EMPLOYMENT TRIBUNALS

Claimant: Mr S Thangaraj

Respondent: Jaguar Land Rover Limited

Heard at: Liverpool **On:** 13-15 March 2018

Before: Employment Judge T Vincent Ryan
Mr S Shah
Mr J Murdie

REPRESENTATION:

Claimant: Mr J Halson, Solicitor
Respondent: Ms R Levene, Counsel

JUDGMENT having been sent to the parties on 22 March 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. **The Issues**

The issues in the case were outlined at the beginning of the hearing:

1.1 The claimant claims that he was unfairly dismissed, emphasising the alleged manifest inappropriateness of a final written warning given to him prior to his dismissal and which was relied upon by the respondent; the claimant contends, and it is in issue, that the sanction of dismissal fell outside the range of reasonable responses of a reasonable employer; he contends that the dismissing officer and appeals officer failed to consider alternative sanctions.

1.2 The second claim is one of disability discrimination, discrimination arising from disability. The unfavourable treatment is said to be the dismissal which is said to have arisen because of the claimant's inability to attend work and to perform his full duties (of the "something" arising from the claimant's disability).

1.3 The third claim is for breach of contract, entitlement to company sick pay, for the period of the week ending 15 December 2016 to the week ending 12 January 2017, in the sum of £1,415.74. In that claim we had to consider what were the contractual terms and whether the terms had then been complied with by the respondent or breached by non-payment.

1.4 There was also an issue as to whether the respondent knew at the material time that the claimant was a disabled person, and if it did not know, whether it ought reasonably to have known.

2. **The Facts**

We found the following facts:

2.1 The respondent is a large employer. It issues written statements of terms and conditions of employment; it has a handbook, absence management procedures (pages 153-172) and guidance on those procedures (page165 and following). All the page references in these reasons are to the trial bundle unless I say otherwise. The respondent has a HR Department and an Occupational Health department. It operates a regime based on time and motion and therefore of time recording. It has genuinely-held concerns about rates/levels of attendance and absence, taking a firm view with targets for attendance supported by incentives and backed by penalties; the cliché applied to this was the "carrot and stick" approach.

2.2 The policies, handbooks and the like are distributed by email to those who have email accounts, but they are in any event available, via a portal, online with hard copies at People Centres that are accessible to employees. There is a recognition agreement with Unite the Union. The policies and procedures are agreed with the trade union. They are generally well-known and we conclude that the claimant was aware of the policies and procedures relevant to absences from work on the grounds of ill-health and the payment procedures in relation to those absences. We reached this conclusion on the basis of the evidence before us including the claimant's.

2.3 The claimant was employed by the respondent as a production operator from 13 October 2012 to 3 April 2017. Various dates of commencement are given in different documents. It does not matter greatly for our purposes as it was 2012, whatever day.

2.4 The claimant is a disabled person. He has rheumatoid arthritis affecting his legs, knees and back; this is his disabling condition. Those symptoms cause him to suffer fatigue and to avoid those symptoms he needs to sit down during any period that would otherwise be a prolonged period of

standing, such as working a full shift on an assembly or sub-assembly line. Because of the claimant's condition, and supported by Occupational Health advice, the respondent placed the claimant on restricted duties. The diagnosis of his condition followed on from symptoms suffered by him from 2013 onwards which necessitated absences from work. He was referred appropriately by the respondent to Occupational Health advisors ("OH"). OH prepared reports (called "DDRs" - Duty Disposition Reports), and they variously reported at different times that he was either unfit for work, or he was fit for work, or that he was fit for work with adjustments. The claimant's symptoms were not consistent symptoms but they varied in intensity and their work-related debilitating effects, hence the varying fit notes.

2.5 During the claimant's employment he did not say that he was a disabled person and neither did his GP who provided supportive sick notes to cover his periods of absence. Occupational Health advisers did not tell the respondent's management that they considered the claimant was disabled either, but nobody ever doubted that he had these symptoms that I have described and that at very least they affected his working practices. What OH did say was that the claimant ought to avoid heavy lifting and excessive bending and he ought to be given the opportunity to sit for 80% of his time on shift. The respondent did not know that the claimant was disabled, that is that the condition had a substantial adverse effect on his day-to-day activities. While the respondent was cautious and followed OH advice, they had no grounds to believe that the symptoms would have reached the bar for disability; that is not to say that the claimant is not a disabled person, but at the material time the respondent's management was not so aware. It consulted with the claimant, considered his GP's sick notes and heeded OH and as none of them hinted at disability and the respondent did not suspect it, there was no apparent reason for the respondent to conclude for its own reasons that he was a disabled person.

2.6 The claimant was absent from work from 4 July 2016 to 28 September 2016 with knee and back pain. That was a certified absence. The claimant contacted the respondent at the outset, on day one, but not subsequently. The Occupational Health advisers issued DDRs eventually saying that the claimant was fit to work. The claimant did not make contact with the respondent to facilitate an early return to work, and in consequence the respondent suspended the claimant's pay; he was given informal counselling, that is short of formal disciplinary action, the counselling being advice and assistance on the basis of his failing to keep in touch and cautioning him about the need to keep in direct touch with line management when absent through ill-health.

2.7 The respondent's rule was that on the first day of absence an employee must contact the appropriate person, variously described as supervisor or team leader or group leader (the claimant knew the chain of command and the person he ought to liaise with and the people he could liaise with if his direct line manager was not available); the rule is that on each day of

any longer absence or at an agreed frequency there must be further direct and personal contact; the known general rule is that contact ought to be made every day of absence unless otherwise directed and then to make contact as directed. Sick notes are to be provided and employees are to attend OH appointments that are arranged for them. The respondent's view in September 2016 was that the claimant had not complied with the requirement to keep in touch, and that is why his pay was suspended and that is why he was given informal "counselling"; he was spoken to and the required practice was explained as were the consequences of breaching the rule. The claimant did not appeal or object to the suspension of his pay for having failed to keep in touch as required. He was placed on stage one of a six-stage absence management procedure. The claimant knew by September 2016 at the latest that he was under a continuing duty to keep in touch on and after day one of any absence and regardless of the submission of sick notes. He can have been in no doubt because he will have lost a considerable amount of money in September and the reason was explained to him.

2.8 On return to work from one of his absences the claimant was moved to lighter duties, moved from "underbody" to "body sides". On 13 October 2016 there was a breakdown in production in another area of the work; without authorisation the claimant left his workstation for at least 20 minutes to make enquiries and investigate the situation, maybe with a view to reporting it to somebody, but it was not his area of responsibility; it was not within his remit to leave his workstation to make enquiries/investigations and submit reports in those circumstances. The respondent's rule, known to the claimant, was that an employee should not leave their workstation other than for planned breaks and at the end of the shift without informing group leader/team leader or supervisor; this was so that even for toilet breaks. The claimant knew this rule. He gave some contradictory evidence but his latest evidence was that he knew that he ought to always tell somebody in authority that he was leaving his workstation, (and that is evidence that he gave in respect of 9 March 2017 which we will come to). He will have known because on 18 October he received an oral warning for his absence from his workstation on 13 October and on this occasion he was given formal counselling under the disciplinary procedure; again the claimant was made aware of what he had done wrong in the eyes of the respondent. The claimant did not appeal against this oral warning.

2.9 This means that by October 2016 it was clear to the claimant, and even if it was not clear it reasonably ought to have been clear that he must stay in contact when absent and he must contact every day or as instructed (the default situation being daily contact), and that he must not leave his workstation without express permission, and he could only leave in accordance with that permission. By the end of October 2016 he had received an informal "word", a formal counselling session and an oral warning on these matters (and he had lost pay) and he had not appealed, contested or complained about the respondent's actions.

2.10 The rules described above are set out in the handbook and guidance in any event. They were known generally on site and supported by the trade union. Even though the daily reporting requirement seems onerous it is one that was corroborated by the claimant's trade union representative at one point of internal proceedings, so there is no doubt that was the requirement. It is also written in the documentation available to the claimant and his colleagues.

