respondent's managing director saying he had been given a "*doctored police report*" and accusing the company of bringing "*fake charges against me*".

16. He was then on sick leave with asthma returning on 12 or 13 February. He then put in a further grievance about not being paid correctly. He then went on sick leave on 19 February with work related stress. This was the time the claimant tried to speak to his doctor but in conversations with his manager, Mr Evlogimenos, he also said that he was going to speak to ACAS. He made reference to his mental health problems and Mr Evlogimenos urged the claimant to see occupational health and gave other information about support the claimant could seek. It took some time for the claimant to agree to see occupational health and Mr Evlogimenos's line manager, Ms Olawo-Jerome, became involved.

17. A number of emails between the claimant and the respondent indicate that the claimant had some concerns and the respondent was trying to address them.

18. There was then an occupational health report after a telephone appointment which was sent to the respondent on 23 March 2021. This set out some background and the history of the claimant's sickness absence which in 2022 was seventy-four days from September of 2020. In that report the practitioner refers to the claimant's concerns about social distancing and then said that the claimant was;-

> *"experiencing symptoms of a mental health condition. He reports he is tearful, wakes frequently in the night and has no motivation for activities such as exercise. He is managing with other activities such as*

housework and shopping. He has spoken with his General Practitioner about his symptoms; he has not had counselling to date, he is not on medication for his mental health."

19. The practitioner then refers to some other physical conditions and then assessed the claimant as being in a high-risk category with respect to Covid. The practitioner gives the opinion that the claimant is unfit for work and states "*the main barrier for him returning are the ongoing managerial issues".* That report does not make reference to the claimant's partner having died or what was said to be a diagnosis of depression at some point.

20. Communication continued between the claimant and the respondent but, in essence, the claimant refused to co-operate. The claimant continued to refer to the grievances that he had and also said that he intended to bring employment tribunal proceedings. In communications with Mr Evlogimenos on 11 April, he said he would return to work once he had lodged his case with the Tribunal to which Mr Evlogimenos asked him to attend a further OH assessment.

21. The claimant having communicated with Ms Olawo-Jerome, he also said that he would be submitting his case to the Tribunal the following day. An email from Ms Olawo-Jerome made it clear that he could not stay off work indefinitely. He replied that he was not attending a further OH assessment and he would "*let the courts decide his fate*" (6 May 2021).

22. As there was no potential return to work, Mr Evlogimenos wrote to the claimant inviting him to a capability hearing on 24 May. This was to be conducted remotely. The claimant replied that the respondent should stop bothering him. Mr Evlogimenos said that they would reschedule the hearing to 27 May to allow him to attend and sent another invitation letter. At this point the claimant wrote to say that he was taking a "*sabbatical*" in the Lake District and would not return until 20 June.

23. Mr Evlogimenos wrote back to say that he was prepared to allow the claimant to take annual leave as there was no provision for sabbatical leave and would reschedule the capability hearing for a date after 20 June. The claimant wrote a little later to Ms Olawo-Jerome with a sick note and she reminded him that he should communicate with his line manager, Mr Evlogimenos. Page 155 of the bundle is the claimant's response which made it clear that he had nothing to say until his Tribunal case was heard.

24. He was therefore invited to attend a further capability hearing on 23 June and a decision was taken for Mr Rogers, who was a manager at the Holloway garage, to deal with this matter as there had been considerable involvement by Mr Evlogimenos and Ms Olawo-Jerome. The letter inviting the claimant appears at pages 160 and 161 of the bundle. Part of it reads:-

"I am writing further to the letters sent by your Line Manager Mr Joannls Evlogimenos dated 17th May 2021, 24th May 2021 and 27th May 2021 inviting you to attend a medical capability hearing on Wednesday 23" June 2021 to discuss your capability in light of your health.

You have been off work since 20th February 2021. The last Occupational Health (0H) report from Medigold indicated you were off work due to work related stress and perceived management issues and your most recent medical certificate states your condition as mixed anxiety and depressive disorder and expires on 26th June 2021.

