EMPLOYMENT TRIBUNALS

Claimant: **Mr A Shaw**

Respondent: **British Steel Limited**

Heard at: **Leeds** **On: 23 June 2017**

Before: **Employment Judge Lancaster**

Representation:

Claimant: **In person**
Respondent: **Mr D Jones, Solicitor**

JUDGMENT having been sent to the parties on and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided taken from the transcript of the oral decision delivered at the time:

REASONS

1 On 25 October 2016 the claimant suffered an accident at work. He was immediately referred to the onsite occupational health medical centre and an in-house ambulance was then allocated to take him to Accident & Emergency. That was perfectly sensible because it transpired that on a crush injury he had fractured the middle finger to his right hand. That initial decision to authorise the ambulance was taken by an occupational health nurse, that is Jill Caley.

2 After being seen at the hospital where his fingers were strapped together he was provided with a cap, which he was to wear as and when the swelling subsided' and having been treated with codeine a manager, Mr Ian Coult, returned him to the site. There he again reported, following the normal procedures, to the medical centre where he was again seen by Ms Caley. He then returned home.

3 There is no evidence that there was any detailed assessment of his condition carried out by the occupational health nurse at that time. However she did, on an internal e-mail record, state that the claimant would be "in work tomorrow on modified duties". I accept the claimant's evidence that he never said in terms that he would in fact return the next day. It would depend how he felt. But he did intend to seek to come back to work albeit it was self-evident that he would not be able to resume his

full duties unless and until the fracture healed. Ms Caley's recording of the outcome in that way is however consistent with the absence management policy in relation to industrial injuries. This requires occupational health to make an initial assessment and select from a drop-down menu whether an injured employee is "fit to return to normal duties"; "fit to return to work on modified duties"; "should be referred to hospital for further treatment" or; s was "advised to go home and return for treatment/assessment at a later date". That is simply a very provisional assessment at the earliest stage.

4 In the event the claimant did not return to work on light duties or full duties but he did attend again the following day, the 26th. Once more I accept his evidence and I find that he attended under pressure from his managers to do so. The claimant has given evidence, which has not been challenged, that he understood the rationale for that requirement that he attend onsite was that had he been involved in an industrial accident that involved him taking time completely away from work that would have potential repercussions for the respondent's health and safety record. What those repercussion may be has not been precisely explained to me, however I understand that it would have had an adverse effect because of the category in which the accident would have to be reported within the respondent's business.

5 So the following day, having not attended at work -which I accept was perfectly reasonable given his continuing pain and swelling having continued overnight - his father drove him again to the medical centre where he once more saw Ms Caley. On that occasion I accept the claimant's evidence that he told the nurse that he would not be able to return even on modified duties to his normal place of work as he would not be able to put on his overalls. I accept his evidence that the response he was given by Ms Caley on that occasion was that she accepted that information at face value. The claimant says he was visibly in pain and she would have observed that. As a trained occupational health professional nurse it would have only been sensible for to her to draw that conclusion. She would have seen that he was telling the truth. He would clearly have been unable to put on his uniform and she therefore indicated that she would make a note that any modified duties should not involve him returning to the normal workplace where he had to dress in safety clothing. I accept that evidence even though there is no record of any endorsement to that effect actually having been made by Ms Caley as she said she would.

6 There was in fact no occupational health report whatsoever in this case. The first documentation is the internal e-mail from Ms Caley. The only reason that e-mail was sent appears to be that she was trying to enter the details of the industrial accident on the internal systems and was unable to get onto the system. She therefore sent an e-mail simply to confirm the relevant information about what had happened on the 25th. There is no record from occupational health of what was said on the 26th when he returned with his father. There is certainly no evidence that she carried out any detailed assessment or examination of the claimant with a view to ascertaining what he would or would not be able to do as and when he returned to work.

7 The only information which eventually was put before the dismissing officer, Mr Smaller, was not anything obtained contemporaneously from Ms Caley It was simply a hearsay account from the claimant's manager purportedly indicating that he understood that occupational health had deemed the claimant fit to return on modified duties. There was no explanation of what may or may not be meant by the phrase "he was deemed to be fit for modified duties". Certainly at no stage did anyone from the respondent carry out any enquiry as to whether the claimant had been fully assessed.

