



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr P Krysinski  
**Respondent:** Asda Stores Limited  
**Heard at:** Ashford  
**On:** 28 September 2018  
**Before:** Employment Judge Pritchard

**Representation:**  
Claimant: In person  
Respondent: Miss R Barrett, counsel

**Polish interpreter:** Mr Katz

## RESERVED JUDGMENT

The Claimant's claim that he was unfairly dismissed is not well-founded and is dismissed

## REASONS

1. The Claimant claimed that he had been unfairly dismissed. The Respondent resisted the claim.
2. The Tribunal heard evidence on the Respondent's behalf from Ivor Perera (Operations Manager) and from Darren Coker (General Manager). The Tribunal heard evidence from the Claimant on his own behalf; in addition, the Tribunal had regard to the statement of Gabor Toth which was put in evidence by the Claimant. The Tribunal was provided with a bundle of documents. At the conclusion of the hearing the Respondent made brief oral submissions supported by written submissions. The Claimant was given the opportunity to make submissions but he declined to do so.

### Issues

3. At the outset of the hearing the Claimant agreed that the draft list of issues prepared by the Respondent contained the issues for determination in the case. Those issues are as follows:
  - 3.1. Did the Respondent dismiss the Claimant for a fair reason for the

purposes of section 98(1) of the Employment Rights Act 1996? The Respondent relies on the Claimant's capability due to ill health which is a potentially fair reason under section 98(2).

- 3.2. Did the Respondent act reasonably in all the circumstances in treating the Claimant's capability as a sufficient reason for dismissal under section 98(4)? Namely, was the dismissal within the band of reasonable responses open to the Respondent in the circumstances?
- 3.3. The Claimant alleges his dismissal was substantively unfair because:
  - 3.3.1. The Respondent should have waited for more medical evidence before dismissing; and
  - 3.3.2. A colleague with a back condition was given amended duties and not dismissed.
- 3.4. Did the Respondent follow a fair procedure in dismissing the Claimant?
- 3.5. The Claimant alleges the dismissal was procedurally unfair because he did not have sufficient notice that the final capability hearing could result in dismissal

4. Issues relating to remedy were listed but are not repeated here.

### **Findings of fact**

5. The Claimant commenced employment with the Respondent in October 2013 working in the Respondent's warehouse. He is described in his contract of employment as a Warehouse Colleague. In each working week 60% of the Claimant's time would be spent on picking duties with the remainder of the time on other duties, such as reach truck driving or attending to batteries used in the various warehouse trucks. This spread of duties is in accordance with an agreement reached between the Respondent and the GMB union which sensibly seeks to provide a rotation of duties among warehouse staff.
6. The Claimant has suffered from a bad back since about June 2014 although it does not appear that he took time off work until September 2015 when he was off work for a few weeks. At the same time the Respondent withheld the Claimant's sick pay because it appeared that there was a repeated pattern to his absence whereby it was consecutive to his annual leave. The Claimant underwent physiotherapy in January 2016 following which he was discharged from the physiotherapy service.
7. The Claimant took sick leave again in October 2016. The Respondent referred the Claimant to its occupational health provider (MSK) who recommended that the Claimant should take micro breaks every hour for his moderate back pain during a return to work in accordance with a rehabilitation plan. However, the Claimant suffered further back pain during the phased return and again went on sick leave on 27 November 2016. The Respondent referred the Claimant to its physiotherapy provider and

although the Claimant initially failed to attend, thereafter he underwent a number of physiotherapy sessions at the Respondent's expense commencing in November 2016. The Claimant was again assessed by MSK on 8 December 2016. Although MSK thought the Claimant was fit for a phased return to work and picking duties and provided a return to work plan, the Claimant said his physiotherapist's view was that he should not return to work for at least another four weeks and the completion of eight physiotherapy sessions. The Claimant would not therefore agree to return to work. However, at a meeting held on 9 December 2016, the Claimant was told that he should return to work in accordance with the plan the following week to which the Claimant said he was unwilling to do so because his wife's work commitments clashed.

