



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr B. Sekou Sow

**Respondent:** TNT UK Limited

**Heard at:** Birmingham

**On:** 2 to 4 April 2019

**Before:** Employment Judge Broughton

Mr N Forward

Mr K Palmer

## Representation

Claimant: in person

Respondent: Mr I Wright, counsel

# JUDGMENT

The claimant's claims of unfair dismissal and disability discrimination failed and were dismissed on 4 April 2019. The claimant subsequently requested written reasons.

## REASONS

### The facts

1. The Claimant commenced employment with the Respondent on 15 October 2001 and was promoted to Section Leader the following year. It was common ground between the parties that he was an excellent employee with a very good record.
2. On 12 June 2015, Mr Stanley, who we heard would normally do the Agency Worker allocations, was on leave and the Claimant was asked to do this particular task. He had apparently done it before, albeit with some difficulty.
3. He claimed, in those circumstances, that, by the time he was asked, he didn't have enough time to complete the task and said as much to his manager Mr Davis. Mr Davis however, felt that the Claimant was refusing a reasonable management instruction. Having called a witness and repeated his request, Mr Davis then issued the Claimant with a precautionary suspension and he left the site.

4. The Claimant had never been suspended or disciplined before. He suggested that Mr Stanley should also have been suspended albeit it wasn't entirely clear to us why.
5. There was an investigatory meeting on 16 June 2015, in which the Claimant was given an opportunity to put his side of events. We heard that it was also at that meeting that the claimant asked for a transfer to the Respondent's site in Birmingham. At that stage, this request was refused and we heard that this was because the Respondent's managers didn't want to lose him.
6. The Claimant was then absent from work due to a depressive illness from 19 June 2015 and did not return to work thereafter.
7. On 24 June 2015, he received a letter confirming that no action was to be taken in relation to the disciplinary allegation. That letter was later referred to by the Respondent as an exoneration.
8. In relation to the Claimant's absence, he had a discussion with a representative of HR about his health on 13 July 2015. It was clear that the Claimant, at that stage and indeed throughout, referenced that he was unhappy about his suspension. He was offered, both at that stage and indeed a number of times subsequently, the Company's grievance process or a mediation procedure with his managers.
9. The Claimant suggested that he had been unhappy about the fact that, when he had given his statement in the investigation, he had been asked to remove part of it. That said, he acknowledged in the discussion meeting with HR that he had shaken hands with Mr Davis and there was no suggestion at the time that he had been put under any pressure to do so.
10. There was a medical review meeting with the Claimant and Mr Wilson on 5 August 2015 and the Claimant said he couldn't return to work due to a concern that there may be a physical confrontation either started by him or, indeed, against him.
11. On 2 October 2015, there was a further medical review meeting and, on 9 November 2015, an Occupational Health Report was produced.
12. The Occupational Health Report said that the Claimant had severe psychiatric symptoms and that there would be no return to work in the short or medium term.
13. There was a further medical review meeting on 16 November 2015 and the Claimant was told that he had been exonerated in relation to the initial disciplinary allegation. It was only at this stage that the Claimant suggested that he had been forced to change his statement and shake hands with his manager.
14. There was a further medical review meeting on 4 December 2015. At that meeting, the Claimant was offered a phased return to work and mediation and again invited to raise a grievance. The Claimant said that he would struggle to work with some of the Operations Managers.