8 The claimant then says, which I accept, that he was persistently subjected to phone calls and contact with a view to getting him back into work. I reiterate that I also accept that that was because of the implications for the respondent if he were not even on site. I have expressed in the course of the hearing and I repeat that I am concerned by an e-mail which has been disclosed in the course of these proceedings from Gary Spindley, one of the claimant's managers, to Ms Kayleigh Pike in HR and copied to his immediate line manager Andy Towers. That was sent just three days after the accident. It indicated, in summary of the events up to that stage, that Ms Caley's line manager, another nurse Sharon Smith, who it is accepted had by then spoken to the claimant him on the phone ,was "fuming with him". That appears to be because Ms Smith, who had never herself seen or examined the claimant, had apparently formed a view that he should return on modified duties in accordance with the wishes of the managers.

9 What concerns me particularly about that e-mail however is the expression from Mr Spindley, "By the way, Anton isn't a union member so we won't get any noise from the TU [the trade union]". There is only one way of reading that: that is that they considered, as management, that they would be able to put pressure on the claimant to return to work, for whatever reason, without the repercussions of him having the backing of a union to protest against the way he was being treated. It is in my view a clear indication that management were indeed prepared to adopt a somewhat bullying attitude at this stage.

10 Throughout this time the claimant was at all points certified unfit to attend for his full duties at work. The respondent nonetheless persistently sought to persuade him to return. The claimant kept them fully informed of the position regards his own medical practitioners. So as of 28 October he had got a doctor's note the previous day covering him for a week, and he informed the respondent that he was now on stronger medication which apparently had made a difference the previous night, that he wanted to see how the weekend would go, that he would give a ring on Monday morning and that he hoped that the pain would have settled and he would be in a better frame of mind to actually return safely. I should also add at this stage that I have, of course, heard the claimant give evidence and it is quite clear that the faced with the combination of worry about having been involved in an industrial accident and also what he felt was undue pressure by management to force him to return early, he was not in a particularly good mental state as well as suffering the physical pain.

11 I accept the claimant's evidence that he continued to suffer pain. There may have been minor delays in responding to management but I accept from this timeline that he did everything that was reasonable to keep his

employers in touch. The suggestion that he was uncooperative I do not accept at all. I accept his evidence that on one occasion very shortly after the accident he had nonetheless agreed that he would be available to be given a lift into the workplace, that was on the morning of the 27th. But on that occasion nobody attended. Subsequently when he did contact Mr Towers to ask why nobody had come fro him he explained it was too late to go into work then because he had a prearranged hospital visit with his daughter. Again I accept the claimant's evidence that he had indeed prearranged that with Mr Towers and that he had worked additional hours in the week preceding before his accident in order to facilitate him taking that extra time off.

12 What the respondent does rely on particularly is then an e-mail from Ms Smith of 3 November. This was in response to a request from Mr Towers to Ms Smith asking for written confirmation of what work the claimant would be able to perform, purportedly so as to arrange a meeting with him to discuss the restricted duties. Mr Towers identified that what he thought the appropriate restricted duties were was for him to chaperone another employee, Mr Wyner, as there was no physical work to be undertaken. In response to that Ms Smith on the 3rd said, "The restricted duties you have outlined below are ideal. Chaperone with no physical work, no climbing of ladders and no requirement to use his right hand. He is left hand dominant so sat down he should be able to put overalls on one leg at a time then injured side first into right armhole and the left arm into overalls and pull up over shoulders. The dominant left hand should not be difficult to do press studs up". So effectively Ms Smith is purporting to say, as from 3 November, that he was fit to come in not to work. She of course had never seen the claimant. She had never carried out any assessment as to whether he would in fact be able to put on his overalls and where she says he "should" be able to do that, that is an opinion based upon no actual knowledge on her part.

