EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102396/2017

Held in Glasgow on 25, 26 and 27 April 2018

Employment Judge: Mr D Hoey

Mr A Ferguson	**Claimant** **In Person**
Multi Packaging Solutions UK Limited	**Respondent** **Represented by:-** **Mr J MacMillan – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Claimant's dismissal was fair and so the claim is dismissed.

REASONS

Introduction

1. This is a case for unfair dismissal that called for a 3 day hearing on liability and remedy. The Claimant had initially instructed a solicitor to help him prepare his Claim Form but was unrepresented during the 3 day hearing. The Respondent was represented by a solicitor, Mr MacMillan.

2. While case management Orders had been issued by Employment Judge McPherson, these had not been complied with. The parties attended the Tribunal with their own bundles of productions. The Claimant brought a large ring binder with 30 separate sections each section containing different documents. The Respondent had brought 32 productions extending to 116

pages. The parties had agreed the authenticity of the relevant productions and no issues arose in that regard.

3. The Claimant had indicated that he had suffered from certain health issues at the outset of the Hearing. Given he was unrepresented and his position, in light of the overriding objective within Rule 2 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the Claimant was given significant number of breaks and time to prepare the relevant questions and focus the issues arising. Assistance was given to the Claimant to explain each stage of the procedure and allowances made to ensure appropriate questions were put to the witnesses and the Claimant's case was clearly understood.

4. No case management had been undertaken in relation to the claim prior to the Hearing commencing. While the Claimant was claiming unfair dismissal there was no clarity as to precisely what the Claimant was arguing resulted in his dismissal being unfair. The Claim Form sets out that the Claimant had been absent from work for physical and mental reasons and that disciplinary proceedings had been initiated against him. The Claim Form narrates that the Claimant felt forced into carrying out work he was physically unable to do. Following a capability hearing he was dismissed.

5. The Response Form narrates the various occupational health interventions that had taken place and the factual background that led to his dismissal.

6. In an attempt to clarify the issues arising, various discussions took place to help the Claimant identify the specific ways in which he claimed the dismissal to be unfair during the course of the Hearing. He maintained that the Respondent had required him to undertake duties which he was unable tocarry out and that the Respondent had decided to dismiss him too soon. He argued that it was not reasonable to dismiss him at the point in time he was dismissed with the information the Respondent had.

7. The Claim Form had stated that the Claimant was seeking reinstatement. The Response Form had made no reference to the Respondent's position in relation to this. At the outset of the hearing during the case management discussion, the Claimant stated that he no longer insisted upon this. The sole remedy he sought was compensation.

8. The Tribunal heard from 3 witnesses from the Respondent, Dr Black, an Occupational Health Physician, Mr Railton, the Dismissing Officer and Mr Carroll, Appeal Officer and from the Claimant himself. The Tribunal also heard detailed submissions from the Respondent's solicitor with the Claimant providing his response.

9. The Tribunal was satisfied that each witness gave their evidence candidly and honestly.

Issues to be determined

10. The issues that the Tribunal had to determine were:

11. Was the reason for the Claimant's dismissal capability?

12. Did the Respondent act fairly and reasonably in dismissing the Claimant fairly for that reason (i.e. capability) given the size of the Respondent, its resources, equity and the merits of the case? In this regard the Tribunal needs to decide whether it was fair for the Respondent to dismiss the Claimant when it did, with the information it had obtained and at the time he was dismissed, rather than delaying dismissal.

13. If the dismissal was unfair, what compensation, if any, should be awarded.

Findings in fact

14. The Tribunal makes the following findings in fact having considered the evidence that was led and the relevant productions.

15. The Respondent manufacturers cartons which house whiskey bottles. It has around 40,000 employees worldwide, 650 employees in Scotland with 320 employees within the facility at which the Claimant worked. The operation is live 24 hours a day for 6.5 days a week.

5 16. The Claimant was based within the factory area of the Respondent's operation.

17. The Claimant received a written statement of terms and conditions of employment which was dated December 2003. This states the Claimant's job is "General Assistant". That was not updated as the Claimant's role changed.

10 18. The Claimant began his employment with the Respondent on 5 January 2004 and was dismissed on 15 May 2017.

19. There are different steps within the manufacturing process. The photographs at pages 108 to 116 of the Respondent's bundle helpfully show the factory floor and relevant machines and working areas.

15 20. Areas of the operation include printing, cutting and folding and gluing. There are 3 areas of the business here, namely finishing, warehouse and cutting with around 150 staff in total in these areas.

21. The cartons begin as flat sheets which are then fed into a machine which cuts the relevant shapes. Each sheet can yield 5 or 6 cartons. The cartons then
20 progress through the system to add value.

22. The process is largely automated but manual interventions are regularly needed to resolve issues that arise at different areas of the process.

23. There are a number of different roles within the departments.

24. A general assistant carries out various handling and physical tasks which
25 includes lifting. Each department has its own general assistants.

25. A robot operator controls the machine. This role can be physically demanding. Each shift usually runs with a robot operator and a backup robot operator who provides cover and often carries out the tasks of a general assistant.

26. Some areas of the operation require less physical work. The overhaul department is a dedicated area where products are checked for defects and requires less physical work than other areas.

27. The Claimant worked in the finishing department and became a backup robot operator, then becoming a robot operator. He then moved to the cutting department with a view to becoming a fully fledged operator.

The Claimant's performance

28. Since joining the Respondent in 2004 the Claimant had worked hard. His performance was good.

29. In 2016 the Claimant had performed well. The Claimant had been promoted from robot operator and was a trainee operator with a view to becoming an operator. There was a good relationship between the Claimant and Mr Railton, the production manager (who had 8 years' service with the Respondent).

30. In the Spring of 2016 the Claimant's performance lagged in comparison to the others in this area. He was given additional training.

31. In April 2016 the Claimant sustained a serious injury to his hand while at work

32. The Claimant was issued with a warning as a result of his admitted failure to look after his own health and safety which led to the accident. The Claimant did not appeal against the outcome of that disciplinary process.

33. Following that incident on or around April 2016 the Claimant asked to change his role and return to robot operator duties. This was agreed by the Respondent. No formal contractual documentation was issued.

