



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr C. Brittan

**Respondent:** DSG Retail Limited

**Heard at:** Birmingham

**On:** 04 May 2018

**Before:** Employment Judge Broughton

## **Representation**

Claimant: In person

Respondent: Mr D. Northall (Counsel)

**JUDGMENT** having been sent to the parties on 8 May 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:

## **JUDGMENT**

1. The Claimant was unfairly dismissed but could have been fairly dismissed shortly after the effective date of termination.
2. The Claimant is awarded the agreed sum of £2186.

## **REASONS**

### **The Facts**

1. The Claimant was employed by the Respondent as a driver since 2014.
2. In September 2015 the Claimant had an accident at work arising, he said, from a faulty tail lift on his lorry. He said that this resulted in him injuring his lower back.

3. He had two days off sick at the time, but as he was already prescribed Co-codamol, he apparently managed the pain by increasing his dose.
4. He was initially not paid for that sickness absence but subsequently that issue was rectified.
5. The Claimant said that this meant that he didn't take further sickness absences because of a fear of not being paid, but I note that he did have a further absence for a virus later that year and was paid.
6. In any event the Claimant said that his pain continued to increase and so he began increasing his reliance on Co-codamol. His GP apparently kept prescribing more and subsequently added other pain relief, such as Tramadol.
7. The Claimant acknowledged before me that he developed an addiction or dependence on such medications but, at the relevant time, he did not seemingly acknowledge that to himself, let alone inform his GP or the Respondent.
8. In April 2016, the Claimant was involved in a road traffic accident at work, he acknowledged that this may have been caused in part by a withdrawal from his medications, which he could not take whilst driving. He ultimately received a final written warning for that in August 2016 which was valid for 12 months.
9. There was some dispute about the extent of the involvement of Scott McKenzie, the Respondent's technical operations manager and the ultimate dismissal officer, in that situation but it did not seem to me that that was material to my deliberations.
10. On 14 December 2016 the Respondent said that there was an issue with the Claimant behaving aggressively and refusing to work with an agency worker. The Claimant disputed this, but acknowledged that there was a legitimate customer complaint against him that day. Both acknowledged that at the end of the day the Claimant was informed that there was going to be an investigation.
11. The next day the Claimant called in sick and, in fact, he never returned to work. The Claimant attended his GP on 22 December and was issued with a sick note, but he acknowledged that he didn't actually post that note to the Respondent until January.
12. On 5 January 2017, the Respondent sent the Claimant a letter saying that his absence was unauthorised, suggesting that he wouldn't be paid and that his absence may lead to a disciplinary but that letter also offered support if he was genuinely sick.
13. It seems to me that, at that stage, with the information that the Respondent had, that was a reasonable approach.
14. The Claimant had actually photographed himself posting sick notes. As a result we could know the dates of posting or at least assume them.

There was no challenge to those dates and so it appears from those photographs it is likely that he posted two sick notes on 13 January covering him for the period from 22 December to 2 February 2017. The Respondent seemingly accepted these and paid the Claimant statutory sick pay and company sick pay for that period.

15. On 17 February the Respondent sent the Claimant a further unauthorised absence letter, apparently after having tried to contact him by telephone. This was in a similar format to the previous letters, again threatening disciplinary action and stopping his pay, but also offering support if he was sick.
16. It appears that the Claimant had actually sent in his sick note on 15 February but it must have crossed in the post as at least sometimes he seemingly sent the sick notes by second class post.
17. The Claimant also texted his line manager on 20 February 2017 to say that he was signed off sick. However, on 22 February 2017 the Respondent sent a letter to the Claimant asking him to attend an absent without leave disciplinary hearing which the Respondent described as potential gross misconduct that could lead to dismissal.
18. It seems to me that was unduly harsh in all the circumstances as the Respondent should have known that the Claimant was genuinely off sick and covered by a sick note at that stage.
19. The Claimant acknowledged receipt of that letter by text and it was unclear why the Respondent had sent that letter. However, when the Claimant did not attend the meeting, Mr McKenzie acknowledged that the Claimant was covered by a sick note and, therefore, should not be treated as absent without leave, rather as long-term sick.
20. In the note of Mr McKenzie's call with HR, it seemingly showed an awareness of the Claimant's behaviour having become strange and aggressive in the months leading up to his absence.
21. On 2 March 2017, the Claimant was invited to accept a home visit for an absence review meeting. There was no reply to that letter. There was a further invite, sent to him on 13 March 2017, for a meeting on 17 March 2017, this time at the Respondent's premises.
22. The Claimant responded by sending a text on 15 March 2017 asking for an Occupational Health referral having had that suggestion made by his GP. The Claimant did not, however, attend the meeting on 17 March 2017 or answer any telephone calls from the Respondent.
23. His next sick note was seemingly posted in on 21 March and, on 23 March, the Respondent sent him a further sickness absence letter explaining their concerns about the lack of contact. The respondent seemingly acknowledged that the Claimant may be having difficulties relating to his health in making contact so they asked the Claimant specific questions about his health, giving him the opportunity to respond in writing.