13 The claimant had been put under particular pressure to return and on 2 November had initially agreed to do so. But he then changed his mind. Having taken advice from ACAS he required confirmation of what the additional duties would be so he could discuss them with his own medical practitioners. As a result of that exchange between Mr Towers and Ms Smith he was then informed that the duties were to chaperone only. That information did not get through to him in time for him to discuss it with his specialist. However after seeing the specialist on 3 November it was confirmed that he would be available to carry out light duties if they were office based only. Again I accept the claimant's account that that was because his specialist, who of course had examined his actual injuries which no one at occupational health and certainly not Ms Smith had ever done, confirmed that he should not be required to put on overalls. So the informed medical opinion was that he could work in his normal clothes in an office but not in a situation which required him to dress himself. I also accept the claimant's evidence his specialist was concerned that the physical environment of working in the tool shop would be potentially detrimental to his recovery if he were involved in any incident, whereas an office environment was deemed to be safer.

14 Following on from the assumption in the occupational health e-mail of the 3rd indicating that chaperoning duties would be suitable without ever having had a meeting with the claimant, without having called for any specific medical evidence or without having discussed the alternative possibilities as mooted in his specialist's fit note that he do office work, it was therefore deemed to be the position that the claimant was refusing a reasonable management instruction to attend work. A decision was then taken to stop his company sick pay and reduce him to statutory sick pay only from 7 November and he was invited to a disciplinary meeting firstly arranged to be held on 29 November; the invitation letter was sent on 16 November. At that stage the charge was "being absent without permission, not having attended work since 28 October despite occupational health advice confirming you are fit to attend work on modified duties and management confirming they can accommodate them". And the basis of this allegation is as I say contained in the e-mail from Sharon Smith dated 3 November 2016.

15 The claimant responded to that indicating that he was still signed off sick, as of course he was, and therefore could not attend the meeting. That of course was not necessarily correct. The fact that you are not able to attend work does not mean you are necessarily unfit to attend a meeting. More specifically his reply identified that he was to attend a specialist again on 1 December, only shortly after the scheduled meeting on 29 November, and he therefore requested that it be adjourned. That was a perfectly reasonable request and it was granted. Also, in any event, the meeting on the 29th could not properly have gone ahead. That was because on 28 November the respondent modified the charges by adding a second charge. That was as a result of them having carried out a surveillance of the claimant on 14 November when he was seen attending the sports centre at his Tai Kwando class and observed engaged in warm up exercises.

16 So on 28 November he was sent a revised letter inviting him to a disciplinary meeting this time for 2 December. The 28th was the Monday, the 2nd was the Friday of the same week, and that meeting was scheduled for 2:30pm. I accept the claimant's account that he then challenged that timing with Mr Towers and asked how long was allocated for the meeting and was told the room was booked until 4:00pm. At this point the claimant indicated that he ordinarily only worked until 3:00pm and that he had a standing arrangement to collect his daughter from school and therefore if he were to attend at the scheduled time that would mean he was only available for some 25-30 minutes for a meeting which on any expectation could be anticipated to last longer than that.

17 That account was misreported, by Mr Towers, as saying that the claimant had refused to attend. The claimant then again explained his position in an e-mail to Ms Pike of HR. I have not heard from Ms Pike although she has been in the Tribunal. I frankly do not understand the reason for her reply. She took the position that still requesting him to attend at 2:30pm even if it meant he would have to extend his normal working hours was not unreasonable. She considered, without making any enquiry into his personal; circumstances, that he ought to have adequate time to make alternative arrangements within those days from Monday to Friday to alter

the normal arrangement for collecting his daughter. But in any event the adjournment was then further agreed and the meeting was postponed to 8 December.

18 Shortly before the meeting was due to start at 10:30am the claimant e-mailed to indicate that he would not be able to attend. He gave the reason that he had been ill over the weekend unfortunately with a bout of what he described as "having the runs" and that he was not able to leave the close vicinity of his toilet. Again I have no doubt that the claimant is telling the truth to me when he says that was the reason. However the respondent decided that as this was the third adjournment it would be proportionate to carry on in his absence. I do not consider that that procedurally is within the band of reasonable responses. The reason for the first adjournment from 29 November to 2 December was perfectly properly to accommodate further updated medical evidence from the claimant's specialist and as I say in any event it would have been necessary, to accommodate the new charge brought by the respondent. Although they had evidence of an alleged attendance at a Tai Kwando class on 14 November they did not bring the further charge until two weeks later. Also the adjournment from 2 December I also consider to have been perfectly reasonable given the timing. Mr Smaller, the dismissing officer, has not told me that he had any grounds to disbelieve the claimant's account that he was ill on the day. He simply considered that because there had been three adjournments for some reason, wholly unexplained, the claimant would not necessarily attend in the future. Despite having a valid reason for not attending the hearing went ahead in the absence of the claimant.

19 On that basis therefore I conclude that this dismissal was procedurally unfair. However, had the matter been adjourned for a reasonable time to allow the claimant to attend and give his explanation I, with some hesitation, conclude that the respondent not only would have come to the same decision on the facts before them but they would have just been acting within the band of reasonable responses had they done so. That is not in relation to the first charge, the alleged failure to attend because he was deemed fit to work by occupational health. I am not at all impressed by the respondent's arguments based on an attendance management policy which provides that the word of occupational health is said to be final over and above of any doctor's report. That is clearly not an appropriate position to take in these circumstances, putting aside the question of whether there would in fact ever be a situation where such weight ought to be attached to that provision in the policy. The briefest factual analysis of what happened would have indicated that in this situation occupational health were in no position to make an informed decision, certainly not as against that of the claimant's own specialist. What they would have been entitled to do would have been to explore further medical evidence, to have carried out a proper detailed assessment upon a referral of the claimant to them to assess what he could or could not actually do, but to simply deal with it on the basis of a presupposition, never having seen him, that he would be able to put on overalls or should be able to put them on is inadequate.

20 As I say, the claimant throughout was in my view acting perfectly reasonably in keeping the respondents informed as to what the position

was between him and his doctors. And he had indicated as from 3 November that he would be able to return to reduced duties certainly in the office environment had that ever been properly explored with him.

21 However, on the second matter, that is in relation to the attendance at Tai Kwando on the 14th, I conclude the respondents would have been within the band of reasonable responses in dismissing. The claimant for the first time today has indicated that he does not accept that he was in fact present on the 14th. However there is photographic evidence that shows his vehicle at the sports centre. That is confirmed in a signed statement by the investigating officer. The claimant accepts that nobody else at this point was driving his vehicle. There is also evidence in the form of statements that he was seen carrying out warming up exercises.

22 The claimant accepts that shortly after this, towards the end of November after his birthday, he did indeed start to attend Tai Kwando again though he says this was largely for the social activities and he was not involved in any contact but was only carrying out some exercise. The evidence before the respondent was that he had started to do that as of 14 November. They are entitled to question whether that is indeed inconsistent with the assertion that he would be unable to attend to carry out the modified minimal job of shadowing somebody else in the workplace on the basis that the claimant had throughout this time persisted in his assertion that he was not fit for anything other than office duties. I conclude they would have just been within the band of reasonable responses in treating that as sufficient misconduct to dismiss. However I am not at all satisfied that it meets the definition of gross misconduct. The respondents must satisfy me of that and they have not done so.

23 What they have shown is that the claimant was attending a Tai Kwando class on the 14th and driving his vehicle. However I accept the claimant's evidence that he was only able to do that with a modification of his car with a steering knob and that he had obtained express confirmation from his insurers that that was permissible. I also accept his evidence that he was not engaged in any contact activity at Tai Kwando. That is to a large extent corroborated by the investigator's only reporting he saw him warming up. I also accept his evidence that the wearing of loose fitting martial arts clothing, into which he had already changed and where he had assistance in tying the belt, is in no way indicative that he would also necessarily have been able to put on his work overalls. However the respondent would have been reasonably entitled to conclude that his participation in this activity indicated that he would have by now been fit for some modified duties in the tool room. This was not a situation where the claimant was alleging that he was wholly unfit for work, it is not therefore analogous with the case of **Hutchinson v Enfield Rolling Mills [1981] IRLR 318**. The claimant throughout this period was expressing through his specialist's fit note that he would have been fit for some modified duties. The only issue was to whether or not those modified duties should in fact be within his normal workplace or only in an office environment. As I say although it is conduct this is just sufficient to justify unfair dismissal, it is not properly described as gross misconduct to justify summary dismissal.