34. Mr Railton persuaded his line manager to maintain the Claimant's pre-existing salary when he reverted to the role .

The Claimant's absence

35. The Claimant had a good attendance record until 2016.

36. In 2016 the Claimant had a 50% absence rate.

37. In 2017 the Claimant's absence rate reached around 77%.

38. The Claimant had received fit notes (certifying him as unfit to work) as follows:

11 April to 14 April 2016

13 April to 27 April 2016

22 June 2016 to 20 July 2016

15 July 2016 to 5 August 2016

4 August to 25 August 2016

25 August 2016 to 1 September 2016

31 August 2016 to 20 September 2016

20 September 2016 to 25 October 2016

28 October 2016 to 9 December 2016

23 November 2016 to 30 November 2016

16 December 2016 to 23 December 2016

4 January 2017 to 18 January 2017

18 January 2017 to 24 January 2017

6 March 2017 to 13 March 2017

28 March 2017 to 4 April 2017

5 39. There was around 20 months when the Claimant was unfit to do the role which he was contracted to do.

40. The Claimant was unfit to do the role he was contracted to do at the date of his dismissal (and appeal against his dismissal).

Warnings for absence

10 41. On 31 March 2017 the Claimant was issued with a final written warning as a result of his level of absence. He was warned that if his absence did not improve he could be dismissed. The Claimant did not appeal against that warning.

42. The letter dated 6 April 2017 from the Respondent to the Claimant noted that
15 a final written warning was issued at the meeting on 31 March 2017.

43. That letter also stated that the Claimant would return to work on 5 April 2017 on a 6 hour shift pattern (which was half a normal shift) until the Claimant felt able to extend those hours.

44. The Claimant was to work for 3 hours shadowing the Robot Operator to
20 provide assistance and learn the new labelling system. He would then work 3 hours in the technical area. He was to avoid lifting if it impacted upon his medical condition.

45. The letter stated that the arrangement was not open ended and a meeting was to take place on 24 April 2017 to review the situation "with a view to [the

Claimant] returning [to his] normal shift pattern" (which would have been 12 hours).

46. The outcome letter also attached the notes of the meeting and asked the Claimant to advise if any inaccuracies existed. The Claimant did not make any comment.

47. The Claimant did not appeal against that decision although he was unhappy with the outcome.

48. The Respondent offered the Claimant counselling which the Claimant said he would take up.

49. The letter of 6 April 2017 stated that the final written warning was issued for "unacceptable levels of absence, repeated failures to follow company absence procedures and actions detrimental to good working relationships". The latter 2 points were not points that had been foreshadowed prior to the meeting. The outcome of the process would have been the same had latter 2 points been ignored. The warning was principally issued because of the Claimant's absence levels.

Occupational health assessments and medical reports

50. The Claimant was seen by Dr Black, Occupational Health Physician on 4 occasions. Dr Black is a qualified registered nurse, specialist occupational health nurse practitioner, registered osteopath and chartered member of occupational safety and health with over 22 years of practice. Dr Black is regularly engaged in clinical activities on a day to day basis. Dr Black met with the Claimant on 4 occasions and provided a report for the Respondent after each meeting.

51. The first occasion was on 5 July 2016 during a home appointment. Following the "precipitating event", the accident at work, the Claimant reported his main health complaint as anxiety and depression. That report refers to the injury at work (and states that the Claimant accepted that injury was "essentially his fault"). Dr Black's opinion is that the Claimant is catastrophising the situation

he faced. Dr Black recommended a meeting with the Respondent as soon as possible to deal with the disciplinary issue since that would likely reduce the anxiety.

52. The second occasion was on 19 December 2016. That report notes that a few weeks prior to the meeting the Claimant went off work due to painful micturition and left sided groin pain. The main reason for his absence was pain. The report notes that the Claimant had some problems when he worked as a machine operator but is now doing the work of a general assistant and is reporting no problems.

53. Dr Black opines that the situation is "tricky" and recommends a face to face meeting after the Christmas break, perhaps with his manager, Dr Black and HR.

54. The third meeting was 7 February 2017. At this stage the Claimant was at work carrying out light duties. Dr Black notes that the Claimant's mental health was affected by his accident which in turn affected his relationship with his line managers and that there remained "unresolved issues". In Dr Black's view "a resolution to these would be helpful for his confidence".

55. The report also notes that the Claimant had developed groin pain, epididymitis, kidney stones and painful micturition. All tests had been clear thus far but further tests were pending.

56. The report notes that "overall Archie has a number of different issues which in combination are having a significant negative impact on his functional capacity. In my opinion the nature of his difficulties means that his physical and mental health have been significantly affected. It should be noted that not all the issues relate to work... With further treatment and time I am confident that there will be a significant improvement in his symptoms and I am sure that this will translate into an increased functional capacity in the context of his employment. At the present time he is clearly cable (sic) of offering more if the right approach can be found."

57. The report again recommends a "clear the air session" to ensure the Claimant is not preoccupied by aspects of the accident. Dr Black also recommends that the Claimant work closer to his role in a gradual fashion to increase his stamina and confidence.

5 58. The Respondent sought a GP report from the Claimant's GP. While the Tribunal was not provided with the questions asked of the medical practitioner, the response dated 30 March 2017 notes that due to the pain suffered by the Claimant "heavy lifting should be avoided". The report also noted that the Claimant was "having concurrent mental health problems and 10 this may affect his concentration". The GP recommended that occupational health input be sought.

59. The final occupational health report is dated 3 May 2017. Dr Black noted that it seemed that a strained tendon in his left groin was the probable reason for the underlying problems suffered. A physiotherapy referral was in place. Dr 15 Black had reassured the Claimant that the groin problem will eventually resolve.

60. The Report noted that the Claimant had identified pain levels a few evenings earlier as at 8 out of 10 but this had settled at 3 out of 10.The report concluded that "Archie in my opinion is fit to remain at work providing he operates with 20 care in manual handling activities. He should avoid where possible aggravating his left groin and take care with repetitive manual handling... Archie's mental health remains brittle and will be helped by reassurance effective and supportive communication and some flexibility around work tasks. When his pain increases he should draw back on activities which 25 agitate the pain and when his pain manageable he can increase his activities."

61. The advice offered by Dr Black was to provide the Claimant was flexibility of breaks and mini breaks. The Claimant was to "manage aspects of the GA role working at a comfortable pace to help build his confidence".

62. In terms of implications for future work performance and attendance, Dr Black said that "The extent to which future regularity and effectiveness of service will be maintained may prove dependent on the extent to which outcomes are implemented or proves effective".

63. The Claimant was seen by a physiotherapist on 12 May 2017 and the report noted that the Claimant presented with left sided abdominal and groin pain which arose after experiencing a kidney stone in July and August 2016. The Claimant was found to have an abdominal tendinopathy with palpable secondary iliopsoas muscle spasm which made lifting duties painful and counterproductive to recovery. The report concluded that a further 4 – 5 sessions over a 7 week period were needed to help the Claimant resume full duties. The report advised modified duties for a minimum of 4 weeks.