8. Because of the Claimant's unwillingness to return to work, he was required to attend a meeting held on 14 December 2016 to discuss his potential abuse of the company sick pay scheme. The Respondent decided that the matter should be considered at a disciplinary hearing. The Respondent also decided that the Claimant's company sick pay should be withheld.
9. The Claimant appealed against the decision that his company sick pay should be withheld and this was considered at a meeting on 3 January 2017. The Claimant's appeal was unsuccessful.
10. The disciplinary hearing was held on 9 January 2017 following an initial adjournment on 28 December 2016 because the Claimant had requested an interpreter. The result was that the Claimant was issued with a 12 month final written warning.
11. By letter dated 12 January 2017, the Claimant was informed that his request to change shifts, a matter discussed at the disciplinary hearing, had been granted.
12. Apart from a return to work on 13 January 2017 when the Claimant left the same day suffering with back pain, the Claimant had remained off work. He was certificated as unfit for work from 5 January 2017 to 31 January 2017.
13. The Claimant's appeal against the final written warning took place on 1 February 2017. His appeal was unsuccessful.
14. MSK reported on 1 February 2017 that the Claimant was fit to return to work and set out a plan for a phased return. Although the Claimant's GP again certificated the Claimant as not fit for work from 1 February 2017 to 14 February 2017, he nevertheless returned to work on 6 February 2017 in accordance with MSK's recommendations. However, during week three of the phased return, on 22 February 2017, the Claimant again went on sick leave suffering from back pain. During a meeting the previous day, after the Claimant had reported that he could not work further because of his back pain, he was informed that the Respondent would follow its capability procedure. The Claimant was unable to say at the meeting whether he might be interested in alternative duties working in one of the Respondent's stores.
15. The Claimant was certificated as not fit for work from 28 February 2017 to 13 March 2017 and again on 11 March 2017 for 12 days.

16. An MRI scan failed to disclose the cause of the Claimant's back pain but suggested further investigation may be required. The MRI results were discussed at a welfare meeting held on 6 March 2017. The Claimant was informed that he might be invited to a capability meeting and that his dismissal was a possible outcome.
17. MSK advised on 7 March 2017 that the Claimant should be permitted to await the outcome of further investigations into his back pain. The Respondent discussed the Claimant's current condition at a welfare meeting on 16 March 2017.
18. The Claimant attended a capability meeting on 21 March 2017 chaired by Mr Perera. It was noted that the Claimant had not undertaken his full duties since November 2016. The Claimant told Mr Perera that he would not be interested in an alternative role working in one of the Respondent's stores. Mr Perera emphasised that no decision had been taken but that if there was no foreseeable prospect of the Claimant returning to work then dismissal through the capability process was a possibility. Nevertheless, Mr Perera decided that the Claimant should have the opportunity to provide the outcome of further investigations into his condition before the Respondent progressed further with the capability procedure.
19. In April 2017, the Respondent informed the Claimant in writing of the outcome of its absence review. It was noted that the Claimant's sickness absence stood at 56.7% over the last 26 week period at a cost to the Respondent of £40,144.00.
20. The Claimant was certificated as not fit for work from 20 April 2017 to 20 May 2017.
21. Mr Perera held a further capability meeting with the Claimant on 16 May 2017. The Claimant indicated that the MRI scan did not reveal a problem with his spine but that he was awaiting the results of further tests on his kidneys which were due on 5 June 2017. Mr Perera decided that he should seek further advice from MSK and based on that he would have to decide whether the Claimant could return to work on phased or restricted duties. However, again Mr Perera told the Claimant that he might be invited to a final capability meeting and his employment terminated due to ill health capability. Mr Perera's letter to the Claimant dated 25 May 2017, in which he summarises the discussion which took place, expressly states that following the occupational health review a capability meeting would take place to discuss the Claimant's health and to make a decision regarding his continued employment which could result in the termination of his employment.
22. On 21 May 2017, the Claimant's GP certificated the Claimant as fit to work on light duties which do not involve lifting or bending. By letter dated 12 June 2017, the Claimant's GP, Dr Sinha, informed the Respondent that the Claimant would be seeing a consultant urologist on 15 June 2017 to discuss the finding of dilation of his left renal pelvis. As to the prognosis, Dr Sinha thought it would depend on the outcome of the kidney investigations but that if a kidney problem could be ruled out, then the prognosis should be good bearing in mind that the MRI scan did not show any serious pathology. Dr

Sinha thought the Claimant capable of undertaking all the activities of his job role but asked that the Claimant be given light duties pending the urologist appointment. Dr Sinha noted that the Claimant was not currently on any medication for his back pain.

23. On 13 June 2017, occupational health reported that the Claimant was fit to return to work, initially with temporary restrictions over four weeks. The Claimant returned to work in accordance with a rehabilitation plan on 14 June 2017. Although the Claimant's GP provided a further certificate on 5 June 2017, valid until 26 June 2017, in which he recommended a phased return on amended duties, and a further similar certificate on 26 June 2017, valid until 31 July 2017, the Claimant suffered a recurrence of back pain at work on 14 July 2017 and took further sickness absence.
24. The Claimant attended a welfare meeting on 19 July 2017. The Claimant was informed that he would be invited to a final capability meeting which could impact on his continued employment. The Respondent's follow up letter repeated this information.
25. By letter dated 26 July 2017 the Respondent sent the Claimant a copy of a vacancy and an application form.
26. On 21 July 2017, MSK reported that the Claimant was fit to return to work on restricted duties: "reach truck duties only if operationally feasible", but that it was unclear if the Claimant would be able to return to his full and substantive duties in the foreseeable future.
27. By letter dated 2 August 2017, the Claimant was invited to attend a meeting on 7 August 2017 to discuss his ongoing absence. The Claimant was informed that a potential outcome of this meeting could be the decision to progress the matter to a final capability meeting. At the meeting the Claimant said he was awaiting the results of a scan of his pelvis. The Claimant indicated that he might be interested in working at the Respondent's other warehouse, XDC, which deals with lighter picking duties. The Claimant repeated that he would not be interested in working at one of the Respondent's stores. As to working reduced hours, the Claimant rejected this because it would reduce his income. Having reviewed the Claimant's absence and the latest known medical position, the manager holding the meeting decided that the Claimant should be referred to a final capability meeting. The Claimant was reminded that the final outcome of that meeting could be the termination of his employment.
28. By letters dated 7 August 2017, sent by both first class post and recorded delivery, the Respondent set out a brief history of the Claimant's sickness absences, a summary of the meeting held on 2 August 2017, and invited the Claimant to attend a final ill health capability meeting with Mr Perera on 11 August 2017. The letter made it clear that the potential outcome of the meeting could be the termination of the Claimant's employment.
29. The Claimant's evidence was that he did not receive either copy of this letter. The Tribunal notes that the letter was addressed using an incorrect postcode. The Tribunal accepts the Claimant's evidence that he had not received a postal copy of the invitation letter.

30. The meeting proceeded on 11 August 2017, the Claimant having been informed by his union representative that it would take place. The Claimant was accompanied by his union representative and a Polish interpreter was present. The Claimant told Mr Perera that he had not received a copy of the letter inviting him to the meeting and a copy was provided to him. The Claimant was happy for the meeting to continue.
31. At the meeting, Mr Perera considered the latest available medical information and listened to what the Claimant had to say. After an adjournment, Mr Perera informed the Claimant of his decision, namely that the Claimant was dismissed on grounds of ill-health capability. Mr Perera confirmed his decision in a letter to the Claimant dated 17 August 2017 and the reasons for it. The Claimant was paid in lieu of notice, his employment ending on 11 August 2017.
32. The Claimant subsequently appealed against his dismissal. Jon Dennis, General Manager of the Respondent's XDC warehouse, held an appeal meeting on 8 September 2017. The notes of the appeal meeting suggest that Mr Dennis carefully considered the Claimant's points of appeal. By letter dated 19 September 2017, Mr Dennis informed the Claimant that his appeal had been unsuccessful and the reasons why.
33. The Claimant then appealed again under the Respondent's stage two appeal procedure. Daren Coker heard the Claimant's second stage appeal at a meeting on 17 October 2017. As with the first appeal hearing, the notes of the second appeal meeting suggest that Mr Coker also carefully considered the Claimant's points of appeal. Before reaching any decision, Mr Coker questioned Mr Perera as to whether he knew if the Claimant had received the invitation letter. Mr Coker also interviewed Dave Barrett who had taken notes at the final capability meeting and who confirmed that he had provided the Claimant with a copy of the invitation letter at the meeting.
34. By letter dated 7 November 2017, the consultant urologist at Medway NHS Foundation Trust informed the Claimant's GP that he did not have kidney stones which had been suspected as perhaps being the source of his back pain.
35. By letter dated 13 November 2017, Mr Coker informed the Claimant that his second appeal had been unsuccessful and set out the reasons why.

### **Applicable law**

36. Section 98 of the Employment Rights Act 1996 provides that it is for the employer to show the reason for dismissal. It must be a reason falling within subsection (2) or some other substantial reason which justifies the dismissal of an employee holding the position which the employee held.
37. In this case the reason relied upon by the Respondent is capability which is a reason falling within subsection (2). That is defined as including ill health.
38. In order to decide whether the dismissal is fair or unfair, having regard to the reason shown by the employer, the Tribunal must consider whether, in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and that

question shall be determined in accordance with equity and the substantial merits of the case (section 98(4)).

39. In S v Dundee City Council [2014] IRLR 131 the Court of Session stated that in a case where an employee has been absent from work for some time owing to sickness, the following issues would need to be specifically addressed:
  - 39.1. Whether the employer could be expected to wait any longer and, if so, for how much longer. This is the critical question to be decided in dismissals of grounds of ill-health. Relevant factors could include whether the employee has exhausted his sick pay, whether the employer was able to call on temporary staff, and the size of the organisation.
  - 39.2. Whether the employee had been consulted with, whether his views had been taken into account, and whether such views had been properly balanced against the medical professional's opinion.
  - 39.3. Whether reasonable steps had been taken to discover the employee's medical condition and likely prognosis. It would not be necessary for the employer to pursue a detailed medical examination as the decision to dismiss is not a medical question but a question to be answered in the light of the available medical evidence.
  - 39.4. The Court also pointed out that length of service is not automatically relevant. The important question is whether the length of service, and the manner in which service was rendered during that period, yields inferences which indicate that the employee is likely to return to work as soon as he can.
40. Miss Barrett also referred the Tribunal to the case of DB Schenker Rail (UK) Ltd v Doolan EATS 0053/09 as authority for the proposition that the Tribunal is required to address three issues:
  - 40.1. Whether the Respondent genuinely believed in the reason they give for dismissal;
  - 40.2. Whether it was a reason reached after a reasonable investigation; and
  - 40.3. Whether they had reasonable grounds to conclude as they did.
41. It is clear from decisions such as that in Iceland Frozen Foods Ltd v Jones [1982] IRLR 439 that the Tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal considers the dismissal to be fair. In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. It is recognised that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another. The function of the Tribunal therefore is to decide whether in the particular circumstances of the case the decision to dismiss the employee fell within the band of reasonable responses which a

reasonable employer might have adopted. Quite simply, if the dismissal falls within that band, then the dismissal is fair; if the dismissal falls outside that band, it is unfair.

42. That decision was subsequently approved by the Court of Appeal in Post Office v Foley [2000] IRLR 827. It was emphasised that the process must always be conducted by reference to the objective standards of the hypothetical reasonable employer, and not by reference to the Tribunal's own subjective view of what they in fact would have done as an employer in the same circumstances. In this regard, Miss Barrett referred the Tribunal to the case of Pinnington v City and County Council UKEAT/0561/03.
43. Defects at the dismissal stage can be rectified on appeal. See for example: Taylor v OCS Group Ltd [2006] IRLR 613 CA in which it was said that the Tribunal must assess the disciplinary process as a whole and where procedural deficiencies occur at an early stage, the Tribunal should examine the subsequent appeal hearing, particularly its procedural fairness and thoroughness, and the open-mindedness of the decision maker.
44. The question of inconsistency of treatment between employees has been considered in conduct cases where two or more employees have been accused of the same offence. In such cases, the guiding principle is whether the distinction made by the employer was within the band of reasonable responses open to it; see Walpole v Vauxhall Motors Ltd 1998 EWCA Civ 706 CA. However, the emphasis in section 98(4) is on the particular circumstances of the individual employee's case and the crucial question is whether the decision to dismiss fell within the range of reasonable responses. An argument by a dismissed employee that the treatment he received was not on par with that meted out in other cases is relevant in determining the fairness of the dismissal in only three sets of circumstances:
  - 44.1. If there is evidence that employees have been led to believe by their employer that certain categories of conduct will be overlooked or not dealt with by the sanction of dismissal;
  - 44.2. Where evidence in relation to other cases supports an inference that the purported reason stated by the employer is not the real or genuine reason for the dismissal;
  - 44.3. Evidence as to decisions made by an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some other lesser penalty would have been appropriate in the circumstances.

See Hadjiioannou v Coral Casinos Ltd [1981] IRLR 352. It was stated in that case that it is of the highest importance that flexibility should be retained and employers and Tribunals should not be encouraged to think that a tariff approach to industrial misconduct is appropriate.

## **Conclusion**

Has the Respondent shown the reason for dismissal and that it was a potentially



fair reason?

45. The Tribunal is satisfied that the Respondent, through its managers' genuine belief, has shown the reason for the Claimant's dismissal, namely that his back condition was such that the Respondent could not reasonably continue to employ him. Although the burden of proof rests with the Respondent to show the reason for the dismissal, the Tribunal notes that the Claimant did not suggest that the Respondent had any other reason or motive for dismissing him.
46. The Respondent's reason for dismissal related to the Claimant's capability which is a potentially fair reason.

Was the dismissal fair or unfair under section 98(4) of the Employment Rights Act 1996?

47. The Tribunal first considers the particular allegations of unfairness of which the Claimant complains:

Failure to give sufficient notice that the final capability hearing could result in dismissal

- 47.1. The Tribunal has accepted in its findings of fact above that the Claimant did not receive the letter inviting him to attend the final capability hearing through the post. However, the Claimant had been informed both orally and in writing on several occasions that the outcome of the capability process might be dismissal. Furthermore, the Claimant was provided with a copy of the letter at the outset of the capability hearing by Mr Barrett. In the circumstances of this case, the fact that the Claimant did not receive the posted letter does not render the dismissal unfair.
- 47.2. Even if it did amount to a substantive defect giving rise to unfairness, it was in any event rectified on appeal. It is clear that both Mr Dennis and Mr Coker handled the Claimant's appeal with thoroughness and fairness. Having considered the notes of the appeal hearings and the content of the outcome letters, and having heard Mr Coker give evidence, the Tribunal is perfectly satisfied that both the appeal managers considered the Claimant's appeals with open minds. The Tribunal has been unable to identify any procedural shortcomings at the appeal stages.

Should the Respondent have waited for more medical evidence before dismissing?