24 The claimant is therefore in my view entitled to the following awards. The dismissal is unfair but he would have been fairly dismissed had it been delayed to allow him to attend the hearing. The limit of his compensation as is just and equitable is therefore 2 weeks additional pay. I am not however satisfied that the respondents have established a level misconduct on his part prior to dismissal which would make it justifiable to reduce the basic award. He would be entitled to that on the basis of his 9 years' employment. I do not reduce those awards for a failure to carry through the appeal process. I am not satisfied there is evidence that is an unreasonable failure. The claimant has given an account to me that there was some confusion in his mind as to when the start date for appealing ran and he was under the impression that he had run out of time and that was the reason why he did not pursue it. That is not an unreasonable failure in all the circumstances, particularly given the wording of the dismissal notification, that would justify a reduction in that award.

25 Also, even though the claimant would have been fairly dismissed after the further period of two weeks when a proper investigation could have been held it would still not have justified summary dismissal and he would have been entitled therefore to a further 9 weeks' net pay.

26 I also conclude that the claimant had suffered an unlawful deduction from his wages having been reduced to statutory sick pay from 7 November. The sum properly payable to him is determined in Appendix C to his contract of employment. That states quite simply "salary will be paid during periods of absence due to certificated sickness injury". In his case this a was up to 26 weeks at normal salary and 26 weeks at half salary. The contract does not purport to say that company sick pay over and above statutory sick pay is in any way discretionary. The claimant was of course at all stages properly certificated absent by his GP and by his specialist. There is no reason as against this to read in an implied term that in some way the respondent had a discretion to pay less than statutory sick pay. This is not a case as in **Luke v Stoke on Trent City Council [2007] EWCA Civ 761**where it is a case simply of no work and no pay. The material distinction in my mind is the fact that this is covered by doctors' notes. That is why the claimant was not at work. It was not as in Ms Luke's case that she was refusing to return to her place of work unless she received a satisfactory outcome to a grievance she had raised within her workplace. The contract is quite clear on its face. There is no discretion.

27 If the respondents had carried out a proper investigation to determine that the claimant was absent without reasonable excuse then they may at that stage have determined he was not entitled to be paid but there is nothing to indicate that HR in the person of Mr Ashton, was entitled to do as he did and decide, on the basis of inadequate evidence from occupational health, that he could find a discretion not to pay company sick pay and revert only to statutory sick pay. If there were any implied term, though it is not necessary for me to determine the issue, it could only be an implied term that after a proper investigation and examination by occupational health if, notwithstanding the terms of a doctor's note, there was a reasoned conclusion that the claimant was fit to work on modified duties that upon investigation then by the appropriate manager sick pay may be stopped.

We are far short of that analysis either by the manager Mr Ashton or by occupational health. It is not however necessary to look at any such implied term as the terms of the contract are quite clear and there is no reason to go behind them. It is not discretionary. He was certificated absent by his doctor so the precondition for payment was clearly met. It is not a case where he is refusing to work at all. The only issue was when he should return on modified duties and in the interim, which certified unfit, he is entitled to be paid. So he is entitled to the balance of his full pay from 7 November until the date of termination.

28 The compensatory award therefore are for unfair dismissal on the basis the claimant had 9 years' continuous employment, the last 5 years of which he was above the age of 22 so that is a total of 5 x 1 + 4 x ½, that is 7 weeks pay subject to a statutory cap of £479 which is a basic award of £3,353.00. In relation to the compensation which is limited to the period it would have taken to have convened a properly conducted disciplinary hearing with the claimant in attendance that is 2 weeks net pay of £738.46 and the damages for breach of contract, pay in lieu of notice, 9 weeks' net pay is £3,323.07. In relation to the unlawful deduction from wages it is agreed that over the 4 weeks and 3 days up to the nominal date of termination on the 8th the claimant would have received £1,634.00 net, he only received £406.00 statutory sick pay. The shortfall is £1,228.00 net.

29 There is no award for costs, the claimant having paid no fees. That therefore is the judgment of the Tribunal.

Employment Judge Lancaster

Dated: 31st July 2017