THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS**

BETWEEN:

Mr B Chowdhury

Claimant

and

Abellio London Ltd

Respondent

ON: **8 January 2018**

Appearances:
For the Claimant: **In person**
For the Respondent: **Mrs H Lunney, Solicitor**

JUDGMENT

The claimant was unfairly dismissed.

His contract of employment was not breached.

A remedy hearing will take place on **18 May 2018** at **10am** listed for 3 hours.

REASONS

1. In this matter the claimant says that he was unfairly dismissed. He also brought a claim of breach of contract but when we discussed the issues at the beginning of the hearing, it became clear that he had already received his notice pay and that the remainder of his concern was with in relation to sick pay post dismissal. I explained that if he succeeds in his claim whether he should have received further sick pay would form part of an assessment of his losses. He also said that he had never been provided with a

breakdown of what he had been paid and in that regard after the lunchtime break the respondent gave him a copy of his last payslip.

2. I clarified with the claimant that he believes the reason, or part of the reason, for his dismissal could have been issues he had raised with the respondent regarding lunch breaks and that he had indicated he wanted to make an application for parental leave. He was not sure whether his previous transfer into the employment of the respondent was a factor in his dismissal.

Evidence and submissions

3. I heard evidence for the respondent from Ms U Patel, the dismissing manager, and Mr J Eardley, the appeals manager. The claimant also gave evidence. There was an agreed bundle of documents. Both parties made oral submissions at the close of evidence. Unfortunately it was too late by that stage for me to deliberate and give a decision on the day. The decision was therefore reserved.

Relevant Law

4. The dismissal was admitted by the respondent and accordingly it is for it to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2) of the Employment Rights Act 1996. Those potentially fair reasons include capability, the reason relied upon by the respondent, which is to be assessed by reference to skill, aptitude, health or any other physical or mental quality (section 98(2)(a) and (3)(a)).

5. If the respondent establishes a potentially fair reason then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test, the burden of proof is neutral.

6. In considering whether the respondent has acted reasonably in treating the claimant's capability as sufficient reason for dismissing him the Tribunal looks to whether the respondent's decision, on the information available to it at the time, fell within the band of reasonable responses to the claimant's capability which a reasonable employer could adopt. That case also confirms that the correct approach is to consider all the circumstances of the case, both substantive and procedural.

7. In coming to this decision the Tribunal must not substitute its own view for that of the respondent.

8. In considering capability dismissals arising from long term sickness absence, guidance from case law can be distilled into three key principles:
    a. each case is to be judged according to its own specific circumstances but in cases concerning long term absences the issue often amounts

to whether the employer can be expected to wait any longer for the situation to improve;

b. the employer should consult with the employee before making its decision; and
c. the employer should take steps to discover the true medical position however the decision whether to dismiss is managerial not medical.

9. Underpinning all these factors is that a reasonable procedure should be followed by the respondent. When considering the procedure used by the respondent, the Tribunal's task is to consider the fairness of the whole of the process. Any deficiencies in the process will be considered as part of the determination of whether the overall process was fair.

Findings of Fact

10. Having assessed all the evidence, both oral and written, I find on the balance of probabilities the following to be the relevant facts.

11. The claimant commenced employment as a bus driver in September 2008. That employment transferred to the respondent in January 2015. There was nothing before me to suggest that the claimant was anything other than good at his job which it seemed he greatly enjoyed. He did not have a particular history of sickness absence prior to the process that eventually led to his dismissal.

12. The claimant had raised with the respondent concerns he had in respect of lunch breaks and what he saw as bullying by certain managers. These issues were pursued both informally and formally under the grievance procedure but not to any final outcome. Whatever the rights and wrongs of those issues I am satisfied that neither Ms Patel nor Mr Eardley, when they made their decisions, were not aware of them and they played no part in those decision. Similarly, they were not aware that the claimant had raised at least the possibility of wanting parental leave. Finally, the claimant had at least suggested that the fact he had transferred into the employment of the respondent and was on more beneficial terms than new employees had played a part in the decision. I am again satisfied that this is not the case. The decision I have to make, therefore, is on the usual principles in relation to dismissals for long term sickness as described above.

13. The respondent operates a sickness absence policy which recognises that a certain level of absence may be necessary due to sickness. Their policy is to offer security of employment during such periods, subject to operational requirements and the conditions set out in the procedure. That procedure sets a trigger for further investigation to begin if sickness absence has lasted for 3 weeks or more. It states that it may be appropriate to liaise with occupational health services (OH) to establish whether the absence is caused by an underlying medical condition, whether attendance will improve and whether the employee is medically fit to continue in their current job. If

there is no satisfactory explanation for the level of absence and it remains unsatisfactory, it may be necessary to progress to the disciplinary procedure.

14. The procedure states that the respondent will be sympathetic when an employee is ill, but the employee should appreciate that if they are persistently absent through ill-health it will not be possible for the situation to continue indefinitely and that employment may be reviewed and/or terminated. Termination will not take place without full consultation with the employee, medical investigation and a consideration of alternative employment.

15. Separately the disciplinary procedure is stated to be designed to help and encourage all employees to achieve and maintain, inter-alia, standards of attendance. The process, including the possibility of escalating warnings, is typical of disciplinary procedures. It does not specifically relate this to long-term absence no doubt reflecting that long-term absence, assuming the absences were genuine reasons, does not sit well with the concept of being disciplined. In any event it is clear that an employee in that situation is entitled to a hearing before he or she is dismissed, at which she will have the right to be represented, and the right of appeal.

16. The claimant commenced a period of sick leave on 2 February 2017. This was first described as being 'flu related and there was some speculation as to whether it might be caused by a leaky boiler in his home. Because of that the claimant was referred for blood tests which later revealed that he had high cholesterol and that, together with his weight, led to him successfully change his lifestyle and greatly improve his general health/weight over a relatively short period. The claimant says that his response to these issues show that he was clearly willing to follow advice in relation to his health and to take whatever steps were necessary to improve it.

17. In any event it became clear relatively quickly and certainly by 15 February 2017 that the reason for the claimant's sickness absence was pain in his left shoulder. On 13 February 2017 the claimant was referred by his staff manager Mr Ayeni to OH. The claimant says that Mr Ayeni was wrong to so refer him so quickly as the referral was predicated on the incorrect view that his absence was related to a possible gas leak. As a result, he says, he went through the dismissal process too quickly and if he had been referred later, he would have been able to return to work when his shoulder improved in June. I do not accept that argument. Even though the referral to OH does focus on the headache and the possible gas issue, it was entirely reasonable for the claimant to be referred at that stage and the questions asked in relation to his expected return to work and medical position, were still relevant.

18. The OH assessment took place on 22 February 2017 and a report was forwarded to HR on 21 March 2017. It stated that the main factor preventing the claimant from working was pain in his left shoulder which was not responding to painkillers, that communication with the claimant was difficult and therefore the doctor had difficulty in establishing to what extent, if at all, stress was rendering him incapable of working. Further, that it was not clear why the pain, which was allegedly agonisingly severe had got worse and that:

    'it could be a very long time before he admits to feeling able to get back to work'.

19. On 24 March 2017 Ms Patel wrote to the claimant, enclosing a copy of the OH report, asking him to attend a capability hearing to consider whether he was capable of fulfilling his duties as a bus driver due to his long term sickness absence.

20. In a reply dated 28 March 2017 the claimant objected to the meeting taking place saying that it should only take place after he had received specialist advice. Ms Patel quite reasonably decided to proceed with the meeting and to explore the issues raised by the claimant with him face-to-face.

21. That meeting took place on 28 March 2017. Typed notes of the meeting, which Ms Patel typed on her laptop as the meeting progressed, were in the bundle. The claimant says that these, and notes of subsequent meetings, were not accurate and did not properly reflect what he said. Copies of the notes were not sent to the claimant at the time. Clearly this is unfortunate, as if they had been any dispute as to their contents could have been much more easily resolved at the time. If it is not the respondent's standard practice to send notes of meetings to employees at the time then I strongly suggest that they consider making that a standard practice.

22. In any event the notes reflect that the claimant was accompanied by a union representative and that in some respects it was a difficult meeting as the claimant felt unwell and communication was difficult. Shortly after commencement the meeting was adjourned for 7 minutes or so as the claimant felt unwell.