Impact on the Claimant's duties

64. The Claimant's absence created difficulties for the Respondent in that they required to "backfill" his duties.

65. The Respondent had adjusted the Claimant's duties on a number of occasions and had placed him on light duties while having other staff cover the robot operator's role. That could not continue indefinitely.

66. The Claimant had been absent for lengthy periods of time over the course of 2016 and 2017.

67. The Claimant had on occasion attempted a return to work, given the warning that he had received, but he found this difficult given the health issues he experienced. His attendance had been irregular and sporadic.

68. The Respondent had accommodated the Claimant by altering his working hours and duties and by being flexible as to appointments and absence but this was becoming difficult to sustain.

Meeting with Dr Black

69. At Dr Black's recommendation an internal meeting had taken place on 11 August 2016 involving the Claimant and his line managers. The Claimant had noted that following the accident he was in a "very dark place". This was due to both work and personal issues. The Claimant indicated that he wanted to "return to normal and get back to work". The Respondent agreed to provide the Claimant with flexibility as to his duties to assist him back to full health.

70. There were no other occasions when Dr Black saw the Claimant at his workstation.

Capability Policy

71. In March 2017 the Respondent introduced a capability policy. This was not expressly referred to or relied upon by the Respondent while managing the Claimant's capability.

Review meeting

72. A meeting took place with Mr Railton and the Claimant on 24 April 2017 as had been foreshadowed in the warning letter in March 2017. This was a positive meeting. The Claimant stated that he felt better and that things had improved although the Claimant was still in pain. The Claimant stated during this meeting that he wished to return to his full shift pattern, which would be a 12 hour shift. The Claimant agreed to increase his hours. There was no express discussion at the specific tasks the Claimant would do during these 12 hours shifts although the Respondent understood that it would involve the Claimant returning to robot operator duties.

73. No written note of this meeting was issued.

May 2017 onwards

74. Upon attendance at his shift on 1 May 2017 the Claimant was rostered to work as robot operator. He attempted the work but knew that he was not yet fit to do it. He had to seek light duties.

5 75. The Claimant had increased his hours from 6 hours to 8 hours and then managed 10 hours during the third week of his return.

76. During week 4 he attempted a return to a 12 hour shift but he cancelled the shift as he knew he could not do it due to the physical issues he encountered.

77. On 8 May 2017 the Claimant was given manual handling training although the
10 Claimant was aware of the rules as to manual handling.

78. After the session the Respondent's health and safety manager sent an email to Mr Railton in which the manager summarised a discussion he had with the Claimant during which the Claimant had stated that he had encountered difficulties in carrying out his role due to his physical challenges.

15 79. The Claimant had struggled with the tasks required of him when working in the overhaul department on 8 May 2017.

80. The Claimant had a discussion with the Respondent on 8 May 2017 when he indicated he was struggling given the twisting involved in the work. The Claimant said he was also unable to do the robot operator's role too.

20 81. On 10 May 2017 the Claimant struggled to carry out his duties again. He asked for a chair. The Claimant asked a colleague to fetch the chair for him. Following a discussion with a colleague, the Claimant was ultimately sent home. The colleague had used inappropriate language towards the Claimant.

82. At this stage, the Respondent was concerned that the Claimant's capability
25 was such that he was unable to carry out the roles required of him and that

he was unable to safely carry out his role. The Respondent was concerned that insufficient progress had been made in terms of the Claimant's fitness for work.

83. On 10 May 2017 the Claimant advised the Respondent that he was able to do some light duties. The Respondent's response was that this would normally involve the duties undertaken in the technical and red bag department but the Claimant had struggled in this area also.

Capability hearing

84. On 11 May 2017 the Respondent decided that the Claimant's capability had reached a critical stage given his inability to carry out the tasks required of him upon his return to work. The Claimant was accordingly invited to a capability hearing by letter dated 11 May 2017.

85. The letter dated 11 May 2017 states:-

> "Following the issue of a warning in respect to unacceptable levels of absence, your progress has been monitored carefully and we have worked with you and Occupational Health to try and put in reasonable adjustments to facilities a full return to work.
>
> I am concerned that despite adjustments advised by Occupational Health and the SHEQ Team, we are unable to find a role that you feel you can undertake....
>
> The purpose of the hearing is to consider your performance and what, if any, further action needs to be taken. You should be aware that depending on the findings made at the hearing, your job is at risk and one possible outcome of the meeting is dismissal."

86. Although the letter does not say so, the letter had attached to it the spreadsheet information found at page 24 to 36 (minus the last entry).

87. The hearing was chaired by Mr Railford and the Claimant attended with his union representative.

88. At the hearing on 17 May 2017, the Claimant produced a note. In that note he stated that:

5 "I do think that I have made a mistake on returning to work earlier than I should as I am clearly not ready to be at work while trying to recover from tendonitis which has been confirmed by private physio. This condition is clearly getting in the way of my fitness hopefully with 100% full concentration. Over [a] 7 week period I should make a full recovery and

10 return to light duties/hours and properly build myself up to do [the] duties required of me... It is difficult to give a timeline due to the longevity of the undetected condition which was probably worsened since my return to work over the last month.

I do have a line over 4 weeks and I would appreciate if you will consider

15 allowing me this time out to help fully recover without it going against me for attendance disciplinary.

I do not have anything else to offer at this time as I need to make a full recovery...."

89. At the meeting Mr Railford considered the Claimant's absence record. The

20 Claimant's absence rate at the time of the meeting was around 16%. Mr Railford was concerned "history was repeating itself" with the Claimant improving and then regressing.

90. The Claimant was told at the meeting that the Respondent required someone "in the role now". The Claimant maintained that he may be able to return to

25 work in around 7 weeks but to carry out light duties. It was not clear when the Claimant would be able to resume his duties properly.

91. The Claimant confirmed at the capability meeting that he was unable to carry out the roles that had been offered to him by the Respondent, namely robot operator, general assistant, driver, technical and red bag.

92. Mr Railton considered the medical evidence that the Respondent had obtained together with the points raised by and on behalf of the Claimant. Mr Railton noted that the company had sought to provide the Claimant with alternative roles, reduce his hours, cancelled shifts and allowed time off for appointments. It was noted that over the year the Claimant had suffered from various conditions including injured hand, kidney stones, anxiety and depression, sickness, pain, constipation and painful groin.

93. Mr Railton considered that the Respondent had offered the Claimant numerous roles and adjustments to facilitate his return to work but the prognosis was not good. It remained uncertain.

94. Mr Railton concluded that insufficient progress had been made by way of improved capability and that he could not "see light at the end of the tunnel". He was of the view that the Respondent had offered as much by way of adjustments to the role, duties and timings that it could and that there was no foreseeable resolution.

95. The "unwillingness of the Claimant to try" was a focal point for Mr Railton. Mr Railton was of the view that the Claimant was at the very least unwilling to carry out tasks required of him, which may have been due to the Claimant's health.

96. The Claimant asked if he could appeal against the previous disciplinary sanction that had been issued in March 2017. This was refused given the time that had passed (and the fact the Claimant had the benefit of his trade union during the process).

97. Mr Railton took into account the warning that had been issued in respect of the Claimant's absence when considering the outcome of the meeting.

98. Mr Railton decided to dismiss the Claimant on grounds of his capability which was confirmed verbally at the meeting on 17 May 2017.

99. The Claimant was paid 12 weeks in lieu of his contractual notice period.

100. If the final written warning had not been issued in March 2017, Mr Railton would not have dismissed the Claimant on 17 May 2017 and he would have issued a final warning.

101. The decision to dismiss was confirmed by letter dated 22 May 2017.

Appeal

102. The Claimant appealed against his dismissal by letter dated 24 May 2017. In his letter the Claimant said that:

> "I do not believe there was a proper investigation carried out with my medical condition for the company to make such a decision. I have been willing and doing light duties until given the all clear by my physio and my doctor. However the tendonitis is highly restrictive.
>
> I am disappointed such a decision has been made as to weather (sic) I am able to carry out duties without causing harm to myself as there has been limited medical opinions and I am currently being treated by the physio and GP as you are aware"

103. The appeal meeting took place on 23 June 2017 chaired by Mr Gary Carroll, Operations Manager. The Claimant was in attendance with his trade union representative.

104. At the meeting the Claimant accepted that he had tried to come back to work "but didn't have much to offer".

105. The Claimant had alleged that insufficient investigations had taken place in relation to his medical position. Mr Carroll noted that 4 separate meetings had

taken place with the occupational health specialist and that GP reports and a physio report had been considered.

106. The Claimant's union representative stated that the "appeal was more based on the misunderstanding where the Claimant was working" in terms of initially being on the labelling machine and then being required to work as robot operator.

107. The Claimant's absence record was considered during the meeting as was the full set of correspondence that had led to the Claimant's dismissal.

108. Mr Carroll understood from what the Claimant told him during the appeal meeting that the Claimant was not in a position to return to work in any of the roles offered to him by the Respondent.

109. With regard to the dispute around what the Claimant had agreed during March 2017, Mr Carroll had spoken with the Claimant's manager who confirmed the Claimant had agreed to carry out the duties of robot operator upon his return to full shifts.

110. The Claimant denied that this had been agreed and maintained at the meeting that he was only able to do labelling and technical duties. These were the duties he had done since April 2017.

111. Mr Carroll decided to hold off making a decision and would speak with the Claimant by telephone on 26 June 2017. That would give the Claimant time to see how his health improved and allow Mr Carroll time to reflect on the evidence and undertake further enquiries (which he duly did).

112. If the Claimant's capability had improved by 26 June 2017, Mr Carroll would have upheld the appeal.

113. On 26 June 2017 Mr Carroll spoke with the Claimant. The Claimant was still in pain and indicated that he was only able to do around 15 to 20 minutes of

light lifting per day. There was no clear position as to when the Claimant's capability would improve such as to allow him to return to carry out the role he was contractually obliged to do.

114. Mr Carroll considered matters and issued his decision in a letter dated 26 June 2017. He decided to uphold the original decision to dismiss the Claimant on account of his capability. He stated that:

> "The basis of your appeal was that you believed there was a lack of medical opinion considered by the company to allow them to make this decision. I did not find this to be the case and found that the company had followed the advice of your GP, an independant (sic) OH specialist who you saw on at least 4 occasions and a physiotherapist who you went to. During discussions notes which are attached, it was then claimed that there was a misunderstanding between yourself and the company on the role that you would be doing upon your most recent return to work. You claimed that you did not know that you would be required to work as a General Assistant on the gluing lines as part of your role. I have subsequently found other notes from a conversation that you had in May 2016 with Jennifer McKee where she has explained the situation to you in depth and followed this up afterwards I writing (see attached). This to me closes out the appeal and the original decision remains."

115. Mr Carroll was of the view that the only tasks that the Claimant could carry out were labelling and the Claimant would struggle with other duties particularly if lifting was involved which was likely.

<u>Claimant's Earnings</u>

116. The Claimant earned £1872 gross and £1521 net when he worked with the Respondent.

117. The Claimant claimed job seekers' allowance in July 2017 and received 1 payment of £450.

118. The Claimant was able to carry out some form of work by around September 2017

119. The Claimant joined agencies in an attempt to find alternative work and secured 1 or 2 shifts a week paying £65 per shift.

120. The Claimant decided to sign up for a 3 year college course on a full time basis which would not have occurred had he remained in employment.

Observations on the evidence

121. By and large the parties were not in disagreement about many of the key issues in this case. The Respondent accepted that the Claimant was incapable of carrying out his role. Indeed the Claimant's position was that the Occupational Health specialist had underplayed the Claimant's incapability and that in fact he was experiencing more physical pain than Dr Black had reported.

122. The Claimant believed that there was a "vendetta" against him by Mr Railton. The Claimant felt that following his accident the Respondent had decided to take steps to remove him from his role. The Tribunal found no evidence of this. The point was not raised in appeal. The Tribunal recognises, however, that the Claimant felt isolated.

123. The Claimant perceived that the warning issued by the Respondent and indeed the process undertaken by the Respondent in managing his attendance and capability generally was part of a scheme to remove him. This was in part due to the absence of a clear policy in relation managing absence. This is commented upon below. The Claimant misunderstood that the Respondent's efforts to secure his return to work were in effect attempts to assist the Claimant. He perceived those meetings and discussions as

negative (as focusing on what the Claimant could not do) rather than seeking the Respondent as being proactive and accommodating the Claimant by allowing him time away from the role he was contracted to do and in providing the Claimant with space to recover.

5 124. A considerable period of time was spent during the Hearing in seeking to understand the precise days when the Claimant was absent. While the general statistics and trends were set out (see page 23) it would have been of assistance for the Respondent to have provided a summary in tabular form of the specific days or number of days absence in each month in 2016 and 10 2017. Rather than cross examine the Claimant on these specifics, that information could have been provided in advance (and agreed between the parties).

