



EMPLOYMENT TRIBUNALS

Claimant: Mr A Morris
Respondent: Asda Stores Ltd
HEARD AT: Huntingdon ET **ON:** 20th & 21st February 2017
BEFORE: **Employment Judge Ord**

REPRESENTATION

For the Claimant: Mr Glass (Lay Representative)
For the Respondent: Miss R Barrett (Counsel)

JUDGMENT having been sent to the parties on 28th February 2017, and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided.

REASONS

Background

1. The Claimant was employed by the Respondent as a Warehouse Colleague from 11th May 2003 to 14 March 2016 when he was dismissed for misconduct, in particular, failure to obey reasonable management instructions (not attending occupational health assessments, welfare visits and failing to keep in touch with the Respondent during a period of absence) which it was said amounted to a breach of trust and confidence. The Claimant was already in receipt of a final written warning and the Respondent dismissed the Claimant on notice 14th March 2016. The Claimant had been absent from work continuously since 3rd July 2015 and throughout that period the Respondent withheld his company sick pay, initially for a failure to comply with the notification of absence process and subsequently because of his failure to attend the occupational health and other meetings. The Claimant complains that the failure to make those

payments amounted to an unlawful deduction from his wages and that his dismissal was unfair.

The Hearing

2. Evidence was heard from the Claimant and from Emma Knight (People Manager), Sarah Dwerryhouse (Transport Operations Manager) and Paul McKay (General Manager) on behalf of the Respondent. Reference was made to a substantial bundle of documents and a cast list and chronology was produced for the benefit of the tribunal. Both parties made closing submissions (the Respondent principally making submissions in writing through counsel) and the Respondent's counsel had helpfully provided a proposed list of issues.

The Issues

3. The issues for the tribunal to determine were
 - 1) Was the Respondent entitled to withhold the Claimant's company sick pay, i.e. was that deduction authorised by a relevant provision of the workers contract as per s13(1)(a) of the Employment Rights Act 1996?
 - 2) Was the Claimant unfairly dismissed contrary to section 94 of the Employment Rights Act 1996?

The Facts

4. Based on the evidence presented to me. I have made the following findings of fact.
5. The Claimant was a night shift worker and during his shift on 2nd to 3rd July 2015 the Claimant became unwell. He told his manager that his "head was not right," and he went home at approximately 1 am on 3rd July.
6. The Claimant was due to work again on the night shift of 3rd/4th July but on 3rd July he attended his doctor's surgery. The general practitioner considered him sufficiently unwell to issue a fit note saying that he was not fit for work for the period 1st July to 3rd August 2015, the entry on the fit note merely reading "headache".
7. Under the Respondent's absence policy company sick pay is payable to all employees with more than 3 years continuous service for 26 weeks of absence. The obligations on the employee to continue to receive such a company sick pay are set out in the managing absence policy which states that managers must not withhold the company sick pay, except in certain circumstances. These include a failure to comply with the notification procedures without any reasonable explanation and unreasonably refusing to attend an occupational health service or depot/home visit appointment or a failure to keep a prearranged appointment.

8. The Claimant says that he telephoned the Respondent's absence line on 3rd July, more than one hour before his shift was due to start. The first time he rang the telephone was put down on him and the second time and it went to a voicemail and he left a message.
9. The Claimant also sent his fit note to the employer. It is not clear when the note was received, but it must have been on or promptly after 3rd July because the Respondent's internal sickness absence notification form (which is undated) reports the presence of the fit note. This is a document which is sent to those people who administer payroll and sickness pay for the Respondent. In answer to the question "did the colleague unjustifiably delayed notification of this absence?" the answer is "no". In answer to the question "should company sick pay be refused for this absence?" the answer is "yes", the explanation being "please withhold all company sick".
10. On 6th July (a Monday, 3rd July was a Friday). Mr McKay wrote to the Claimant stating that as of 3rd July his company sick pay had been suspended because he had failed to make contact with the depot following on from his part shift absence on 2nd July and reminding the Claimant that a failure to comply with the notification procedures without reasonable explanation would result in the withholding company sick pay.
11. On 7th July, Sarah Harding, People Manager, telephoned the doctor's surgery, which had issued the Claimant's fit note, apparently to confirm that the fit note was genuine. According to her handwritten note of the conversation the doctor's surgery receptionist told her that the Claimant had been seen as an urgent patient on 3rd July, suffering from neck and back pains, and had pains in his neck and headaches for a few months and was prescribed medication and advised that he was not fit for work until 3rd August 2015.
12. On 8th July 2015 the Claimant wrote in reply to the letter from Mr McKay saying that he called the Asda absence line on 3rd July at 9:03 pm and then again at 9:04 pm. He said that on the first occasion the call was answered and then hung up on, on the second occasion he left a recorded message and that he had proof of this.
13. Mr McKay, who had authorised the suspension of company sick pay was asked what steps he had taken in relation to these matters (receipt of a fit note, confirmation of the position from the general practitioner and receipt of the Claimant's letter). Although he said he asked Ms Harding to make some enquiries he could not say what those enquiries were and there was no suggestion that she had carried out any further investigation at all. Notwithstanding the fact that the Claimant had given precise times of contact to the absence line and notwithstanding the fact that Mr McKay accepted that throughout this whole process that he agreed that the Claimant's absence was genuine there was no reply to the Claimant's letter and his sick pay remained withheld.
14. On 15th July, the Warehouse Operations Manager, Mr Carter, wrote to the Claimant telling him that he had failed to follow the correct notifications procedure and "in addition to this you failed to respond to any of the attempts that have been made to contact you" which "could result in the

withholding of all or part of your entitlement to company sick pay". No details were given of the attempts which the Respondent said had they had made to contact him.

15. The Claimant was also told in that letter that he was considered absent without leave, which could result in disciplinary action.
16. On 17th July 2015 the Claimant was sent an appointment for an occupational health appointment to take place at the Respondent's premises on 22nd July.
17. On 21st July, the Claimant repeated that he could prove he contacted the depot by telephone on 3rd July and said that the Respondent was in breach of its absence procedure as he had done everything that was required. He referred to the fact that he was on medication for depression, referred to the sick note which had been sent from his GP and said that the Respondent was making matters worse for him. He asked for an explanation for the purpose of seeing occupational health.
18. On 22nd July. Ms Harding replied at length to the Claimant saying that they were not aware that he had called on 3rd July and had no record of a message being left. The Respondent apparently wipes clear all messages on its absence line every 8 hours, although this was not explained to the Claimant. Ms Harding, referred to the Claimant not having had "a verbal conversation with a manager" despite what was said to be "repeated attempts which have been made by the management team to contact you" although, again, these were unspecified. It was said that the Claimant's telephone did not have the facility for a message to be left and referred to the Respondent's concern, "about the lack of contact". It identified that the Claimant had "chosen to write back rather than contact a member of the management team as we would expect."
19. Ms Harding went on to say that the purpose of the visit occupational health was to allow the Respondent to better understand the Claimant's illness and to better support him through his period of absence. It repeated the company sick pay had been stopped due to the Claimant not following the expected processes around contact with the site management team and said that "non-conformance with the company's absence policy will also be investigated as a potential conduct issue on your return to work"
20. The occupational health meeting had been re-arranged 26th July, but the Claimant did not attend. On 3rd August 2015 the Claimant was issued with a fit note for 11 months up to 3rd July 2016 as a result of "tension headache, neck pain".
21. Thereafter, there were a number of attempts by the Respondent to contact the Claimant. They wrote to him on many occasions seeking to make appointments for welfare visits or to fix occupational health meetings and thereafter to arrange investigation and disciplinary meetings with the Claimant. The long sequence of letters sent by the Respondent is as follows;-

14th August 2015 invitation to a meeting on Monday 17th August to discuss his absence.

17th August 2015, writing with the option of a home visit or depot visit but saying that if the writer (Ms Harding) did not hear from the Claimant within 48 hours she would be forwarding the issue to investigation for failure to comply with company notification procedures.

24th August 2015, when the Claimant was invited to an investigatory meeting to take place on Thursday 27th August to discuss the allegation that he had failed to follow depot absence and notification procedures, attend schedule depot visits and occupational health appointments, leading to a breach of trust and confidence.

28th August 2015, when the Claimant was called to the rescheduled investigatory hearing on the 2nd September, having failed to attend the meeting on 27th August.

2nd September 2015, when the investigation meeting was held in the Claimant's absence (Steve Gale attended as an appointed representative from "colleague voice") as a result of which the matter was progressed to a disciplinary hearing

2nd September 2015, when the Claimant was called to a disciplinary hearing to take place on Monday 7th September to face the same allegations as set out in the letter calling him to the investigation meeting

7th September 2015, when after the Claimant's non-attendance on that date, the disciplinary hearing was rescheduled for 10th September

10th September 2015, when the disciplinary hearing was held in the Claimant's absence, Mr Gale again representing him at the request of the disciplining officer, the hearing being adjourned so that the disciplining officer could check the proof of delivery for the meeting before reaching a decision

15th September 2015, when the Claimant was invited to a rescheduled/reconvened disciplinary hearing on 21st September

22. In respect of all the above the Claimant made no contact with the Respondent.
23. On 18th September 2015 the Claimant's general practice wrote a letter "to whom it may concern" confirming that the Claimant had had intermittent back and neck pain since 2012, with numerous reports of back pains in 2013, 14 and 15. To confirm the Claimant's diagnosis of tension headaches in July 2015 and in August complained of further neck pain relating to ongoing stresses which he attributed to his work. The Claimant apparently said that talking about work increased his pain and that he felt victimised. He was tearful when talking about work and found that his neck pain intensified when he spoke about it, found these matters so stressful that the letters associated with his work were being opened by a friend on his request and that reading about work related matters made his neck pain worse. He was being referred to a specialist to help him with his mood and stress and he was under continued review by the GP.
24. That letter was sent to the Respondent along with a copy of a printout from the Claimant's mobile telephone number (07572) 186895, which showed calls to the absence line on 3rd July 2015 at 9:04 PM, lasting 12 seconds and 9:04 PM, lasting 42 seconds together with confirmation that he had been contacted by the Respondent on that same number in January and

May 2015. There was some doubt as to when these documents were received by the Respondent but they were attached to a letter from the Claimant of 25 September 2015.

1. On 21st September 2015 the Claimant was invited to another occupational health meeting on 25th September. Mr Glass, who was assisting the Claimant with his correspondence wrote to the Respondent referring to a perceived change in the mental well-being of the Claimant over the previous 2 years, saying that the Claimant was in a difficult financial situation and saying that he needed the Respondent's help and urging them to "help sort out this problem". That accompanied a letter written by Mr Glass on the Claimant's behalf, but signed by the Claimant referring to errors in the handling of the Claimant's company sick pay, forwarding the call log showing no calls to the Claimant's number since 30th May 2015. He also referred to attending the general practitioner with the Claimant because the Claimant himself could not explain his illness or condition and copying the letter from the GP Mr Glass stated "I hope this is sufficient information you can amend the situation and arranges company sick pay as soon as possible".

In view of the date of that letter, I find as a fact that the Respondent was aware of the position as set out in the general practitioner note and of the employees general condition (as well as the fact that they had been calling the Claimant on an incorrect number) by at the latest Monday 28th September 2015

26. On 8th October 2015 the Respondent replied to those letters stating first that they had been calling the telephone number (07867) 726381, which was "the number we have on file", acknowledging receipt of the general practitioner letter but still requiring occupational health assessment and asking for consent to access the Claimant's medical records. There was reference to a home visit that was arranged between Mr Glass and Mr McKay to take place on Thursday 3rd October 2015. That had not happened and the letter stated that the Claimant had "failed to make [himself] available" for that meeting.
27. The letter concluded by stating that as the Claimant had not engaged in any conversations with any of the management team since he left site due to sickness on 3rd July, despite numerous requests for him to contact the depot; because of his refusal to attend to occupational health appointments, his failure to attend any depot visits and the fact that no one was available at the home visit fixed for 8th October and a generalised comment that there had been a failure to follow the company's notification procedures his company sick pay would remain suspended until such time as the Claimant engaged in the absence policy. A continued disregard of the process would lead, it was said, to consideration under the disciplinary policy. The letter said that the Respondent would be happy to facilitate a further home visit with an independent senior manager who had had no prior involvement from the depot and that a separate letter would be written regarding the outstanding disciplinary hearing which was currently in adjournment.

28. On 23rd October 2015 the Claimant was invited to a meeting on 26th October (Monday) being the reconvened disciplinary hearing. He did not attend as a result of which the matter was concluded in his absence. Mr Carter, who conducted the hearing, said that he was satisfied that absence policies had not been followed by the Claimant, that whilst letters had raised concerns about his health the Respondent had not been given the opportunity to assess the position from either a management perspective or by occupational health and whilst Mr Carter considered the Claimant to be guilty of gross misconduct, he wanted to give the Claimant the opportunity to amend the position and resume contact. So rather than dismiss the Claimant for gross misconduct he issued a final written warning and confirmed that a further occupational health appointment had been made for Friday 6th November. The Claimant was told that there was an expectation of an immediate improvement and a failure to do so may result in further disciplinary action. The Claimant was also advised that any further breach of rules whilst the final written warning was live could result in dismissal
29. On 29th October a letter from the Claimant to Mr Carter asked what it was that Mr Carter needed the Claimant to explain, given that he had a letter from the general practitioner who was the only person qualified to inform the Respondent of the position; that in answer to this to Mr Carter's question about how the Respondent could help the Claimant, the answer related to financial difficulties. The letter says that the Claimant did not feel that he can deal with anybody from the depot, stating that his belief was that they were trying to mentally destroy him. He said that he would not accept visitors from Asda Bedford to his home "as they are the cause" of his problems. An appointment with other managers from another Asda plant would be acceptable. He wanted Mr Glass to be present and he would record the meeting. The Claimant said he was still waiting for a response from the letter of 22nd October and asked for a reply within 5 working days.
30. Dr Siddiqui, Specialist Doctor to a Consultant Psychiatrist at Luton East Community Mental Health team wrote a "to whom it may concern" letter about the Claimant on 3rd November 2015, explaining the Claimant's mental health difficulties.
31. Neither in that letter, nor in the letter from the Claimant's general practitioner, is it said that the Claimant should not attend the Respondent's premises, is unfit to attend a meeting to discuss his condition, nor unfit to attend an occupational health assessment .
32. On 3rd November the Claimant was invited to a further occupational health appointment on 6th November.
33. The Claimant did not attend and another occupational health appointment was fixed for 9th November although the letter inviting him to it appears to be dated 11th November which cannot be explained as a "typographical error" and on 9th November. Ms Dwerryhouse and a Mr Palmer attended for a house visit at 3 pm but there was no answer to the door. There was no visible evidence of anyone being at home and a telephone call to the

Claimant's mobile telephone went straight to answer phone. The call was being made to the wrong number

34. Because of the Claimant's failure to attend that arranged home meeting he was called to an investigatory hearing by letter dated 11th November to take place on 13th November. That letter was hand-delivered to the Claimant's address at 7:15 pm on 11th November. The Claimant did not attend, the meeting was rescheduled for 19th November when he again did not attend but he did write again on 17th November, asking to help resolve the issue, saying that Doctor Siddiqui had said that if the Respondent needed information about the Claimant's mental condition to feel free to contact her and enclosing a copy of the letter to be forwarded to the occupational health team (there is no evidence that it ever was forwarded to them).
35. On 17th November the Claimant was called to a further investigatory meeting to take place on 19th November which letter was hand-delivered at 5:30 pm. Again, the Claimant did not attend and again Mr Gale was asked to attend on his behalf. The investigation officer, Mr Spooner, confirmed that the Claimant had failed to attend a scheduled appointment with occupational health on 6th November and the home visit on 9th November, as a result of which he should be charged with serious misconduct for failing to comply with reasonable management requests
36. A copy of the outcome of the investigation was sent to Claimant on the 19th November
37. On 26th November. Mr McKay wrote again to the Claimant clarifying the position with regard to company sick pay. That said that a letter had been sent on 6th July, confirming non-compliance with the absence notification procedures and withholding of sick pay and that if the Claimant wished to discuss the matter further, to contact the depot to speak to a manager; but a further letter was sent on 17th August clarifying that company sick pay would continue to be withheld because of failure to attend occupational health appointments since when two home visits had been attempted unsuccessfully and letters requesting the Claimant's attendance at an occupational health appointment on 2 separate occasions had been fruitless. Mr McKay said that he trusted the letter clarified the matter, but if the Claimant wished to discuss the matter further then he could contact either himself or Mr Carter and gave two telephone numbers to assist.
38. On 1st December 2015 the Claimant appealed against the withholding of his company sick pay, on the basis that he had called and spoken to a manager, Mr McKay, and submitted reports from Dr Siddiqui and from the GP and that Dr Siddiqui was willing to answer any queries which the Respondent had.
39. The Respondent wrote to Dr Siddiqui on 8th December, asking certain questions. Notwithstanding a reminder on 13th January no reply, appears to have been made
40. The Claimant was invited to a meeting to discuss his company sick pay 11th December. He did not attend.

41. On 18th February 2016 the Claimant was invited to an investigatory hearing on 25th February because of a failure to comply with absence notification procedures. He did not attend and a telephone call (made again to the wrong number) was unanswered.
42. On 25th February the Claimant was called to a reconvened investigatory meeting on 29th February, which again he did not attend as a result of which on 2nd March he was called to a disciplinary hearing on 7th March relating to the failure to comply with the depot absence and notification procedures in the correct manner his refusal to have contact with the depot and failure to attend the occupational health appointment scheduled after the final written warning in respect of which he had not offered any explanation
43. That meeting was rescheduled for 11th March. When the Claimant did not attend on the 11th March it was held in the Claimant's absence. Mr Mackay came to the conclusion that the failures identified amounted to further misconduct on behalf of the Claimant, constituting serious misconduct. In light of the fact that the Claimant had been in receipt of a final written warning, which remained live on his file the Claimant would be dismissed with notice, his last day of employment would be 11th March and he would receive payment in lieu of any notice holiday pay and any other payments due to him on 18th March.
44. The Claimant wrote saying that he wished to appeal the decision and on 25th March. He was invited to an appeal hearing to take place on 30th March, which again he did not attend, so it was rescheduled for 5th April. Again he failed to attend as a result of which his appeal was rejected.
45. Against that background, the Claimant claims that he suffered an unlawful deduction of wages and that his dismissal was unfair.

The Law

46. Under section 94, of the Employment Rights Act 1996 every employee has the right not to be unfairly dismissed.
47. Under section 98; when determining the question of whether a dismissal is fair or unfair, the employer must show the reason or the principal reason for dismissal and that it is a reason falling within subsection (2) or some other substantial reason to justify the dismissal of an employee holding the position which the employee held.
48. Under section 98 (2) (b) conduct is a potentially fair reason for dismissal.
49. Under section 98(4) where a potentially fair reason for dismissal has been established by the employer, the question of whether a dismissal is or isn't unfair 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 sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

50. Tribunals have been reminded on countless occasions, in cases such as *Post Office v Foley*, that they must not substitute their own view, for that of the employer but must determine whether what the employer did fell within the range of responses open to a reasonable employer.
51. Under section 13 of the Employment Rights Act 1996 an employer shall not make a deduction from the wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract.
52. I note that it is common ground in this case that the sickness absence policy is a contractual document and thus the Claimant has a contractual right to company sick pay, but that the terms of the policy entitle the employer to withhold that company sick pay in the circumstances set out therein

Conclusions

53. In relation to the Claimant's claim that he was unfairly dismissed, this is a simple case. The Claimant was called to a number of meetings to discuss his absence from work with the company, was called to a number of occupational health meetings and had two home visits scheduled. He attended none of them. Under the Respondent's disciplinary policy breach of company policies and procedures and rules is an act of misconduct, deliberately refusing to comply with a reasonable management request is serious misconduct, which can lead to the issue of a final written warning and a breach of trust and confidence resulting in a breakdown of the working relationship is considered an act of gross misconduct
54. The Claimant was dismissed as a result of his failure to attend the occupational health appointment on 6th November 2015 and the home visit on 9th November 2015. He was already in receipt of a final written warning for similar matters which remained live on his file. The Respondent categorised these as a failure to obey reasonable management instruction although they could equally have been categorised as a breach of company policy, procedure and rules. In either case, the Claimant did not attend the investigatory hearing or disciplinary hearing to defend himself. He did not explain the reason for his absence at either meeting. He did not produce any medical evidence in support of the contention which he now makes that he was told by his doctor not to attend any such meeting. In those circumstances, where the Claimant already had a final written warning, the employer was clearly acting within the range of responses open to a reasonable employer in treating that continued failure as sufficient reason for dismissing the Claimant. The matter relates to his conduct, which is a potentially fair reason for dismissal and the Respondent acted reasonably in treating the misconduct as sufficient to justify dismissal in the light of the earlier final warning.
55. In the circumstances, the Respondent has established a fair reason for dismissal and acted reasonably in treating the reason found as sufficient to justify the dismissal of the Claimant in the circumstances of this case.

Had the Claimant told the Respondent what he has told the tribunal (and had his general practitioner or Dr Siddiqui confirmed it) ie that he should not attend any meetings at all with the Respondent for a period of time whilst his mental health recovered, I have no doubt that the Respondent would have acted accordingly but sadly he did not do that. The Respondent can only act upon the information it has in front of it and in the circumstances of the case and based on the information that it had before it had acted reasonably in dismissing the Claimant for his continued failure to attend any of the meetings relating to his absence , (including those which had been arranged to take place at his own home) in the light of the previous final written warning.

56. In relation to company sick pay, however, the matter is more difficult. The withholding of company sick pay, which is a contractual right, is only permitted in the circumstances set out in the contract. It is not a question therefore of reasonable belief, but a question of fact.
57. The Claimant's company sick pay was originally withheld because he had failed to notify the Respondent of his absence in accordance with the policy which required him to "inform the depot, ideally one hour before the start of their shift ". I have found as a fact, as the telephone records clearly demonstrate that the Claimant did contact the depot by telephoning the absence line on 3rd July before the commencement of his shift. The Respondent cannot explain why there was no record of these calls. A blank message left on answer phone for 42 seconds would have alerted the Respondent to some issue, but Mr McKay told us that he had no recollection of that being mentioned at the meeting held each day to consider absences and notifications. The telephone records clearly demonstrate that the calls were made, made to the correct number, and made of the times which the Claimant set out in his very first letter to the Respondent on 8th July when he received the first notification that his company sick pay was being withheld. The Claimant also submitted a fit note confirming that he was absent from work and would be absent from work for one month commencing 3rd July information which had been corroborated in circumstances which I find somewhat disturbing by the receptionist at the Claimant's general practice in reply to an enquiry from the Respondent about the veracity of the sick note.
58. The question for me, therefore, is whether the Claimant suffered an unlawful deduction from wages (or, to put it another way, the deduction being admitted, whether the Respondent was entitled to withhold the pay under the terms of its contractual absence and sickness policy).
59. In relation to the initial period starting 3rd July, I conclude that they were not and reach that conclusion because the Claimant had complied with the notification process. He had telephoned the absence line and had reported that he would not be in attendance at work that day. He also submitted his general practitioner fit note.
60. However, when he then failed to attend the occupational health appointment on 22nd and 26th July 2015, the Respondent was entitled to withhold company sick pay from that time because the Claimant had unreasonably (no excuse having been given) refused to attend an

occupational health service appointment, which is a reason set out in the contractual policy which entitles the Respondent to withhold company sick pay.

61. That remained the case throughout the remainder of the Claimant's period of sickness absence. Had he advised the Respondent that he could not attend, on medical advice, meetings with the company and had that been confirmed by medical advice, the Respondent would have been in a different position and may well have been required (I make no finding on this because it is unnecessary to do so) to restore company sick pay, but he did not do so and no medical evidence in support of that position was ever produced to the Respondent. Accordingly, for the period after the 6th July I find that the Respondent was entitled company sick pay and thus from that date on new unlawful deduction has occurred.
62. In the circumstances, therefore, the Claimant is entitled to payment at the rate of company sick pay (taking into account statutory sick pay already received) for the period 3rd to 26th July 2015.
63. Save and except to that extent of the Claimant's claims do not succeed and are dismissed. There was no further unlawful deduction from the Claimant's wages and he was not unfairly dismissed

Employment Judge Ord, Huntingdon

Date: 29 March 2017

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS