EMPLOYMENT TRIBUNALS

Claimant: Mr S Sathanantham

Respondent: BP Express Shopping Limited

Heard at: London South (Croydon) **On: 3 January 2018**

Before: Employment Judge John Crosfill

Representation
Claimant: Mr Mukulu of Counsel
Respondent: Ms Hirsch of Counsel

JUDGMENT having been sent to the parties on 11 January 2018 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:

REASONS

1. In his application to the Employment Tribunal the Claimant Mr Sathanantham brought a single claim that he had been unfairly dismissed contrary to Section 94 of the Employment Rights Act 1996. From around January 2005 the Claimant had worked as a customer service assistant at the petrol station/shop located at the Tudor Filling Station in Maidstone, Kent. In late 2011, following an accident, the Claimant took time off work because of pain in his knee and shoulder. In November 2012 the pain had got worse and he was thereafter absent from work. On 4 April 2016 the Claimant's employment transferred to the Respondent pursuant to the Transfer of Undertakings (Protection of Employment etc) Regulations 2006. Following the transfer the Respondent commenced an absence management process and on 7 April 2017 the Claimant was informed that he was dismissed. He says that the dismissal was unfair.

2. In the course of the hearing I was provided with an agreed bundle of documents. Unfortunately, when I requested the bundle in order to prepare these written reasons it had already been disposed of. The Claimant kindly provided a duplicate. I am sorry that that had added to the delay in providing these reasons.

3. In the course of the hearing I heard from Ms Nicola Mitson, an HR Advisor with the Respondent and the individual who took the decision to dismiss the

Claimant. I then heard from Nicole Tilbury who is the Area Manager who heard the Claimant's appeal against his dismissal. Finally I heard from the Claimant who gave evidence on his own behalf. Both parties were represented by Counsel who made submissions on behalf of their respective clients. I was grateful for their assistance. I shall not set out the entirety of the submissions although I had regard to them when I gave my oral judgment.

4. The Claimant's essential point in this case is that he says that the Respondent had insufficient regard to a possible improvement in his condition which would, he argued, have permitted him to do some work perhaps at a retail outlet nearer his home. The Claimant had not made any claims under the Equality Act 2010.

Findings of fact

5. Having heard the evidence of the parties I made the following findings of primary fact in respect of the events leading up to the present claim.

6. As I have set out in my summary above the Claimant worked at the Tudor Filling Station in Maidstone, Kent. The actual date that the Claimant commenced his employment appeared contentious (it was not accepted by the Respondent) but the date contended for by the Claimant was included in employee liability information provided by his initial employer and would support the suggestion that the Claimant started work on 1 January 2005. I accept that this was the case.

7. The Claimant had worked for a succession of employers at the Tudor Service Station including he believes BP Shopping Limited. The responsibility for the filling station and the Claimant passed to the Respondent on 4 April 2016.

8. The Claimant had, since 2002 suffered some knee problems but, prior to 2011 they had not given him any significant problems at work. On 26 September 2011 he had an accident at work during which he injured his right shoulder and perhaps at the same time his ribs. He returned to work effort shortly afterwards. Ultimately in the course of 2012 at the pain became unmanageable particularly in his knees which were badly affected by long periods of standing. From November 2012 he became unable to work and has not returned to the workplace since then (to do any work).

9. In April 2016 at the BP Tutor site was purchased by the Respondent whilst basic information was provided by the previous operator it does not appear that the Respondent ever had a full copy of the Claimant's personnel file. The extent to which his absence was managed by anti-previous employer remains are unclear. It appears that very few of the recognised steps that might normally be expected in the case of long term absence were taken.

10. The Respondent has conventional, a well written, formal absence management policy. It provides for meetings with the employee and for gathering information about the reasons for any absence and the prognosis for any return to work. In the operation of that policy the Respondent has contractual arrangements with BUPA. Under those arrangements it outsources occupational health advice in respect of employees suffering from ill health. The manner in which it ordinarily works there is that a manager or somebody from the Human Resources Department at would fill in a fairly comprehensive referral document. The referral would be completed setting out: the nature of

the employee's duties, the reason for the referral and by checking boxes on the pro forma the Respondent could ask various questions seeking specific advice. Once this referral was completed it was for BUPA to decide, at the discretion of an occupational health advisor, whether to meet the employee face-to-face or conduct that an assessment on the telephone. Once that part of the process was complete the outcome of the consultation would be posted, initially on online computer-based system but then reduced to a more formal report. That report would be sent as a PDF file to the Respondent and usually shared with the employee.