48. At the time of dismissal, the Claimant was awaiting tests to see whether he had a kidney problem which might account for his back pain. The question is whether the Respondent could reasonably be expected to wait any longer. In the Tribunal's view, the Respondent's decision to dismiss fell within the band of reasonable responses notwithstanding the fact that the outcome of the tests were awaited. At the time of dismissal, the Respondent was unable to ascertain when the Claimant might be able to return to his full duties. There was simply no clarification as to what was causing the Claimant's back pain. He had been absent from work for significant periods.

Those absences incurred costs for the Respondent and caused operational difficulties. In evidence, Mr Perera referred to the requirement to use agency staff to cover the Claimant's absence whereas it was be more beneficial for the Respondent to recruit a replacement full time permanent employee and this could not be done while the Claimant was still employed. Mr Perera also referred to the operational difficulties caused by employees who are unable to return to their full duties which thus puts pressure on their colleagues and gives rise to difficulties ensuring they are placed on rotational duties. Additionally, Mr Perera referred to the cost of paying company sick pay.

49. Even had the dismissal been postponed, the Tribunal notes that it would have made no difference given the results of the kidney tests.

Did the Respondent treat the Claimant unfairly because a colleague with a back condition was given amended duties and not dismissed?

50. The Claimant claims he was treated inconsistently in comparison to Mr Toth who was given amended duties and not dismissed. In this regard the Tribunal has had regard to the principles set out in Walpole and Hadjiannou.

51. There was no evidence before the Tribunal to suggest that the Respondent's employees had been led to believe by the Respondent that an employee with the Claimant's level of sickness absence would be overlooked or not dismissed by reason of capability.

52. There was no evidence before the Tribunal in relation to other cases to support an inference that the purported reason stated by the Respondent was not the real or genuine reason for the dismissal.

53. In the Tribunal's view, the situation relating to the Claimant and Mr Toth were not truly parallel. Mr Toth was suffering from a degenerative back condition (meaning he was quite possibly a disabled person under the Equality Act 2010 such as to place a positive obligation on the Respondent to make reasonable adjustments) whereas the cause of the Claimant's back pain was unknown. Although Mr Toth was put on reach truck driving duties only, these duties were simply not available in the Claimant's case. Mr Toth's allocation to such driving duties in 2016 meant there was less work available for the Claimant in the summer of 2017.

54. In any event, the Tribunal accepts that it is within the band of reasonable responses to treat different employees with different medical conditions differently and on a case by case basis. The Tribunal concludes that the Respondent's decision to dismiss the Claimant by reason of capability was within the band of reasonable responses open to it.

Other factors

55. The Tribunal's conclusion as to whether the Respondent could be expected to wait any longer is set out above. The Claimant attempted to return to full duties on a number of occasions by way of phased returns/amended duties but without success. Although the Respondent was a large organisation and able to call on temporary staff, this was not reasonably a situation which

could continue indefinitely for the reasons stated by Mr Perera.

56. The Claimant was consulted at length. An interpreter was provided at meetings; the Claimant was accompanied by his trade union representative. The Claimant's views were taken into account and properly balanced against the medical professionals' opinions which were sought on a regular basis.
57. The Respondent had patiently awaited the outcome of various investigations into the Claimant's back condition. At the time of his dismissal, the only possible explanation for the Claimant's back pain was kidney problems which the Tribunal has addressed above.
58. The Respondent made reasonable attempts to redeploy the Claimant but he made it clear that he was not interested in working in a store. Enquiries were made but there was no alternative employment available at the Respondent's XDC warehouse. The Respondent referred the Claimant to vacancies but there was no evidence to suggest that he followed them up or expressed an interest in them. The Claimant was not interested in reducing his hours because of the consequential loss of income.
59. At the time of the Claimant's dismissal, there was no foreseeable return to work
60. The Tribunal concludes that the decision to dismiss was reached after a reasonable investigation based on reasonable grounds. The decision to dismiss fell within a band of reasonable responses open to a reasonable employer.
61. The Claimant was not unfairly dismissed.

Employment Judge **Pritchard**

Date: 10 October 2018