EMPLOYMENT TRIBUNALS

Claimant: Mr S George

Respondent: Stage Electronics Partnerships Ltd - SLX

Heard at: Bristol **On:** 24 and 25 October 2017

Before: Employment Judge Street

Representation
Claimant: Adam Griffiths, counsel
Respondent: Michael Howson, solicitor

JUDGMENT having been sent to the parties on 7 November 2017 and reasons having been requested by the respondent on 7 November 2017 in accordance with Rule 30(5) of the Rules of Procedure 2004

REASONS

1. Evidence

1.1. The tribunal heard from Mr George, from John Wallace, Managing Director, Sam Mathisen, Warehouse Supervisor and line manager and from Kamil Grzechowiak.
1.2. The Tribunal read the documents in the bundle referred to. Numbers in brackets below are to the page numbers in the bundle, numbers against "ws" are references to witness statements.

2. Issues

2.1. Mr George claims that he was unfairly dismissed. The issues were agreed as follows.
2.2. What was the reason for the dismissal? The respondent asserts that it was a reason related to capacity which is a potentially fair reason under section 98(2), Employment Rights Act 1996. ("the 1996 Act").

2.3. Did the respondent hold that belief in the claimant's lack of capacity honestly and on reasonable grounds based on reasonable enquiry? The burden of proof is neutral here but it helps to know the claimant's challenges to the fairness of the dismissal in advance and they are identified as follows:

2.3.1. The failure to take into account favourable advice from Occupational Health ("OH").
2.3.2. The failure to obtain a medical report from the claimant's general practitioner ("GP")..

2.4. The issue here is not whether the tribunal thinks that he could or could not do the job. The question is what the employer thought and whether it was a reasonably held belief.
2.5. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer? That is an objective approach – the tribunal cannot substitute its own view.
2.6. If the procedure is found to be unfair, does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event, to what extent and when?
2.7. Remedy, to include compensation

3. Findings of Fact.

3.1. The respondent is a supplier of stage lighting and sound equipment
3.2. The company don't have a capacity policy or absence policy. They have a disciplinary policy which expressly does not cover cases involving genuine sickness absence (36).
3.3. Mr George's employment as a Warehouse Team Technician began on 7/03/13.
3.4. His responsibility was unloading and loading, maintaining hire equipment and picking and packing orders (79).
3.5. The job involves moving equipment, including double stacking of flight cases which could weight up to 100 kg. There is no marked weight on the boxes. Two people were required for the heavier weights. Staff were expected to lift weights up to 25 kg for a single man, with team lifting of weights up to 45 kg. The job also involved maintenance and repair of equipment and ensuring it was properly stowed and its dispatch recorded (71)
3.6. The warehouse team was divided into teams, with usually 4 men to a team. Mr George worked in lanterns, and aside from lighting, he did fixing and repairs. Other teams dealt with cables and distribution boxes, speakers and video screens and lighting. There were other teams, Hire in, Hire out and Rigging.
3.7. Agency workers were frequently used at busy times.
3.8. Agency workers were employed substantially over the latter part of 2016. For example, there were 10 in the week of 1/07/16, including Mr Duell for the full week, (100), 9 in the week of 8/07, and 15/07, 12 in the week of 29/07, 7 in the week of 28/10, 6 in the week of 4/11, 2 in weeks 11/11 and 18/11 and 7 in the week of 2/12, including again Mr Duell (117).

