Case Number: 3201619/2017

JJE

EMPLOYMENT TRIBUNALS

Claimant: **Mr S Jugroop**

Respondent: **London Underground Limited**

Heard at: **East London Hearing Centre**

On: **9 & 10 August and (in chambers) on 31 August 2018**

Before: **Employment Judge MS Hallen, sitting alone**

Representation

Claimant: Ms B Criddle, Counsel
Respondent: Miss J Shepherd. Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. The Claimant was substantively and procedurally unfairly dismissed from his employment and the case is listed for a Remedy Hearing on 11 January 2019.

REASONS

Background

1 The Claimant in his Claim Form submitted to the Tribunal and received on 29 January 2017, asserted that he was unfairly dismissed from his position of Customer Services Supervisor following a period of sickness as a consequence of an assault at work by third parties. The Respondent in its Response Form asserted that the Claimant was fairly dismissed on grounds of medical incapability confirming that he commenced his employment on 26 August 2003 and was dismissed with effect from 14 July 2017. The Claimant had 13 years complete service.

2 The parties agreed the issues for the Tribunal prior to the Hearing. These issues were as follows:-

2.1 Was there a potentially fair reason for the dismissal? The Respondent asserted that the fair reason for dismissal was a reason related to the Claimant's capability or in the alternative, some other substantial reason of a kind that would justify dismissal of an employee holding the position that the Claimant did, namely that the Claimant's return to work would potentially put members of the public and colleagues at risk.

2.2 Did the Respondent act reasonably in treating the Claimant's capability, namely that he was not fit to work because of his anger issues which may potentially put members of the public and work colleagues at risk, as a sufficient reason for dismissing the Claimant in all the circumstances and in accordance with equity and substantial merits of the case?

2.3 Was the dismissal procedurally fair?

3 The Claimant asserted that the dismissal was procedurally and substantively unfair for the following reasons:-

3.1 The Respondent relying on an occupational health report dated 4 July 2017 from a doctor who had not examined the Claimant;

3.2 The Respondent ignoring the Claimant's assurances that he felt better and was able to control his anger;

3.3 The Respondent taking the decision to dismiss despite the fact that the Claimant had not been examined by occupational health since 20 June 2017;

3.4 The Respondent failing to obtain an up to date medical report from a doctor who had assessed the Claimant prior to dismissal and/or from a doctor who had been made aware of the Claimant's comments about his anger on 10 and 14 July 2017;

3.5 The Respondent failing to obtain an occupational health review 4 to 6 weeks after 20 June 2017;

3.6 The Respondent giving undue weight to the Claimant's comments about his anger on 26 June 2017 and not giving weight to his assurances on 10 and 14 July 2017 that he was fit to return to work;

3.7 The dismissing manager expressing an inappropriate non medical view about whether 1 to 2 weeks would make a difference to the Claimant's recovery at the case conference on 26 June 2017;

3.8 The Respondent failing to note that the Claimant's prognosis had been improving in the weeks preceding this dismissal;

3.9 The Respondent failing to consider the availability of alternative employment;

3.10 The Respondent failing to consider changing the requirements of the Claimant's job;

3.11 The Respondent failing to adequately consider the suggestion of temporary alternative duties and providing anger management courses;

3.12 The Respondent failing to take into account the Claimant's 13 years of service and exemplary attendance;

3.13 The Respondent failing to consider that the Claimant was not known to have used violence in the past;

3.14 The Respondent failing to take into consideration that the cause of the Claimant's absence was an incident and injury that he suffered during the course of his employment;

3.15 The Respondent failing to assist the Claimant in returning to work;

3.16 The Respondent failing to follow the attendance at work procedure.

4 If the dismissal was procedurally unfair, would the Claimant have been dismissed in any event and when would this have been?

5 At the Tribunal Hearing, the Tribunal had in front of it an agreed bundle of documents. The Claimant attended and presented a witness statement as did his union advisor Eamon Lynch, who also attended and prepared a written witness statement. The Respondent called two witnesses, Ms Claudia Borgatti, Area Manager and the dismissing officer and Mr Frank Ibe, Head of Line Operations and appeal officer. Both of these witnesses prepared written witness statements. All of the witnesses gave evidence under oath and were subject to cross examination and questions from the Tribunal.

Facts

6 The Claimant was employed by the Respondent as a Customer Services Supervisor commencing employment on 26 August 2003 until the termination of his employment on grounds of medical incapability with the effective date of termination being 14 July 2017. Until February 2017, the Claimant had a good attendance record. He also had a clean disciplinary history.

7 On 15 February 2017, the Claimant was assaulted and racially abused by a number of youths on bicycles, estimated at 15 to 20 while working on the gate line at South Woodford station. The Claimant suffered facial injuries which left him bruised and bleeding and the police were called. This incident came shortly after an earlier incident where the Claimant was also racially abused. The Claimant completed an incident report form which was at page 58 of the bundle of documents, which confirmed the incident of racial abuse on 2 February 2017. In addition, an incident report form was completed in respect of the incident of assault and racial abuse which was at pages 59 and 60 of the bundle of documents. As a result of these incidents, the Claimant suffered from stress related symptoms and was signed off work by his GP on 22 February 2017. The fitness

for work certificate completed by the Claimant's GP was at page 64 of the bundle of documents and referenced stress as the reason for absence. It should be noted that at page 270 of the bundle of documents in respect of the attendance procedure, the Respondent confirmed that certain types of non attendance at work would not normally count towards disciplinary action and assault on duty was referenced as one of those examples.

8 On 5 April 2017, while the Claimant was signed off work for stress, he attended a case conference with Claudia Borgatti, Area Manager for the Respondent. At the meeting, counselling was arranged for him through London Underground occupational health (LUOH). He was additionally referred to the Drug and Alcohol Assessment and Treatment Service (DAART) regarding his alcohol use as he had mentioned that he had been drinking two or three times per week. The notes of the meeting were at pages 70-72 of the bundle of documents. During this meeting, the Claimant referenced some matrimonial difficulties that he was having but that he was attempting to recover from his illness doing yoga and mediation. He also confirmed that he was feeling well and anticipated a return to work soon. He confirmed that he was taking medication and that he wanted time for that medication to work.

9 DAART provided an assessment report on 21 April 2017. The report said that the Claimant's drinking had increased since the incidents at work as the assault on him had caused him considerable distress. However, the Claimant confirmed that he had stopped drinking on 5 April 2017 (the day of the case conference). The DAART assessment report confirmed that the Claimant's liver function results were normal. The assessment was at page 76 of the bundle of documents. The assessment confirmed that the Claimant had stopped drinking on 5 April, that his liver function results were normal and that he would continue to abstain from drinking in the future. The assessment recommended appropriate counselling services.

10 While the Claimant was absent from work, unsurprisingly he was angry about what had happened at work as a consequence of the racial abuse that he suffered on 2 February 2017 and the racial assault that occurred on 15 February 2017. He wanted to know why he had been assaulted and wanted an apology from the parents of the children who had attacked and abused him, but the police confirmed that they could not find any of his attackers. As he said to Ms Borgatti, he had had some difficulty with his marriage at this time and had thrown a plate onto the kitchen counter and it fell off and broke on the floor. These events occurred in April and early May 2017.

11 The Respondent referred the Claimant to Donna O'Connor, a counsellor who worked at Townsend House near to London Underground head office on the Broadway. The Claimant missed the first appointment on 16 May due to being given the wrong time by the Respondent and missed another appointment on 23 May, due to difficulties with public transport. He also missed a third appointment on 5 June due to him feeling unwell. However, he attended the rest of the appointments with Donna O'Connor and found them to be helpful. There was some dispute about the number of appointments the Claimant missed with the counsellor but the Tribunal preferred the evidence of the Claimant and, as noted above, he had missed three for which he had reasonable excuse.

12 The Claimant was invited to a second case conference meeting by letter dated 8 May 2017 from Ms Borgatti and this meeting eventually took place on 22 May 2017. The

notes of this meeting were at pages 81-83 of the bundle of documents. The Claimant attended with Mr Lynch, his trade union representative. During the course of this meeting, the Claimant confirmed that he was still unwell for work but that he was continuing to attend counselling. The Respondent confirmed that it would arrange a further case conference in the future.

13 Prior to that further case conference, the Claimant was examined on 20 June 2017 by the Respondent's specialist occupational health doctor, Shahana Jina on 20 June 2017. The health assessment was at page 86 of the bundle. It should be noted that this was the final face to face health assessment conducted with the Claimant by the Respondent's occupational health doctors prior to his dismissal. In this assessment, Dr Jina confirmed the Claimant's symptoms had improved although not fully resolved. He was still suffering mild ongoing mood related symptoms, erratic sleep and ongoing difficulties with appetite and concentration. The doctor notably confirmed that the Claimant was fit to return to restricted duties with restrictions applying to critical work, not working alone and not having customer facing duties. She recommended a further assessment in four to six weeks time.