11. As soon as the Respondent took over the business the absence management of the Claimant was handled by the Respondent in accordance with the absence management procedure. There was an initial meeting on 8 April 2016 with an HR adviser, George Flint. That meeting resulted in a referral to the occupational health service. On 12 April 2016 a telephone consultation took place with Adam Kadi. He advised that the Claimant was unfit to work. He said: *"It is not possible to predict a return to work date at present. It may be some item [assumed to be "time"] before this can be predicted accurately, as it will be influenced by his recovery rate".* The report noted that the Claimant was awaiting surgery on his knee in June 2016. He recommended that a follow up appointment was made towards the end of June 2016.

12. A further appointment with the occupational health service was made for the end of June but it transpired that the surgery had not taken place. As a result no further information became available. During this period the Claimant's GP submitted Statements of Fitness for Work on each occasion stating that the Claimant was unfit for work and not noting any adjustments that might make it possible for him to return to the workplace. It seems that the Claimant had an arthroscopy in or around August 2016.

13. The Respondent organized a further meeting with the Claimant under the absence management procedure. That meeting took place on 20 September 2016 at the Claimant's home. It was conducted on behalf of the Respondent by another human resources officer, Holly Bradford. The purpose of the meeting was to ascertain the state of the claimant's health and to see what steps could be taken to assisting him back into the workplace. The operation on the Claimant's knee had in fact taken place at that stage and it is not been unfortunately as successful as had been hoped. The Claimant is recorded as in the notes of that meeting is saying: *"I cannot stand"* and *"the pain is not tolerable"*.

14. The outcome of that meeting was that a further occupational health report was commissioned. On 25 November 2016 the first face-to-face consultation between the Claimant and Dr JRB Cooper of the occupational health service took place. The outcome of that consultation was recorded in a report. Included in the report were the following comments:

> *"I took the liberty of examining him, both knees show a limited and cautious to range of movements with pain on active and resisted movement. The shoulder also has a limited range of movement and exacerbates the pain.*
>
> *He tells me he very much wants to work, but is conscious that the job he has been doing involves a considerable amount of standing walking around. I discussed with him the option of exploring a sedentary role, but he says*

he would not be able to sit for long either. He does however emphasise to me that he wants to get back to work.

My Occupational Health opinion is that he is certainly not fit to undertake his normal role in his current condition, and not likely to be fit for the medium-term future. A trial of physiotherapy may help, but if not its almost certain he would be offered the option of further surgical intervention. It may be determinable in 4 to 6 weeks whether physiotherapy is starting to have the benefit".

15. The report went on to inform the Respondent that a review of the position would take place by conducting a telephone assessment on 9 January 2017 by which time it was anticipated it would be possible to see whether the treatment offered to the Claimant had had any significant benefit. Pending that appointment, the Claimant continued to supply statements of Fitness to Work from his GP which stated that he was unable to work and suggested no steps that might facilitate a return.

16. The consultation in fact took place on 11 January 2017 and a report was produced confirming the outcome of the discussions. The report confirmed that the Claimant remained temporarily unfit for work. It recorded the Claimant as saying that despite having 4 sessions of physiotherapy his mobility remained restricted. He was able to walk only 20 to 30 meters without using his sticks. He had advised that his surgeon had counselled against further surgery. The report recorded that the Claimant had been referred for a cortisone injection in his shoulder. The Claimant had assessed his pain in the shoulder as 9/10 and 7/10 in his knee. Julia Wright, the author of the report, stated that she would be writing to the Claimant's GP and had arranged a further telephone conversation upon receipt of that report.

17. A final telephone assessment took place on 22 February 2017. The current circumstances were described in the subsequent report as follows:

"Mr Sathanantham's physiotherapy has now concluded and he reports feeling some slight improvement in that he is now able to walk unaided for up to 50 m and is experiencing a decrease in pain levels from 7 to 6 in his left knee (1 being no pain 10 being extreme pain). In respect of his right shoulder problem, this remains problematic and has been provided with appointment date of 24 March 2017 for assessment and hopefully treatment. Mr Sathanantham will be contacting them to advise that he is able to take a late cancellation appointment if this becomes available"

18. The report under a heading "future plans" included the following:

"We have *written to Mr Sathanantham's GP for a medical report detailing his opinion on progress and prognosis we are well is currently in progress. I will arrange an Occupational Health Physician review following receipt of his cortisone injection, and supply the GP report OHP to make an assessment on progress and hopefully will be in position to provide clearer advice on timescales in regards the potential future fitness for work"*

19. Before any further report was received the Claimant was invited to a meeting which was scheduled to take place on 20 March 2017 at his home. The letter of invitation was especially amended to include a warning that one possible

outcome of this meeting was that he would be dismissed. Prior to that meeting a further statement of fitness to work was submitted from the Claimant's GP which stated that he was unfit to work.