15. A further medical review meeting took place on 19 January 2016 and this was the first time that the Claimant mentioned that he believed his treatment may have been influenced by his race. That was an allegation that was originally made in these Tribunal proceedings but had subsequently been withdrawn.
16. The Claimant was again encouraged to raise a grievance and, when asked if he would return if the managers were dismissed, he said that he would. That said, both before and after this incident, he did make clear to the Respondent, and confirmed to us, that this was not what he was seeking.
17. The Claimant raised his first grievance alleging bullying and race discrimination on 25 January 2016. The first grievance meeting took place on 9 February 2016. That was conducted by Mr Wilson, the Hub Support Services Manager. At that meeting, the Claimant was represented by the local Trade Union Representative of the recognised union. The Claimant apparently wanted another representative although it was unclear whether the individual he preferred, a solicitor at a local law centre, was, in fact, a Union Representative.
18. In relation to his grievance, the Claimant agreed not to pursue a number of historic matters and so Mr Wilson was primarily looking at the allegations around the incidents that took place in June 2015. The grievance meeting was reconvened on 1 March 2016 and ultimately the grievance outcome was communicated by letter of the same date.
19. Mr Wilson's findings were that there was no evidence of any race discrimination. We note that when the Claimant initially complained, he was suggesting that Mr Davis treated both him and others in a way that he found unsatisfactory. This would tend not to support an allegation of race discrimination but, as already mentioned, that was not a claim before us.
20. Mr Wilson felt that there had been a reasonable management request and that, nonetheless, no action had been taken against the Claimant.
21. It was conceded that the claimant was asked to remove a paragraph from his statement. However, the respondent did not accept that the claimant was put under any pressure to do so and this appears consistent with the claimant's initial version of events. The paragraph was viewed to have been about an irrelevant matter that had previously been addressed. That said, we can understand why the Claimant raised the issue as it was in the context of responding to a question about Mr Davis and it would seem to us very unwise for an employer to seek to remove paragraphs from any statement given in grievance or disciplinary proceedings.
22. Mr Wilson did not accept that the Claimant had been forced to shake hands and that was not an unreasonable conclusion on the evidence.
23. The Claimant appealed against that outcome. His initial focus was on the principal issue that remained before us, his unhappiness about being suspended. He also asked for new witnesses to be interviewed and repeated the allegations regarding being forced to remove something from his statement and shake hands with Mr Davis.

24. There was a further medical review meeting on 12 April 2016. On 27 April 2016 the Claimant requested a number of documents from the Respondent that ultimately were produced for him.
25. The first Grievance Appeal meeting took place on 22 May 2016 and that was heard by John Morris, the General Manager. That Hearing was reconvened on 11 October 2016. The delay was due to a number of matters including providing the additional information to the Claimant and the availability of his preferred representative. By this stage, the Claimant wanted to be represented by his Union's area organiser and he was.
26. The Claimant requested witnesses who were still employed by the Respondent and who were also present to give evidence at that Hearing.
27. On 18 October 2016 the Appeal outcome letter was sent to the Claimant.
28. It seemed clear that the Claimant wanted an apology in relation to his suspension and indeed some action against the others involved. Mr Morris concluded that there was no evidence of race discrimination, but he did acknowledge that others had also been equally at fault in relation to the initial incident and the Claimant should be exonerated.
29. That said, he understandably felt it was not appropriate to act against the others involved over a year later. In any event, to reflect the treatment of the Claimant, it would have been somewhat bizarre to suspend the other employees at that late stage, only to then take no action against them.
30. That effectively exhausted the Respondent's grievance procedure but, nonetheless, the Claimant submitted a further appeal which the Respondent treated as a second grievance. It largely raised the same issues but also complained about the process followed in the original grievance.
31. On 27 October 2016, there was a meeting to discuss the potential for a return to work.
32. At the Hearing of the second grievance, which took place on 18 November 2016, the grievance was rejected and the focus was put on encouraging the Claimant's return to work. The written outcome was sent on 4 January 2017.
33. The Claimant appealed against the outcome of his second grievance on 9 January 2017 and there was a meeting on 20 January which was conducted by Dave Copping, the Respondents Improvement Manager.
34. The outcome of that was, again, that the grievance was not upheld and the Claimant was offered counselling and a transfer to a different site. In relation to those options that were put to the Claimant, a response was subsequently chased and a final Occupational Health Report was provided on 26 May 2017. In that Report, it was made clear that the Claimant believed that his depression had been caused by the situation at work and went on to say that his symptoms were severe and there was no foreseeable return date.

