EMPLOYMENT TRIBUNALS

Claimant: Mr G O'Connor

Respondent: Express Linen Services Limited

Heard at: Manchester **On:** 16, 17, 18 December 2019

Before: Employment Judge Warren
Mrs A L Booth
Ms B Hillon

REPRESENTATION:

Claimant: Mr L Bronze, Counsel
Respondent: Mr T Hussain

Written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The respondent has requested written reasons in relation to the finding of unfair dismissal.

2. When this case was heard it dealt with issues of disability discrimination (failure to make reasonable adjustments) and discrimination arising from disability as well. In accordance with the respondent's request these reasons will deal only with the findings in relation to the allegation of unfair dismissal.

The Evidence

3. We heard evidence from the claimant in his own regard. Mrs Budd, Mrs Allan and Mr Hopwood gave evidence on behalf of the respondent.

4. There was an agreed bundle of documents consisting of 154 pages. Of the witnesses we found Mr Hopwood to be entirely credible. We found Mrs Budd and Mrs Allan to be less so because their evidence was less specific eg 'I would have sent the minutes because I always do so', when there was no evidence to support that contention). We found the claimant to struggle

because we found that he had no notes or minutes of the various meetings as reminders and he was entirely reliant on memory. We applied the standard of proof, the balance of probabilities and in relation to the unfair dismissal claim the burdens of proof set out in the Employment Rights Act 1996.

5. The issues in relation to the unfair dismissal are as follows:-

    4.1 What was the reason for the claimant's dismissal? The respondent asserted that it was capability – a potentially fair reason.

    4.2 Was the claimant's continuous absence sufficient to trigger a fair dismissal on capability grounds?

    4.3 Did the respondent follow a fair process in dismissing the claimant?

The Facts

6. The Tribunal made the following findings of fact from the evidence we heard and read.

7. It was conceded by the respondent that the claimant was at the material time a disabled person and the respondent was aware of it.

8. The claimant began work for the respondent on 11 February 2008, and in early 2016 had time from work because of a bad back. Later that year he alleges that he sustained an injury at work, and suffered a further back issues, for which he is bringing a civil claim for personal injury.

9. He had intermittent absences from work caused by back pain for which he received two warnings in February 2017 and July 2017. He then began a lengthy period of absence in October 2017 which eventually ended in his dismissal in November 2018.

10. The respondent began a process of regular reviews after the claimant had been absent for eighteen weeks, to establish what progress he was making towards recovery, and return to work. On each occasion he was supplied with an agenda which included items such as his medical condition and prognosis, consideration of any adjustments to rectify the situation at work, consideration of alternative employment and the way forward. The review was in effect ongoing.

11. At some meetings the claimant was invited to attend with a representative, at others he was not.

12. A letter sent to the claimant on 20 February was admitted to be a template and the same letter was used for the first three reviews. The first review took place on 26 February between the claimant and Mrs Budd. The claimant chose to be unrepresented but had been invited to be represented.

13. The claimant explained that the prescribed pain relief was ineffective and he had not had any improvement in his condition. He believed he was being referred to a specialist by his GP but it was later confirmed that the appointment was with a Physiotherapist. He agreed he could not come back

to work because he was in constant pain. At this point there was a discussion about reduced hours but the claimant rejected that suggestion because of the pain. He consented to provide a GP report to his employer and it was agreed to wait and see what his doctor said. Mrs Budd gave evidence that she kept notes of the meeting and later transcribed them. The original notes have never been disclosed and while it is asserted by both Mrs Budd and Mrs Allan that the transcribed notes were supplied with each following letter of invitation to a further review the claimant says that they were never sent to him. The earlier letters contain no suggestion that they were. Even if they were sent it was not mentioned that the claimant could amend or agree them or sign or return a copy to signify acceptance. Further, if they were sent it would have been many weeks later, as Mrs Allan suggested that they were sent with the letter of invitation to the next review. That would have been at least seven weeks later and on the second occasion eleven weeks later.

14. The claimant's GP reported to the respondent on 29 March. Reading it gives the impression that it was produced from the records without seeing the claimant. It was produced by a different doctor in the surgery to the one whom the claimant regularly saw. The claimant was described as being limited in terms of bending and mobility and there being a reference to a Muscoskeletal clinic which transpired to be a Physiotherapist's appointment. The GP suggested that the claimant was likely to experience recurrent symptoms as it was a chronic problem which had by then been ongoing for nearly two years. Based on the outline duties (heavy work in a laundry), he could not recommend any adjustments to the workplace.

15. On 20 April the claimant was invited to a second review with the same objectives as the first. The claimant was not told he could be accompanied, and the template letter was not used.

16. Again, the meeting was conducted by Mrs Budd with the claimant present. Again, Mrs Budd kept notes which were never disclosed. The claimant explained that he was still the same, but was now having physiotherapy and that he may be referred by his Physiotherapist for pain management. His medication was making him dizzy and he said at that stage there was no likelihood of a return to work because he couldn't sit for very long and he couldn't stand for very long. He did say that he could now carry light "stuff". The claimant did not receive the minutes of that meeting either.

17. On 20 July 2018 the claimant was sent a further invitation to a case review in identical terms to that sent on 20 April. He was not offered the opportunity to be accompanied. He was not sent a copy of the minutes of the previous meeting in April.

18. On this third review meeting the claimant said that if he could move around and not stand in one place all day he could come back to work, but the previous night he had had no sleep because he was in pain. The physio had ceased and he could not give a timescale for his return to work, although he did want to return. His medication had been increased and it was helping but he was still in pain. He said if they could find him a job where he didn't stand or sit all day and could account for him being unable to bend he would return.

One of the suggestions was that the claimant should sit at the towel machine which was less heavy work, and be allowed to walk around periodically – according to Mrs Budd and Mrs Allan that would have been fine. They were however contradicted by Mr Hopwood, the respondent's witness, who agreed with the claimant that this would no tbe allowed. We preferred Mr Hopwood's evidence as being very clear and frank. The minutes of this meeting refer to Mrs Budd discussing dismissal on capability grounds. However, the claimant did not see her original notes and is adamant that nothing was said about dismissal in this meeting, and that he would have remembered it, which seemed credible to us. We found his evidence that he saw the minutes of all of the meetings for the first time during disclosure for this hearing to be credible. He disagreed with a substantial amount of their content and had he seen them early would have commented at the time. We note that he still has not seen the original handwritten notes from which they were drawn, and nor have we.

19. As a Tribunal we have been placed in an almost impossible situation and spent a considerable period of time trying to resolve the issues arising from these minutes. The claimant is adamant that he did not receive them at the time and that is supported in that there was no mention of them in the first three meetings, or the second and third invitation letter. There is no evidence that the claimant was ever asked to agree the minutes and sign them, nor given the chance either in letter or at the meetings to comment or alter the minutes. Mrs Budd insists that she sent the typed minutes taken from her hand-written notes (which have never been disclosed) but on her own account that she sent these with the following invitation letters several weeks or months after the event. Her view was that she sent them because she always did. This took us no further at all. If they had been sent we would have expected a reference to them in the letters and a reference to them in the minutes of the following case review meeting. We therefore cannot conclude that the minutes are either an accurate record upon which we can rely or that the claimant ever had sight of them. We therefore discount everything said in the written minutes of which we have not heard direct evidence. We did note that mention was made of the minutes being enclosed in the fourth invitation letter on 17 October. This letter was the first to make reference to the recently received occupational health report, it again did offer the right to be accompanied and did warn that dismissal was a possibility on capability grounds. We know that the claimant received the letter although he says the minutes were not included. The agenda now had an additional head for discussion, being the impact on the business of the claimant's absence.

20. At the fourth case review, having heard the evidence of what was said we establish that there was a discussion about the claimant saying he could undertake light duties on the towel machine providing he could have regular breaks. Mrs Allan expressed concern that his medical treatment was inadequate and that he should be demanding more medical assistance from his doctor. The claimant again says that the minutes are inaccurate to the point of including things he did not say and not including things he did say. We have not relied on the minutes.

21. The occupational health report dated 12 October 2018 relied entirely on the request for advice from the respondent who described the claimant's job and

the information provided by the claimant, on the telephone to an occupational health advisor. From that report we can see there is no suggestion of any reasonable adjustment to enable the claimant to return to work, nor is there any suggestion of light duties or of the claimant's capabilities. The report is based on the claimant's conversation and there is no evidence that when he received a copy, at the same time as the respondent, he in any way objected to its contents. The contents paint a picture of an ongoing medical condition with no improvement, that the claimant was unfit for his job, that there had been no progress over the previous twelve months and the situation was unlikely to change without further intervention or robust rehabilitation. Neither of these issues appeared to be in the mind of the claimant's GP and we have no evidence that the claimant went back to his GP to ask about it. There is reference in the report to there being no diagnosis of a condition, no comment to possible recovery and no foreseeable return to work date. On the face of the evidence there was no discussion about this report on the fourth review at all.