24. They also asked for consent for an Occupational Health referral and gave him information about their employee assistance programme. It seems to me that, at that stage, this was, again, a reasonable and appropriate response on the part of the Respondent.
25. The Claimant did not reply to that letter. In fairness, he could not recall whether he had received the letter or not, but he had no recollection of having done so. He acknowledged that because of the state of his health at that time, he may well have received it, but he could not be sure.
26. The Claimant's sick note next expired on the 3 April 2017.
27. On 19 April 2017 the Claimant answered a telephone call from a Lesley Marangoni, People Coordinator at the Respondent . I heard a recording of that call.
28. The Claimant had been called and asked for his up-to-date sick note and the Claimant responded by saying he had it but had been too unwell to get to the post. He said he would rectify that as soon as possible. He was told, wrongly and unfairly, that he would have to deliver the sick note in person. The Claimant became upset by this and asked repeatedly to be left alone. His responses, having heard them clearly, demonstrated his fragile mental state at the time.
29. On 20 April 2017 the Respondent sent the Claimant a letter about unauthorised absence, again threatening a disciplinary and that they would stop his sick pay but also offering support. That was despite having been told the previous day that the sick note was on its way. It seems to me that this was, again, unreasonable.
30. The Claimant replied to that letter by letter incorrectly dated the 20 April 2017 as it was a response to the Respondent's letter of that date) and, seemingly from his photographs, it was actually posted on the 25 April 2017.
31. He understandably complained about having been told to deliver his sick note in person and also about having received the unauthorised absence letter of 20 April.
32. He went on to say, "that to be perfectly honest, I am past caring now, whatever you choose to do, just do it. The Wednesbury Depot is a truly appalling place to work and my current physical and mental state are as a direct result of the adverse conditions we are expected to work under and the bullying nature of many of the FLM's and Senior Management, so I have included my sick note and do whatever you want, I am genuinely passed caring about everything".
33. It was unclear why that letter was not treated as a grievance, but the Claimant's complaint was seemingly ignored. It appears that he included his sick note covering a period up to the 15 May 2017. Again, it ought to have been clear to anyone that the Claimant felt harassed and in a fragile mental state.

34. There was a note on the Respondent's files that suggested that Lesley Marangoni recorded that she had told the Claimant to bring in his sick note and that the Claimant had shouted and disconnected the call. That was obviously not a full or fair reflection of the conversation.
35. Lesley Marangoni was told that she was wrong to have asked the Claimant to bring the sick note in but there was no evidence of this information ever being passed on to the Claimant, nor of any apology. That was unreasonable.
36. On 19 May 2017, the Respondent wrote the Claimant a stage two absent without leave letter, despite the previous absence without leave situation having been cancelled due to the sick note having been received.
37. They referenced a failure to respond to the Respondent's letter of 20 April, but the Claimant clearly had responded. They also alleged that the Claimant had been absent without leave from the 4 April, but the Respondent had a sick note covering the period to the 15 May. The Claimant was threatened with gross misconduct and that was clearly unreasonable and disproportionate in the circumstances.
38. On 2 June 2017, Mr McKenzie sent an internal email asking to book the Claimant in for a disciplinary as soon as possible. He suggested that the Claimant had been abusive and foulmouthed to Lesley Marangoni when, from the evidence I heard, the Claimant clearly had not.
39. It was unclear, at that stage, how Mr McKenzie had come to that conclusion as there was no evidence before him at that time to support it and that may suggest that he was not impartial, along with his clear impatience.
40. On 5 June 2017 the Claimant was sent an invitation to the absent without leave meeting, again threatening him with gross misconduct and dismissal. That meeting was arranged for the 12 June 2017.
41. The Claimant seemingly sent his next sick note in on 10 June 2017 but acknowledged that it wouldn't have been received before the hearing. He had no other contact with the Respondent.
42. On 6 June 2017 Lesley Marangoni had sent Mr McKenzie a summary of the background and that included the false allegation that the Claimant had sworn and abused her on the phone.
43. Mr McKenzie prepared a disciplinary script that included the abuse allegation as part of the reasons for that meeting.
44. The Claimant did not attend the meeting and Mr McKenzie decided to dismiss for gross misconduct, His reason was specifically for the Claimant being absent without leave, for not having followed the Respondent's policy and for not being contactable.

