EMPLOYMENT TRIBUNALS

Claimant: Mr K Thompson

Respondent: Board 24 Ltd

Heard at: Manchester **On:** 10 March 2022
17 March 2022
(in Chambers)

Before: Employment Judge Gianferrari

REPRESENTATION:

Claimant: In person
Respondent: Eric Marshall, Operations Manager

JUDGMENT

1. The claimant's claim for unfair dismissal under Section 98 Employment Rights Act 1996 fails. The claimant was fairly dismissed by the respondent.

REASONS

Introduction

1. By the claim form presented on 13 October 2021 as clarified and agreed at the subsequent discussion before the evidence, the claimant complained of unfair dismissal from his role as fork lift truck driver/ production operative at the respondent's corrugated packaging business. The claimant argued that he had suffered work related illness, been unfairly dismissed and sought an award of compensation.

2. In the response form of 29 November 2021 the respondent resisted the claim arguing that there had been a fair dismissal on the grounds of capability.

Issues to be determined

3. In the absence of a clear indication from the claimant in the claim form as to the extent of his actual claim, a discussion took place at the start of the hearing and

it was confirmed by the claimant that he was bringing a claim for unfair dismissal on the basis of capability. Whilst there were conduct issues that the claimant needed to ventilate, it was explained that they could only be considered in the context of his sickness and subsequent dismissal for it. The remaining relevant issues were:

(1) Did the respondent genuinely believe the claimant was no longer capable of performing his duties?

(2) Did the respondent adequately consult the claimant?

(3) Did the respondent carry out a reasonable investigation, including finding out about the up-to-date medical position?

(4) Could the respondent reasonably be expected to wait longer before dismissing the claimant?

(5) Was dismissal within the range of reasonable responses?

Agreed Facts

4. The claimant attended a disciplinary hearing on 3 July 2020 in relation to his starting work half an hour late which caused delays in the business and consequently led to a written warning being given on 8 July 2020.

5. On 6 July 2020 the claimant became sick and did not return to work again prior to his dismissal on 22 June 2021.

6. On 26 August 2020 the claimant sent an email to the respondent's HR consultant, Denise Hendry, of Majenta HR, alleging incidents of unfair bullying and harassing treatment, which were then raised as a grievance and investigated by an Operations Manager from the company's Colville site and not the Preston site where the claimant worked. The grievance was summarised into eight key areas dating back 17 years and the company undertook 13 sets of interviews with the individuals complained of and a random selection of employees to assess whether there was a culture of behaviour as complained about by the claimant.

7. No evidence was found to support the claims made by the claimant.

8. The claimant appealed this decision and a further investigation was then undertaken by the Managing Director, who upheld the initial grievance outcome.

9. At the same time as this investigation commenced, the respondent also sought to engage with the claimant to support his absence from work. Initially there were absence meetings with the claimant's line manager, Lee Bullen, supported by Denise Hendry, until Mr Bullen himself left the business in April 2021.

10. Operations Manager Eric Marshall then continued to correspond with the claimant in respect of requesting information and arranging absence meetings. This included requesting from the claimant information regarding his sickness, what medication he was prescribed and alternatively a request to correspond directly with the claimant's GP; in addition the claimant was invited to engage with the Employee Assistance Programme. The claimant did not provide the information requested,

which the company sought, in order to assess his fitness and capability to return to work and when that might occur.

11. On 11 June 2021 a capability meeting was held with the claimant who indicated he was not fit to return to work, nor did he know when he might be able to, and he did not provide the company with permission to obtain a report from his doctor and declined to attend an Occupational Health appointment.

12. The claimant was paid 12 weeks' notice pay and accrued but untaken holiday pay, having previously been paid company sick pay for 12 weeks and 28 weeks of statutory sick pay.

The Hearing

13. The hearing took place on 10 March 2022. The Tribunal heard evidence from Mr Thompson, the claimant, and on behalf of the respondent from Mr Marshall and Ms Hendry.

14. An agreed bundle of documents was presented at the commencement of the hearing and referred to in evidence.

15. The claimant gave oral evidence with reference to his claim form and correspondence between the parties.

16. The respondent's witnesses, Mr Marshall and Ms Hendry, gave oral evidence with reference to the response form and correspondence between the parties.

Submissions

Claimant's Submissions

17. The claimant submitted that he did not choose for his health to deteriorate whilst employed by the respondent, for whom he had worked for over 25 years.

18. He had previously had very little time off work, he had a good record and was a responsible employee.

19. He felt that when he became ill the respondent didn't listen to him and he was suffering with mental health issues.

20. He felt that the company put his concerns to one side and recorded one instance with a particular line manager but nothing came of it.