22. On the 14 November a follow up meeting was arranged for 23 November to discuss any improvement following the claimant's attendance at his doctors. He was warned of the possibility of termination for capability and he was given a right to be accompanied, the letter was sent by Mrs Allan, Mrs Budd's manager. The minutes of this meeting are very brief and again challenged by the claimant. We have not reached any conclusions from them. The difficulty with finding facts about this meeting, is that the claimant cannot remember what he was asked or what was said but he denies that the contents of the minutes are accurate, and we have found all of the other minutes to be too unreliable to use. On this occasion we have very little evidence on which to find facts. The parties do not even agree on what date this meeting was held, it may have been the 23 November or 27 November.

23. What we do know, because the parties agreed this, is that the meeting was adjourned to enable the respondent's legal team to be consulted about the claimant's entitlements on termination. The meeting was reconvened on either 27 November or 30 November. We have considered all of the evidence and concluded that the second meeting was on 27 November on the basis that a letter sent from the respondent after the meeting on 27 November is dated 30th, and there is reference to the first meeting being held on a Friday which in 2018 would have been the 23rd. The claimant made a mistake about this date but as there was a mistake on the date in the minutes, which he saw for the first time this year when they were disclosed to him, it is hardly surprising that he is confused.

24. In this fifth meeting the claimant was advised that he was being dismissed on capability grounds and he would receive 10 weeks' notice pay in lieu.

25. The respondent asserts that this was followed up with confirmation in a letter dated 30 November which offered a right of appeal. The claimant gave evidence that he did not receive this letter which referred to his P45 following but did not say the P45 was actually included in that letter. He remembers receiving his P45, but is adamant that it did not come in the same envelope as the letter of dismissal which he never received.

26. We find on the balance of probabilities that either the letter was not sent or it went astray. The claimant was already in receipt of legal advice and mentioned this in the fourth case review meeting. It would seem unlikely that he would fail to appeal the decision to dismiss, when he was already discussing a Tribunal claim about his potential dismissal. It is accepted by the respondent that there was no mention of an appeal in the dismissal hearing. Without the confirmation letter he was never advised of his right to appeal.

27. If he had been, he would have noted that Mrs Allan who made the decision to dismiss was referring the case to her husband to deal with the appeal, even though he had been involved in one of the capability meetings.

28. The claimant as it happened did not appeal the decision and brought his claim direct to the Tribunal. It is worthy of note that after his dismissal but before the case was brought, a medical report was obtained by the parties in connection with the personal injury claim he is bringing separately against the respondent. That report, prepared on 1 November 2018, describes the claimant as saying that he felt the manual nature of his work precluded him from returning to his job, because of his described levels of lower back ache.

29. There was therefore conflict between the claimant's account to the Consultant investigating his back pain for the personal injury claim, and the unminuted account he says he gave to Mrs Allan and Mrs Budd that he was improving and could, with adjustments, return to work.

The Law

30. Section 98 of the Employment Rights Act 1996 provides:-

    27.1 In determining for the purpose of this part whether the dismissal of an employee is fair or unfair it is for the employer to show:-

        (a) the reason (or if more than one, the principal reason) for the dismissal; and

        (b) that it was 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.

    27.2 A reason falls within this subsection if it:-

        (a) relates to the capability or qualifications of the employee for performing work of a kind which he was employed by the employer to do.

    27.3 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 reason shown by the employer):-

        (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the

employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case.

31. It is for the employer to show the reason for the dismissal and that it was a potentially fair one. The burden is on the employer to show that it had a genuine belief in the reason alleged. *British Home Stores -v- Burchell 1978 IRLR 379*. The Tribunal must consider whether that belief is based on reasonable grounds having carried out a reasonable investigation but in answering these two questions the burden of proof is neutral.

32. The Tribunal is assisted by the guidance offered in *Iceland Frozen Foods -v- Jones 1982 IRLR 439* namely:-

(a) The starting point should always be the words of Section 98(4) themselves;

(b) In applying the section, the Tribunal must consider the reasonableness of the employer's conduct not simply whether they consider the dismissal to be fair;

(c) In judging the reasonableness of the dismissal, the Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;

(d) In many though not all cases there is a band of reasonable responses to the employee's (capability) within which one employer may take one view, another quite reasonably takes 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 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. The correct approach is to consider together all of the circumstances of the case, both substantive and procedural and reach a conclusion in all of the circumstances.

Submissions

33. The claimant asserted that the dismissal was unfair because the procedure followed was unfair. He believed and asserted that the minutes of all of the meetings are so inaccurate as to have been "created". He points out that he did not receive any of the minutes and was never asked to comment upon them, until disclosure in this case. He was not always invited to be accompanied at meetings which eventually led to his dismissal.

34. He points out that by the end of the period before he was dismissed, he was not being paid by the respondent and there was therefore no financial benefit to them in dismissing him. He further asserted that the respondent had been

able (and confirmed the same in evidence) to employ agency workers to fill his role, which was unskilled.

Respondent's arguments

35. The respondents argue that the claimant was dismissed for capability reasons having been absent from 6 October 2017 to 27 November 2018 – an absence of more than thirteen months. It was submitted that a continuous absence of between three to six months is deemed sufficient to trigger dismissal and therefore dismissal was justified. The respondent carried out regular and extensive case review meetings with the claimant to facilitate his return to work by all means while extending full assistance and support. No reasonable response was forthcoming from the claimant in relation to his ability to work. The letter of termination (page 76 to 77) provided a summary of the numerous meetings and outcomes of those meetings. The respondent considered all possible venues including the possibility of alternative employment but had no alternative but to terminate the claimant's employment. The claimant was given the right to appeal and also a right to be accompanied by a work colleague or a trade union representative throughout the meetings and in the invitation letters. The claimant was informed of the possibility of dismissal on more than one occasion. The dismissal was therefore fair.

Conclusions

36. At the point of the claimant's dismissal he had been absent for over twelve months. He had two previous time expired warnings for excessive absence. No one, least of all himself, could give any indication of a prospective return to work. The occupational health report was open ended. The respondent was not affected financially by the claimant's absence, they covered his work station with agency or inhouse workers and this was not a skilled operation. The only requirements of the work were physical. We accept completely that the reason for the dismissal was the claimant's capability. The respondent have had every reason to believe that he was incapable of undertaking the work for which he had been employed even on his own assertions.

37. We turn therefore to whether or not this was a fair procedure. We find that the lack of records of minutes being sent promptly to the claimant was inherently unfair. He never got the chance to comment on the minutes or to reply to them in any way. Neither he, nor the Tribunal had sight of any of the original meeting notes from which those minutes are alleged to have been produced. If they were sent, which we do not accept, it would have been weeks or months later. The claimant was never invited to comment or agree the minutes or the notes either in writing or at the following meeting. There was no reference made to those notes at all or the minutes in any of the letters or indeed in the minutes of the later meeting. Minutes we were told were transcribed from handwritten notes which have not been disclosed and which the claimant has never seen. He insists that he saw the minutes as part of the disclosure in this case and we find that to be the case. That was not fair on the claimant. The respondent was asking the Tribunal to accept the veracity and accuracy of those minutes. They had been produced by the respondent for the respondent, and we do not know when they were produced

and why they were not sent to the claimant. In the circumstances we chose to limit ourselves to considering only the live evidence heard in Tribunal of what was said in those meetings and of assessing the credibility of those who told us what had been said.

38. The claimant was not invited to be accompanied at every meeting, at some he was, and others he was not. Such inconsistency speaks of a failure to comply with a reasonable procedure. That said, we noted that the claimant chose not to be represented at those meetings where he was so invited.

39. We find that the claimant did not receive a dismissal letter and so was unaware of his right of appeal. We know that he intended bringing a claim and we are sure that he would have appealed had he been aware. We also know however that the appeal was to be heard by Mrs Allan's husband and that he had never overturned any of her decisions in the past. Mr Allan had also participated in the third case review and would therefore have been an inappropriate choice of appeal officer in any event.

40. We therefore find that the claimant was dismissed for a fair reason but following an unfair procedure. This was therefore an unfair dismissal overall, but we would expect to hear submissions on the issue of Polkey v AE Dayton Services [1987} IRLR 503 HL and on whether the claimant contributed to his dismissal. The issues to be decided are:-

41. What was the chance that the claimant would have been dismissed in any event, had he received the minutes and been given the opportunity to be accompanied at each meeting and had he received the dismissal letter and been given the opportunity to appeal?

42. Did the claimant contribute to his dismissal?

43. The case is adjourned to deal with these issues, and Remedy if appropriate.

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Employment Judge Warren

23 November 2020

REASONS SENT TO THE PARTIES ON
27 November 2020

FOR THE TRIBUNAL OFFICE

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

[JE]