3.9. In April 2016, Mr George was absent with lower back pain and spasms.
3.10. He returned in May but the GP recommended no heavy lifting – that is, no lifting above 5kg - for at least four weeks (50). The recommendation was that he was then eased back into full duties.
3.11. He was given light duties. The adjustments made at that point were in terms of reduced lifting, no picking orders and packing.
3.12. He took time off in June, still having trouble, but was encouraged to take it as annual leave. (83, para 6 Cws, oral evidence)
3.13. From 23/06/16 to 1/07/16, he was again signed off work, the GP certificate referring to sciatica.
3.14. At the return to work meeting on 5/07/16, he was warned that formal action would follow if his absence record did not improve. (Cws 7).
3.15. From then on, the claimant was on light duties (Cws8)
3.16. On 14/07/16, he was given an informal warning about the effect of further absences – clearly taking the approach that his behaviour represented misconduct (56).
3.17. On 16/08/16, Mr George had an MRI scan.
3.18. From 19/10/15 to 21/09/16, he had a total of 24.5 days off on sick leave. Absences related to his back pain are recorded being four episodes over 2 – 3 months, namely 23/06, 6.5 days, 8/06, 5 days, 2/06, 1 day, 20/05 1 day, 13.5 days (96).
3.19. On 2/09/16, he collapsed with abdominal and chest pains. An ambulance was called (ws 13). It was a temporary problem and did not lead to further time off.
3.20. On 21/09/16, he was off sick for three days with a urinary tract infection (57).
3.21. This was the last sickness absence before dismissal. There was an unrecorded return to work meeting with Ms Cheeseman when he was told that his absences had got to a level where it would require disciplinary procedures.
3.22. He had improved from when he first came back to work with back trouble. He had gone from very light duties to taking on more of his normal role. Mr Mathison was aware of the improvement. He still had a hand with heavier lifting. He was not aware of any particular individual being assigned to work with him to support him in carrying out his duties. Agency workers were common, he was used to finding himself working with them for substantial periods.
3.23. On 11/10/16, there was a formal disciplinary hearing regarding sickness absence (62). It was dealt with as misconduct. Ms Cheeseman confirmed that they did not doubt that he was genuinely ill when off sick. The issue was the level of absences.
3.24. Mr George reported at that meeting that he had a herniated disc, that he was on fairly light duties, was fine on Mondays and Tuesdays, but that it got progressively worse during the week. The disc was healing nicely though further treatment with cortisone was a possibility. He consented to a medical report being obtained from his GP.
3.25. He was reassured that the company respected his work and wanted to make him as comfortable as they could. He was put on statutory sick pay for all absences in excess of 10 days.
3.26. No GP report was obtained.

3.27. On 4/11/16, there was a telephone consultation with OH. The report was that there was a,

> "Good likelihood of being able to provide regular and effective service outside of any possible exacerbations"
>
> "This could have intermittent flare-ups/ exacerbation periods as is the nature of the condition but for the time being he continues to be fit for work with some reasonable adjustments if the company can accommodate them."

3.28. The report continued

> "I would advise in relation to any future manual handling activities that these are risk assessed to ensure he does not lift weights heavier than 15 kg to ensure no further exacerbation occurs. …I could not identify any further medical treatment options or management support which would increase the likelihood of Mr George providing a better level of attendance." (66)

3.29. It does not recommend a GP report and it does not suggest that the limitation on lifting is time limited.

3.30. The report was solely based on telephone interview. Medical records were not consulted.

3.31. On 9/11/16, a Stage 1 written misconduct warning for sickness absence was issued with a warning of "unacceptable levels of absence, namely 24.5 days in the past 12 months which are unacceptable for our company". The warning ran for six months (68).

3.32. Also on 9/11/16, Mr George was invited to a medical capability hearing (69. He was issued with the OH report. The invitation said that,

> "If there is little likelihood that you are able to return to your Team Technician role in its full capacity, within a reasonable timescale, and with the restrictions of lifting no more than 15 kg is no longer in place, or alternative employment is not available, then the outcome may be notice of the termination of your employment on the grounds of ill health."

3.33. On 17/11/16, the capability hearing took place, chaired by Mr Henson.

3.34. At that hearing, Mr George reported a improvement in his back condition (70):

> "Paracetamol only, quite a dramatic improvement, lifting not a major issue in the last couple of weeks, but a hand needed for weights over 15 kg. Standing can be a problem, best if I can move about."
> "How long do you feel it will be before you are able to fully return to your duties?…..Someone has to cover your role so we have an agency employee."
> "I don't know. In view of my age, I'm going to now always have back issues. It's never going to go away, it's just knowing my limits. The last few weeks I've manage to work around this."

3.35. The request that a GP report be obtained was refused:

"We are not going to gain anything".

3.36. On 24/11/16, Mr George was dismissed (73).

> "Further to your prolonged period of absence over the last 12 months and our meeting on 17/11/16…"
> "We discussed whether there were any reasonable adjustments that could be made to your current post to facilitate a return to work but none were found."

3.37. The basis for the decision is set out that there was no possibility of Mr George returning to his substantive role for foreseeable future. It is recorded that he agreed with that.