21. He felt that he is starting to feel better and is looking for work.

22. He did enjoy working at Board24 otherwise he wouldn't have stayed that long.

23. He said that he could not make up such allegations and that he has told the truth.

Respondent's Submissions

24. The respondent submitted that the claimant had previously had an excellent attendance and disciplinary record but on the 6 July 2020 he took sick leave and never returned. The respondent's view was that the initial disciplinary issue prompted the claimant's absence.

25. Following a meeting on 26 August 2020 with the claimant Denise Hendry and Lee Bullen an email was received by Denise Hendry from the claimant the contents of which were taken very seriously and the Managing Director immediately informed.

26. The company took swift action and investigated. No complaints against Lee Bullen had been received previously at the Preston site and the complaints were not upheld. Therefore, Lee Bullen continued as the claimant's line manager and was so at the time of the absence process.

27. The tone of the letters from the respondent to the claimant reflect the tone of the meetings. At no time did the claimant complain of Lee Bullen's involvement at the meetings.

28. The respondent made the claimant very aware that medical information was needed and there could be consequences if not as the information was needed to ensure the claimant's safe return to work. Every time this was asked for the claimant shut it down.

29. The respondent did not pressurise the claimant but requested when he was able to provide it as it was important that he could return safely.

30. The respondent had informed the claimant that Lee Bullen had left the business during a Teams meeting when Denise Hendry was present.

31. The respondent had conducted a full and fair process. Overtime payments were paid to other staff to cover the claimant's role which had been left open for nearly a year.

32. The information being asked of the claimant was reasonable and would've helped both him and the company to put a plan in place for his return.

33. In later meetings the claimant said that he did not want to return to work and that he couldn't work was supported by his doctors.

34. The respondent had exhausted all options and had to dismiss.

Findings of Fact

35. Having considered the evidence, I made the following findings of fact. Where a conflict of evidence arose, I resolved the same on the balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts.

36. The findings of fact relevant to those issues which have been determined are as follows.

(1) The claimant was employed by the respondent for 25 years, most recently as a fork lift truck driver.

(2) The claimant was a valued employee.

(3) Prior to 6 July 2020 the claimant had a very good sickness record.

(4) The respondent had engaged in previous grievance processes and the investigations had been exhaustive and exhausted.

(5) The claimant did not bring any new information regarding his grievances into the absence process.

(6) The respondent engaged in consultation with the claimant .

(7) The respondent did not know the detail of the medication the claimant was taking and its potential effect on the claimant's ability to work.

(8) The respondent did refer the claimant to Occupational Health, its employment assessment scheme and requested direct contact with the claimant's GP on multiple occasions.

(9) The claimant did not provide sufficient detail of his medication or willingness to engage with the processes that would have enabled the respondent to make an assessment on his capability.

(10) The claimant was dismissed on 22 June 2021 on the grounds of ill health capability.

The Law

37. The law places, the burden of proof on the employer to show that the reason or principal reason for dismissal is a potentially fair one or failing that there is some other substantial reason (Section 98(1)).

38. One of the potentially fair reasons for an employer to dismiss is the employees capability to perform the work he was employed to do (Section 98(2)).

39. Capability is assessed by reference to skill, aptitude, health or any other physical or mental quality (Section 98(3)).

40. The general test of fairness in relation to a potentially fair reason to dismiss on the grounds of capability is at **Section 98(4) of the Employment Rights Act 1996:**-

(4) 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.

41. In applying the law and the principle of fairness at Section 98(4) the Employment Appeal Tribunal (EAT) in **Iceland Frozen Foods Limited -v- Jones [1982] IRLR 439** confirmed that when judging the reasonableness of the employer's conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In most cases there is a band of reasonable responses to the situation and a Tribunal must ask itself whether the employer's decision falls within that band or not.

42. In **Spencer –v- Paragon Wallpapers Limited [1976] IRLR 373** and in **East Lindsey District Council –v- Daubney [1977] IRLR 181,** the EAT considered fairness in cases of dismissal due to ill health and absence. The **Spencer** case established that when looking at the fairness of the dismissal the question is can the employer be expected to wait any longer and if so how much longer? This would include consideration of the nature of the illness, the likely length of the continuing absence and the overall circumstances of the case. In **Daubney**, the EAT made clear that in the absence of wholly exceptional circumstances, the employer must consult with the employee and attempt to discover the true medical position before a decision on whether to dismiss can properly be taken.

43. In the case of **BS –v- Dundee City Council [2014] IRLR 131** the court considered the **Spencer** and **Daubney** cases when considering dismissal of an employee with 35 years' service who had been off work for 12 months, stating:-

> "Three important themes emerge from the decisions in Spencer and Daubney. First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasize, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered."

44. In the case of **McCadie –v- Royal Bank of Scotland [2008] ICR 1087** the significance of how the incapacity was caused and in particular that cause being illness following treatment in the workplace was considered:-

> "it seems to us that there must be cases where the fact that the employer is in one sense or another responsible for an employee's incapacity is, as a matter of common sense and common fairness, relevant to whether, and if so when, it is reasonable to dismiss him for that incapacity. It may, for example, be necessary in such a case to "go the extra mile" in finding alternative employee for such an employee, or to put up with a longer period of sickness absence than would

> otherwise be reasonable … thus it must be right that the fact that an employer has caused the incapacity in question, however culpably, cannot preclude him forever from effecting a fair dismissal. If it were otherwise, employers would in such cases be obliged to retain on their books indefinitely employees who were incapable of any useful work. Employees who have been injured as a result of a breach of duty by their employers are entitled to compensation in the ordinary courts, which in an appropriate case will include compensation for lost earnings and lost earning capacity: Tribunals must resist the temptation of being led by sympathy for the employee into including granting by way of compensation for unfair dismissal what is in truth an award of compensation for injury. We also agree with Morison P [a reference to London and Fire Civil Defence Authority –v- Betty [1994] IRLR 384] in sounding a note of caution about how often it would be necessary or appropriate for a Tribunal to undertake an enquiry into the employer's responsibility for the original illness or accident, at least where that is genuinely in issue: its concern will be with the reasonableness of the employer's conduct on the basis of what he reasonably knew or believed at the time of dismissal, and for that purpose a definite decision on culpability or causation may be unnecessary".

Conclusions

Did the respondent genuinely believe the claimant was no longer capable of performing their duties?

45. **Yes the respondent genuinely believed the claimant was no longer capable of performing his duties.** The claimant submitted a series of sick notes stating that he was suffering work related stress, the respondent paid him the full amount of company sick pay before statutory sick pay took effect. The respondent engaged with the claimant in emails, letters and meetings to obtain further information as to the extent of the claimant's sickness. I find that the respondent believed the claimant was ill and required further medical details to assess how he could be assisted back into work and also referred him to Occupational Health to assist.

46. No medical information was forthcoming from the claimant and his evidence was that he was not able to return to work. The respondent could not positively assess the claimant's position and could only conclude that the claimant was no longer capable of performing their duties.

Did the respondent adequately consult the claimant

47. **Yes**. The respondent wanted the claimant to return to work and the evidence of both parties confirms that absence meetings were held with outcomes confirmed by letter. Emails were exchanged in relation to requests for further information and the consequences for not providing medical information potentially leading to capability findings. The claimant was consulted throughout the process and played an active role in attending absence meetings remotely and engaging in correspondence. The respondent reasonably focussed on the claimant's capability to return to work, there were no satellite or ancillary investigations of unrelated issues. The requests for further medical information were relevant to this issue and decisions the respondent would need to make in respect of planning the return to claimant's safe return to work.

Did the respondent carry out a reasonable investigation, including finding out about the up-to-date medical position?

48. **Yes the respondent carried out a reasonable investigation and sought to confirm the claimant's latest medical position.** The respondent consulted and engaged with the claimant throughout the investigation. The tone of the correspondence confirms reasonable and clear requests were made of the claimant to provide further detail of his medical position and medication prescribed. Provision was made in the alternative to seek authority from the claimant for the respondent to make direct inquiry of the claimant's GP. The claimant refused to provide the requested medical information or authority.

Could the respondent reasonably be expected to wait longer before dismissing the claimant?

49. **No, the respondent had waited a sufficient period of time.** The claimant first went on sickness leave on 6 July 2020 and was ultimately dismissed on 22 June 2020, nearly 50 weeks later. The respondent had held the claimant's job open and requested medical information to effect any safe return to work. The claimant had not provided this and it was reasonable for the respondent to then dismiss on grounds of capability.

Was dismissal within the range of reasonable responses?

50. **Yes, dismissal on grounds of capability is within the range of reasonable responses an employer could make.** In these circumstances the respondent had engaged with the claimant in a reasonably undertaken investigation and sought to confirm his medical position. That had not been provided and after nearly 50 weeks the respondent could reasonably determine that the claimant was no longer capable of performing his duties and dismiss.

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Employment Judge Gianferrari

Date:13 April 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
Date: 19 April 2022