2.11 The claimant was absent from work from 2 December 2016 until 6 January 2017 owing to his health. He telephoned the respondent on the first day, 2 December 2016, and he was expected to and told to contact the respondent again on 5 December 2016. That would have been the next working day. The claimant submitted sick notes via colleagues on two occasions, but on neither occasion did he take the opportunity while he was in or about the site to speak to any of his supervisors or HR, and he did not make contact again with the respondent other than through that means until 5 January 2017. He visited the site and saw a colleague in the car park asking him or her to pass on the fit note rather than speak to his line manager. On or about 20 December 2016 the respondent sent the claimant what is referred to as an "AWOL" letter, citing day one of unauthorised absence as 5th December 2016. Clearly that letter was sent some two weeks late, and the respondent's email trail acknowledges that the letter was late. It was the respondent's management's intention to send the "Day 2" letter the following day, and we conclude on the balance of probabilities that it did so (in the light of email evidence), that was 21 December 2016.

2.12 On 3 January 2017 the respondent sent the "Day 3" "AWOL" letter concerning disciplinary action in respect of the claimant's conduct for failure to maintain contact. The claimant says that he received two letters on 4 January 2017 but late in the day, either because he was sleeping or because he was at the temple; his explanations are unclear and were contradictory, but in any event he did not make contact with the respondent until after he had received his post on 5 January when he got the third letter, and that is what triggered his contacting the respondent. The third letter was an invitation to a disciplinary hearing because of prolonged unauthorised absence from 5 December, that is from the second day that the claimant should have but did not contact the respondent's management.

2.13 The claimant says that he does not remember an instruction to contact the respondent on 5 December, but the Tribunal finds that the claimant knew the rules about contacting supervisors, that is every day or as otherwise instructed, and 5 December would have been the next occasion even if he does not remember the specific instruction; the claimant's assertion that he could not remember the instruction was not persuasive of his ignorance.

2.14 On 30 January 2017 the claimant received a final written warning said to take effect from 27 January for 24 months; 30 January is the date of the

letter confirming the warning that was given on 27 January. The warning was for a serious breach of the Code of Conduct and the absence management process. The claimant did not appeal against the final written warning. He did not appeal because he was worried that on appeal he may actually be dismissed. That was a tactical decision that he took and we also take from it that he knew the extent of the risk that was facing him when he went for that disciplinary hearing, and that dismissal was a real risk to him. He accepted a final written warning as a reasonable outcome in the circumstances. The final written warning was issued because of the claimant's conduct as described and we find no evidence of any conspiracy or bad faith or vendetta or ulterior motive on the part of the respondent in issuing that final written warning. It is not a question of whether we would have issued a warning in the circumstances but we find that it was an appropriate warning; we cannot make a finding of fact in all of the circumstances that it was a manifestly inappropriate warning; it was not.

2.15 We noted also that the oral warning had been given by Mark Eden and the final written warning by Gary Rowlands. The claimant alleges bad faith by Darren Thomas, his immediate line manager and the person to whom he was to report absences. The procedures have distanced Mr Thomas from the decisions, which as we have said in any event were not manifestly inappropriate.

2.16 The claimant's absence that started on 2 December went on until 16 February 2017, albeit from 6 January 2017 the claimant had established regular contact with Mr Thomas. He then moved to stage two of the absence management procedure and he remained at stage two of six stages up to the date of termination of employment. We find no evidence that the respondent in any sense was rushing the claimant through a procedure, was anxious to see his departure or engineered it.

2.17 The claimant had a medical appointment arranged for 1.00pm on 9 March 2017. He received notification of that appointment probably in late December 2016 or early January 2017, but some months in advance of it, and he duly notified Mr Thomas by email that he had an appointment at the hospital at 1.00pm on 9 March 2017.

2.18 On 8 March 2017 the claimant asked Mr Thomas for permission to leave work to attend the appointment. Mr Thomas said that he could leave at 12.00 midday which would give him enough time to make it to the appointment at 1.00pm. Employees are allowed up to four hours' paid time for hospital appointments. On 9 March 2017 the claimant left his workstation and the site at 11.00am, one hour earlier than he had been allowed, without telling his team leader, supervisor or group leader; he merely told the colleague on the production line next to him that he was going. Shortly after 12.00 midday he received a message from a team leader asking whether or not he was ready to go so that cover could be arranged on the sub-assembly line. By that time clearly the claimant was

well away and he says he was already at the hospital. Mr Thomas also noted the claimant's premature absence.

2.19 The claimant attended the appointment at 1.00pm and did not return to work that day. The respondent invited him to attend a disciplinary hearing about leaving early and his absence of 4½ hours. The claimant thought, erroneously, that the only consequence would be that his pay would be docked by half an hour.

2.20 Mr Whitty conducted the disciplinary hearing. During the course of the investigation and the hearing the claimant alleged confusion between him and Mr Thomas, saying that possibly by mistake Mr Thomas had agreed that the claimant could leave at 11.00am. The claimant attempted to explain the confusion both to the investigating and disciplining officers, and indeed to the Tribunal, and the Tribunal was no more convinced of his evidence than the investigating officer and the disciplining officer. He gave differing accounts in a faltering way (due allowance for the pressure of the hearing and cross-examination having been taken into account by the tribunal) and he lacked credibility. We find that, having notified the respondent previously by email of the date and time of his medical appointment, the claimant only asked permission of Mr Thomas on 8 March and it was to leave work in time for 1.00pm; that Mr Thomas said he could go at 12:00 midday, that the claimant left one hour earlier without notifying the respondent properly as he knew he ought to do. He left his work station, and indeed site, without authorisation and without telling the appropriate person at 11 a.m. We do not believe the version of events that he gave for the first time today, that shortly before leaving, sometime between 9.00am and 10.00am on 9 March, he had a further conversation with Mr Thomas where he asked permission. It is implausible because it would have been such an obvious matter to put forward at the investigation or disciplinary hearing or any one of the three appeals that followed; he did not do so.

2.21 We find that Mr Whitty gave due consideration to all of the relevant circumstances including Mr Thomas' and the claimant's explanations, the claimant's record and the fact that he was subject to a live final disciplinary written warning. The reason for the dismissal was as stated by Mr Whitty in the dismissal letter of 7 April 2017 at pages 99-100. The reason was misconduct while subject to a final written warning, which was classed as "progressive misconduct".

2.22 The claimant appealed through the three-stage appeal process to Mr Sullivan, then Mr Corns and then Mr Lord. On appeal the available evidence, the claimant's grounds of appeal and all relevant circumstances were considered, including whether dismissal was an appropriate sanction, and they conscientiously concluded, as Mr Whitty had, having considered other options/alternatives and the appropriateness of the sanction that dismissal was the appropriate response from the respondent. Each of the outcome letters of the appeals set out reasons that the Tribunal find to be the true and conscientious reasons for the

claimant's failure at the appeal stages, in so far as live evidence and corroborating documentary evidence bore out those letters.

2.23 The claimant had support by way of advice and representation from his trade union throughout the chronology of events described above.

2.24 The effective date of termination of the claimant's employment was 3 April 2017, the reason for the dismissal being a reason related to the claimant's conduct as described above.

3. **The Law**

3.1 Unfair Dismissal:

3.1.1 Section 94 Employment Rights Act 1996 (ERA) states that an employee has the right not to be unfairly dismissed, while s.98 ERA sets out what is meant by fairness in this context in general. Section 98(2) ERA lists the potentially fair reasons for an employee's dismissal, and these reasons include reasons related to the conduct of the employee (s.98(2)(b) ERA). Section 98(4) provides that once an employer has fulfilled the requirement to show that the dismissal was for a potentially fair reason the Tribunal must determine whether in all the circumstances the employer acted reasonably in treating that reason as sufficient reason for dismissal (determined in accordance with equity and the substantial merits of the case).

3.1.2 Case law has established that the essential terms of enquiry for the Employment Tribunal are whether, in all the circumstances, the employer carried out a reasonable investigation and, at the time of dismissal, genuinely believed on reasonable grounds that the employee was guilty of misconduct. If satisfied of the employer's fair conduct of the dismissal in those respects, the Employment Tribunal then has to decide whether the dismissal of the employee was a reasonable response to the misconduct. The Tribunal must determine whether, in all of the circumstances, the decision to dismiss fell within the band of reasonable responses of a reasonable employer; if it falls within the band the dismissal is fair but if it does not then the dismissal is unfair.

3.1.3 Questions of procedural fairness and reasonableness of the sanction (dismissal) are to be determined by reference to the range of reasonable responses test also (**Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588** and **Iceland Frozen Foods Ltd v Jones [1983] ICR 17**).

3.1.4 The Tribunal must not substitute its judgment for that of the employer, finding in effect what it would have done, what its preferred sanction would have been if it, the Tribunal, had been the employer; that is not a consideration. The test is one of

objectively assessed reasonableness. **In *Secretary of State for Justice v Lown*** **[2016] IRLR 22** , amongst many others, it was emphasised how a Tribunal can err in law by adopting a "substitution mindset"; the point was made in **Lown** that the band of reasonable responses is not limited to that which a reasonable employer might have done. The question was whether what this employer did fell within the range of reasonable responses. Tribunals must asses the band of reasonable responses open to an employer, and decide whether a respondent's actions fell inside or outside that band, but they must not attempt to lay down what they consider to be the only permissible standard of a reasonable employer.

3.2 Discrimination arising from disability:

3.2.1 Section 15 Equality Act 2010 provides that it is unlawful for an employer to discriminate against a disabled employee by treating that employee unfavourably because of something arising in consequence of disability where the employer cannot show that the treatment was a proportionate means of achieving a legitimate aim, in circumstances where the employer knew, or ought reasonably to have known, that the employee was a disabled person at the material time.

3.2.2 In Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14/RN The Honourable Mr Justice Langstaff (then President) held and said at paragraphs 24 - 28:

"The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" - and second upon the fact that that "something" must be "something arising in consequence of B's disability", which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the Tribunal to conclude that it is A's treatment of B that is because of something arising, and that it is unfavourable to B. I shall return to that part of the test for completeness, though it does not directly arise before me.

In my view, it does not matter precisely in which order the Tribunal takes the relevant steps. It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by "in consequence of", and thus find out what the "something" is, and then proceed to ask if it is "because of" that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B's disability.

The words "arising in consequence of" may give some scope for a wider causal connection than the words "because of", though it is likely that the difference, if any, will in most cases be small; the statute seeks to know what the consequence, the result, the outcome is of the disability and what the disability has led to".

3.3 Breach of contract: Contract law is not governed by principles of reasonableness or considerations of whether treatment is less favourable than given to another or is unfavourable (albeit in some circumstances not relevant to us principles of unfairness may be part of a consideration of lawfulness). Provided parties enter into a contract without coercion and know, understand and agree the terms then whether it is a good deal or a bad deal is not in issue. Parties can agree express terms, and some terms will be implied but only where necessary to make the contract work. Provided there are agreed terms and a mutuality of obligation in respect of them then the parties are bound and must adhere or risk being in breach of contract having then to face the consequences. Some terms may be implied by custom and practice but even then, it is not just a matter of chronology of a practice; the parties must mean and expect to be bound by such customary practices as contractual terms.

3.4 We have heard detailed, comprehensive, expert submissions from both advocates, and neither of challenged the other on the interpretation of the law and authorities, which it is agreed are as described above.

4. **Application of Law to Facts**

4.1 Dismissal: The reason for the claimant's dismissal was his conduct, which is a potentially fair reason. Mr Whitty, and indeed it would appear from what we heard and read each of the subsequent appeals officers, had a genuine and reasonable belief in the claimant's conduct, which was considered to be progressive misconduct, based on an investigation that was reasonable. The claimant had absented himself early from work; he had not given an adequate explanation; he had every opportunity to defend and to explain himself, but the respondent did not believe the claimant's explanations, as indeed neither does the Tribunal. In those circumstances and on the back of a final written warning dismissal falls within the band of reasonable responses of a reasonable employer. It is not a question as to whether we would have dismissed the claimant in the circumstances or whether we would have been lenient; that is not the point; dismissal in the circumstances described must fall within the band of reasonable responses of a reasonable employer. On 9 March there was an unauthorised absence; the claimant left not just his workstation but the plant (site) without notifying those in authority; he was on a final written warning and he had previously been picked up for similar conduct in the relatively recent past. Where somebody is subject to a final written warning they must accept and expect that further incidents of misconduct will trigger consideration of dismissal. We accept Mr Whitty's evidence that his was not an automatic reaction but that it was a conscientious decision in the light of the warning and after he had considered the

claimant's record and suitable sanctions. The claim of unfair dismissal fails.