23. On resumption, the claimant confirmed to Ms Patel that he was getting pain on the left side of his body increasing when he moved his shoulder and that he had also been given advice about his weight and cholesterol. When asked for the likelihood of resuming work when his then sicknote ran out on 20 April or possibly sooner, the claimant advised that he would be seeing a specialist on 24 April and he provided letters showing that he had appointments with the GP on 20 April, physiotherapy on 19 April and chemical pathology on 8 May. He also said that he could prove the report from OH was wrong. Ms Patel adjourned the meeting as she wanted the claimant to see the OH again.

24. The claimant attended the OH for the second and final time on 12 April 2017 and a report was provided on 19 April 2017. This recorded that it was again a difficult consultation, that the claimant continued to be off work with pain in his left shoulder, headache, dizziness, breathlessness and discomfort on the left side of his face. Also, that he had had an x-ray but did not yet know the result and was due to see the physiotherapist on 19 April. It recorded that he had high cholesterol but this was not relevant to his fitness to work. He was also not willing to be examined and said that he was not doing anything at home, he had impaired sleep and was not driving and felt the need to sit down after using a staircase due to dizziness but was able to dress and wash with his right hand but was not using his left arm at all and keeping it firmly next to his body. The report concluded:

    'Given his numerous symptoms, all of which appear to be continuing with little or no improvement and without any clear explanation, I fear it could be weeks or months before he admits to feeling well enough to get back to work.'

25. The claimant says that this report does not accurately reflect the discussion he had with OH and in particular that the detailed symptoms described was what he said he experienced when specifically asked how he felt when he used his left arm as opposed to all the time.

26. The claimant attended the physiotherapy appointment on 19 April 2017 and was diagnosed with chronic left supraspinatus/bursitis with altering cervical spine posture. A care plan was agreed with a range of management strategies including a targeted home exercise programme, a physiotherapy led exercise class and, if needed, pain management and one-to-one physiotherapy sessions. The claimant's evidence, which I have no reason to doubt, was that he conscientiously carried out the prescribed exercises which, together with his successful weight loss over this period, improved his condition.

27. On 21 April 2017 Ms Patel wrote to the claimant inviting him to resume the capability meeting. Very regrettably that letter contained an incorrect reference to advice given by the OH with regard to another employee and made a reference to a 6 to 8 weeks recovery time after surgery. This error led to subsequent unhelpful confusion between the parties. The letter did however enclose a copy of the OH report from 12 April 2017 and Ms Patel tells me that she is confident the correct version of the report was enclosed and that therefore it would have been clear to the claimant that there was in fact no reference to surgery.

28. The resumed meeting took place on 28 April 2017 during which the claimant confirmed that he had been given a 5 week exercise plan by the physiotherapist, that he was doing those exercises and that:

    '…now I feel like it is getting better'

and that he was now taking Naproxen tablets (a non-steroid anti-inflammatory drug) which led to side effects as described in the OH report. He also said the condition was completely healable (and made a reference to the prospect of surgery – incorrectly due to the error described above) and that his GP had said he looked a lot better. When asked by Ms Patel when he felt he would be returning to work, he did not give a precise date but said that he had been given 5 weeks of exercises to do and that the situation would be reviewed in May to see how he had progressed.

29. Ms Patel adjourned the meeting and wrote to the claimant on the same day confirming what they had discussed. In particular, that he was still in pain and could not move his left arm, that he had been given exercises to do for 5 weeks and there was a review appointment on 18 May and that he was unable to let her know when he was able to return to work. She confirmed therefore that she would not make a decision about his employment until he had seen his GP and specialist in May. She asked the claimant to email her on 19 May 2017 to inform her of the outcome of the GP appointment and to come in for a further capability meeting on 22 May 2017.

30. At that meeting on 22 May 2017 Ms Patel made handwritten notes. Again the claimant says these are not accurate and do not fully reflect what he said. The notes show, however, that he had seen the physio on 18 May 2017, that there had been some improvement but he was still in pain and that he had a next appointment with the physiotherapist on 23 June 2017 and that his GP had signed him off until 11 June 2017. The notes show that Ms Patel asked the claimant if he was able to come back to work or give a return to work date and that he replied 'not at the moment' and that he would not be able to establish this until the next physiotherapy appointment.

31. The claimant's evidence is that he told Ms Patel - in more detail than the notes suggest - that he was making an improvement and that he fully expected to be able to return to work on or from 23 June 2017. It is clear that the notes are not verbatim nor particularly detailed but I do conclude that if Ms Patel had understood that he was saying with any certainty that he would be able to return to work on 23 June, she would have recorded that. Equally it is clear from the notes that the claimant indicated his situation was improving and that the next physiotherapy appointment was potentially significant.

32. Ms Patel adjourned the meeting during which she reviewed the file and the claimant's submissions and OH reports. The meeting resumed and she informed the claimant that she had decided to dismiss him on medical capability grounds and that he would be paid in lieu of his notice. He was advised of his rights to appeal. Ms Patel wrote to the claimant on 24 May 2017 confirming his dismissal.

33. The claimant emailed Ms Patel, HR and his union representative on 24 May 2017 setting out his grounds of appeal. He stated that he had told Ms Patel that although he had not been discharged by the physiotherapist the pain had stopped spreading out and was receding and that he had made a 'tremendous level of recovery in a very short period of time'. He also said that in the meeting Ms Patel was not prepared to wait until 23 June 2017, the 'return back to work date I gave you'.

34. As to whether the claimant said to Ms Patel that he would return to work on 23 June 2017, I have balanced their respective oral evidence as well as the note of the meeting and the claimant's appeal email written 2 days later. I have also taken into account the claimant's style of communication as I experienced it at this hearing. He does not always express himself as clearly as he could, frequently refers to irrelevant detail and gets side-tracked. This can make it difficult to follow what he is saying and I suspect it is easy for him to think he has said something clearly when he has not or for the person listening to him to not fully appreciate what he is saying or trying to say. On balance I find that the claimant did refer to a return to work date of 23 June 2017 during the dismissal meeting but Ms Patel failed to recognise that. It is clear, however, that she did understand he was saying he was getting better to at least some degree.

35. The claimant was invited to an appeal hearing on 1 June 2017 at the Camberwell depot. He replied on 26 May 2017 asking for the appeal to be rescheduled after 23 June 2017 for personal/financial and health reasons as he would not be available until then. He did not in this email, or any subsequent ones, expressly say that travelling to Camberwell was a problem for him. He did however, under the heading 'Company property', say that because of his shoulder injury and having given up his bus passes, travelling anywhere was difficult due to financial reasons. He did not go so far as to request that the appeal be heard at Beddington which, during this hearing, he said he had wanted. The respondent cannot be criticised in this respect.

36. In response on 26 May 2017 Ms Jones of HR indicated that the respondent was willing to reschedule the hearing but it was not reasonable to delay until 23 June. The claimant replied on the same day repeating that he could not make it before the 23 June due to personal/financial and health reasons and that he was:

    'putting all my recourses (sic) in making sure I get discharged on the 23rd of June 2017.'

37. Ms Jones replied on 31 May 2017 saying that the respondent would consider rearranging the appeal hearing until after 23 June if the claimant signed a document accepted that, should he be reinstated, any reinstatement payment would only cover the period 23 May to 1 June (the

date of the first suggested appeal hearing). In all the circumstances this approach was not unreasonable.

38. The claimant replied on 31 May 2017 saying that it was not appropriate to ask him to sign any disclaimers, that he was seeing the physiotherapist on 23 June 2017 'my expected return to work date' and that he was seeing his doctor on 11 June 2017 when an update would be possible. In that email he also said that he would be in touch after 11 June with an update and that he would be busy with his exercise routines until then so the respondent should not expect a reply to any letters sent until after that date. He also stated in conclusion:

    'I'm making great progress and determined to get discharged on the 23 June 2017'

39. On 2 June 2017 Ms Jones again wrote to the claimant repeating that it was not reasonable to delay the appeal until 23 June, that they would consider doing so if he signed the disclaimer and that if he did not sign it the hearing would be rescheduled on the next available date and may be heard in his absence. The claimant did not reply and on 8 June 2017 the claimant was notified that the hearing would take place on 13 June 2017 at Camberwell and that if he chose not to attend he could make written submissions.

40. On 13 June 2017 Mr Eardley attended at Camberwell to conduct the appeal. Ms Jones was also present to assist. They waited for 30 minutes to see if the claimant would attend but when it was apparent he would not attend, Mr Eardley reviewed the papers on the file including the exchanges between HR and the claimant described above. Ms Jones prepared a timeline from the file and Mr Eardley identified that he wanted to establish whether there were any light duties available elsewhere and also to clarify the reference to surgery in Ms Patel's letter dated 21 April 2017. Ms Jones dealt with both of those issues on 28 June 2017 receiving confirmation from Ms Patel that the reference to surgery was an error and that no light duties were available elsewhere in the region.

41. In the meantime on 23 June 2017 the claimant received written confirmation that he was discharged from the physiotherapy service as he was showing full range of movement with very occasional mild pain, that he could complete the exercise programme at home and was doing very well. That letter was not put directly before Mr Eardley although the claimant's evidence, which I have no reason to reject, was that he posted a copy of it, together with a fit note from his GP dated 15 June 2017 which said he was able to return to work on amended duties, to the Beddington depot and he expected it to be forwarded to HR.

42. Mr Eardley wrote to the claimant on 10 July 2017 confirming that his appeal was not successful. He summarised the events to date, the documentation he had taken into account and his belief that Ms Patel had thoroughly

considered all medical evidence available to her and had adjourned meetings to ensure she had the most up-to-date information available. Further that as the claimant was unable to provide a return to work date, given the length of his absence and the OH advice that it could be weeks or months before he returned to work, he concluded Ms Patel's decision was correct. Mr Eardley also said that although the claimant had referenced the 23 June:

'…this was for a physiotherapy appointment and did not give any assurance or indications that you would have been fit from that date for example assuming this was why the reference was made'.

43. Mr Eardley confirmed to me that the exchange of emails between the claimant and HR when setting up the appeal and discussions regarding its date were in the file he reviewed. It is clear that contained within those exchanges are at least two references to the claimant's belief that he would be discharged by the physiotherapist on 23 June 2017 and that that was his expected return to work date (on 31 May 2017 at 17.28 and on 2 June 2017 at 15.58). Mr Eardley said that he did not remember picking this point up.

Conclusions

44. The respondent has established that the reason for the dismissal was the claimant's capability as a result of his sickness absence commencing in February 2017. I am satisfied that any other issues concerning lunch breaks, parental leave and/or TUPE were irrelevant to both Ms Patel and Mr Eardley.

45. It is clear that prior to making the decision to dismiss Ms Patel consulted with the claimant and gave him more than one opportunity to clarify his medical position by adjourning meetings pending further consultations. I am also satisfied that the respondent followed a reasonable process.

46. However, I am concerned both as to the quality of the medical evidence relied upon by Ms Patel and her unwillingness to await the outcome of the physiotherapy appointment on 23 June 2017.

47. When she made her decision to dismiss, Ms Patel had the physiotherapist's diagnosis which contained no indication of likely recovery time and the OH reports dated 21 March and 19 April 2017. Both of those reports were non-specific in both diagnosis and prognosis. Even if, as I have found, she did not specifically understand that the claimant expected to return to work on 23 June 2017, she knew that he was improving (he had told her this on 28 April 2017 and 22 May 2017), that he believed the condition to be 'completely healable' and that he had another physiotherapy appointment booked.

48. In those circumstances I conclude that it was not reasonable for Ms Patel to refuse to await the outcome of that appointment; she could reasonably be expected to wait longer. The claimant, who had eight years' service and no relevant prior sickness history, had commenced the absence on 2 February 2017 and his condition was improving. He was cooperating with the respondent's process and taking the required action to aid his own recovery. Deciding to dismiss on 22 May 2017 and refusing to await the outcome of the appointment on 23 June 2017 was unreasonable in all the circumstances including the size and resources of this large employer.

49. This flaw was not remedied by the appeal. It is unfortunate that the claimant did not send copies of the physiotherapy discharge letter and the last GP fit note to Mr Eardley direct. Even without seeing those documents, however, Mr Eardley would have been aware - if he had taken proper note of what the claimant said in the email exchanges with HR – that the claimant had indicated he expected to be able to return to work on 23 June 2017.

50. In all the circumstances therefore I conclude that the decision to dismiss was outside the band of reasonable responses and unfair.

51. A remedy hearing will take place on **18 May 2018** commencing at **10am** listed for 3 hours. The claimant is ordered to send an updated schedule of loss to the respondent on or before **6 April 2018** together with copies of all supporting documents including any he relies upon as evidence of his attempts to mitigate his losses. The parties will not receive a separate notice of remedy hearing.

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Employment Judge K Andrews
Date: 12 January 2018