> "We discussed whether there were any reasonable adjustments that could be made to your current post to facilitate a return to work but none were found. We also considered the possibility of suitable alternative employment, but unfortunately there were no suitable vacancies".

3.38. The dismissal was immediate, with pay in lieu of notice.

3.39. On 30/11/16, Mr George appealed, on the grounds that the procedure had been unfair, that the decision to dismiss was unreasonable and premature. He pointed out there had been no absence since 23/09/16 (75). His back was improving and the respondent had not obtained proper evidence on the prognosis.

3.40. On 13/12/16, there was an appeal hearing, conducted by Kuldeep Chahal, from HR Face2Face. It lasted 50 minutes. The appeal was by way of review of the original decision.

3.41. Mr Chahal did not at that stage have a copy of the OH report, had not read any documents, even the minutes of the dismissal hearing, and did not have a representative of the company present (78).

3.42. Mr George's evidence to the appeal officer was that within the last month he had only needed help with things that would be two man lifting jobs in any case (80). He had been getting back to the stage where he could do the tasks at issue. In fact, "I had done those tasks on particularly busy occasions and I'd been asked to do it and I'd done overtime the week before."

3.43. Mr George says he was doing 90% of his role by then and felt ready to start doing it fully (85). He reported on the dramatic improvement the physiotherapist had seen which had led to him being discharged from further treatment (81).

3.44. After that hearing, the appeals officer interviewed Ms Cheeseman of HR and reviewed the documents, that is, those relating to the disciplinary hearing and the medical capability hearing.

3.45. Christine Cheeseman provided a summary of events and set out the absences, with the reasons for them. Her summary addresses absences. Adjustments are only mentioned in the context of the level of adjustments being unreasonable:

> "Following the medical capability hearing and with advice from Peninsula we decided that the reasonable adjustments that have

been in place for the past 4 – 6 months can no longer be sustained, no other adjustments can be made in his current role to facilitate a return to work and there were no other suitable positions available, we therefore decided to terminate his employment." (87)

3.46. Nothing is said as to the nature of the adjustments in place, or as to what might be required in future.

3.47. The appeals officer concluded that the level of absences for back pain was a total of 24.5 days in 12 months, with 5 episodes, attributing all the absences to back pain rather than the 13.5 days.

3.48. The majority of factual findings in the report were about levels of absence.

3.49. In relation to adjustments, the appeals officer records that the respondent felt they had accommodated Mr George with adjustments and light duties for far too long and that it could no longer be sustained and that they were entitled to reach that conclusion.

3.50. There was no discussion in the appeal report of the adjustments already made or whether they could continue. It isn't recorded what the adjustments were. There was no assessment of the impact of the adjustments on the company's business or on Mr George's performance.

3.51. On 10/01/17, the appeals officer's recommendation that dismissal be confirmed was accepted.

3.52. In summary, Mr George had had 24.5 absences over 12 months to September 2016. Four episodes, that is 13.5 days, were in relation to his back condition. The rest were in relation to various minor conditions and self-limiting. Most recent were the incident of abdominal pain and a three day absence with a urinary tract infection. There had been no absence since 23/09/16.

3.53. The stage one warning in respect of absences was issued on 9/11/16 for six months and there had been no further absences.

3.54. He had had help throughout from other members of the team, including agency workers. At the point of dismissal, he would still have struggled with heavy lifting, in particular team lifting, but he was ready to go back to a more substantial proportion of his normal workload and had been doing it with much less help over the last month. By the date of his appeal hearing, he had made a further marked improvement.

3.55. He has since found work, his current job being active and heavy.

4. Law

4.1. By section 98(1) of the Employment Rights Act 1996 ("the ERA"), it is for the employer to show -

> "a) the reason (or, if more than one, the principal reason) for the dismissal, and
> b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

4.2. A reason falls within subsection (2) if it relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do or which relates to the conduct of the employee.

4.3. By section 98(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."

4.4. First therefore the employer must establish the reason or principal reason for the dismissal and that it is a potentially fair reason.

4.5. It must be true in fact or believed to be true on reasonable grounds (W Devis & Sons Ltd v Atkins [1977] AC 931, [1977] 3 All ER 40 HL) . If there are no reasonable grounds for a belief relied on as an important part of the reason for dismissal, the employer may be held not to have acted reasonably in all the circumstances in relying on it (Smith v City of Glasgow District Council [1987] IRLR 326, [1989] ICR 796, HL).