4.2 Discrimination claim - Section 15 Equality Act 2010: the "something" that arose in consequence of the claimant's disability was his absence from work on occasions and his inability to carry out his full substantive role for a full contractual shift. Dismissal is unfavourable treatment as claimed. The claimant was not dismissed due to the "something" that arose from the disability. The dismissal was due to the claimant's conduct; it was not due or related in any sense to capability by reference to health, ability or disability or for any reason or thing arising from his disability. The claimant's culpable conduct was not conduct that arose in consequence of his disability. The claim of discrimination fails and is dismissed.

4.3 The respondent did not know that the claimant was a disabled person but by way of making adjustments to his working practices and moving him to a sub-assembly line it effectively treated him as if he was a disabled person anyway. This consideration is largely irrelevant to the outcome of this case in view of our earlier findings.

5. **Breach of Contract Claim**

5.1 We have dealt with the breach of contract claim separately, so if we now revert to the findings of fact in respect of the breach of contract claim we found the following facts:

5.1.1 The claimant's sick pay was suspended for the period for the week ending 15 December 2016 to the week ending 12 January 2017. The claimant's contract says that employees with three or more years' service are entitled to up to 104 weeks full pay for sickness absence (page 48 paragraph 11) provided there is contact with a supervisor as directed and that the employee follows the absence procedures.

5.1.2 The absence management procedure, paragraph 3.1, specifies that employees must comply with the respondent's notification and certification requirements otherwise failure to do so will lead to suspension of sick pay.

5.1.3 We were referred by the claimant to page 162 paragraph 4.3.2 and the three circumstances that were needed to apply for a suspension of pay, under a heading "Unauthorised Leave" where it says that pay will not be paid during unauthorised leave where certain circumstances exist, such as the absence has not been certified, the respondent is not satisfied at the reasons given and when no contact has been made by an absent employee. That provision relates to "unauthorised leave". To further explain the situation "authorised leave" (paragraph 4.3.3) is defined as being for an emergency, for a medical appointment, paternity, maternity, jury service, public duty where permission is given, or bereavement. Paragraph 4.3.2 excludes from this consideration

certified medical absence. The respondent through those documents has drawn a distinction between “leave” that is authorised or unauthorised and “sickness absence” that is authorised or unauthorised.

5.1.4 Leaving aside those circumstances of leave for emergency, paternity, maternity etc., where sickness is the reason for the absence, custom and practice and the printed rules require one to notify one’s line manager otherwise pay will be suspended. This finding is reinforced by the claimant’s awareness in that it was spelled out to him on numerous occasions and the claimant knew the rule. The claimant did not comply with that requirement from 5 December 2016 for one month. He had contacted the respondent properly on 2 December but the absence from 5 December was an unauthorised ill health absence and this meant that the respondent could withhold sick pay notwithstanding that because of disciplinary action the claimant later maintained appropriate and agreed contact.

5.2 Application of law to the facts: On the strict wording of the contract, coupled with the implied terms of the contract (if implied terms were needed) because this is the established custom and practice and it is what the claimant was told and accepted on numerous occasions, his claim that he was entitled to sick pay fails and is dismissed. He did not comply with the notification rules that would entitle him to sick pay. He effectively absolved the respondent from having to pay it by his failure to perform his part of the transaction.

5.3 The unanimous judgment of the Tribunal is that all the claimant’s claims fail and are dismissed.

Employment Judge T Vincent Ryan
Date: 10.04.18

REASONS SENT TO THE PARTIES ON

30 April 2018

FOR THE TRIBUNAL OFFICE