125. A further difficulty in terms of the evidence was in connection with the specific tasks carried out by each of the roles. Having clear written job descriptions 15 would clearly have assisted in this regard together with an up to date written statement of particulars.

126. One of the issues that the Claimant raised was in connection with the Capability Policy. This had been introduced in March 2017. For those reasons the Respondent had not expressly adverted to the Policy in managing the 20 Claimant's capability. As set out below, the Tribunal is satisfied that a fair procedure was carried out and that even if the Policy had been followed, the outcome would have been the same.

127. The fundamental disagreement between the Claimant and Respondent arose as a result of the meeting on 24 April 2017. This was the review meeting that 25 the warning letter issued on 31 March 2017 had foreshadowed. The Respondent believed that the Claimant had agreed to work towards a return to his full shift as robot operator. The Claimant believed that he would try and return to his full shift, namely 12 hour shifts, but understood he would be permitted to continue to work on labelling and technical. The failure to follow

the meeting up with correspondence setting out the specifics led to this confusion.

128. The Claimant felt that he was being "forced" to do a role that he felt he physically could not do. This confusion arose as a result of the lack of clarity at the review meeting as to what tasks the Respondent was expecting the Claimant to carry out when he increased his hours.

Relevant law
The Law
Unfair dismissal

129. Section 98 (1) of the Employment Rights Act 1996:-

> "In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show: -
>
> 1. the reason (or if more than one the principal reason for the dismissal); and
>
> 2. that it is either a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

Section 98(2) of the Employment Rights Act 1996:-

> "A reason falls within this subsection if it:
>
> 1. relates to the capability or qualifications of the employee for performing work of the kind which he was employed to do
>
> 2. relates to the conduct of the employee
>
> 3. is that the employee was redundant or

4. Is that the employee could not continue to work in the position which he held without contravention.. of a duty or restriction imposed by an enactment.

Section 98(3) of the Employment Rights Act 1996

5 "In subsection 2(a) –

1. capability, I n relation to an employee, means his capability assessed by reference to skill, aptitude, health or other physical or mental quality."

Section 98(4) of the Employment rights Act 1996:

10 "Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer):-

1. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the 15 employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee;

2. and shall be determined in accordance with equity and the substantial merits of the case".

Range of reasonable responses:-

20 (i) When assessing whether the dismissal was fair, the Tribunal must ask whether dismissal fell within the range of reasonable responses of a reasonable employer and this test applies both to the decision to dismiss and to the procedure. The correct approach is to consider together all the circumstances of the case, both substantive and 25 procedural, and reach a conclusion in all the circumstances. The

band of reasonable responses test applies as much to the question of whether the investigation into the Claimant's capability was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

5 (ii) The starting point should always be the words of section 98(4) themselves. In applying the section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the Tribunal must not substitute its own decision as to 10 what was the right course to adopt for that of the employer; it is not for the Tribunal to impose its own standards. The Tribunal has to decide whether the dismissal and procedure lay within the range of conduct which a reasonable employer could have adopted.

(iii) In many (though not all) cases there is a band of reasonable 15 responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a 20 reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair. However, the band is not infinitely wide and is not a matter of procedural box ticking.

Compensation

25 In addition to a basic award (Section 119 Employment Rights Act 1996), Section 123(1) Employment Rights Act 1996 provides for a compensatory award: "…the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so 30 far as that loss is attributable to action taken by the employer".

Mitigation

Section 123(4) Employment Rights Act 1996 requires a claimant to mitigate their loss and a claimant is expected to explain to the Tribunal what actions they have taken by way of mitigation. This includes looking for another job and applying for available state benefits. The Tribunal is obliged to consider the question of mitigation in all cases. What steps it is reasonable for the claimant to take will then be a question of fact for its determination.

Polkey

Where evidence is adduced as to what would have happened had proper procedures been complied with, there are a number of potential findings a Tribunal could make. In some cases it may be clear that the employee would have been retained if proper procedures had been adopted. In such cases the full compensatory award should be made. In others, the Tribunal may conclude that the dismissal would have occurred in any event. This may result in a small additional compensatory award only to take account of any additional period for which the employee would have been employed had proper procedures been carried out. In other circumstances it may be impossible to make a determination one way or the other. It is in those cases that the Tribunal must make a percentage assessment of the likelihood that the employee would have been retained.

The Tribunal has also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "Section 207A(2)" and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the Code"):

"(2) If it appears to the Tribunal that –

1. the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

2. the employer has failed to comply with that Code in relation to that matter, and

3. that failure was unreasonable,

The Employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%

(3) If, in the case of proceedings to which this section applies, it appears to the Employment Tribunal that –

1. the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

2. the employee has failed to comply with that Code in relation to that matter, and

3. that failure was unreasonable,

The Employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

Section 38 Employment Act 2002 says:-

"(1) This section applies to proceedings before an Employment Tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule 5.

(2) If in the case of proceedings to which this section applies –

1. if the Employment Tribunal finds in favour of the employee, but makes no award to him in respect of the claim to which the proceedings relate, and

2. when the proceedings were begun the employer was in breach of his duty to the employee under Section 1(1) or 4(1) of the Employment Rights Act 1996 (c 18) (duty to give a written statement of initial employment particulars or of particulars of change) [or under section 41B or 41C of that Act (duty to give a written statement in relation to rights not to work on Sunday)].

The Tribunal must, subject to subsection (5), make an award of the minimum amount to be paid by the employer to the employee and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

(3) If in the case of proceedings to which this section applies –

1. the Employment Tribunal makes an award to the employees in respect of the claim to which the proceedings relate, and

2. when the proceedings were begun the employer was in breach of his duty to the employee under Section 1(1) or 4(1) of the Employment Rights Act 1996 [or under Section 41B or 41C of that Act],

The Tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3) –

1. references to the minimum amount are to an amount equal to two weeks' pay, and

2. references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

(6) The amount of a week's pay of an employee shall –

5

1. be calculated for the purposes of this section in accordance with Chapter 2 of Part 14 of the Employment Rights Act 1996 (c 18), and

2. not exceed the amount for the time being specified in section 227 of that Act (maximum amount of week's pay).

10

(7) For the purposes of Chapter 2 of Part 14 of the Employment Rights Act 1996 as applied by subsection (6), the calculation date shall be taken to be –

1. if the employee was employed by the employer on the date the proceedings were begun, that date, and

15

2. if he was not, the effective date of termination as defined by section 97 of that Act."

Schedule 5 of the Employment Act 2002 sets out the jurisdictions to which Section 38 applies. This includes Section 111 of the Employment Rights Act 1996 (unfair dismissal).

20

Submissions

Respondent's submissions

130. Mr MacMillan produced a 5 page skeleton written submission together with some authorities. The Claimant had been given copies.

131. The Respondent accepts that the Claimant was dismissed in terms of section

25

95(1)(a) of the Employment Rights Act 1996.

132. It was argued that the reason for the dismissal was capability which is a potentially fair reason.

133. The central question was whether the Respondent had acted fairly and reasonably in dismissing for that reason when it did.

134. In this regard Mr MacMillan submitted that one of the key questions was whether the Respondent ought to have waited longer and obtained more medial evidence.

135. A key issue was whether the employer was expected to wait any longer and if so how much longer (Spencer v Paragon 1977 ICR 301).

136. He referred to East Lindsey v Daubney 1977 ICR 566 which was authority for the proposition that the employer is entitled to proceed on the basis of the medical opinions it received (see page 6):

> "While employers cannot be expected to be nor is it desirable that they set themselves up as medical experts, the decision to dismiss or not dismiss is not a medical question but a question to be answered by the employers in light of the available medical advice."

137. It is for the employer to take steps to identify the correct medical position.

138. Mr MacMillan then referred to Shenker v Doolan 2011 WL 2039815 for 2 propositions.

139. Firstly at para 35 Lady Smith stated:

> "The issue for the Tribunal was whether a reasonable management could find from the material before them that the Claimant was not capable of returning to the post of production manager. The tribunal also required to bear in mind that the decision to dismiss is, properly, a managerial one, not a medical one. Whilst medical or other expert reports may assist an employer to make an informed decision on the

issue of capability, the decision to allow someone to return to work or to dismiss for reasons relating to capability is, ultimately, one which the employer has to make. It is not a decision that is to be dictated by the author of a report. Quite apart from considerations of his duty not to dismiss an employee unfairly, an employer owes a common law duty of reasonable care to the employee and, in cases, such as the present, requires to make his own assessment of the risk of a return to work causing a recurrence of the employee's ill health, albeit that any such assessment will normally be informed by the content of an expert report or reports

140. Secondly at para 58 Lady Smith stated:

"In determining whether or not the Claimant's dismissal was fair or unfair (s.98(4)) of the 1996 Act) there were, accordingly, three initial questions that the Tribunal required to address: whether the Respondent genuinely believed in their stated reason, whether it was a reason formed after a reasonable investigation and whether they had reasonable grounds on which to conclude as they did."

141. Mr MacMillan then referred to BS v Dundee 2014 IRLR 131 in which the Court of Session held that:

"[27] Three important themes emerge from the decisions in Spencer and Daubney. First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer. Secondly, there is a need to consult the employee and take his views into account. We would emphasize, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him.

Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered.

[28] As to the first of these issues, the question of whether the employer can be expected to wait longer was not directly addressed by the Employment Tribunal. They did, however, make reference to a number of factors that are relevant in this connection. It was noted that the respondents had a temporary labour agreement under which they could call on temporary staff to fill posts where required, and they were available to perform tasks that would otherwise be performed by the appellant. The pay of such staff was the same as permanent staff. Moreover, the Tribunal noted that the appellant had exhausted his entitlement to sick pay and was no longer receiving salary. It is no doubt true that the respondents would have incurred administrative costs and the costs of OHSAS referrals, as the Appeal Tribunal note, but the amount of these is not known and it seems inherently improbable that they will have been very large. Furthermore, it had been noted that the appellants were a large organization; it is obvious that such an organization can absorb costs better than an employer with fewer employees. Against all of these considerations, however, it would be necessary to set the unsatisfactory situation of having an employee on very lengthy sick leave. In such a case it must clearly be open to the employer to bring the employment to an end. The main problem with the Tribunal's approach to these issues is in our opinion that it did not expressly address the balancing exercise that the decision in Spencer requires. The nearest it came to do so is at paragraph 89, where reference is made to the availability of temporary staff and the appellant's not being paid salary. Nevertheless, the question itself did not receive an express answer."

142. At para 33 the Court noted that length of service is relevant but not as relevant as it would be in a misconduct dismissal.

143. The Court noted, in summary, that when investigating the medical position the employer should be judged by the standards of a reasonable employer. In that case the Tribunal set the bar too high by expecting the employer to have made further inquiries. The employer was entitled to take the medical opinion at face value particularly given the employee reported he did not feel he was getting better.

144. Mr MacMillan said the Tribunal requires to consider 4 things:

1 Carry out a balancing exercise and ask whether a reasonable employer could have waited any longer

2 Weigh the Claimant's view into the balance and assess how reasonable it is

3 Was the medical investigation sensible and reasonable and supportive of dismissal

4 Balance length of service

145. In terms of equity and substantial merits of the case, Mr MacMillan reminded the Tribunal that the Iceland 1982 IRLR 439 position remains good law in that the question is whether the decision to dismiss fell within the band of reasonable responses that a reasonable employer might have adopted. It is not for the Tribunal to substitute its decision. To be unfair, the employer needs to have acted in a way which no reasonable employer would have acted.

146. Mr MacMillan submitted the decision to dismiss was fair and fell within the band. There was no doubt that the Claimant was unable to perform the role he was contracted to perform. From May 2016 to April 2017 he was unable to do any substantive work. He had been placed on lighter duties and an

attempt to have him carry out his normal role had failed. He was not physically able to do it.

147. The real reason was the physical impairments the Claimant suffered. While the Claimant's mental condition was "brittle" the evidence did not show that his mental impairments had any impact upon his ability to do his job.

148. The Claimant, said Mr MacMillan, had himself repeatedly said that he was not capable of doing the job he was employed to do . He was not paid to do light duties. He was a robot operator (and possibly general assistant as a fall back). A reasonable employer would try light duties and then expect a return to work.

149. The Claimant had been given a warning about his attendance and it was open to the Respondent, submitted Mr MacMillan, to dismiss absent any improvement. It was not for the Respondent to keep the Claimant on light duties indefinitely.

150. In terms of the contractual position, the Claimant had agreed to carry out the role of robot operator (which failing general assistant). Mr MacMillan argued that the written statement that had been issued in 2003 was sufficient and up to date.

151. In terms of the 4 questions:

152. Firstly the balancing act – Following the accident and the warning, the Claimant's attendance dipped. He had been absent June to November 2016 with very sporadic attendance to March 2017. The warning issued on 31 March 2017 was clear with a solutions based approach.

153. Mr MacMillan invited the Tribunal to accept Mr Railton's evidence that the meeting with the Claimant on 24 April was positive. But by early May 2017 this collapsed. The Respondent had waited long enough. All the Claimant could do by way of lifting was around 15 minutes a day.

154. The length of absence in its totality was sufficiently long that the Respondent had fairly waited long enough to get the Claimant back to the job he was employed to do. Mr MacMillan invited the Tribunal to accept Mr Railton's evidence that there was no "light at the end of the tunnel" in terms of the prognosis to have the Claimant return to his contracted position.

155. Secondly the views of the employee should be taken into account. In this case it was the Claimant who was saying he was incapable of doing his job which was confirmed by his GP. The Claimant knew his body better than anyone else and if he says he cannot do his job that should be respected.

156. Thirdly there was considerable medical opinion sought. Even if the doctors say the Claimant was fit, the Claimant says he was not. The Claimant knows whether or not he is capable of doing his job.

157. Finally length of service is not significant in context since there was one year of consideration of the Claimant's capability.

158. Mr MacMillan submitted that in the round a fair procedure was carried out. There were discussions with the Claimant, warnings, resolutions, a meeting and an appeal. The procedure was admittedly not perfect, seen by the lack of clarification in documentation, the uncertainty as to attachments with documents and the fact that the warning referred to matters that were not in the invite letter. But there was no doubt absence was the critical driving factor.

159. Mr MacMillan urged the Tribunal to find that the Respondent's witnesses were all credible and reliable. The Claimant's suggestion that there was a vendetta against him by Mr Railton was not credible in Mr MacMillan's submission.

160. In terms of remedy, if the Tribunal found the dismissal to be unfair, it would be open to the Tribunal to find that it is just and equitable to make a nil or a nominal award.

161. As to the basic award, this was calculated at £432 x 13 in the sum of £5416.

162 The compensatory award was such amount that is just and equitable. The Claimant had received pay in lieu of notice. The Respondent's position was that sick pay would have been paid to 1 September 2017 in the sum of £1100 but that earnings of £821 fall to be deducted.

5 163 Mr MacMillan argued that no further losses should be awarded since the Claimant had chosen to go to college and remove himself from the job market.

164 Mr MacMillan accepted an award for loss of statutory rights in the region of £350 would be appropriate.

10 165 In the event that the Tribunal decides the dismissal is unfair as a consequence of some procedural flaw, it was argued that in terms of Polkey there was a 100% chance the Claimant would have been dismissed.

166. Mr MacMillan argued the ACAS Code applies to the capability dismissal and the Claimant's failure to appeal against the final written warning ought to justify
15 a reduction in the award.

Claimant's submissions

167. The Claimant in his response candidly accepted that the reason for his dismissal was capability.

168 He argued that the dismissal was unfair. The accident at work caused him a
20 number of issues. He felt that it was unfair to apply a final written warning about his attendance without any prior warning that disciplinary proceedings were going to ensue. Proceeding from that to a capability dismissal within a few months was unfair in his submission.

169 The issue arose as a result of the change in his duties. The Claimant was of
25 the view that he could continue doing the light duties which he had done following the warning. The Respondent, in his submission, tried to force him to do tasks that he was simply not capable of performing. The Claimant

candidly accepted that he could not carry out the role of robot operator at the point of his dismissal and appeal hearing.

170 The Claimant noted that his own GP advised the Respondent that the Claimant was struggling to do his job. The Claimant argued that Dr Black had not fully examined him and his physical condition and had he done so it would have been clear that the Claimant was not physically able to do the job required of him.

171 The Claimant maintained that it was unreasonable to dismiss him at the time the Respondent did. They ought to have allowed the Claimant to continue to carry out the lighter duties he had been doing since April 2017 and gradually improve his physical position.

172. The Claimant submitted that he would have been able to carry out his duties by September 2017 or January 2018.

173. The Claimant argued his dismissal was unfair and he sought compensation.

Discussion and decision

174. The first issue to be determined is the reason for the dismissal. There is no doubt that the Claimant was dismissed by the Respondent by reason of capability.

175. The key issue in this case is whether the Respondent dismissed the Claimant fairly for that reason.

176. It is important to note that the question is not whether the Tribunal would have dismissed the Claimant but whether the Respondent in the particular circumstances acted fairly and reasonably in all the circumstances in dismissing the Claimant on grounds of capability.

177. As set out above the authorities make it clear that a balance has to be struck. The Tribunal considered the authorities in detail. Different employers would necessarily act in different ways. This Tribunal may well not have dismissed the Claimant at the time the Respondent did, but that is not the issue to be determined.

178. After lengthy consideration of the evidence in this case, including the productions referred to and the oral evidence led before the Tribunal, the Tribunal has decided that the decision to dismiss was fair in all the circumstances.

179. Employment law recognises that a balance has to be struck between an employee's "right" to earn a living (and have a sympathetic employer to manage illness and absence) and the employer's right to have an employee carry out the role for which the employee was employed. In this regard the law requires an Employment Tribunal to decide whether the action the Respondent took in this case falls within the range of responses of a reasonable employer.

180. The Claimant accepted that the Respondent had to a considerable extent made accommodations for him during the course of his employment. For example, he was permitted to revert to his robot operator role following his accident. His salary was not reduced.

181. The Respondent went to considerable lengths to seek to assist the Claimant in his return to work and fitness. The Claimant expressed concern and surprise at the disciplinary process that was undertaken in March 2017 that led to a warning. He believed that this "came out the blue" and was therefore unfair.

182. At that time (namely in March 2017), the Respondent did not have a written Capability Policy and no training had taken place. It was not surprising that the Claimant was concerned to have been issued with a warning. Nevertheless the Respondent was in effect trying to be fair to the Claimant by

making him aware that the level of his attendance and his capability had become sufficiently serious that his job was in jeopardy. The Claimant appeared at the relevant meeting to have accepted that outcome and did not appeal (even if he did not like the outcome). The Claimant was essentially placed on notice that if his absence did not improve, there is a risk that the Respondent could decide that it could not continue to employ him.

183. It was unfortunate that the matter was treated internally as a disciplinary sanction. It was in effect more of an attempt by the Respondent to show that it was supporting the Claimant by adjusting his duties, his hours and his working environment in such a way so as to facilitate his return to fitness and to his duties.