14 The Claimant went to a further case conference with Ms Borgatti on 26 June 2017. He explained that he was improving but continued to have flashbacks and nightmares. At this conference, temporary alternative duties were discussed. The Claimant described his progress, how the medicine was working but confirmed that he still had concerns about returning to work at that stage. The notes of the meeting were at pages 87-90 of the bundle of documents. The notes mentioned that the Claimant had feelings of anger which had not resolved and that he had been attacking and lashing out at his family. The Claimant disputed saying that he had attacked his family and was angry with his children or that he may act in similar way with colleagues if he returned to work. There was some dispute at the Tribunal Hearing as to the exact words used by the Claimant. The Tribunal believed the Claimant in this respect. The Tribunal noted that the Claimant had been assaulted in the workplace and had been going through significant stress as a consequence of such assault. Although he may have indicated anger and stress related issues during the course of this meeting, the Tribunal found that it was unlikely that he would say that he was attacking and lashing out at his family, especially given the fact that the Claimant had exhibited no issues of violence previously. Both of the Respondent's witnesses confirmed that the Claimant was a mild mannered individual and that there had been no previous incidents of violence or anger exhibited in the workplace during the relatively long period of the Claimant's employment. Consequently, the Tribunal found that there was a level of exaggeration of what the Claimant said in the notes presented at pages 87-90 of the bundle of documents. Nevertheless, the Claimant asked for a bit more time before coming back to work, simply a further one to two weeks (page 90) to see if the medication would work and that he would be able to return on a phased basis as recommended by Dr Jina. At this point, Ms Borgatti told the Claimant that the following week the Respondent's may be considering termination of his employment on medical grounds. She confirmed that she was not sure if one or two weeks would make a difference to the Claimant's recovery. As a consequence of this, the Claimant became upset and left the meeting prior to the time it was due to end.

15 Following the case conference, Ms Borgatti sent an email to Dr Illeanna St Claire, another occupational health doctor retained by the Respondent and who was covering for Dr Jina. She attached the notes of the meeting with the Claimant on 26 June 2017. She

recounted the incidence of "violent episodes" and asked Dr St Claire whether in her medical opinion, the Claimant would be likely to recover in one or two weeks. If not, she asked what sort of time scale was she looking at and whether it was likely that the Claimant would exhibit violence towards staff in the workplace in the future. This email was at page 91 of the bundle of documents. Pending the receipt of Dr St Claire's opinion, the Claimant was invited to a further case conference which eventually took place on 10 July 2017. The letter of invitation was at pages 93-94 of the bundle and confirmed that one of the possibilities was that the Claimant could be dismissed upon medical grounds.

16 On 4 July 2017, Dr St Claire wrote an occupational health assessment which was at page 99 of the bundle of documents. Surprisingly to the Tribunal, this report was written without the doctor examining the Claimant. It appeared that the report was written only upon the basis of the notes of the case conference meeting with the Claimant on 26 June 2017 supplied to the Doctor by Ms. Borgatti. It seemed odd to the Tribunal that the doctor could comment upon what appeared to be alleged "violent episodes" without the benefit of seeing the Claimant to interrogate the details of the notes and get a clear understanding of what the Claimant had to say. Nevertheless, Dr St Claire confirmed that she had reviewed the notes of the consultation with Dr Jina (who had recommended a phased return to work) and then the notes of Ms Borgatti taken on 26 June 2017. On the basis of these two documents, Dr St Claire accepted, without asking the Claimant, that he was not fit to work at the time and suggested more substantial treatment. Her report said that she was unable to provide a timeframe for the Claimant's recovery.

17 On 7 July 2017, the Claimant attended a counselling session with Donna O'Connor, Psychotherapeutic Counsellor retained by the Respondent. At this meeting, the Claimant confirmed to Ms O'Connor that he felt fit and well and ready to return to work. Ms O'Connor as his counsellor, advised him to book one last appointment with her so that he could tell her how work had been once he had returned. Nevertheless, despite what the Claimant had said at this meeting, Ms O'Connor wrote an assessment report dated 10 July 2017 (page 105) referencing a conversation with Ms Borgatti and confirming that she had seen the Claimant on 7 July 2017. In the assessment, she confirmed her professional opinion that he was not currently fit to return to duties because of his anger issues although at no point had he expressed to Ms O'Connor an intent to hurt anyone. She also confirmed that he had expressed a desire to return to work to his substantive duties.

18 The third case conference took place on 10 July with the Claimant in attendance and Mr Pike his union representative supporting him. The Claimant confirmed that he felt fine and apologised for leaving the previous meeting early. At the case conference, the Claimant confirmed that he had attended the counselling session with Ms O'Connor on 7 July and felt fine with any anger related matters not having returned. So much so that he had confirmed to the counsellor that he wished to return to work. For the two weeks preceding the case conference, he confirmed to Ms Borgatti that he felt no anger. His GP had increased the dosage of his medication as he found the previous dose had not worked and this was having some success. He confirmed that he was undertaking yoga and massage and explained that he now wanted to return to work as per Dr Jina's advice that followed the last face to face examination of the Claimant by the Respondent's occupational health doctor. The Claimant produced a sick note for four weeks from 27 June 2017 but explained that his GP had said that she had hoped he could return to work before the certificate ran out. The meeting was adjourned for the Respondent to

obtain clarification and a report from the counsellor. During the course of this meeting, Ms Borgatti expressed some surprise at the Claimants "miraculous" recovery. To which Mr Pike confirmed that the recovery was not "miraculous" but part of a process that took place gradually over time. This did not surprise the Tribunal given the fact that the Claimant had been assaulted and racially abused which had caused his current sickness absence. In such a situation any recover would take time.

19 The case conference was reconvened on 14 July 2017, the notes of which were at pages 108 – 112 of the bundle of documents. The Claimant attended this reconvened case conference meeting with Eamon Lynch, his trade union representative and witness at the Tribunal Hearing. Ms Borgatti said that the counsellor's report dated 7 July 2017 agreed with Dr St Claire's report of 4 July stating that the Claimant was not currently fit for work. The Claimant argued that he was fit and wanted to return to work. Mr Lynch, the Claimant's union representative confirmed that although the Claimant's GP had signed him off work for four weeks, the Claimant did not need that period of time to recover. Mr Lynch suggested temporary alternative duties and an anger management course would be a reasonable option at that stage. This option was rejected by the Respondent because it said that he had only attended 50% of his counselling sessions. Instead, Ms Borgatti took the decision to dismiss the Claimant on grounds of medical capability. It should be noted that this decision was taken despite the Claimant confirming that he would shortly be fit to return to work and that the last medical assessment conducted on a face to face basis by the Respondent's occupational health doctor (Dr Jina) on 20 June 2017, had confirmed that the Claimant could return to restricted duties (page 86). It should also be noted that the decision to terminate on grounds of medical capability was taken by the Respondent on the basis of Dr St Claire's assessment which had been undertaken without a face to face medical assessment with the Claimant or a serious consideration of what he allegedly said to Ms Borgatti on 26 June 2017 or in fact if he really posed a threat to anyone.

20 The outcome letter dated 20 July 2017 which was at pages 115-119 of the bundle of documents, relied upon the report from Dr St Claire dated 4 July 2017 even though the Claimant had not been examined by Dr St Claire. It ignored the Claimant's request to return to work and dismissed his comments about being able to control himself. Instead, the letter said that the Claimant was dismissed due to the weight of evidence against him on the question of anger, as expressed at the meeting on 26 June. The question of redeployment was also ruled out for this reason as well. The Claimant was given the right of appeal against Ms Borgatti's decision to dismiss him as well as being given the right of appeal against the medical evidence to the Head of Occupational Health. Pursuant to its procedures, the Respondent has a two stage appeal process. The first stage was an appeal against the substantive decision to terminate the employment by the dismissing officer. In addition, if the appeal was on the grounds of medical evidence, the senior manager is required to consult with the Head of London Underground Occupational Health in respect of the medical evidence that was used to determine the Claimant was unfit for work. This two stage procedure was at page 286 of the bundle of documents.

21 The Claimant by way of his union representative Eamon Lynch, submitted an appeal dated 20 July 2017 against both Ms Borgatti's substantive decision to terminate the Claimant's employment for medical incapacity as well as on the basis of the advice that was given by Dr St Claire, in the absence of examining the Claimant. In support of his appeal, the Claimant produced a witness statement from his wife which was at page

120 of the bundle of documents. In this statement Mrs Jugroop confirmed that the Claimant was fit and well to return to work since June 2017. She confirmed that his problems were as a consequence of the racial abuse and attack at work which had caused his sickness absence and she assured the Respondent that he was not a violent person. In any event, this was not disputed by the Respondent as it produced no evidence to show to the Tribunal that the Claimant had exhibited violence in the workplace previously. In addition, the Claimant adduced a letter from a GP, Dr Orekoya which was at page 121 of the bundle of documents and dated 25 July 2017. It confirmed, "*Today I have reviewed him. Well dressed and groomed. Good eye contact. Feels well in himself. ……he was in normal mood. …..he has insight into his problems. There are no thoughts of self harm. ….in my view of today's presentation and the records available to me, I believe. is fit to resume work".*

22 In addition to Mr. Lynch's email of appeal of 20 July 2017, the Claimant sent an email dated 14 July 2017 (pages 113-114) to the appeal officer Frank Ibe confirming his grounds of appeal as follows:-

Abusive Procedures

Disregard of relevant information

Failure to support employee

Failure to offer reasonable counselling services

23 The Respondent understood that there would be two levels of appeal. The first level would challenge the medical evidence, particularly the report of Dr St Claire which was prepared in the absence of an examination of the Claimant by her after reviewing the disputed case conference notes prepared by Ms Borgatti of 26 June 2017. This understanding was supported by the letter of dismissal, especially at page 119 in which Ms Borgatti confirmed "*If the basis for the appeal is that you are currently fit to perform the full duties of Customer Service Supervisor your appeal will be referred to the Head of Occupational Health, together with any supporting medical evidence you provide".* It is further supported by the Respondent's own procedures at page 286 which confirmed "*If the appeal is on the grounds of medical evidence, the senior manager will then consult with the Head of London Underground Occupational Health".* As confirmed by Mr Ibe at the Tribunal Hearing, this part of the appeal did not happen. Instead, what did happen was that Dr St Claire, the same doctor that had advised Ms Borgatti on the Claimant's medical health without examining him, had been provided with the Claimant's medical appeal to which she responded by letter dated 14 August 2017 (pages 184-185 of the bundle). The Tribunal was surprised to note that this assessment was again undertaken by Dr St Claire without examining the Claimant. It seemed odd to the Tribunal that such a medical assessment and conclusions could be drawn by Dr St Claire without such examination. Furthermore, it is clear that Dr St Claire had been forwarded the Claimant's doctor's note dated 25 July 2017 which confirmed that the Claimant was fit to return to work at least at that date. What Dr St Claire does say is that as a consequence of the Claimant's GP assessment confirming that he was fit to return to work as at the date of the appeal "*If the management would wish further advice from occupational health then this should not be handled through the appeal process any longer but, as per guidance of the appeal, it should be handled as a new assessment. If that is the way the business wants*

to pursue then it would be beneficial, to start with, that a report from a GP or any specialist that you have seen in the meantime or since is obtained." Mr Ibe, the appeal officer, despite Dr St Claire's recommendation and the fact of the Claimant's own GP saying he was fit to return to work, did not action any further medical assessment to take place. At the Tribunal Hearing Mr Ibe confirmed that he had no medical expertise and could make no such assessment of the Claimant's fitness to return to work in the absence of any further medical assessment in that regard. Mr Ibe also confirmed that in apparent breach of the Respondent's procedures (page 286), where the medical evidence of Dr St Claire had been challenged by the Claimant, the Head of London Underground Occupational Health had not been consulted.

24 The Claimant's appeal was not heard until 27 September 2017, some two and a half months after he lodged it. He was accompanied at the appeal by his trade union advisor Mr Lynch. At the appeal, the Claimant explained that although his last fit note was due to run until after 14 July, he was able to return to work before it expired. He also confirmed that the Respondent should have considered redeployment rather than dismissing the Claimant on 14 July as well as pointing out his objections to the meeting notes of 26 June 2017. He explained to Mr Ibe that he denied that he was out of control or that he had said that he had attacked his family. He explained that he was well enough to return to work on 29 June 2017 and Mr Lynch explained that the Respondent had used the worst items in the note of 26 June to dismiss the Claimant. Furthermore, he confirmed that the Respondent took no account of the fact that the Claimant had been assaulted and abused by a gang of youths which was the cause of the Claimant's illness. Mr Lynch confirmed that the Claimant was suffering from post traumatic stress disorder and that the Claimant was not a violent or aggressive character. The Claimant and his representative challenged the idea that he was a danger to colleagues and to the public and that if the Respondent seriously believed that the Claimant was so, then an alternative suggestion would be an anger management course rather than dismissal on 14 July. At the conclusion of the appeal meeting, the Claimant confirmed that he was able to return to work and felt able to do so. Mr Ibe adjourned the meeting and subsequently wrote to the Claimant by letter dated 15 November 2017 which was at pages 254-262 of the bundle of documents. The outcome letter rejected every point of appeal brought by the Claimant. The outcome letter confirmed that the Claimant had been absent from work for a long time and that there was no date for his return despite the fact that at the date of the appeal, the Respondent had the letter from the Claimant's own GP dated 25 July 2017 (page 121) saying that he was fit to resume work. The second part of Mr Ibe's letter commencing at page 260, dealt with the Claimant's main reason for dismissal by rejecting all of his comments about his recovery and insisting that the Claimant was a danger to colleagues and the public. It seemed strange to the Tribunal that Mr Ibe being a non medically qualified person could come to any reasoned conclusion about the Claimant's danger to himself, his family or the public. Indeed, at page 262, he says "*It is difficult for me to form a clear view of your mental health and readiness to work"..... I did consider whether or not it was appropriate for me to refer you to OH. At our meeting you had not had any further treatment nor did you advise me that any was planned. Instead you said you were fully recovered and ready to return to work".* It seemed to the Tribunal that any reasonable appeal officer given his professed difficulty in coming to any medical assessment would have instigated further medical assessment before coming to a decision on the appeal to ascertain whether the Claimant could indeed come back to work, which is what he and his GP were saying. Instead, Mr Ibe did not do this and dismissed the Claimant's appeal.