35. There was a Capability Meeting held with the Claimant on 16 June 2017. It was clear at that stage that the Claimant remained very angry at the actions, as he perceived them, of the Respondent. He expressly refused the option of a transfer although subsequently various other vacancies were provided to him.
36. On 15 November 2017, the Claimant was invited to a Capability Hearing and that Hearing took place on 30 November 2017. The Claimant was again represented by his Regional Officer and a decision was to be taken by Mr Stenner of the Respondent. That meeting reconvened on 13 December 2017 when the Claimant confirmed that he was unwilling to look at other options in relation to employment. His focus remained almost entirely on his grievance relating to the events surrounding his suspension.
37. The Claimant confirmed that the position as outlined in the earlier Occupational Health Report remained the same and that he could become very angry, even at receiving letters from the Respondent. The Respondent understandably concluded that they couldn't reopen the grievances again and the Claimant confirmed that, in those circumstances, there was no prospect of a return to work.
38. We heard oral evidence before us about some of the difficulties that the Claimant's absence caused the Respondent. Specifically, Mr Wilson informed us about the pressure put on other Section Leaders who were required to cover his role which they could not recruit to replace while the Claimant remained employed.
39. The Claimant was offered the opportunity to appeal against his dismissal, but he elected not to do so. He said that his reason was that he had lost all trust in the Respondent by that stage.
40. Those are the key facts as we have found them.

The issues and the law

41. The claims before us were for unfair dismissal under Section 98 Employment Rights Act 1996 and discrimination arising from disability under Section 15 of the Equality Act 2010 in relation to that dismissal.
42. The Claimant had initially made other claims but those had been withdrawn at a Preliminary Hearing last year.
43. As to the law, this was set out helpfully in the Respondent's closing submissions and was largely uncontentious.
44. In relation to unfair dismissal, the Respondent advanced the potentially fair reason of capability and acknowledged that the burden was on them to prove that reason.
45. Thereafter the burden becomes neutral in determining whether or not this was a sufficient reason for dismissal, including whether it was fair or unfair considering equity and the substantial merits of the case. All the circumstances includes the size and resources of the Respondent.

46. There was no dispute from the Claimant as to the reason for his dismissal.
47. Section 15 Equality Act 2010 states that an employer discriminates against an employee if they treat them unfavourably because of something arising in consequence of their disability and if they cannot show that it was a proportionate means of achieving a legitimate aim.
48. In this case, the Respondent conceded that the Claimant had a disability as defined. That disability being depression. It was conceded that he met the definition under the Equality Act both before, on, and after the effective date of dismissal, 13 December 2017.
49. The Respondent was contending that the dismissal was for his long-term ill-health absence and, as a result, they also conceded that the dismissal amounted to unfavourable treatment and that this was because of something arising in consequence of the disability, specifically, the absence.
50. It is, therefore, for the Respondent to show that the treatment was a proportionate means of achieving a legitimate aim. Such an aim needs to reflect a real need on the part of the Employer.
51. The tests in relation to the two matters that were directly before us are different but they do significantly overlap. Indeed, we were reminded that it has been said that it is undesirable for the tests to lead to different results. Nonetheless, we address each test in turn.

### Decision

52. When considering fairness in a long-term ill-health dismissal, there are various established factors that can aid our deliberations. These include:
- an employer finding out the correct current medical position and
  - consulting with the employee,
  - considering the needs of the business and
  - the effect of the sickness absence,
  - the nature of the illness,
  - the length of the illness,
  - the prognosis
  - the need for the work to be done,
  - the impact of the absence on others,
  - the extent to which these factors are discussed with the employee and
  - proper consideration of alternative employment if appropriate
53. Again, there was no material dispute on those being relevant factors for us. The Claimant's principal argument has already been highlighted and focussed on what he considered to be both the cause of his ill-health and the Respondent's failure to aid his recovery by having a different approach to the grievance process and indeed a different outcome.
54. It was, again, common ground that whether the ill-health was caused by the employer is not the only consideration when considering fairness. We were

rightly referred to *McAdie v The Royal Bank of Scotland* [2007] IRLR 895. If the employer was responsible for an injury, the Court of Appeal effectively held that this may be a relevant factor that may require greater leniency in determining when and whether to dismiss. Ultimately, however, even if the employer was entirely at fault for an injury, this would not necessarily prohibit a fair dismissal.