45. The Claimant was not informed of that decision at the time and the Claimant submitted a further sick note covering the period to 25 July. That was seemingly received by the Respondent early in July 2017. A note from Lesley Marangoni confirms that.
46. It seems to me that this, and the previous sick note, should have been referred to the decision maker as, at that stage, the decision had not been communicated to the Claimant and so, technically, he had not been dismissed.
47. In any event, they were not.
48. The Claimant subsequently received his P45, apparently on 12 July 2017. That was obviously after Lesley Marangoni had raised the issue having received a further sick note. Such an approach was, at best, inconsiderate.
49. The Claimant was only sent the outcome via letter dated 9 August 2017 and was offered the right to appeal but he did not.

#### Issues and law

50. The issues and the law in this case are relatively straightforward.
51. I have to consider whether the Respondent had a potentially fair reason for dismissal under Section 98 subsection 2 of the Employment Rights Act 1996.
52. They relied on conduct which is a potentially fair reason. I must then go on to consider Section 98 subsection 4 and whether that dismissal was reasonable in all the circumstances including having regard to the size and resources of the Respondent.

#### Decision

53. My decision in this case is that I accept that Mr McKenzie genuinely believed that this was a conduct issue and that this was the reason for dismissal.
54. However, I do not consider that any reasonable employer would have treated the circumstances in this case as gross misconduct. An employee being absent without leave can sometimes warrant a finding of gross misconduct. It was clear in the Respondent's policies that they considered being absent without leave to amount to gross misconduct and the Claimant was clearly made aware of that.
55. However, the situation in this case were far better characterised as a failure to submit sick notes on time and no reasonable employer would treat that as gross misconduct in all the circumstances.
56. There was no suggestion that the Claimant was not genuinely sick.

57. Whilst the Respondent could not fully know the extent of that sickness and certainly not the Claimant's issues with prescription drugs at that time, there was lots of evidence to support the Claimant's sickness.
58. That ranged from Mr McKenzie being aware that he was behaving strangely before he went off sick, to the fact that he had produced sick notes to cover his entire period of absence up until a couple of weeks before the dismissal. In addition, he was regularly late in submitting those and so it was likely that his health was the reason again.
59. It was clear that the Claimant was having difficulties communicating with the Respondent and that was, to some extent, acknowledged in one of their letters.
60. Also it was clear that the Claimant was unwell and in the telephone call with Lesley Marangoni and, indeed, in his letter following that call.
61. The Respondent was, however, entitled to address the Claimant's failure to communicate and submit sick notes in time.
62. It seems to me that they could have done so either by treating it as conduct, although that's uncomfortable given that it was clearly related to his ill-health or, better still, by reverting to their capability procedure.
63. Either way, it seems to me clear on the evidence that the Claimant would not have responded and the Respondent would have got to a position where a fair dismissal was possible relatively swiftly.
64. Even if the Claimant had responded, it is clear that the Respondent could, and would, have got to a fair dismissal as the claimant remained unfit for work for many months thereafter.
65. The Respondent should, however, have shown far greater compassion for the situation in which the Claimant found himself and proceeded along a line more akin to that demonstrated by their letter of the 23 March.
66. Ultimately, whichever route the Respondent had taken, the Claimant would have been entitled to his notice pay and summary dismissal was unfair.
67. That is before consideration of the other matters that I have already identified as unreasonable throughout the procedure which, whilst they would not have rendered the dismissal unfair on their own, further confirm that view.
68. I also consider that Mr McKenzie was too keen to dismiss and must have had some thought of the allegations of abusive behaviour as they were mentioned in his script notwithstanding his evidence that they played no part in his deliberations.
69. The sending of the P45 and the failure to consider further sick notes before communicating the dismissal also seemingly further confirm my view on unfairness.

70. For all of those reasons, I find that dismissal in connection with his conduct was unfair and outside the band of reasonable responses.
71. That said, the Claimant could, and would, have been dismissed fairly for capability, or perhaps even conduct, soon thereafter when he was no longer entitled to sick pay.
72. A conduct dismissal would have been as a result of the same allegations as the Claimant was ultimately dismissed for albeit, as mentioned, they could not possibly be considered as gross misconduct.
73. That is all before consideration of the Claimant's "live" final written warning and the other investigation that was required in relation to the events of 14 December 2016.
74. Similarly, if the respondent had gone down the capability route and the Claimant had exhausted his entitlement to sick pay, the only difference would have been that he would have been entitled to notice pay. It seems to me that he is entitled to that and, perhaps, a basic award, although that is potentially subject to deductions for contributory fault.
75. Following some directions and discussions the parties agreed the remedy amount.
76. The only other point that I would make is a suggestion to the Respondent to consider a review of their policy in relation to absence without leave, particularly when dealing with late sickness notes and difficulties communicating in long term ill health cases, particularly where mental health is potentially involved.
77. The claimant had made reference to a disability discrimination claim that had been struck out many months prior to the hearing. That was not something over which I had any jurisdiction and he had not raised any appeal at the relevant time

Employment Judge Broughton

29 June 2018