Law

25 The Tribunal had to ascertain whether the reason for dismissal fell within section 98(1) of the Employment Rights Act 1996 (ERA) and whether the Respondent had shown the dismissal was by reason of the Claimant's capability and/or some other substantial reason that justified the dismissal of the Claimant in the position that he held.

26 If the Respondent could show that the reason for dismissal was capability and/or some other substantial reason and a potentially fair reason for dismissal, the Tribunal had to decide if the employer acted reasonably or not in dismissing for that/those reasons. The statutory test for fairness is set out at section 98(4) of the ERA;-

"*The determination of the question whether the dismissal was fair or unfair, having regard to the reasons shown by the employer depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating as sufficient reason for dismissing the employee and ……shall be determined in accordance with equity and the substantial merits of the case*."

27 In *DB Schenker Rail (UK) Limited v Doolan (2010) UKEAT-0053-09*, the EAT observed that in respect of ill health capability dismissals the Respondent must show:-

27.1 It had a genuine belief that ill health capability was the reason for dismissal;

27.2 It had reasonable grounds for its belief;

27.3 It carried out a reasonable investigation.

28 Where an employee has been absent long term, the Tribunal must also consider whether the employer can be expected to wait longer for the employee to return (*Spencer v Paragon Wallpapers Limited (1977) ICR301*). Further, in the case of *East Lyndsey District Council v Daubney* it was held that it was not a function of employers or Employment Tribunals to act as medical appeal tribunals to review advice received from medical advisers, the decision whether or not to dismiss an employee was not a medical question but had to be taken by employers in the light of available medical evidence which should be requested in such a way as to enable them to make an informed decision so that the employer can discover the true medical position.

29 In the case of *BS v Dundee City Council (2013) CSIH91* as applied in *Monmouthshire County Council v Harris (2015) UKEAT/0010/15* indicated that the following factors may be relevant in how long an employer may be expected to wait:-

29.1 The likely length of absence;

29.2 The fact that the employee has exhausted sick pay;

29.3 The cost of continuing to employ the employee, the size of the employee

and the size of the employing organisation.

30 Finally, in the recent case of *O'Brien v Bolton Saint Catherine's Academy (2017) EWCA CIV 145* it was held that where the position had changed between the dismissal and the appeal hearing as a result of developments in the medical condition itself in considering the proportionality of a dismissal decision, it was disproportionate and unreasonable for the school to disregard medical evidence that confirmed the employee was fit to return to work without at least further assessment by its own occupational health advisers.

Tribunal Conclusions

31 In this case, the Tribunal was satisfied that the reason for dismissal fell within section 98 (1) of the ERA and that the Respondent has adduced sufficient evidence to show that the dismissal was by reason of the Claimant's capability. As a consequence of suffering facial injuries following racial abuse and assault on 15 February 2017, the Claimant was signed off work on 22 February 2017 and by the time of his dismissal on 14 July 2017 the Claimant remained incapable of undertaking his duties by reason of ill health.

32 However, the Tribunal was of the view that the Claimant had been substantively unfairly dismissed by reason of his ill health. The Claimant had nearly 14 years of continuous service with the Respondent at the time of his dismissal and the Tribunal accepted his evidence that he had no long term sickness issues prior to this nor did he have any disciplinary issues on his record. The Respondent's attendance procedure at page 270 of the bundle of documents required the Respondent to take a sympathetic attitude towards sickness absence, especially if it was due to an assault whilst an employee was on duty, as was the case in this instance. In addition, at page 271 of the bundle of documents which was an extract of the Respondent's attendance procedure, it stated "*an employees service will not be terminated until a minimum of 39 weeks have elapsed from the time he/she first became unable to carry out his/her job for medical reasons*." This section is a section that related to suitable alternative employment and clearly contemplated a lengthy period of continuous sickness absence. In this case, the Claimant's dismissal was progressed reasonably rapidly pursuant to the Respondent's attendance procedure in the absence of due consideration for the reasons for the Claimant's absence (racial abuse/assault at work) and without giving the Claimant a reasonable opportunity to recover, especially given the timeframes specified at page 271 of the attendance procedure which contemplated an absence of up to 39 weeks. In this case, the Claimant's employment was terminated within 5 months of his sickness absence. The Respondent produced no evidence to show that the costs of the Claimant's absence was causing it undue stress nor any evidence to show that it could not wait longer for the Claimant to recover especially in the light of the time period mentioned above in it own procedures. This did not surprise the Tribunal given the fact that London Underground is a substantial employer and could very likely absorb the cost of the Claimant's sickness absence, especially given the cause of such absence.

33 In addition, at the time of the Claimant's dismissal by Ms Borgatti on 14 July 2017, the Claimant had only been examined once by the Respondent's occupational health advisers, namely by Dr S Jina on 20 June 2017. Her assessment was at page 86 of the bundle of documents and at that time she recommended that the Claimant was fit to return

to work on restricted duties. However, at a case conference which took place on 26 June 2017, the dismissing officer Ms Borgatti in the Tribunal's mind, took comments made by the Claimant about his anger issues out of context and conflated them and gave them a significance which they did not warrant. It was clear from the evidence heard at the Tribunal that the Claimant had no past history of violence or anger in the workplace nor had he been violent towards customers or staff of the Respondent in the past. Given this knowledge, it seemed to the Tribunal that Ms Borgatti should have been highly critical of any such comments made by the Claimant especially given the fact that he had recently been the victim of assault and racial abuse, was suffering from stress and anxiety and was under the effects of medication. However she did not apply the necessary caution that a reasonable dismissing officer would in the Tribunal's mind have applied given the facts at her fingertips at the relevant time. Instead, she referred the notes of the meeting of 26 June 2017 (pages 87-90) onto another occupational health physician who was covering for Dr Jina who had conducted the last face to face examination. What was surprising to the Tribunal was that Dr St Claire could come to the conclusions that she came to at page 99 of the bundle of documents without conducting any face to face examination with the Claimant. It seemed that Dr St Claire took what the Claimant had allegedly said at the meeting on 26 June 2017 at face value, stating "*I understand that Mr Jugroop is at present reporting outbursts of anger. That, of course in a work situation, would potentially put members of the public at risk if he is to return to a customer facing role or his colleagues even if he returns to a non customer facing role."* These conclusions were reached by Dr St Claire without examining the Claimant and were entirely different to those of Dr Jina who examined him on 20 June and confirmed that he was fit to return to work on restricted duties. The Respondent in such circumstances to clear up this ambiguity could not have held a reasonable belief in the absence of such further medical assessment as it could not be properly aware of the true medical circumstances. In addition, as of the date of the case conference on 10 July and the subsequent reconvened conference on 14 July, the Claimant was adamant that he would be fit and well to return to work within two to three weeks further absence. He confirmed that he was making progress and would like a short further period of time to fully recover. It seemed to the Tribunal that the Claimant was being painfully honest to the Respondent and was taking a cautious approach. Furthermore, Ms Borgatti gave evidence to the Tribunal that she did not disbelieve the Claimant's assertions that he was recovering and was very likely to be in a position to return to work shortly. She also confirmed that the Claimant had not been violent in the workplace and that the only reference to violence that had occurred was that which occurred on 26 June at the case conference. This, the Claimant disputed specifying that the Respondent had given it significance to which it did not deserve. It was also clear to the Tribunal that Ms Borgatti did not seriously consider any other alternatives that were open to her such as redeployment or temporary alternative duties. Furthermore, she failed to consider Mr Lynch's suggestions that the Claimant should be provided with anger management counselling if that was a serious concern for the Respondent and it truly believed that he was a danger to staff or customers. The Tribunal came to the conclusion that given the above serious irregularities the Respondent did not carry out a reasonable investigation before dismissing the Claimant and therefore could not come to an informed decision on the true medical position. Furthermore, reasonable alternatives to dismissal were not considered by the dismissing officer even though these were open to the Respondent and the reasons for not considering them were not convincing to the Tribunal. These alternatives including waiting longer for the Claimant to recover, considering a phased return to work, considering temporary alternative duties and considering suitable alternative employment. For these reasons, the Tribunal came to the conclusion that Ms Borgatti's dismissal of the Claimant was substantively and procedurally unfair.