You have indicated you intend to remain off work until your Tribunal case gets to a hearing and declined to participate in any further appointments with OH or hearings with managers. It would not be feasible for you to continue in this way because getting the case to a final hearing would easily take12-18 months and you have already been off for several months. We cannot leave you in a situation where you are off sick and refuse to cooperate with reasonable management instructions (including attending sickness review and disciplinary hearings) for up to two years. I propose in the circumstances that you attend a hearing with a member of the management team from another garage to discuss whether it is possible for you to return to work and if so where and on what basis, and what arrangements might need to be made to facilitate it……

This capability hearing is considered to be part of Metroline's formal procedure and therefore could result in action being taken against you. If you are unable to undertake the job for which you are employed and if there is no other suitable work that you can do, your employment with Metroline may be terminated with notice, on the grounds of capability due to ill health".

25. Mr Rogers sent out a request for light duties to all garages and the Tribunal has seen copies of the responses which indicated there were no such light duties available. The claimant did not reply to the invitation to the hearing. Mr Rogers decided to try and proceed with the hearing. He rang the claimant on his mobile phone, sent a message via the internal messaging system and an email but received no response. Mr Rogers therefore proceeded. He did not involve HR as it is a small department and the respondent's case is that managers are well trained in dealing with these sorts of matters.

26. Mr Rogers set out his thought processes in considerable detail in the notes of the hearing and then put that all in a letter. The claimant was dismissed with 12 weeks' notice to be paid in lieu. Part of the letter reads:-

"Having reviewed all the associated documentation In the pack coupled with the fact that your current sickness certificate expires on the 26m June 2021 but assumed you would produce one if requested and if you made contact back with the company but your lack of reasonable responses expected of an employee, not just today but throughout your periods of time off over the last 12 months (sickness), It is clear that you will not be returning to you substantive this as a bus driver in the forseeable future given your clear negative feelings towards the company and tribunal date in 2022. I have taken the decision to dismiss you with

notice by reason of capability due to ill health given the fact that you currently incapable of fulfilling your contractual role as a bus driver"

27. The claimant decided to appeal against his dismissal. It is unclear when he got the letter telling him that he was dismissed but he seems to have appealed relatively quickly. Mr Wright was appointed to hear that appeal with another manager and he therefore chaired the meeting with another manager from a different garage. Again, a letter of invitation was sent to the claimant but he did not attend. The claimant had notified his intention to appeal on 28 June. Relevant documents were sent to him. A number of times the claimant suggested he wanted the appeal to be cancelled although it was not clear what he meant by that. He suggested to us that he wanted the matter to be postponed until after 9 August because at that date he had heard from an Employment Tribunal (not in this case) that there was to be a preliminary hearing which he wished to attend. There were a number of communications but in essence the appeal went ahead without the claimant.

28. Mr Wright and his colleague went through the documentation including all the email exchanges, the occupational health report and details of the claimant's personnel record. They took the view that the decision to dismiss was reasonable in the circumstances.

Law and submissions

29. The claimant brings claims under the Equality Act 2010 (EQA). The first question for the Tribunal is whether he was disabled at the material time under the definition contained within s.6 which reads as follows;

"(1) 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"

30. Paragraph 2 of Schedule 1 of EQA states that an impairment is long term if it has lasted for at least 12 months; is likely to last for at least 12 months or it is likely to last for the rest of the person's life. The Tribunal should also take into account any relevant guidance in Guidance to be taken into account in determining questions relating to the definition of disability (April 2011).

31. If the claimant is disabled, he brings claims under s.13 for direct discrimination which reads:-

"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)- ".

33. The question of whether the claimant was disabled requires a Tribunal to look at any medical evidence and any evidence the claimant produces with respect to his health conditions. The claimant confirmed he does not rely upon asthma as the disability referred to in this case. He says that his condition of depression amounted to a disability at the relevant time.

34. The EQA makes provision for when the burden of proving discrimination shifts. The relevant parts of s.136 read:-

"136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) -

(5) -

(6) A reference to the court includes a reference to—

a) an employment tribunal;"

36. In essence, as with all claims, the tribunal must make findings of fact and then apply the correct tests. For the direct discrimination complaint, namely less favourable treatment contrary to section 13 EQA, the Tribunal is mindful that it is unusual for there to be clear, overt evidence of direct discrimination and that it should consider matters in accordance with section 136 EQA. The Tribunal accepts the guidance of the Court of Appeal in Igen V Wong [2005] IRLR 258 which confirms that given by the EAT in Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332, concerning when and how the burden of proof may shift to the respondent, as modified and clarified in other recent cases. When making findings of fact, we may determine whether those show less favourable treatment and connection to disability. We bear in mind the ratio of the House of Lords in Zafar v Glasgow City Council [1998] IRLR 36 to the effect that the test we should use to establish whether there has been less favourable treatment is not whether there was treatment which was less favourable than that which would have been accorded by a hypothetical reasonable employer in the

same circumstances. The test is: are we satisfied, on the balance of probabilities and with the burden of proof resting on the claimant, that this respondent treated this claimant less favourably than they treated or would have treated an employee who did not have the claimant's disability.

37. The claimant's claim for unfair dismissal falls to be determined under the Employment Rights Act 1996 (ERA). Section 98 (1) and (2) contain the potentially fair reasons for dismissal including "capability" which means "*capability assessed by reference to skill, aptitude, health or other physical or mental quality*". The burden of proof at this stage rests on the respondent.

38. As to the fairness or otherwise of the dismissal, Section 98 (4) states;-

> *Where the employer has fulfilled the requirements of subsection (1), 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 it as a sufficient reason for dismissing the employee, and*
>
> *b) shall be determined in accordance with equity and the substantial merits of the case"*

39. At this stage the burden of proof is neutral. We have to consider whether the procedure used by the respondent was a fair one, what investigation was undertaken, including the medical advice obtained, what meetings were held with the claimant and what opportunity he had to put forward his case. We look at whether there was a right of appeal and how that appeal was undertaken.

40 If there is a fair procedure, we then go on to consider whether, in all the circumstances, the dismissal for the reason found, fell within or outside the band of reasonable responses. This was set out in Iceland Frozen Foods v Jones [1982] IRLR 439 and affirmed in Foley v Post Office [2000] ICR 1283. We must take into account the facts at the time of dismissal and we must not substitute our view for that of the respondent. In broad terms, we must assess whether the dismissal of this employee for capability was outside the range of reasonable responses.

41 Ms Nicolaou produced outline submissions in writing which were helpful in that they were a concise summary of the law and the facts in this case. She added to those orally with respect to issues which had been raised over the hearing. Some of those related to whether the claimant had or had not received various emails and notifications. She reminded the Tribunal to consider the medical evidence when determining disability.

42 The claimant also made submissions. He reminded us that he had had significant difficulties during the pandemic and had found the diagnosis of

depression particularly difficult. He had concerns about safety measures the respondent had put in place and told us about contact with various medical practitioners. He told us that he found it difficult to deal with matters and that he could not remember some of the emails he sent or whether he got some of those which were sent to him by the respondent.

Conclusions

43 We refer here to the list of issues. First, we do not need to consider any questions about whether the claims as appearing in the list of issues were out of time. They are clearly in time.

44 We then deal with the question which appears at issue 1.5 which is whether the claimant was a disabled person under EQA because of asthma and/or anxiety/depression. The claimant does not rely on asthma as amounting to a disability. We therefore have to assess whether, at the material time, the claimant's depression was such as to constitute a disability. For those purposes we have considered whether the condition was long term and whether it had a substantial adverse effect on his normal day to day activities. Although the claimant's condition did not seem to be at the most severe end of the spectrum, the Tribunal have taken the view that it was long term, not least because it extended from late in 2020/early 2021 until the end of 2021 and would seem to be, to some extent, continuing. For our purposes, therefore, the condition had either lasted 12 months or was likely to last longer than 12 months.

45 We then turn our attention to whether the depression had a substantial adverse effect on his normal day to day activities. We have considered what the claimant wrote to the Tribunal as well as what was reported to his doctors. We appreciate that the claimant did not seek medical advice early and there is therefore little by way of medical support for his statement about his mental health at this time. We do take into consideration that the claimant has mentioned walking the streets and crying and that he was suicidal. These seem to the Tribunal to be sufficient for us to decide that that the symptoms of his depression amounted to a substantial adverse effect on his normal day to day activities and we have taken the view that, on balance, the claimant was disabled at the material time.

46 We therefore turn to the questions under the direct discrimination heading appearing under the list of issues at 1.6, 1.7 and 1.8. The complaint is that the dismissal was less favourable treatment than others in not materially different circumstances and that it was because of his protected characteristic. The Tribunal have formed the firm view that the claimant cannot show that there was such less favourable treatment. Of course, the claimant can show the basic facts, that is that he was dismissed. He cannot show that that was treatment which was any different from anybody else with or without a disability who had been away from work for that length of time who was refusing to engage with the respondent or communicate any possibility of a return to work.

47 It is not entirely clear whether the respondent knew that the claimant had depression at the time the decision to dismiss was taken. They were unaware that the claimant's partner had died late in the previous year but they certainly knew that he had some mental health problems. The claimant showing that he had been dismissed and he had a disability is not sufficient to shift the burden of proof to the respondent without more evidence that it was in some way related to his disability. Even if the claimant had shifted the burden of proof to the respondent, the respondent has shown the Tribunal that the reason for his dismissal was because of his lengthy absence, his refusal to engage and the fact that he had told them that he would not return to work until the determination of a Tribunal case. The dismissal was therefore not because of the claimant's disability and that claim cannot succeed.

48 We then turn to the unfair dismissal issues which are contained in the list of issues under 1.2 and 1.3. The respondent bears the initial burden of proving that there was a potentially fair reason for dismissal. The Tribunal is satisfied that the respondent has shown that the claimant was dismissed because he was unable or unwilling to attend work and it was therefore for a reason relating to his capability.

49 We therefore turn to the question whether that dismissal was fair or unfair in accordance with s.98(4) ERA. We first looked at the procedure used by the respondent in dismissing the claimant. The Tribunal finds that the respondent took a number of steps to try to encourage the claimant to engage with them and to attend a meeting to discuss a potential return to work. Unfortunately, the claimant felt unable to engage with the respondent even though they had postponed the capability hearing to accommodate his absence from the London area. The procedure the respondent followed was well within their policies which were agreed with the trade unions. The respondent had sought medical advice and had considered that and had tried to get up to date information from the claimant and further medical advice. The Tribunal finds that the procedure used was, in all the circumstances, a fair one. The respondent had tried to contact the claimant before the hearing and had looked to see whether there were any light duties available for him.

50 Furthermore, the appeal process was also one which, on balance, was a fair one. Although the claimant had asked for a postponement, there was really no valid reason for one to be given and given that all the hearings could be held remotely, there was very little reason for the claimant not to attend. The problem was that the claimant was unable to return and was unable to give any indication when he might return, save for referring to an Employment Tribunal claim which may well have taken some time to be determined.

51 Finally, we assess whether dismissal fell outside the range of reasonable responses. We cannot find that was the case. The claimant could not say when he would return, he did not attend meetings or agree to a further occupational health appointment. The dismissal was not unfair.

The deposits paid

52 Finally, we need to consider another issue which does not appear in the list of issues. This is because the claimant was ordered to pay deposits of £1,000 as a condition of this case continuing. £500 was in relation to the unfair dismissal claim and £500 in relation to the disability discrimination claim. In the circumstances, and in accordance with Rule 39(5) Employment Tribunal Rules of Procedure 2013, we have to consider whether our reasons for dismissing the claims are substantially the same as those in the Deposit Order to assess whether the claimant has acted unreasonably.

53 To make for ease of reading, the orders for deposits made appear below with reasons:-

"Conclusions: Deposit orders in this case

£500 deposit order for the unfair dismissal claim

I make no findings of fact in this decision and merely note initial observations on the potential facts in this case (including any apparently agreed facts or admitted facts) in line with the established legal guidance on issuing deposits as described above.

The respondent set out, at the hearing, and in the response, in some detail, what appeared to be a cogent basis, at least at first sight. that there was a genuine belief that the claimant was fully incapable through illness of performing his role or indeed any other role and there was no sign of this situation changing for a lengthy period.

The Claimant had been off sick since 20 February 2021, a total of 124 days, in response to being investigated for a potential disciplinary matter. This absence length appeared to be not disputed.

The Claimant had attended an occupational health on 22 March 2021 and the ensuing report suggested that he would be unfit to return to work until his perceived work related issues had been resolved. There also appeared to be potentially cogent evidence that the respondent had made numerous attempts to communicate with him and try to resolve these issues, but the Claimant had, it seems, failed to act in a fully co-operative manner or engage fully with finding a solution. It appeared that he was placing all his focus in the tribunal claim which was not likely to resolve for at least 12 months.

There also appears to be evidence that on 8 March 2021 and 27 May 2021 the Claimant indicated that he would effectively no longer engage with the Respondent, nor return to work, until his case had been heard by the Employment Tribunal. Since that date the Claimant It appears that had made no further contact with the Respondent and had moved away to the lake district.

The Claimant also admitted at the hearing that he was not fit to resume his role and return to work and it appears to be accepted by the claimant that there were no light duties he could perform.

There is also potential evidence suggesting that the claimant had significantly reduced or ended meaningful communication with the respondent. There appeared to be ample evidence suggesting there was no likelihood of any return to work for the foreseeable future.

At first sight, there appeared to be reasonable grounds for a belief that a decision to dismiss for extended absence was within the band of reasonable responses and that the respondent could not be expected to keep the job open any longer and for such a long additional period.

Further, that the employer had tried to get as much information as possible from the employee and that a reasonable process of investigation had been followed.

For all of these reasons, it appears clear to me that there is little reasonable prospect that the claimant will establish that his dismissal was unfair.

The issue of a deposit order in regard to this claim would therefore be in the interests of justice.

£400 (this is an error and should read £500) *deposit for the direct discrimination claim*.

The essential difficulty for the claimant is that there appears, at first sight, to be potentially strong evidence justifying the treatment of the claimant and his dismissal. In such circumstances the employer may show that anyone who acted in this way, disabled or not, would have been treated in the same way or similarly.

For similar reasons to those set out above. the capability case against the claimant appears to be potentially strong.

In such circumstances, there is a real risk the claimant will not shift the burden of proof to the respondent and/or the respondent will show, at stage one, that the real reason for treatment was long term absence and incapability of the claimant.

The claimant must show more than a difference in protected characteristic and a difference in treatment to establish a prima facie case of discrimination. The claimant has not, as yet, set out any cogent basis I can see to suggest that the reason for the treatment was his disability. The primary facts relied upon. so far, appear insufficient to shift the burden of proof to the respondent.

The claimant has also not explained how and when an alleged comparator was treated differently or how the alleged comparators are in circumstances not materially different to him (ie a comparator who was in the same position of extended absence with no prospect of that ending soon).

It appears that there is little reasonable prospect that the claimant will establish that any less favourable treatment with regard to dismissal was on the grounds of disability.

For these reasons, this claim also has little reasonable prospect of success and the issue of a deposit order in this regard would also be in the interests of justice".

54 We have compared our findings with those outlined here. It appears to us that the reasons we have given are substantially the same as those which gave rise to the deposit orders. This means that the deposits, totalling £1000 should be paid to the respondent under Rule 39(5)(b). The claimant's claims must fail and are dismissed.

_____
Employment Judge Manley

Date: 16 November 2022

Sent to the parties on: 24 November 22

For the Tribunal Office