184. The Claimant's position throughout the hearing was that his capability was in fact worse than that set out by the Occupational Health specialist. The reports provided to the Respondent suggested that the Claimant was able to carry out significant tasks, albeit with some adjustments. The Claimant's position was that his health (particularly the physical challenges he suffered) had been misunderstood and downplayed and that in fact he had significant physical impairments that prevented him from carrying out the vast majority of the tasks needed by the Respondent, specially the job he was contracted to carry out.

185. The Claimant was of the view that he was physically unable to do most of the tasks needed by him. At the point he was dismissed (and at the appeal hearing), the Claimant advised the Respondent that he was not able to do the job he had been contracted to do. He was able to carry out some light duties and some lifting (around 15 to 20 minutes a day). The Respondent's operation necessarily demanded physical work.

186. The Respondent had already adjusted the Claimant's duties and placed him on light duties. That had taken effect following the issuing of the warning in April 2017. Prior to that period the Claimant had been absent from work for lengthy periods of time. The Respondent hoped that the Claimant's health

would have improved to have allowed some degree of physical work and return to some of the duties he was contracted to carry out.

187. It became clear that this was not what the Claimant had understood and there was confusion. The Claimant believed that his agreement to seek a return to a full shift was that he would continue to carry out the light duties. He was clear that his health would prevent him from doing the physical work that role required. He was not in a position to do it and indeed remained unfit until at least September 2017. He was only able to carry out light duties which was not something the Respondent was prepared to sustain any longer. The Respondent did not act unreasonably in reaching that conclusion, even if another employer would not have so acted.

188. At the point of dismissal the prognosis was unclear. At best the Claimant said he would need perhaps 7 weeks before being able to return to light duties and then see whether further duties could be carried out. There was no certainty that his health would improve. The Respondent was concerned that there would be repetition of what had happened before which was that the Claimant's health would improve and then some other health concern would arise resulting in further set backs. That had been the position during 2016 and at the start of 2017.

189. It was not unreasonable for Mr Railton to conclude that there was no "light at the end of the tunnel" in terms of the Claimant's capability and when the Claimant was likely to be able to return to the job he was employed to do. While the Respondent moved from a final warning to dismissal within a short period of time, it cannot be said that no reasonable employer would have so acted. It was clear that the Respondent had reached the view that the position was not likely to improve in the short to medium term and that there was a real risk the position could well worsen or remain the same. The Respondent was not prepared to allow the uncertainty to continue.

190. The Tribunal took into account that matters moved quickly from the warning to dismissal. While not every employer would have moved so quickly, it could

not be said in the specific circumstances of this case that no reasonable employer would have so acted. The Respondent had already made considerable adjustments to the Claimant's role and timings. It was clear that by May 2017 the Respondent had decided that it could not reasonably wait any more for a return to the contracted role. The Tribunal bears in mind that this is an unfair dismissal case and not on involving unlawful discrimination.

191. One issue that the Tribunal considered carefully was whether or not the Respondent had implemented the suggestion of Dr Black that there be "on the job meetings" involving Dr Black and management. While there had been ongoing discussions, there is no doubt that involving Dr Black in day to day activities to allow him to see the Claimant and work with him in reaching his conclusions as to what tasks he could do etc, would have helped but ultimately the outcome would not have differed. It would, however, have been better if Dr Black had been involved in more meetings with the Claimant and management (as he had recommended).

192. The Respondent had already provided considerable adjustment to the Claimant's role, duties and tasks. The Claimant wished to continue carrying out light duties. The Respondent required the Claimant to return to the role that he had been contracted. The Claimant's absence from that role had begun to affect the business. The Respondent is not required to place the Claimant on different duties on an indefinite basis. The Respondent is, however, required to act reasonably in dismissing the Claimant at the point in time it chooses to dismiss.

193. The Tribunal has therefore carried out the balancing act required when determining whether the dismissal was fair in all the circumstances, applying the statutory test set out above (and as interpreted by the courts). The Claimant's candid position was that he was not fit for the work he was contracted to do. He had already carried out limited tasks and sought more time in those tasks.

194. A reasonable employer might well have acceded to that request and waited longer before dismissing. Equally however a reasonable employer could have decided that "enough was enough" and that from all the information available, including the medical reports, the Claimant's views and the impact upon the business, dismissal on grounds of capability was an appropriate outcome.

195. The Claimant accepted that he had been given the opportunity to present his position during the internal dismissal procedure which included his dismissal meeting and his appeal.

196. The Tribunal has considerable sympathy for the Claimant. He was an ambitious worker who had previously excelled in his role. It is regrettable that his health resulted in him being unable to carry out his contracted duties.

197. Nevertheless in light of the legal test, the Tribunal is satisfied that the claim must fail. In all the circumstances the Claimant was fairly dismissed both procedurally and substantively.

198. In light of its conclusions, the Tribunal does not propose to consider what, if any, specific compensation would have been awarded had the dismissal been unfair. A number of observations are, however, appropriate.

Observations

199 Firstly if the Tribunal had concluded that the dismissal was substantively unfair, the Tribunal would have been minded to have concluded that dismissal would have been highly likely at some point shortly following the Claimant's dismissal. Even if another warning had been issued, it is likely that the Claimant's health would not have improved to a sufficient extent. It is likely that he would have been dismissed during Summer 2017. The Claimant's evidence was that in reality it was not until January 2018 that he was probably able to carry out more of the physical work which was a large part of the robot operator's role.

200 Secondly reference was made to the Respondent's Capability Policy. The Tribunal recommends that the Respondent considers introducing greater visibility of that policy and its application upon the factory floor. Had the Claimant been aware of the policy and its application, it is likely that his surprise at the warning and process that followed would have been avoided. Having a clear approach to managing absence and ensuring employees know what will happen is good practice.

201 Thirdly Mr MacMillan sought an uplift in compensation as a result of the Claimant's failure to appeal against the earlier warning. The Tribunal would have rejected that submission. It is unlikely that the failure to appeal against an earlier warning is a relevant consideration in connection with the dismissal process. At a more fundamental level, the Employment Appeal Tribunal in Holmes v Qinetiq Ltd UKEAT/0206/15/BA held that the ACAS Code of Practice is not engaged in capability dismissals. The Respondent does of course still require to follow a fair procedure as the authorities show.

202 The Tribunal wishes to thank both parties for their professionalism in managing the issues arising in this case, in the professional way that the matters were tackled and in assisting the Tribunal in complying with the overriding objective.

203 The dismissal was fair and so the claim is dismissed.

Employment Judge: David Hoey
Date of Judgment: 17 May 2018
Entered in register: 22 May 2018
and copied to parties

5

10

15

20

5

10

15

20

5