34 The Respondent did not conduct a fair appeal process in respect of the Claimant's appeal. It was clear to the Tribunal that the Claimant was appealing against the substantive decision to terminate his employment by Ms Borgatti as well as appealing against the medical decision made by Dr St Claire. The Respondent's appeal procedures at page 286 of the bundle of documents gave employees a two stage right of appeal. Firstly in respect of the substantive decision to terminate by way of the dismissing officer and secondly, if the appeal was also on the grounds of medical evidence, the senior manager was required to consult with the Head of London Underground Occupational Health. This was reiterated by Ms Borgatti in a letter of dismissal at page 119 where she confirmed "*If the basis for the appeal is that you are currently fit to perform the full duties of Customer Service Supervisor you appeal will be referred to the Head of Occupational Health, together with any supporting medical evidence you provide*." It was clear to the Tribunal that pursuant to the email from Mr Lynch at page 128 of the bundle of documents that the Claimant was appealing against the advice of Dr St Claire. No evidence was produced by the Respondent to confirm that the Head of London Underground Occupational Health had been consulted or that an appeal had been conducted by him or her. What does seem to have occurred was that the Claimant's medical appeal was again referred to Dr St Claire (the original decision maker) who essentially reconfirmed by way of her letter at page 184 and 185 of the bundle of documents (24 August 2017) the original decision provided to Ms Borgatti on 4 July 2017 (page 99). The Tribunal did not consider this to be a fair medical appeal as it was the same occupational health doctor that was reconfirming a decision that she had already earlier made. It should be borne in mind that Dr. St. Claire came to her conclusions without examining the Claimant on both occasions. In the Tribunal's mind, a fair appeal if it was being conducted reasonably would have been undertaken by a new and independent occupational health doctor at the instigation of the Head of the Respondent's occupational health department as was allowed for in the Respondent's own procedures. This did not occur and there appears to be no reasonable explanation for this failure.

35 The substantive appeal against Ms Borgatti's decision to dismiss the Claimant was conducted by Mr Frank Ibe and the Tribunal came to the conclusion that this was not a fair substantive appeal of Ms. Borgatti's decision to dismiss. In spite of the criticisms that the Tribunal has had of Dr St Claire reviewing her own decision, she did say dated 24 August 2017, "*If the management would wish further advice from occupational health then this should not be handled through the appeal process any longer but, as per guidance of the appeal, it should be handled as a new assessment. If that is the way the business wants to pursue then it would be beneficial, to start with, that a report from a GP or any specialist that you have seen in the meantime or since is obtained*." This was Dr St Claire's response to the Claimant's medical report of 25 July 2017 (page 121) which confirmed that he was fit to resume work. Given both of these recommendations, one from the Claimant's GP and the other one from the Respondent's own occupational health adviser, the Tribunal was surprised to note that Mr Ibe was still confused as to what he should do. It seemed obvious to the Tribunal that a reasonable appeal officer in these circumstances would have referred the matter onto an independent and senior occupational health adviser to ascertain the fitness of the Claimant to return to work as of the date of the appeal. Indeed, Mr Ibe in his appeal dismissal letter says the following at page 262 "*It is difficult for me to form a clear view on your mental health and readiness to return to work*"..... *I did consider whether or not it was appropriate for me to refer you to OH. …..and the medical prognosis available to me I do not think that a referral to OH would achieve anything because nothing has really changed since your final meeting with Ms Borgatti*." The Tribunal was at a loss to see how Mr Ibe could have come to this

conclusion especially given the fact that the Claimant had long been saying he was fit to return to work, his GP had provided a report to say that he was fit to return to work and Dr St Claire in her letter of 24 August 2017 also made a similar recommendation. It seemed to the Tribunal that the only reasonable course of action for Mr Ibe was to accept the available medical evidence, allow the appeal and permit the Claimant to return to work on a phased return to work basis or take further independent occupational health advice to assess the Claimant's abilities to return to work on a phased return to work basis. Mr Ibe did neither of these and therefore the Tribunal concluded that the appeal was substantively and procedurally unfair.

36 For the above reasons the Claimant was unfairly dismissed. The Tribunal after consultation with the respective parties fixed the Remedy Hearing for 11 January 2019. The Tribunal noted that the bundle of documents prepared for the Hearing had at its final section, Remedy and Mitigation and that the Claimant had produced a Schedule of Loss. The Tribunal also noted that the Claimant had partially mitigated his losses by obtaining employment as a bus driver with Stagecoach on 11 November 2017. As a consequence, the Tribunal gives no further directions in respect of preparation for the Remedy Hearing and leaves it to the respective solicitors to agree appropriate directions for such Remedy Hearing and in the hope that this matter can be settled without recourse for such Hearing by way of ACAS or other mediation routes open to the parties.

Employment Judge Hallen

6 September 2018