20. The meeting at the Claimant's home took place as arranged on 20 March 2017. It was attended, on behalf of the Respondent by Nicola Mitson and Leanne Smith who took notes using a pro-forma. From the evidence I heard I conclude that the notes are not, and were never intended to be, a complete record of everything said. The notes cover just three pages of short bullet point notes. I was told, and accept, that the meeting took something between one and one and a half hours to complete. That said I consider that what has been recorded is a broadly accurate summary.

21. The material parts of the notes are as follows:

    21.1. Under a heading, "Could you please tell about your condition and how was caused/started?" is recorded: *"left knee problems and shoulder problems from accident. Shoulder is more of a problem due to fluid. Injection due 24 March, then I will have physiotherapy and they say it will be ok. Lower and upper back problems as well"*

    21.2. When asked how does a condition impact and ability do your job role the following is recorded: *"manual handling will be hard" "long commute to work not good for back*"

    21.3. Asked what symptoms there were the notes record the Claimant as saying *"pain in knees (have GP Appointment due)" "only drive short distances (10 miles)", "cannot move quickly" "pain in shoulder need physio but injection first"*

    21.4. When asked how you currently feeling? What impact has your condition caused? The reply was: *"pain in knee and shoulder"*

    21.5. Asked about his current situation the Claimant is recorded as saying: *"condition is improving- knee is a bit better but shoulder is the main issue now"*

    21.6. Asked about future appointments the Claimant disclosed that he was to have his cortisone injection on 24 March and would see his GP on 21 March 2017.

    21.7. Asked how he felt about returning to work the notes record the Claimant as saying: *"I want to return to work" "role in Maidstone - cannot drive there, more local may be able to carry out the duties. Driving irritates back and shoulder"*

    21.8. Finally when asked about his recovery time the Claimant is recorded saying "*not guaranteed but hopefully May after physio"*

22. As a result of the Claimant indicating a renewed interest in working more local to his home Nicola Mitson reviewed whether there were any vacancies more local to the Claimant but found that there were none. Nicola Mitson then took the decision that the Claimant was unfit to return to work in the foreseeable future. In the light of that she decided that he ought to be dismissed albeit with a payment in lieu of notice. She wrote to the Claimant on 7 April 2017 setting

out her decision and giving her reasons. The decision letter is a significantly more comprehensive document than the notes of the meeting. It was written shortly after the meeting and I find that it is more likely than not that it reasonably accurately summarises the discussion and the reasons held by Nicola Mitson for reaching the decision that she did. The letter includes the following:

> *"We discussed your current condition and how this impacts on your job role. We also talked about your current symptoms, medications, limitations and your likely the work.*
>
> *You advised that you are still suffering from pain your knee and shoulder, you can only drive very short distances (approx 10 miles) without discomfort and you are unable to move quickly. You believe your knee is a bit better but your shoulder is now the main problem and you take strong painkillers daily which can make you drowsy.*
>
> *In your most recent occupational health assessment dated 6 March 2017, you reported that your physiotherapy is now concluded for your knee and that you are now able now to walk unaided for up to 50 m and that the pain levels in your knee had decreased from 6 to 7. Your shoulder remains problematic.*
>
> *We discussed your current role and you stated that due to the pain you experience in your shoulder you would find it difficult to lift items including customer shopping baskets and products. You would also find it difficult to stand or sit for long periods of time.*
>
> *We considered and discussed whether been any significant changes to circumstances, whether the any adjustments that could facilitate a return to work and whether return to work was likely at this time as a result of the above.*
>
> *You advised me that a store close at your home (within 10 miles) would be beneficial to you as the drive to your current store aggravates your back problems and then causes you to too much pain whilst at work.*
>
> *You also stated that whilst you have made some progress with your recovery and are waiting further appointments that may enable you to return to an alternative location in May you do not feel that there are any adjustments that could be made in your current store in order to enable you to return in the foreseeable future.*
>
> *I have now reviewed all current vacancies within BP unfortunate this time there are no suitable alternatives for vacancies"*

23. After the passages I have quoted above Nicola Mitson set out her reasons for concluding that the Claimant should be dismissed. Those reasons included her conclusion that the medical evidence did not indicate that a return to work has likely in the foreseeable future. She noted the lack of vacancies at any stores within a 10-mile radius of the Claimant's home. Finally, she noted that the Claimant had accepted that even if such a role could be found the Claimant was unsure whether he could fulfill all of the duties. She recorded her decision that the Claimant would be dismissed and a payment made in lieu of notice. The Claimant was offered the right to appeal this decision. In her witness

statement and oral evidence Nicola Mitson accepted that it would have been a possibility to have placed the Claimant on a rota at a service station nearer his home even if no permanent role was available. She had thought about that and decided against it because she had concluded that the Claimant's then current and future likely state of health meant that he would be unable to discharge any duties he might be offered. In short she had formed the belief that the Claimant would be unable to carry out any work in the near future.

24. On 30 March 2017 the Claimant's GP prepared a report which he said in his witness statement was sent to the Respondent. It does not appear to have been received by the Respondent and the decision to dismiss took place without its contents being considered. In fact the report simply set out the Claimant's history and concluded with the information that the Claimant was awaiting further treatment for his shoulder injury and an opinion as to the proper treatment for his knee. It gives no prognosis whatsoever.

25. On 11 April 2017 the Claimant wrote to the Respondent seeking to appeal his dismissal. He stated that he had seen some improvement in his condition and that, if there were no vacancies nearer his home, he thought he could return to the Tudor Service Station. He said that he was due to see the Orthopedic Surgeon who had operated on his knee on 2 May 2017 and was reviewing the progress. On 2 May 2017 the Claimant obtained a further statement of Fitness for Work from his GP. In common with all previous certificates his GP certified that he was unfit for work and did not indicate that any adjustments would enable him to do so.

26. The appeal hearing took place on 12 May 2017 which was conducted by Nicole Tilbury. The letter inviting the Claimant to the meeting had not arrived in advance and the Claimant had not been made aware of his right to be accompanied. That was explored at the outset of the hearing and the Claimant indicated that he was content to proceed. In the course of his appeal the Claimant presented a more optimistic view of his ability to do at least some of his work particularly work on a till. He did concede that his shoulder and ribs were still getting somewhat worse and that he was unable to do any heavy lifting. That was illustrated by him when he indicated that he was unable to lift his own backpack which was only modestly heavy as it contained the papers necessary for the presentation of his appeal. He suggested that he would be undertaking a 9 month course of physiotherapy for his shoulder injury.

27. I find that in the course of the appeal hearing the Claimant was understandably presenting his health problems optimistically and courageously. He went as far to say that suggest that whilst, he could only drive for say 10 to 15 minutes without significant pain, if there were no other vacancies, he was prepared to take steps to drive to Maidstone. He suggested that he would make that journey by breaking it up into short 10 minute spells at the wheel. Having heard from the Claimant Nicole Tilbury dismissed the appeal. She took into account the fact that since the dismissal the Claimant's GP had continued to state that he was unfit for work. She believed that the Claimant had downplayed the amount of lifting required to do till work. In particular, she noted that the Tudor Service Station which had formerly sold only petrol had been rebuilt as a convenience store which sold a variety of products. She came to the same conclusion as Nicola Mitson that even were a role to be identified nearer the Claimant's home he would not be able to fulfil the duties involved in the near future. She had regard to the fact that there was a difficulty in simply keeping the Claimant "on

the books" as not knowing whether he would return was an impediment to recruiting a permanent replacement.

28. After the appeal and in the course of the hearing before me the Claimant sought to argue that the Respondent's witnesses were wrong to suggest that he was physically unable to do the work of a cashier. He relied upon evidence gathered at least in part after his dismissal. In particular, for the first time on 2 June 2017 the Claimant's GP certified he was fit for some light duties. He said in correspondence that he had been told by his physiotherapist that the range of movement in his shoulder has improved.

The Law

29. Section 94 of the Employment Rights Act 1996 (hereafter "the ERA 1996") sets out the right of an employee not to be unfairly dismissed by her or his employer.

30. It is for the employee to show that there has been a dismissal. The statutory definition of dismissal for these purposes is set out in section 95 ERA 1996. In the present case there is no dispute that the Claimant was dismissed for the purposes of that section.

31. If dismissal is established sub-section 98(1) ERA 1996 requires the employer to demonstrate that the reason, or if more than one the principal reason, for the dismissal was for one of the potentially fair reasons listed in sub-section 98(2) of the ERA 1996 or for "some other substantial reason". "Capability" is a potentially fair reasons for dismissal listed in sub-section 98(2) of the ERA 1996.

32. If the employer is able to establish that the reason for the dismissal was for a potentially fair reason, then, with a neutral burden of proof, the employment tribunal must go on to consider whether the dismissal was actually fair applying the test set out in section 98(4) of the ERA 1996 which reads:

'(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.'

33. The correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision itself. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: ***Iceland Frozen Foods Ltd v Jones*** **[1982] IRLR 439**. That test recognises that two employers faced with the same circumstances may arrive at different decisions but both of those decisions might be reasonable.

34. The range of reasonable responses test applies as much to any investigation and the procedure followed as it does to the substantive decision to impose dismissal as a penalty ***Sainsbury's Supermarkets Ltd v Hitt*** **[2003] IRLR 23**.

35. Where the reason for the dismissal arises from a long term health issue the Court of Session in ***B S v Dundee City Council*** **[2014] IRLR 131** reviewed a number of EAT authorities and gave the following guidance (which although not strictly binding is persuasive):

> *"Three important themes emerge from the decisions in Spencer and Daubney. First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasise, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him. Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered."*

36. In ***East Lindsey District Council v GE Daubney*** **[1977] IRLR 181 EAT** it had been said that a dismissal for incapacity would not normally be fair unless the employer had consulted with the employee and taken steps to ascertain the true medical position and, where appropriate permitting the employee to have an opportunity to challenge any of the employer's medical evidence or provide medical evidence of their own.

37. Where the employee might be eligible for early medical retirement (or other similar scheme) then it may not be fair to dismiss the employee before his eligibility for such a scheme is assessed ***First West Yorkshire Ltd v Haigh*** **[2008] IRLR 182, EAT**.

38. Whether the decision to dismiss is itself reasonable needs to be considered in the light all of the relevant factors, including the nature of the illness, its cause, likely duration, the nature of the job, and the employee's length of service: ***Spencer v Paragon Wallpapers Ltd*** **[1976] IRLR 373**.

39. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

> *"any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question."*

40. Whilst the issue of whether any Code of Practice applies to dismissals following long absences from ill health I consider that the better view is that the relevant code for present purposes is the ACAS Code of Practice on Disciplinary and

Grievance Procedures 2009 although such parts that are plainly not relevant on the facts of the case may be disregarded (warnings etc).

Discussion and conclusions

41. I have no hesitation in concluding that the reason for Nicola Mitson's decision to dismiss the Claimant was that she believed that because of the state of his health he would be unable to return to work in the foreseeable future. As such I accept that the reason for the dismissal was capability and was potentially fair. The issue remains whether, in all of the material circumstances, it was actually fair.

42. As in a case of misconduct, a dismissal for capability will not be fair unless the belief that the Claimant is not capable of carrying out his role is formed on a reasonable basis and, applying the law set out above, follows reasonable enquiries following consultation with the Claimant and obtaining advice as to the medical condition and prognosis.

43. A key question in this case is whether or not Nicola Mitson acted reasonably in deciding to take a decision as to whether the Claimant should be dismissed when there was the possibility of obtaining a report from the Claimant's GP, information following the cortisone injection and a final OH report. It was in my view a robust decision to proceed in the absence of that information. That said I do not consider that the Respondent was bound to follow each and every piece of advice given by BUPA and proceed at the pace they suggested. Nicola Mitson was entitled to look at matters in the round. She took into account the following relevant matters. The Claimant had been unable to work for over 4 years. Since at least April 2016 the Claimant's GP had been signing him off sick without making any suggestion that any change in his duties might enable him to return to work. The Claimant had accepted, as was recorded in the OH report prepared in November 2016, that he was unfit to do any work at all.

44. The most recent reports in January and February 2017 do not say that the Claimant would be able to return to work in the near future. It was certainly a reasonable conclusion to draw from those reports that they said no more than it was a possibility that that might be the case but that it was not possible to say so at that time. As such the position was really no further on than when the absence management process had started. It is not the case that an employer is required to exhaust all enquiries and explore all possibilities before taking a decision whether or not the employee should be dismissed. I would accept that some employers might have thought that a further wait or an additional report might assist them but that is not determinative of the question I must ask myself.

45. I must ask whether the decision that sufficient enquiries had been made at that stage was one which was open to a reasonable employer. I consider that where an employer asks its medical advisors the proper questions – here simply when it was likely that the Claimant would be fit for work and is, for quite proper reasons, unable to get a definitive answer, it may not be unreasonable to proceed on the basis of the information available. It is not always going to be the case that medical practitioners will be able to give an accurate prognosis within a reasonable timescale. In those circumstances, provided the employer has taken reasonable steps to ascertain the likely prognosis it cannot be expected to await that information indefinitely. I consider that after 3 years of absence and nearly 12 months of absence management without any indication

of when, if ever, the Claimant was going to return to work it was open to Nicola Mitson to decide that she would not await any further reports. In other words, it was a decision which fell within a band of reasonable decisions.

46. In taking the decision to dismiss at that time Nicola Mitson had regard to the reports that had been produced at that stage. Whilst they did suggest that there was the possibility of a sufficient recovery to enable the Claimant to return to work they also repeatedly set out the difficulties the Claimant faced as a result of his ill-health. The reports were in no sense optimistic. In addition, Nicola Mitson had GP statements of fitness to work that continued to the date of the dismissal stating that the Claimant was unfit to return to work. She also had the same information from the Claimant who, at the stage of the dismissal did not suggest that he was fit to undertake any duties at that time although he thought May 2017 was a possibility.

47. Nicola Mitson made appropriate enquiries as to whether there was some work nearer the Claimant's home. That would have alleviated the difficulty of driving to Maidstone. Whilst there were no vacancies that did not form the basis of her rejection of that possibility as an option. She concluded that there was no possibility that the Claimant would be fit in the foreseeable future for any altered duties. As the Claimant did not suggest that he could take up those duties at that time Nicola Mitson could quite properly have excluded redeployment as an immediate option. It could have been an option if she had concluded that there was a possibility of some recovery in the future. However, she concluded that there was no evidence to suggest that this was anything other than a possibility.

48. One point raised in argument initially was that the Respondent had failed to consider ill-health retirement relying on ***First West Yorkshire Ltd v Haigh***. That point rather fell away when as a matter of fact it was established that the Claimant benefitted from a basic "Nest" pension scheme that did not provide ill-health retirement benefits. That fact being known to Nicola Mitson she did not give it any great thought. I find that she did not act unreasonably in failing to make any further enquiries in this regard.

49. On the evidence available to Nicola Mitson it was open to her to reach the conclusion that there was little prospect of the Claimant returning to work of any kind for a substantial period. In those circumstances I am unable to say that her decision, taking into account all of the circumstances, was one which was not open to a reasonable employer.

50. When applying the test set out in Section 98(4) ERA 1996 I must have regard to the entirety of the process including the appeal. It was the Claimant's position that by the time of the appeal he was sufficiently recovered to do some work. He suggested that he may be able to resume his original duties.

51. A manager hearing an appeal in these circumstances did not need to take the Claimant's assertions that he was fit for his duties at face value. That is not to suggest that there was any dishonesty, far from it. It was unsurprising that the Claimant was putting the most optimistic view forward. The extent of that is demonstrated by the fact that the Claimant suggested that he would travel to Maidstone in short 10 minute stages. Nicole Tilbury was entitled to have regard to the fact that only days before the appeal hearing the Claimant's GP had said he was unfit for work. She was also entitled to have regard to the fact that the Claimant was unable to lift his backpack which in her view, which I cannot say

was unreasonable, on his ability to act as a cashier. There was an evidential basis for Nicole Tilbury's conclusion that there was no clear evidence of an improvement in the Claimant's condition. I cannot say that her decision on the evidence before her was one which was not open to her. Whilst the Claimant had provided evidence acquired after the appeal that might have suggested that she was wrong that evidence was not before her at the time. I therefore conclude that there was nothing in her refusal to reverse the decision to dismiss the Claimant that meant that the dismissal was unfair. I note that the decision might have been different had it been open to me to make my own decision as it would have been had the Claimant relied upon the Equality Act 2010 but he did not. On the evidence before them both of the Respondent's witnesses took decisions which were reasonably open to them on the evidence they had.

52. It was suggested on behalf of the Claimant that the fact that the Claimant was not informed of his right to be accompanied in advance of the appeal hearing impacted on the fairness of the dismissal. There had been a failure to send the written invitation to the appeal meeting out on time. That said, the issue was discussed with the Claimant and he was willing to proceed. He had been informed of his right to be accompanied at the earlier hearing on 10 March 2017 and had not availed himself of that right. This failure although in no sense condoned, is not by itself, or with the other matters, sufficient to make the dismissal unfair.

53. For these reasons I conclude that the Claimant's dismissal was fair and the claim should be dismissed.

Employment Judge John Crosfill
Date: 22 May 2018