4.6. East Lindsay District Council v Daubney [1977] ICR 566 (EAT) shows that the reasonable respondent is under a duty to make reasonable enquiry as to the claimant's capability in his role.

4.7. In the EAT decision in Spencer v Paragon Wallpapers Ltd [1976] IRLR 373, [1977] ICR 301, Phillips J emphasised the importance of scrutinising all the relevant factors.

> ''Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?''

4.8. The relevant circumstances include 'the nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do'.

4.9. The Tribunal must be satisfied that the employer has acted reasonably in treating the ground as a sufficient reason for dismissal. The decision of the employer must in the particular circumstances of each case fall 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 (Iceland Frozen Foods v Jones [1982] IRLR 439).

4.10. It is not the function of the tribunal to substitute its own view for that of the tribunal. It doesn't matter what the tribunal thinks of the claimant's competence; it is what the employer thinks that matters, provided that

that is the employer's genuine and honest belief on reasonable grounds.

4.11. This was made clear by Lord Denning MR in Taylor v Alidair Ltd [1978] IRLR 82, [1978] ICR 445, when he enunciated the basic test which should be applied in deciding whether or not a dismissal was fair:

> ''Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable and incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent'.'

4.12. Sir Geoffrey Lane LJ said in the same case that the function of the tribunal was to decide 'whether the employers honestly and reasonably held the belief that the employee was not competent and whether there was a reasonable ground for that belief'.

4.13. Three factors relate to the assessment of reasonableness:

- the evidence necessary to establish that the employer has reasonably concluded that the employee is incompetent;
- the procedures adopted; and
- the question of to what extent the employer should seek alternative employment for the employee.

4.14. Sir John Donaldson delivering judgment for the NIRC in James v Waltham Holy Cross UDC [1973] IRLR 202, [1973] ICR 398 stated that:

> ''An employer should be very slow to dismiss upon the grounds that the employee is incapable of performing the work which he is employed to do without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground, and giving him an opportunity to improve his performance.''

5. Reasons

5.1. On the basis of the issues as identified above, and applying the law to the facts found, the Tribunal finds as follows.

What was the reason for the dismissal?

5.2. The reason in the letter of dismissal is about the inability to perform to the full extent required by the contract.

5.3. The letter inviting Mr George to the meeting on 17/11/16 is about the inability to perform to the full extent required by the contract (69).

5.4. The meeting itself is primarily about that.

5.5. The respondent says that the dismissal was about capability to do the job.

5.6. Mr George's belief is that the trigger for dismissal was the absences – the concerns arose after his urinary tract infection and the unrecorded meeting with HR on his return.

5.7. The letter of dismissal opens by saying "Further to your prolonged period of absence over the last 12 months…. "

5.8. That letter shows that the absences were taken into account.
5.9. The OH report was obtained in part based on his sickness absences (65), as well as "his health and safety recently". The referral is set out as "In particular with regard to him having had five episodes of absence in the last 12 months." It was obtained after the warning in relation to absences.
5.10. Mr Wallace saw no difference between absence and capability – in effect, he acknowledged that the absences were relevant to the decision he said he made to dismiss.
5.11. The briefing to the appeals officer emphasised the absences.
5.12. Absences figure largely in the appeal officer's findings. The appeal officer's findings exceeded the evidence by attributing the whole of the 24.5 days of absence to the back pain over 12 months (89).
5.13. I am satisfied that the company saw the absences and the reduced performance as part and parcel of the same thing and the absences influenced the decision to dismiss.
5.14. On fine balance, I am satisfied that the principal reason for the dismissal was the inability to perform the full extent of the role as Warehouse Team Technician, given the terms of the letters referred to above and that the procedure took place after the absences had ceased.
5.15. The category of such reason is capacity and it is a potentially fair reason for dismissal.
5.16. Mr George's absences, while not the principal reason for the dismissal, coloured the thinking of the employer at all stages.

Genuine belief on reasonable grounds based on reasonable enquiry?

