EMPLOYMENT TRIBUNALS

Claimant: Mr A Burke

Respondent: DHL International (UK) Limited

Heard at: Manchester Employment Tribunal in person and CVP

On: 9,10 and 11 and 20 September 2024

Before: Employment Judge Dennehy
Mrs C Bowman via CVP
Mr N Williams

REPRESENTATION:

Claimant: in person
Respondent: Ms Firth (counsel)

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claimant was unfairly dismissed by the respondent.

2. The respondent failed to make reasonable adjustments for the claimant.

3. A one-day hearing to deal with remedy including any Polkey and claimant's contributory fault deductions is listed for 22 November 2024 starting at 10am in person at the Manchester Employment Tribunal.

REASONS

Introduction

1. The hearing took place on 9, 10 & 11 September in person. The Tribunal deliberated in chambers on 20 September 2024.

Witnesses and Evidence

2. The Tribunal heard from the claimant and from Mr John Midgley, Service Centre Manager, and Mr John Morrison Director Field Operations- UK for the respondent.

3. At the start of the hearing there was an agreed bundle of 243 pages and 25 pages of witness statement. On each day of the hearing further documents were disclosed by both the claimant and respondent. The Tribunal listened to the submissions from the claimant and respondent as why these documents should be disclosed, weighted up the prejudice to both sides and allowed all further documents to be included in the agreed final bundle which on the third day ran to 297 pages.

4. Each witness was cross examined and answered the Tribunal's questions.

Reasonable adjustments

5. No reasonable adjustments were requested by either the claimant or respondent.

Issues for the Tribunal to decide

6. A list of issues had been agreed at the Case Management Hearing held on 2 May 2023 and the Tribunal confirmed these with the claimant and the respondent at the start of the hearing.

7. The respondent confirmed that it had conceded the disability issue and accepted that the claimant was disabled at the relevant time via email dated 29 August 2023.

8. At the start of the hearing it was confirmed with the parties that the Tribunal would determine issues of liability first, leaving remedy issues to be determined later, only if the claimant succeeded in his claim.

9. The issues identified were as follows:

1. **Unfair dismissal**

Reason

1.1 Has the respondent shown the reason or principal reason for dismissal?

1.2 Was it a potentially fair reason under section 98 Employment Rights Act
1996?

Fairness

1.3 If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?

2. **Remedy for unfair dismissal**

2.1 What basic award is payable to the claimant, if any?

2.2 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

2.3 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.3.1 What financial losses has the dismissal caused the claimant?

2.3.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

2.3.3 If not, for what period of loss should the claimant be compensated?

2.3.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

2.3.5 If so, should the claimant's compensation be reduced? By how much?

2.3.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

2.3.7 Did the respondent or the claimant unreasonably fail to comply with it?

2.3.8 If so, is it just and equitable to increase or decrease any award payable to the claimant?

By what proportion, up to 25%?

2.3.9 If the claimant was unfairly dismissed, did he cause or contribute
to dismissal by blameworthy conduct?

2.3.10 If so, would it be just and equitable to reduce the claimant's
compensatory award? By what proportion?

2.3.11 Does the statutory cap of fifty-two weeks' pay apply?

4. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

4.1 Did the respondent know, or could it reasonably have been expected to
know that the claimant had the disability? From what date?

4.2 A "PCP" is a provision, criterion or practice. Did the respondent have the PCP of requiring its courier drivers to undertake collections of parcels from customers as well as delivery of parcels to customers?

4.3 Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that (1) the claimant's anxiety made it difficult for him to engage with customers and the process of collections requires much more customer engagement than deliveries (2) driving unfamiliar routes (which the claimant was often required to do) meant that the claimant did not know the particular customers and their hours of business. Arriving at a customer for the purposes of picking up a collection and finding that customer closed, increased the claimant's anxiety. Deliveries on the other hand did not, as a closed/absent customer simply required the claimant to return a parcel to the respondent's depot.

4.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

4.5 Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

4.5.1 Placing the claimant on delivery rounds only.

4.6 By what date should the respondent reasonably have taken those steps

5. **Remedy for discrimination**

5.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

5.2 What financial losses has the discrimination caused the claimant?

5.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

5.4 If not, for what period of loss should the claimant be compensated?

5.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

5.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

5.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

5.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

5.9 Did the respondent or the claimant unreasonably fail to comply with it?

5.10 If so, is it just and equitable to increase or decrease any award payable to the claimant?

5.11 By what proportion, up to 25%?

5.12 Should interest be awarded? How much?

Findings of Fact

6. The Tribunal decide on the facts by asking what is more likely than not to have occurred. We do our best to weigh the evidence we have read and heard and reach a decision on what was more likely to have occurred (not what did occur – no one will know this for sure even witnesses- we only judge on probabilities). Where a conflict of evidence arose, this was resolved on the balance of probabilities. The Tribunal has considered its assessment of the credibility of the witnesses and consistency of their evidence with the surrounding facts. Having considered the evidence, the Tribunal made the following findings of fact.

Background

7. The claimant was employed by the respondent as a courier from 2 October 2015 until 8 November 2022. The claimant had seven years of service with the respondent. The claimant worked three days a week on Fridays, Saturdays and Mondays. The role involves driving, making deliveries and collections to and from commercial and private customers.

8. The respondent is a parcel delivery and collections business and has approximately 5,500 employees, a dedicated HR department of about 40-50 people. It organizes training for managers on how to deal with sickness and absence in line with its Capability Heath Policy Procedure (08 pages) and Sickness Absence Procedure (17 pages).

9. The claimant had significant periods of sickness absence from work due to various medical conditions since 2019 which increased during 2021 and 2022.

The Policies and Procedures

The Capability Health Policy & Procedure

10. States at Section 5 procedure for managing long term absence “the stages involved are:

    Stage 1 making contact which states “Upon *initial notification of an employee’s absence, the manager will contact the employee to discuss a diagnosis and details of their fit note. Together the employee and manager will agree keeping in touch arrangements, dependent on individual circumstances*”;

    Stage 2 Home visits or first review meeting which states “*after two weeks of continuous absence the manager may need to contact the employee with details of a meeting at their home or an alternative location*”;

    Stage 3 continue regular contact and hold review meetings; which states “the *employee and manager will keep in regular contact as agreed. If a medical report has been obtained the manager will discuss the findings with the employee and consider any adjustments and/or alternative roles that the employee may be capable of performing…. If it is clear that termination may be contemplated the employee will be invited to a meeting prior to any termination taking effect”.*

    Stage 4 further review/potential ill health capability termination meeting.

11. Section 6 is titled when capability changes due to worsening health issues – the key objective it states “is *to help employees resume or continue in*

employment in their existing roles are similar role. In most cases it is helpful to get advice from occupational health advisors and we would go through the process of getting this advice." It then goes on to say "the *two key parts to managing changing capability are: "consider making adjustments to current role- these might be to do with hours, workstations or equipment, or where this is not possible searching for a suitable alternative role*…"

The Sickness Absence Procedure

12. States at Initial contact **– "***regardless of the length of time the employee expects to be unable to attend work..he is required to notify.. at the earliest opportunity and no later than one hour before the employees normal shift start time by telephone* **….***email and text notification is unacceptable***"**

13. Absences over 7 working days-"the *manager must arrange regular meetings…with the employee to discuss their progress and provide updates on work related issues*.."

    "*Should an employee refuse or be unable to attend any meetings the Company Disciplinary Procedure may be invoked, and the employees Company sickness Pay may be withheld. Regular contact must be maintained to allow the business to provide the appropriate support with the employee's rehabilitation and manage the operation*."

    "*As soon as it becomes apparent that an employee is going to be absent from work for more than two weeks, the manager must involve their HR business partner. They will discuss the individual case and reason for the absence and discuss whether a referral to occupational health or another support service is required. Referrals are made to facilitate a speedy return to work, support any changes that may need to be made to aid the employee's return and ensure prompt and accurate medical information is received*."

    "*High levels of absenteeism or repeated spells of sickness/absence cause considerable disruption and increased operating costs to the business. They also place an undue burden upon other team members as a result DHL have the following triggers to ensure that all employees are treated fairly and consistently*."

    "*Where the employee is disabled……the manager will consider any reasonable, practical adjustments that may be made to work practices, premises or equipment*."

14. The respondent's absence trigger is 3%. If reached it triggers an Absence Hearing and the respondent can arrange an occupational health report and/or request medical records.

15. The claimant was familiar with and understood both respondent's policies. The claimant regularly failed to report his absences in line with the policy and provide fit notes on time.

16. The respondent had instructed an occupational health report provider, Healthcare rm to provide a report on the claimant and 05 such reports were in the bundle of documents. These are dated 18 January 2019, 18 March 2019, 9 March 2020, 23 April 2020 and 8 February 2021.

Sickness in 2021

17. A full list of the claimant's absence and reasons during 2021 are set out at

page 161 of the bundle of documents. The respondent's trigger of 3% was exceeded by the claimant.

18. In January 2021 the claimant had been absent for over four weeks and the respondent arranged for an occupational health assessment. This report is the Case Management Report dated 8 February 2021.

OH Report dated 8 February 2021

19. This report states that the claimant was able to return to his role " *He planned to return to work this week, although he admitted he had intended to return previously on a few occasions when anticipatory worry got the better of him….*"but "..*it is on balance likely his absence levels will continue at a similar pace..*" and that .".*it may be helpful to obtain clinical information to confirm Mr Burke's diagnoses, and treatment plan*"

20. In the section "Should the Equality Act 2010 (Disability) be considered? It states " *Mr Burke's psychological condition is likely to be covered by the Equality Act 2010 (Disability). DHL international will therefore be expected to consider any necessary reasonable and practicable adjustments in the workplace*"

21. It is a disputed fact whether the claimant was ever shown this report. The claimant says he was never shown this report, although the respondent told us that the claimant could have requested it at any time. The first time the claimant became aware of the contents of this report was when he requested disclosure of documents and received them on 2 December 2022.

22. Mr Morrison told the Tribunal in his oral evidence that the process was for the employees' manager to discuss the contents of the report with the employee in their return to work interview. The respondent's capability policy also states this. However, no evidence was produced by the respondent showing that this had actually happened.

23. One of the documents disclosed during the hearing was the return-to-work meeting notes. These are the notes of the meeting between Mr Midgley and the claimant on 23 April 2021, which took place upon the claimant's return to work after 29 days absence. It states the reason for absence was "*stress, depression, anxiety and sickness from Covid jab*" There is no mention of the contents of the report dated 8 February 2021 being discussed or mentioned to the claimant.

24. On the balance of probabilities, the Tribunal finds that the respondent did not discuss the report's contents or provide the claimant with a copy of the report prior 2 December 2022 as it was not mentioned in the meeting notes.

Sickness during 2022

25. During 2022 the claimant 's absent increased and a full list of the absences and reasons can be found at page 126 of the bundle. The claimant's absence was again more than the respondent's absence trigger of 3%.

26. The claimant's absence from January to July 2022 was 41% and for the year prior to his dismissal was 55%. There was a pattern of the claimant being absent and then returning for short periods before going absent again. The fit notes from the claimant's GP do not consistently cite the same reason for sickness, although there is a reoccurrence of the claimant's anxiety condition.

27. In July 2022 there is a dispute about the date on the document titled Absence Investigation Document which is dated 28 July 2022. The claimant says the date should have been 8 July 2022 which is when the meeting took place. The claimant believes 8 July is the correct date as this is when he was in work, whereas the 28 is a non-working day. The claimant believes that this is typo. The claimant's manager has since left the respondent was unable to comment on this point.

28. On the balance of probabilities, the Tribunal finds that this was a typographical error on the form and that the date of the meeting was 8 July 2022.

29. The claimant began a further long period of absence on 4 August 2022 and did not return to work before he was dismissed on 08 November 2022.

30. The respondent had commenced a formal capability process in line with its own internal procedures. The respondent made six attempts to invite the claimant to come to a meeting to discuss his absence record and return to work.

31. The respondent sent all letters via DHL to the claimant. Each letter advised that the respondent had an employe assistance program, to provide additional support to the claimant that was free for the claimant to use either via the telephone or online.

32. The claimant never attended any of these meetings, never offered alternative times and never used the employee assistance program offered.

33. On numerous occasions the claimant said that he would return to work but would fail to. The claimant told the tribunal that he was trying to set himself a target, but his anxiety would get the better of him.

The letters requesting attendance at capability meetings

34. The respondent sent the following letters to the claimant and the claimant reasons for non attendance are as follows:

    (i) First letter was dated 1st September 2022 invitation to attend a sickness absence review meeting on 5th September 2022 at 1pm.

35. The claimant's response was to send a text on the 5 September to Mr Midgley at 11.41. There is a dispute about whether Mr Midgley could recall receiving it. Mr Midgey said his phone did not have a record of it and confirmed this in his oral evidence. The claimant produced a screen shot of his mobile phone showing that the text had a time stamp and date on it. The text was long and in it the claimant explained his panic attack and anxiety. The claimant says this was when his anxiety was at its worst. The Tribunal could not make a finding on this fact on the evidence provided.

    (ii) Second letter was dated 15th September 2022 invitation to attend a capability meeting on 21 September 2022 at 2pm.

36. The claimant was unable to attend this meeting due to a conflicting medical appointment and advised Mr Midgely of this on 20 September at 16.35 via email. The claimant did not email evidence of the appointment until 5 October.

    (iii) Third letter dated 21st September 2022 invitation to a capability meeting on 26 September 2022 at midday.

37. The claimant failed to attend this meeting and did not communicate that he was not going to attend. The claimant says he was not aware of this meeting because his mother had put the letter in a drawer, and he was unaware that he had missed the meeting until the next letter arrived on 26 September. The claimant then emailed Mr Midgely explaining this and that he was struggling with his anxiety.

    (iv) Fourth letter dated 26th September 2022 invitation to attend a capability meeting on 30 September 2022 at 2pm.

38. The claimant had a hospital appointment on that day at 10am and advised Mr Midgley of this via email sent on 27 September.

    (v) Fifth letter dated 13 October 2022 invitation to attend a capability meeting on 18 October 2022.

39. The claimant advised Mr Midgly that he was still unwell via email on 17 October. The claimant did not expressly state that he was unable to attend the meeting on the 18 October.

40. The contents of the fifth letter are disputed. Mr Midgley says that he used the standard HR template to draft the letter to the claimant advising him of the meeting on 18 October ("short version").

41. He then sent the short version to HR and the letter was amended to the longer version letter that contained a paragraph warning "*that a possible outcome of this meeting may be dismissal on the grounds of capability*" and it advises that he could be accompanied, could ask questions, provide evidence and raise any points and if he failed to attend a decision could be made in his absence ("long version").

42. Mr Midgley's says it was the long version that was sent to the claimant. Mr Midgley says he was "confident" that he printed out the long version letter and the two attachments that went along with it. The evidence produced by the respondent to demonstrate this was printout of the properties of the letter that the respondent says it send showing that it was created on 13 October 2022 at 07:53 and saved at 08:06. It was then sent by DHL courier to the claimant. Mr Midgley told the Tribunal he only sent one letter. Mr Midgley had previously sent the short letter to the claimant five times without attachments.

43. The claimant says that he only received one letter dated 13 October. He says the letter he received was the short version but that it had the sickness absence policy attached which he thought was "weird". In spite of this the claimant did not query this with the respondent or keep a copy of the letter. The claimant only discovered that there were two versions of the fifth letter when he received copies of all the letters on 2 December 2002. The claimant says he was "quiet confident" that he had received the short letter but after seeing a copy of the long letter he was "100% sure" he had only seen the short letter.

44. On the balance of probabilities, the Tribunal finds that the claimant is more than likely to have received the long version of the letter. We find it highly unusual that the claimant did not keep a copy of this letter.

    (vi) Sixth letter dated 27 October 2022 invitation to a capability meeting on 7 November 2022.

45. The letter stated that its purpose was "*to discuss your future employment in*

conjunction with the medical information available.."This letter did not advise the claimant that dismissal was a possible outcome, that he had the right to be accompanied or to ask questions, bring evidence and that if he did not attend a decision could be made in his absence.

46. The claimant did not attend. The respondent telephoned him on 6 November to check that the claimant would be attending but the claimant did not answer.

47. The claimant says he " *genuinely forgot* "about this meeting and the reason for this was because he had received the letter on 27 October but had forgotten about it by 7 November. Knowing that the claimant had already not attended five other capability meetings and his high level of absences, the Tribunal find this hard to understand how the claimant could so easily forget about this meeting.

The dismissal meeting

48. The respondent held the dismissal meeting on 7 November 2002. At that time, it had not had any communication from the claimant saying he couldn't attend.

49. Mr Midgley was the dismissing officer . He told the Tribunal that he was experienced in dealing with similar cases and had HR training in classroom and elearning. Mr Midgley told the Tribunal he looked at the medical evidence he had before him at that time, the occupational health reports the various different reasons for the claimant's sickness in the fit notes, the promises to return to work that never materialized, the claimants length of service, alternatives to dismissal, the effect on the claimants colleagues and the financial and operational impact on the wider business.

50. Mr Midgley concluded that due to the claimants lack of engagement it was " *impossible to determine if he would be fit at any point or in the near future*" and that dismissal would take effect from 7 November 2022. He tried to telephone the claimant to advise him of the outcome by telephone but the phone went straight to voicemail.

51. The claimant was advised of the outcome of the meeting by letter dated 8 November 2022 that he was being dismissed on the grounds of medical capability.

52. The claimant appealed this decision on the 12 November on the following grounds; (i) medical evidence, the occupational health report relied upon was out of date; no GP notes had been requested, he was unsure what medical records the respondent had based its decision on (ii) it was not correct that he had refused medication for his anxiety; (iii) he had no warning prior to any meeting that dismissal was a likely outcome at the capability meeting on 7 November 2022. He also gave examples of his anxiety symptoms in August and September 2022, panic attacks, his efforts to drive distances and he requested doing deliveries only.

The appeal meeting

53. The appeal meeting was held on 21 November via Teams. The claimant was advised of the employee assistance program that was available and of the right to be accompanied and that if he failed to attend a decision would be made in his absence.

54. Mr Morrison was the appeal hearing officer. He told us that he was experienced in dealing with similar cases and had HR training. Mr Morrison

confirmed that he did not consider whether a full rehearing of the claimant's case was more appropriate.

55. The claimant attended the meeting and chose not to be accompanied. There was a notetaker and the notes were set out in the bundle.

56. Mr Morrison considered the conflicting reasons for claimants' numerous absences, the missed capability meetings, the promises to return to work, and confirmed whether the claimants' symptoms were similar to those in the 8 February 2021 occupational health report. He asked the claimant about his symptoms and concluded that they were worse and that the claimant was not fit to return to work, even though the claimant was saying he would be in two weeks' time. He investigated the issue of the claimant not been warned of the likelihood of dismissal in the fifth letter, with Mr Midgley and concluded that the claimant had been sent the long version of the letter.

57. On the issue of whether the claimant was or was not taking medication Mr Morrison thought that this had been confirmed by the claimant that he wasn't taking medication, although this was later clarified. Mr Morrison stated that this misunderstanding was not material in his reasoning.

58. Mr Morrison concluded that removing collections or limiting deliveries would not have alleviated the claimant's anxiety and were not feasible as routes were always changing.

59. The outcome of the appeal was communicated over Teams on 28 November 22 and by letter dated 29 November 2022. The letter stated that the decision to dismiss was upheld for the following reasons: (i) although the occupational health report was dated 8 February 2021 the claimant had confirmed that he was still experiencing the same symptoms and the report said that report stated that there was no reason to prevent the claimant from returning to work; (ii) doing little to help himself namely, not taking medication, failure to attend six absence review meetings and no contact with the respondents employee assistance program; and (iii) although the claimant had said he was fit to return to work he had said this previously in the past and had failed to show up for work.

60. The claimant was sent the notes on the 30 November and he queried them and requested copies of all documents that the respondent had made the decisions to dismiss on. These were sent to him on the 2 December 2022.

61. The claimant contacted ACAS on 8 December 2022 and the certificate R276803/22/15 is dated 19 January 2023.

62. The claimant issued ahis claim ET1 on 19 January 2023 and the respondent filed an ET3 and grounds of resistance on 15 March 2023.

63. The claimant confirmed he was seeking financial compensation only and has submitted two undated schedules of loss with different figures.

Claimant's submissions

64. The claimant says that the respondent was aware that he had a mental impairment, that could be classed as a disability and this was the cause of much of his absence from work because whenever he had physical pains this would also increase his anxiety. He says that the occupational health report was not shared with him until 2 December 2022, and he says he did not know that he was disabled and had he known he could have asked for reasonable

adjustments to be made.

65. He says the dismissal was unfair because he was at no stage warned that the respondent was considering dismissing him. He denies having received the long version letter that the respondent says it sent, warning the claimant that consideration was being given to ending his employment.

66. The claimant says that the respondent had failed to obtain up to date medical advice, relying on an occupational health report that was some 18 months old, and it was wrong to conclude that the claimant had failed to take steps to improve his situation.

67. The claimant also says that the respondent failed to make a reasonable adjustment to assist the claimant's return to work. The specific adjustment was suggested by the claimant at the appeal stage; it was to limit the claimant's work to delivery work only. The claimant explained that the collections of parcels put him at a particular disadvantage because:

(i) It required greater discussions and involvement with customers.

(ii) It created anxieties for the claimant, particularly on unfamiliar routes when he would not know the closing times of commercial customers. The anxiety was so much greater than with deliveries when he would simply be able to return the undelivered package to the depot.

68. The claimant became upset when delivering his submissions and says that he does not understand why the respondent did not want to help him.

Respondent Submissions

69. The respondent says that the claimant was dismissed for the fair reason of capability and that the dismissal and appeal followed a full and fair capability procedure. It invited the claimant to six capability meetings none of which the claimant attended. The claimant gave conflicting reasons for sickness, promised to return, then failed to do so numerous times, all of which had a detrimental effect on colleagues and the wider business. The respondent could not see the claimant returning to work and due to the claimant's lack of engagement could not instruct for a new occupational health report to be undertaken.

70. Re reasonable adjustments the respondent says that the following cases **Home Office v Collins [2005] EWCA Civ 98,NCH Scotland v McHugh UKEATS/0010/06, London Underground Ltd v Vuoto UKEAT/0123/09, Doran v Department for Work and Pension UKEAT/0017/14 and West v RBS UKEAT/0296/16** give rise to the general principle that there is no duty to make reasonable adjustments where the employee would not be fit to return to work, even if proposed adjustments were made.

71. The respondent avers that the duty to make reasonable adjustments has not been triggered because the claimant did not make his request for reasonable adjustments until the appeal stage, by which time the claimant had already been dismissed. At no return-to-work meeting has the claimant ever requested any reasonable adjustments.

72. The respondent had no actual knowledge of the substantial disadvantage that the claimant says he suffered and even if it had the adjustment proposed by

the claimant was not reasonable because it would not have alleviated the disadvantage.

73. If the Tribunal finds that the procedure followed by the respondent was unfair, then the respondent suggests that a Polkey reduction of 75% be made as the claimant would have been dismissed in any event had a fair procedure been followed. The respondent also considers that the claimant is blameworthy by failing to engage with the respondent and its request for capability meetings has contributed to his own situation and asks the Tribunal to consider making a reduction for contributory fault.

Relevant Law

74. 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)).

75. 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)).

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

77. 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.**

78. The employer is required to follow a fair procedure. In **East Lindsey District Council v Daubney [1977] ICR 566**, the EAT stated:

“"Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill-health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it

will be found in practice that all that is necessary has been done."

79. The employer must show it had a genuine belief that ill-health was the reason for dismissal, it had reasonable grounds for its belief, and it carried out a reasonable investigation; **DB Schenker Rail (UK) Ltd v Doolan [2010] UKEAT/0053/09.**

80. In **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** the EAT held that the function of the Employment Tribunal was to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair. The Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer.

81. In **McAdie v Royal Bank of Scotland [2007] EWCA Civ 806**, the Court of Appeal stated that an employer could fairly dismiss an employee for ill-health capability despite the fact that the employee's stress-related illness was attributed to the conduct of the employer. The key issue is whether the employer acted reasonably in all the circumstances, which include the fact that the employer was responsible for the ill- health.

82. In **BS v Dundee City Council [2014] IRLR 131** it states "*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 favor, 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 employee to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered*."

The duty to make reasonable adjustments

83. We remind ourselves that an employment tribunal is obliged to take the Equality and Human Rights Commission's statutory Code of Practice on Employment ('the Code') into account in any case in which it appears to be relevant — S.15(4)(b) Equality Act 2006.

84. Section 20 EqA provides that the duty to make adjustments comprises three requirements:

(i) a requirement, where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(ii) S.20(3) a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(iii) S.20(4) a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

Conclusions

85. We have sympathy for the claimant who copes with anxiety and we also have sympathy for the respondent and for the pressures on its business when dealing with sickness absences. Justice does not mean we should be swayed by our sympathies one way or another. It means we should coolly and with care reach a considered decision holding no candle for either side.

86. In deciding the issues, the Tribunal has not set out all the evidence heard at the hearing on 9,10 & 11 September 2024 but has selected those details which are most important to the decisions. Just because something is not mentioned does not mean that the Tribunal did not consider it. We have only dealt with matters that we found relevant to the issues we had to determine.

Unfair dismissal

Potentially fair reason

87. The Tribunal finds that the respondent dismissed the claimant for a potentially fair reason, namely his capability on the grounds of long term absence due to ill health. The claimant did not assert any alternative reason for his dismissal.

88. We considered the approach in **BS V Dundee City Council [20145] IRLR 131** for reasonableness of treating the capability as sufficient reason for dismissal.

Was it reasonable to expect the respondent to wait any longer for the employee to return to work?

89. No. The respondent's absence triggers had been well exceeded by the claimant and the respondent had commenced disciplinary process for capability. The claimant wasn't engaging with the respondent, kept on promising to come back and didn't and the respondent had no idea when the claimant was ever going to return.

90. The respondent had to bear the extra costs of agency staff to cover the claimant's work, and it was impacting the moral of other staff.

91. The Tribunal finds that it was not reasonable to expect the respondent to wait any longer for the claimant to return to work.

Did the respondent consult with the claimant to see what his views are?

92. No. We considered that the respondent is a large employer with a well-

resourced dedicated HR function. It had policies and procedures in place for dealing with sickness and capability. Both witness for the respondent said they had training and experience in capability dismissals. The claimant was an employee with seven years' service although his absences had been increasing for some time.

93. The respondent attempted to arrange six capability meetings with the claimant, none of which the claimant attended. The respondent says that it therefore could not engage with the claimant. The respondent in its policy says that it will consider alternatives such as home visits, but this was not explored with the claimant. Mr Midgley told us that the claimant never asked for an alternative venue.

94. We find that the 8 February 2021 report put the respondent on notice that the claimant's "*psychological condition was likely to be covered by the Equality Act 2010 (Disability) DHL will therefore be expected to consider any necessary reasonable and practicable adjustments in the workplace*." Yet in the return-to-work meeting after this report was received by the respondent which took place on 23 April 2021 there is no mention of its being discussed with the claimant. This is in breach of the respondent own capability policy.

95. There was no consultation by the respondent with the claimant about his mental health that the report was stating was likely to be a disability. The claimant gave evidence that he was unaware that his anxiety was a disability and therefore had no idea that meant he could have asked for reasonable adjustments to be made.

96. When the claimant's manager changed the respondent failed to notify the claimant of this and consequently the claimant was contacting his old manager re his sickness. A reasonable employer would have notified the claimant when his manager changed. The respondent own capability policy says " *the manager should keep in contact with employees who are off work due to ill health"*.

97. We find that a reasonable employer would have done more to stay in regular contact with the claimant and arranged home visits as per its own policy.

98. Taking all of the above in consideration we find that the respondent failed to adequately consult with the claimant.

Did the respondent carry out a reasonable investigation, including obtaining up to date medical advice?

99. No. It was common ground that the claimant had numerous absences due to a variety of illness and had been seen by occupational health with the last report done on 8 February 2021. By the time of the dismissal some twenty months had passed, during which time the claimants' absences had increased. His fit notes contained conflicting advice as to the reason for his absence, although anxiety was mentioned. The claimant had a pattern of saying he was going to return to work and then went off sick before returning.

    The respondent did offer a free employee assistance program and mentioned this in each letter it sent to the claimant. The claimant did not offer a reasonable explanation as why he did not utilize this facility.

100. The respondent made no request for any further medical evidence or follow-up with the claimant after the 8 February 2021 report. On the claimant's own admission, he had always engaged with occupational health assessments and

reports. We heard no valid reason from the respondent as to why they couldn't have arranged another occupational health report prior to making the decision to dismiss, so that they could have a clearer up to date picture of the claimant's state of health. Mr Midgley told that the claimant wasn't engaging with him so they couldn't arrange an up-to-date report, but the respondent didn't attempt to arrange one.

101. Rather, the respondent relied on a twenty-month-old occupational report, and conflicting fit notes that the claimant was sending in.

102. In the circumstances we find that a reasonable employer would have obtained an up to date occupational health report where an employee was repeatedly failing to turn up to a capability meeting to ascertain if the In claimant was fit to: (i) attend a meeting; and (ii) to ascertain an up to date position on his mental health.

103. Re the test of fairness we also considered:

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

104. Yes. The Tribunal finds that the respondent genuinely believed that the claimant was no longer capable of performing his duties. When Mr Morisson questioned the claimant at the appeal about his state of health he believed that the claimant was worse and was not fit to return to work. Mr Morrison believed that the claimant was not following medical advice and not doing anything proactive to improve his health.

Did the respondent follow a fair procedure?

105. The ACAS code of Practice states that if an employee fails to attend a first meeting it will be usually good practice for the employer to rearrange and this is what the respondent did, five times. Employers cannot be expected to put off a hearing indefinitely but the employees right to attend a hearing should not be dispensed with too hastily. The claimant never made any attempt to rearrange the meetings and often left it very late to tell the respondent that he wasn't attending. The claimant said he was avoiding the situation "hiding" and when he said he was coming back to work he was setting himself a target but would then get anxious and fail to return.

106. The Tribunal finds that the claimant did receive the long version of the letter of 13 October and was therefore aware that he was likely to be dismissed due to his absences. The claimant did not attend this meeting. We also find that the claimant was aware that the disciplinary process had commenced and that his sickness levels were unsustainable.

107. However, the sixth letter of invite to a capability meeting did not contain a warning that dismissal was likely, it did not advise the claimant that he could be accompanied, could bring evidence and ask questions. Rather it stated that "*We will explore a number of options focusing on your potential return to work*" The claimant did not attend this meeting, and it was held in his absence and the decision to dismiss was made.

108. No evidence was provided by the respondent as to whether it considered asking the claimant to make written representations rather than attend the dismissal meeting. This is something that a reasonable employer the size of the respondent and with the respondents' resources could have done.

109.Mr Midgley as dismissing officer says he considered all the medical evidence available, the pattern of the claimant saying he would return and then didn't and if he did return he would shortly go off sick again. He came to the conclusion that it was "*impossible to determine if he would be fit at any point in the near future.*" He also considered the impact on the business and colleagues and the claimant's length of service. The lack of contact and engagement from the claimant says Mr Midgley meant he couldn't discuss making any reasonable adjustments.

110.At the appeal hearing it was not considered whether a full rehearing should happen. A full rehearing would have been an opportunity to correct any procedural flaws and an opportunity for the claimant to present his case.

111.At the appeal hearing Mr Morrison discussed the 8 February 2021 report with the claimant to understand if the claimant was experiencing the same symptoms, however he never mentioned the disability finding with the claimant. No one asked the claimant if he had seen the contents of the report previously, just whether he had remembered talking to occupational health. We find that a reasonable employer would have mentioned this to the claimant.

112.Mr Morrison says he found the details regarding the claimant state of health conflicting and was of the view that an up to date report could only been requested if the claimant had attended a capability meeting, because the claimant was not engaging an up to date report could not be obtained.

113.The capability policy states that the manager should liaise with HR to organize occupational health and that "*throughout the process the manage may refer the employee to occupational health to get advice and support from occupational health advisors."*

114.The ACAS code states that employers should carry out necessary investigations to establish the facts of the case. We find that a reasonable employer would have obtained an up to date medical report at the appeal stage when on the medical position was conflicting.

115.Mr Morrison adjourned the meeting and went back to Mr Midgely to check that a fair process had been conducted and given the claimant options. He was satisfied and upheld the dismissal. The claimant was informed on Teams and via letter.

116.Taking all of the above into consideration the Tribunal finds that the respondent failed to carry out a fair procedure.

Was dismissal within the range of reasonable responses

117. No. The Tribunal finds that dismissal was not within the range of reasonable responses because the respondent had failed to gain an up-to-date medical position on the claimant and a reasonable employer with the size and resources of the respondent would have obtained an up-to-date report on the health of the claimant and consulted with the claimant. The respondent relied on an out of date report even though the claimants absences had been increasing and he was avoiding attending meetings.

118.The respondent's capability policy section 6 When capability changes to a worsening health condition states that *"The key objective is to help employees resume or continue in employment in their existing role or similar*

role, in most cases it is helpful to get advice from occupational health advisors and we would go through the process of getting this."

119. The policy goes on to state two key parts to managing changing capability (i) consider making adjustments to current role; and (ii) searching for a suitable alternative role.

120. Mr Midgley and Mr Morrision both said they had explored other alternatives to dismissal but due to conflicting sicknotes, promise to return that never happens and lack of engagement from the claimant they could not foresee when the claimant would be able to return to work.

121. Since the 8 February 2021 report the claimant's sickness absences were increasing, and he was failing to attend any capability meetings. It had been twenty months since the last occupational health report that stated he may have a disability yet the respondent did not instruct a report on the up to date position of the claimant. It failed to consult with the claimant on the 2021 report or reasonable adjustments.

122. Taking all of the above circumstances into consideration the Tribunal unanimously finds that the respondent unfairly dismissed the claimant.

Reasonable Adjustments

Did the respondent know the claimant had a disability ?

123. Yes. The burden of proof is on the respondent to prove that it did not have knowledge. The Tribunal finds that the respondent was aware that the claimant suffered a disability from 8 February 2021 when it received the occupational health report.

Did the respondent have a PCP?

124. Yes. The respondent admits that it is agreed that the respondent had a PCP requiring its courier drivers to undertake collections and delivery of parcels to customers.

Did the PCP put the claimant at a substantial disadvantage?

125. Yes. Section 212 Equality Act 2010 defines substantial as "more than minor or trivial".

126. The claimant explained that if he was often on an unfamiliar route making collections from commercial customers, he would suffer greater anxiety because he did not know the commercial customers regular opening and closing times, the scanner was not always accurate with this information and, he had to make sure that he got there in time to make the collection. More interaction was required with collections as having to look in package, complete manual waybills all of which was added responsibility that created anxiety for him.

127. One reason for this was because he thought there were greater consequences for failing to make collections. The respondent advised that there were similar consequences for failing to make collections and deliveries.

128. The deliveries by contrast the claimant told us required less contact with customers and if undelivered could be returned to the base. The respondent

told us that the deliveries could be on unfamiliar routes as well and if parcels were damaged could create extra paperwork so were as stressful as collections, but we were not persuaded by this.

129.The claimant explained this in his oral evidence to the Tribunal, he said that having to get to collections on a Friday and not knowing (as he was unfamiliar with the customer) what time they would be closing on a Friday, as many customers closed early on a Friday and the information, he was given on the scanner was not always up to date.

130.The Tribunal finds that the disadvantage is more than minor or trivial because of the added stress that the claimant says he suffered by being placed on an unfamiliar route and with collections.

131.The disadvantage was substantial due to the level of the claimant's anxiety. An employee who wasn't suffering from anxiety would not have been as fearful.

Did the respondent Know that the claimant was likely to be placed at a disadvantage?

132.Yes. The burden of is on the respondent to prove that it did not have knowledge.

133.The respondent had received the occupational health report and was on notice that the claimant was suffering anxiety as a disability from 8 February 2021 and the Tribunal finds it did have actual knowledge of the disability and constructive knowledge of the substantial disadvantage from that date.

134.On the issue of knowledge, the Code at 6.19 states that "*The employer must, however do all they can reasonably be expected to do to find out whether this is the case.*" This is an objective assessment and depends on the circumstances of the case.

135.The report states that the claimant had experienced anxiety to such a degree that a ambulance had been called, as the claimant thought he was having a heart attack. A doctor had advised the claimant that chest pains could be due to anxiety. The report then goes on to describe anxiety " *Anxiety presents as worries about what might happen next, but also in many physiological ways such as palpitation, shakiness, chest tightening- this is adrenalin and caused by the fear response*."

136.The claimant suffered anxiety and was employed as a courier which involved driving, and a reasonable employer would have understood that having a driver suffering with anxiety could create a health and safety issue and would have made further enquiries to understand the disadvantage.

137.The report states "*it may be helpful to obtain clinical information to confirm Mr Burke's diagnosis, prognosis and treatment plan*."

138.The respondent did not provide any evidence to show that it had made any enquiries as to the claimant's condition, sought any further medical evidence, for consulted with the claimant about the contents of the report and failed to consult on reasonable adjustments with him.

139. The Tribunal finds that a reasonable employer with the resources of the respondent would have made further enquiries with the claimant when he returned to work in April 2021 about his disability and the substantial disadvantage the claimant was suffering because of it.

Did the respondent fail to take steps to avoid the disadvantage?

140. Yes The respondent didn't' make any reasonable adjustments to accommodate the claimant's disability when he returned to work in April 2021. What they did do was make an adjustment as they would for anyone on a return to work from long term absence to ease them back into the workplace.

141. Mr Midgley in his statement says the reasonable adjustment they made was to give a reduced number of parcels on day 1 "*to reduce his stress and ease him back into work on his first day*". Three days later he had a route with only 26 deliveries and no collections. These were not permanent reasonable adjustments and no consultation had taken place with the claimant. The claimant told us that these parcels were spread over a greater distance than normal, so it did not alleviate the disadvantage.

142. The Tribunal finds that a reasonable employer would have consulted with the claimant to fine tune the reasonable adjustment of deliveries only which would have alleviated the substantial disadvantage that the claimant suffered because of his disability of anxiety.

143. The respondent's capability policy states that the two key parts to managing changing capability (i) consider making adjustments to current role; and (ii) searching for a suitable alternative role.

144. The factors a reasonable employer might take when considering reasonable adjustments are set out at 6.28 of the Code and include financial cost, type and size of employer, and whether the adjustment would have been effective in preventing the substantial disadvantage.

145. Mr Midgley told us that "*without doubt*" reasonable adjustments could have been made had the claimant only asked for them. The Code at 6.24 states "*There is no onus on the disabled worker to suggest what adjustments should be made (although it is good practice for employers to ask).*"

146. The claimant was consistent in saying that not doing collections would reduce his stress and alleviate the substantial disadvantage. This did not involve a huge financial impact on the respondent.

147. The Code at 6.32 states "*it is a good starting point for an employer to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required*."

148. The Tribunal finds considering the size and resources of the respondent this would have been a reasonable step for the respondent to take to remove the substantial disadvantage for the claimant, but it failed to do so.

By what date should the respondent reasonably have taken those steps?

149. The Tribunal finds that the respondent should have taken such steps by 23 April 2021 when the claimant returned to work.

150. The claimant did not know that he was disabled in April 2021 and that he could have asked for reasonable adjustments. Respondent's counsel made the point that the claimant knew he was disabled on 23 November 2022 from his GP, but this does not mean that he knew about his right to request reasonable adjustments because of his disability. The respondent's failure to discuss the contents of the occupational health report dated 8 February 2021 meant the opportunity to consult with the claimant about what reasonable adjustments could be made was missed on 23 April 2021. A reasonable employer would have consulted with the claimant about reasonable adjustments on 23 April 2021when the claimant had returned to work.

151. Taking all the above circumstances into consideration the Tribunal unanimously finds that the respondent failed to make reasonable adjustments for the claimant's disability of anxiety.

Employment Judge Dennehy

Date 29 September 2024

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

3 October 2024

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/