55. It seemed clear, on the evidence before us at least, that it was the suspension that played a part in triggering the ill-health. That is not to say, however, that the ill-health was a foreseeable consequence, or that the Respondent was necessarily to blame, nor indeed the Claimant blameless. Nonetheless, we have considered all of those factors in coming to our conclusions.

56. Here whilst it may well be that the Dismissing Officer didn't consider the causation of the Claimant's ill-health, the Respondent had already supported a considerably longer period of absence than reasonableness would normally require.

57. In relation to the unfair dismissal, the Respondent submitted, as already stated, that the reason was capability and this was not in dispute.

58. The Respondent further submitted that the final Occupational Health Report clearly stated that the Claimant was unfit for work and unlikely to return for the foreseeable future and that his condition was severe. There had been no change to that prognosis at the time of dismissal and that was confirmed by the Claimant both at the time and before us.

59. There had been several medical review meetings at which the Claimant confirmed that he remained unfit for work and he was fully consulted throughout the process. The Claimant accepted there was no prospect of him returning to work unless his grievances were dealt with to his satisfaction. Even then, it was unclear entirely what he wanted or, if received, whether that would have aided his recovery. That said, it was clear that he did want some form of apology and some action against those he considered to be equally, or even more, responsible for the situation surrounding his suspension.

60. The Claimant was offered mediation and counselling and he was offered a transfer both in the second grievance appeal and the dismissal hearing. The Claimant was clear that he would not return to work in the absence of an alternative outcome to his grievances.

61. In those circumstances, the Respondent submitted there was nothing more that they could do. The Claimant had been absent for around 2½ years.

62. All of those submissions on the part of the Respondent were not materially in dispute before us. It was clear that all of the Respondent's witnesses from whom we heard wanted to secure the Claimant's return to work and viewed him as a valuable employee and they made various efforts to achieve that.

63. In terms of the business case, the Respondent said that they had a need to dismiss the Claimant because of his long-term ill-health absence, his

reluctance to return. We also heard and accept that there was a genuine concern that, even if he were to attempt to return, that may have had an adverse impact on his health and/or that, on returning, he may have had a bad reaction to members of management.

64. In addition, we heard that the Claimants absence had led to the Respondent being unable to recruit a replacement and other Section Leaders had to cover his role.

65. The Claimant's principal challenge was that the suspension shouldn't have happened and that the grievance should have resulted in an apology and action against the others who may have been involved. He said that such an outcome may well have aided his recovery and that, if he was then given even more time, he may have been able to return to work.

66. In that regard, we note that the suspension was for a relatively short period. It was following a perceived refusal by the Claimant to arrange the allocation of agency work. The investigation, that was conducted promptly, concluded that no action should be taken.

67. We accept that the Claimant may not have expressly refused to do as asked but asking for more time may have had the same result. We further accept that he felt that the suspension was unfair. It appears that, in at least one of the grievance outcomes, it was acknowledged that suspension perhaps should not have happened and it may well have been an over-reaction.

68. That said, the Claimant was asked to do something and acknowledged that he didn't do it. The Respondent said that after the charges were dropped, the Claimant was made to feel valued and great efforts were made to encourage his return to work. Whilst initially the letter in response to the disciplinary allegation merely stated that no action was being taken, it was clear from all the evidence we heard, and saw, that the Respondent perceived this as an exoneration and said the same to the Claimant. This was certainly confirmed in the Grievance Appeal outcome.

69. It was clear that the Claimant wanted more. The Respondent could, perhaps, have apologised but we accept the evidence of Mr Morris that he considered that the Claimant was not entirely blameless and that was not an unreasonable conclusion to reach. Despite this he said the Claimant was fully exonerated and that others were partly to blame. He considered that it was not appropriate to suspend and then take any action in relation to those matters over a year later to mirror the Claimant's treatment and, it seems to us, that this was a reasonable response.

70. In addition to those matters, the issue around the Claimant being asked to delete part of his initial statement was certainly unwise on the part of the Respondent. However, we note that the Claimant initially said he had been asked to change it and it was only subsequently that he suggested that he was forced. The allegation that was apparently removed was something that had previously been dealt with and was not overly material to the issues at hand. Nonetheless, as previously stated, it was somewhat unwise for an employer to suggest amending statements in such a way.



71. Similarly, with regard to the handshake, we note that it wasn't initially suggested that this was forced and this allegation again only came later. Ultimately it was clear that there was a handshake but, if the Respondent was able to secure a return to work, something would have needed to be done to restore the relationship with the Claimant with his managers.
72. In relation to the Union Representative issue, it does appear that, at the initial meeting at least, the Claimant was accompanied by someone who he would not have chosen. It was less clear whether his alternative representative would have been someone who he was entitled to be represented by. Ultimately, the Claimant did have his choice of representative in the later grievance and dismissal hearings.
73. It was clear that the Claimant was unhappy with the investigation of his grievance. There were some issues there which rendered the process less than perfect. That said, we accept that all of the managers involved were genuine and that their responses, especially that of Mr Morris, were within the band of reasonableness. Indeed, we note that the Respondent allowed the second grievance which appeared to be almost entirely covering the same ground. This was, therefore, beyond their ordinary obligations.
74. In addition to those matters, the Claimant also suggested that Mr Wilson had inappropriately sworn at and, on a separate occasion, threatened him. However, it was clear from the evidence before us that they had previously had a good relationship and that Mr Wilson was trying to encourage the Claimant's return to work. Whilst certain language may have been used, this was not as portrayed by the claimant, nor was it unusual in a warehouse environment.
75. Turning to the principal issues of the unfair dismissal claim, we accept that the Claimant was an excellent worker and he was unhappy at his suspension. Ultimately, the allegation that led to the suspension was not upheld and no action was taken against him. The Claimant's severe reaction was both unforeseeable and saddening.
76. It was clear that all the managers we heard from were honest and genuinely trying to secure a return to work. The absence was a very lengthy one. There were obvious adverse effects on the business. There was no prospect of a return and a possible risk to the Claimant and others if he did.
77. We note that it's not for us to overly scrutinise the grievance or earlier disciplinary issue in the context of the considerations that we must apply, and we don't consider that any of those were manifestly inappropriate even if we may have taken a slightly different approach.
78. There were some failings but the findings, particularly those of Mr Morris having considered the additional documents and evidence adduced by the Claimant, were about right.
79. The Claimant couldn't accept those conclusions and that is, of course, deeply regrettable. The Respondent offered such things as a phased return, counselling and relocation but, by that stage, given the state of the Claimant's health, he refused those opportunities.

80. We note, going back to the time at which the Claimant did request a transfer, that this was actually before his sickness absence had even commenced. It is to his credit that the reason that was refused at the time was because he was such a valued employee.
81. We accept that the Claimant was consulted throughout and the other issues that were raised, such as regarding the representative, are not directly relevant to our considerations about whether this dismissal was within the band of reasonable responses. Given the length of the absence and the lack of a prospect of a return, we cannot say that this dismissal was unfair in all the circumstances, however regrettable it may have been.
82. Finally, turning to the Section 15 issue, there was clearly plenty that the Respondent could have said in relation to the justification defence, although their evidence was relatively light on this point.
83. We are mindful that it is not for us to simply apply our own experience and identify legitimate aims that may well have applied. That said, we would accept that it was a legitimate aim to avoid the adverse effect on the Claimant and others of any potential return and a further legitimate aim not to prolong his absence in circumstances where he was suggesting that the respondent's genuine attempts to manage the situation were fueling his ill-health. In addition, it was a legitimate aim for the Respondent to be able to recruit to replace to ease the pressure on the remaining members of the team.
84. We need to balance those aims against the significant effect on the Claimant of dismissal from employment in which he had worked for many years. In doing so, we have also considered the fact that ultimately, there was no prospect of a return and so the Claimant would have been dismissed at some stage in any event.
85. The Claimant had a very lengthy absence and two grievance procedures. The Respondent consulted with him throughout, obtained appropriate medical advice and went to considerable lengths to encourage a return to work, including offering alternatives. It seems to us that there was not much more that the Respondent could do and in those circumstances dismissal was a proportionate response and the Section 15 claim must also fail.

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Employment Judge Broughton

13 August 2019