5.17. Did the respondent hold that belief in the claimant's lack of capacity honestly and on reasonable grounds based on reasonable enquiry?
5.18. The job involves heavy manual work, and if he could not do it, he could not perform as to 100%. The respondent obtained an OH report. That advised against Mr George lifting more than 15 kg. His job involved lifting up to 25 kg and team lifting weights up to 45 kg. He could not do the job as required. He didn't challenge the report.
5.19. The OH report has to be carefully read. It does not say that he is not able to lift weights over 15 kg. It says he should not lift weights over 15 kg, because he risks an exacerbation. It would be a brave employer that would disregard that advice.
5.20. The simple answer here might be that the respondent was entitled to accept the report that they had obtained and that on his own account that he could not lift more than 15 kg. The OH report is fuller than the report considered in East Lindsay v Daubney. A much briefer report there was not held to be so unsatisfactory as to require further medical evidence.
5.21. The full picture however is less clearcut.
5.22. The company knew that Mr George's condition had improved. That is because he had been slowly improving over time and because his manager had started giving him heavier duties as well as because at the time of the November hearing, the dismissal and the December appeal, Mr George was reporting improvement.

5.23. There had been a period, earlier in the summer, when Mr George was on very light duties, and, as he admits, getting through the work that he could do in good time, looking for more. Over time he had been taking on more and more.

5.24. Mr George was reflective and careful in his answers. He acknowledged openly that he was going to have continuing back problems, but was also clear that he was back to doing the greater part of his job. What he said in the appeal hearing was that by the last month, the only stuff he needed help with would ordinarily have required a 2 man lift (80).

5.25. In determining whether it was right to dismiss on the grounds of capability it was necessary to establish to what extent the company was still making adjustments for him and how long they might continue to be needed and at what level.

5.26. The respondent's case for dismissal was that the level of adjustments was excessive and could not continue.

5.27. There is no record of the adjustments.

5.28. Mr George was not aware of adjustments, save that his colleagues, full-time and agency, helped him with lifting as necessary, and in being relieved of picking and packing, tasks he had begun to resume.

5.29. The best account given of adjustments is given for the first time in the course of the medical capability hearing on 17/11/17, when Mr Mathisen said that other members of staff were relieving Mr George from his duties. Mr Mathisen said too that in response to Mr George's health an agency member of staff had been employed to assist in what he was unable to fulfil, by lifting heavy pieces of equipment above 15kg to the desk so that Mr George could carry out the testing on it.

5.30. Mr George had not been aware of that – it was the first time he had been told that.

5.31. At the tribunal hearing, the agency staff member was identified as Mr Duell.

5.32. The company had heavy reliance on agency staff during busy periods. Mr Duell was one of the regular agency workers, working throughout this period and after the dismissal. The records show that Mr Duell was engaged but not what he was doing.

5.33. There is no record of a discussion leading to a decision to take on an agency worker to support Mr George. Mr Mathison himself spoke of other team members helping out. Mr George did not know. Mr Wallace simply said he saw Duell with him when he was in the warehouse.

5.34. It seems genuinely unlikely someone could be employed to support, Mr George, to help him, without him knowing. I find that overstates what was done. I do accept that they did factor in the need for some support; it was one factor amongst many in managing work load and staffing. I also accept that he was on light duties over the summer. But there had then been improvement, and a resumption of duties.

5.35. There is no assessment made of the extent to which support was still needed at the time of the hearing in November.

5.36. The appeals officer treats it as a steady arrangement that had lasted over a number of months. That is based on Christine Cheeseman's account. It fails to address the detail of Mr George's slow and steady improvement, to the point where he was doing heavier work

and overtime and reporting dramatic improvement following physiotherapy.

5.37. There is some uncertainty in the evidence about how much Mr George should be doing. The OH had advised against lifting 15 kg. That was based on a telephone consultation without medical records. There is not a direct conflict between the OH report and the GP note from May 2016, but it is noteworthy that the GP recommended light duties and no lifting above 5 kg for at least four weeks. Since then there had been both diagnosis, based on MRI scan and treatment, physiotherapy, and improvement.

5.38. At the medical capability appeal, Mr George was reporting a dramatic improvement since having physiotherapy, to the point where he had been discharged.

5.39. It would have been possible to obtain medical evidence that would clarify whether or not the OH was right, in the advising against lifting above 15kg. It would have been possible to establish the extent of the adjustments continuing to be necessary from November. Further review of the evidence available might have been prompted by the report of dramatic improvement in December (which the appeals officer did not pass on).

5.40. Were the only issue the question of capability, it may be that the respondent had done enough. However, there is also the question of absences.

5.41. Absences had been considered on a disciplinary basis only in October, leading to the issue of the warning. It was treated as a misconduct issue. There had been no further absences. It would be unfair to take into account the absences on that basis – they had been dealt with.

5.42. But the absences were certainly taken into account, as outlined above. That is inescapable – and admitted. Mr Wallace saw no distinction between absences and capability. Absence is heavily relied on in the medical capability hearing and in the appeal outcome

5.43. If the absences had not been weighing heavily in the thinking of the respondent, the respondent's officers might have been more responsive to the improvements in Mr George's condition, recognised the limitations of the evidence and conducted the fuller enquiry that would have allowed a proper assessment of his capability.

5.44. I am satisfied that the company was unhappy with its own decision on the absences. They were clearly a factor in their thinking pointing towards early dismissal, notwithstanding the recent issue of a warning. It was taking the absences into account that probably led the respondent to disregard the improvements achieved and to dispense with full evaluation of what future adjustments were likely to be needed. The employer therefore unreasonably limited the enquiry.

5.45. No reasonable employer would have discounted the evidence of improvement or failed to assess the extent of adjustments likely to be needed to his role.

5.46. This was not a reasonable level of enquiry.

A fair procedure?

5.47. It is a requirement of a fair procedure that someone whose performance is under scrutiny as below what is required is warned of that and given a chance to improve.

5.48. The initial steps here were in relation to absence, not a failure to perform. Reduced levels of performance were only raised on 9/11, discussed on 17/11 and led to immediate dismissal a week later on 24/11/17. He was not told until 17/11, on the employer's evidence, of the extent of the adjustments they claim they made. On their own evidence, the claimant was not told of substantial adjustments to accommodate him or that they were excessive. He was faced with it at what turned out to be the dismissal hearing, which gave him little opportunity to address the question of what adjustments might be necessary in future or to demonstrate that they were not excessive.

5.49. To dismiss based on the very first disclosure of the extent of the adjustments said to be in place was unfair. Following a fair procedure by warning and consulting Mr George and carrying out a fair investigation would also have meant that the employer had nothing to lose in seeking clarification of the prognosis. It was necessary to give him a chance to address the concerns, and if so, there was time to obtain medical evidence.

5.50. The absence of a warning makes the procedure adopted unfair.

5.51. The appeal did not remedy that. The appeal was only a review, but there were points that the appeals officer could have considered which could have led to a different outcome: the reliance on absences in the light of the earlier warning given – leaving aside the error that was made as ; the failure to establish the real extent and likely future extent of the adjustments and the failure to consider the improvement in Mr George's condition – which was not passed on to the respondent in the appeal report. There was clear evidence before the appeals officer that dismissal might not be justified which was not considered.

5.52. The appeal therefore did not remedy the weaknesses of the earlier procedure.

A fair sanction?

5.53. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

5.54. If the matter had been as clearcut as the respondent believes, that the claimant could not do the job he was employed to do, the dismissal would have been fair.

5.55. He hadn't been. But the extent to which he couldn't do his job, at the date of the dismissal, is not properly established by the respondent.

5.56. It was his back that had caused the trouble. He had had no back-related absences for some months. He was doing heavy work again. He was having physiotherapy at the date of the medical capability hearing and had been discharged from physiotherapy with marked improvement by the date of the appeal hearing.

5.57. No reasonable employer would have dismissed at that point, without establishing what the current situation was and so what level of cost and inefficiency would be required to keep him on. It would have been reasonable to see what the outcome of the physiotherapy was, and it was unreasonable not to do so and properly to assess whether the current level of support would still be required.

5.58. The absences could not be taken into account, having been the subject of a very recent warning. Absences were taken into account.

5.59. A reasonable employer, disregarding the absence history, and recognising the scope for treatment, improvement and at least further enquiry, would not have dismissed at that point.

5.60. Dismissal was not within the range of reasonable responses.

5.61. Given that Mr George's condition continued to improve between November and December, and has continued to improve since, to the extent that he is again in heavy work, it can't be said that dismissal would have been inevitable within the period of a fair investigation and fair procedure including fair warning.

5.62. I find unfair dismissal.

5.63. Remedy was agreed between the parties.

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Employment Judge Street

Date: 1 December 2017

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REASONS SENT TO THE PARTIES ON

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS