EMPLOYMENT TRIBUNALS

Claimant: Mr. M Swailes

Respondent: Muller UK & Ireland Group LLP t/a Muller Milk & Ingredients

HELD AT:	Leeds Employment Tribunal (By CVP)	**ON:**	22 February and 15 March 2021
BEFORE:	Employment Judge Buckley		

REPRESENTATION:

Claimant:	Miss Brooke-Ward (Counsel)
Respondent:	Miss Ferrario (Counsel)

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

Claims and issues

1. This is a claim for unfair dismissal. The issues that arise were agreed by the parties at the start of the hearing as follows:

    1.1 What was the reason or principal reason for dismissal? The respondent says the reason was capability.

    1.2 If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

        1.2.1 The respondent genuinely believed the claimant was no longer capable of performing their duties;

        1.2.2 The respondent adequately consulted the claimant;

        1.2.3 The respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

        1.2.4 Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;

1.2.5 Whether dismissal was within the range of reasonable responses;

1.2.6 Whether the respondent took reasonable steps made to consider suitable alternative employment.

1.3 If there is a compensatory award, how much should it be? The Tribunal will decide:

1.3.1 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

1.3.2 If so, should the claimant's compensation be reduced? By how much?

1.4 What basic award is payable to the claimant, if any?

Evidence

2. I heard evidence from the claimant and from Mr. Battye and Mr. Roberts from the respondent. I was referred to and read documents from the bundle.

Findings of fact

3. The claimant started work for the respondent on 4 July 2006. At the relevant time he was employed as a Driver of HGVs at the Leeds depot. The respondent distributes milk and dairy ingredients to retailers.

4. On 20 January 2020 the claimant sustained an injury at home to his arm and he began a period of sickness absence on 21 January 2020. On 10 Feb 2020 he was referred to a physiotherapist. On 12 February 2020 he exhausted his entitlement to company sick pay

5. Because of the coronavirus pandemic, the claimant did not have any face to face meetings with his physiotherapist or Occupational Health, and he did not see the consultant surgeon until October 2020.

6. The claimant had a number of telephone consultations with the respondent's Occupational Health Advisor. Her first report is dated 31 March 2020. It records that there had been slow progress, and that the claimant was not expected back to work within the next 2 months. It stated that the OH advisor would review the claimant in 6 months' time.

7. On 7 April 2020 the first meeting between the claimant and the respondent took place. The claimant told the respondent that all appointments at the hospital and with the surgeon and the physiotherapist had been cancelled due to Covid. He was in contact with the physiotherapist via phone, but she had said that his progress could not be measured until he was seen. It was concluded that they could not establish a date for his return at that time.

8. The follow up letter to that meeting stated, as do all the other follow up letters from the respondent, that the options that were discussed to facilitate a return included a transfer to a suitable alternative position and/or shift pattern and/or

department and/or location. They respondent's witnesses accepted that the respondent had not in fact considered any alternative jobs at the Manchester Depot and I find on that basis that there had been no consideration of alternative employment at a different location.

9. The second meeting between the claimant and the respondent took place on 23 May 2020. The notes record that there had been some improvement. The claimant confirmed that he had had no contact with the surgeon or physiotherapist except for a phone call from the physiotherapist every 3 weeks. He mentioned the possibility of a further operation in October if, when he eventually got to see the surgeon, he was not satisfied with his progress. The claimant said that he would be capable of returning to work on amended duties and said he would do anything 'time wise' other than nights. The claimant said he really did not know when he could come back to full duties but that he wanted to return now to amended duties.

10. The second occupational health report is dated 2 June 2020. The report sets out that his physiotherapist is calling him every three weeks and he is doing as much physiotherapy as he can himself in the meantime. However he has no idea of how much progress he is making because his follow up xray appointments have also been stopped for the time being. It records that his physiotherapist has advised that he is unlikely to get much more movement back in his arm and so he should concentrate on getting his strength back now and that he will see the surgeon in September for review. It states that he has been tentatively advised that more surgery may be an option depending on what the surgeon thinks of his recovery. It states that he isn't fit to drive an HGV as he won't be able to work the gears but that she is happy to support a return to work if they can find something light enough for him to do - essentially something that you could employ 'a one armed man' into.

11. The third meeting with the respondent took place on 30 June 2020. The claimant confirmed at this meeting that he was no different from last time. He said that he was building strength with the physiotherapist. He stated that although the occupational health advisor said he couldn't drive HGVs he thought he could drive but that couldn't do the physical side of the job with tail lift and trolleys etc. He listed some jobs that he thought he could do and said that he didn't know his progress but hoped that he was progressing well.

12. When asked if there was any indication of a time frame he said that his GP had said to speak to the surgeon or specialist as his GP isn't a specialist on this type of injury, but he couldn't get to speak to anyone because of COVID-19. He said that the phone calls from the physiotherapist were just to keep an update and they can't give a time frame. He said that he felt had been left in limbo. He had been given a pencilled in appointment date of the 27th of September, but it could be cancelled nearer the time.

13. The third Occupational Health report is dated 7 July 2020. It states that the claimant remained in much the same position. It records that the claimant said that he thinks he may need more surgery to help straighten it. The report states that at this stage neither of them (the claimant and the occupational health advisor) could give the respondent any guarantees about how successful that will be and how much function he will get back in the longer term. It recorded that the claimant was happy and very keen to try any role that the respondent may have available. The report stated that they had both

concluded that it was going to be a minimum of six months before the claimant was likely to be fit for his old role and 'that is of course assuming he ever gets fit enough to do that'. The occupational health adviser concluded by saying 'I do not plan to review again unless you do indeed find him something else to do'.

14. The claimant was invited to a further meeting with the respondent by a letter dated 16th of July 2020. The letter is headed 'invite to welfare meeting' and says, 'I'm writing to invite you to a meeting to discuss your ongoing absence on 24th of July 2020 to take place over the phone'. On the second page of the letter it states, 'Please be aware that if we are unable to agree a resolution to your ongoing absence then the company will have to review its ability to continue to support your absence. One possible outcome of this meeting could therefore be dismissal on the grounds of ill health incapacity.' Although this letter is headed 'welfare meeting' it clearly states on the second page that dismissal is a potential outcome. Given that the claimant states that he read the letter I find that he was aware that this was a potential outcome of the meeting. The respondent's policy states that this meeting will not take place until the possibility of dismissal has been discussed. This had not taken place at this point.

15. At the meeting on the 24th of July the claimant told the respondent that the appointment had been knocked back from September to October due to Covid, that the doctor had said he couldn't have an appointment for six months, that he didn't know what's happening and didn't know if it has even got worse. The claimant said he could feel the strength coming back in his arm but depending on how he moves it, sometimes he felt like it was going to give way. He said that he would struggle with the manual tail lift and pulling himself into the cab. There was a discussion of further roles that the claimant was willing to try.

16. Mr Battye adjourned the meeting to consider the situation and dismissed the claimant for capability in that meeting. The claimant was paid in lieu of notice but the dismissal was with immediate effect. This was confirmed by letter dated 28th of July 2020. The letter stated that as there was no prospect of a return to work in the near future they were unable to allow the absence to continue indefinitely.

17. The claimant submitted an appeal letter dated 5th of August 2020 which set out four grounds of appeal.

    17.1 The dismissal was too harsh and other sanctions short of dismissal were not considered;

    17.2 The decision to dismiss was in breach of the company's absence policy in that it failed to take into account the recommendations of the occupational health report;

    17.3 The decision to dismiss was a breach of the policy in that it failed to take account of reasonable adjustments as a result of the injury; and

    17.4 The respondents failed to consider alternative roles.

18. The claimant was invited to an appeal hearing but he decided not to attend partly as a result of advice he had been given. The decision to dismiss was upheld after an appeal in the absence of the claimant on 3 September. Mr.

Roberts heard the appeal. The appeal concluded that dismissal was an option that was available where all other options have been considered and were not possible. These options included a return to his normal role within a reasonable time frame; a return to his normal role with reasonable adjustments; or transfer to a suitable alternative position/shift pattern/ department/location. Mr. Roberts stated that these options were considered but no reasonable options were available.

19. In relation to the occupational health report point the appeal concluded that there were only driver vacancies available at the Leeds Depot and those roles would not be suitable. Mr. Roberts concluded that there were no available vacancies that the claimant would have been able to trial whereby his left arm would not been utilised. In relation to reasonable adjustments it was stated that this would only be done as part of a phased return. The occupational health advisor had concluded that it would be a minimum of six months before he would be able to return to full duties and even then there was no certainty or no guarantee of how much function he would get back into longer term.

20. I accept Mr Battye's evidence that he had considered throughout the process whether there was any suitable alternative employment available on the Leeds site. I accept his detailed explanation of why he thought none of the jobs were suitable, whether adjusted or otherwise, for someone with the claimant's symptoms. The claimant may have been keen to get back to work but the respondent had to take into account of the information from Occupational Health before them. The respondent had to consider the safety of the claimant and others, not just what the claimant said he was willing and capable to do. I accept the reasons given by Mr. Battye for his conclusion that the other roles were not suitable. I note that the claimant said in the second meeting that did not want to do night work and I find that it was reasonable for employer to take this on board and rule out any night shift roles.

21. Mr. Battye did not consider any jobs available at the Manchester Depot because he assumed that the claimant would not be interested. During cross-examination he was taken to some of the vacancies in Manchester by the claimant's representative. I accept his evidence that, in his view, none of them would have been suitable in any event.

The law

Unfair Dismissal

22. The employer must show a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996. The Respondent relies upon capability.

23. Section 98(4) of the Employment Rights Act 1996 requires the Tribunal to determine whether the Respondent acted reasonably or unreasonably in treating that reason as sufficient reason for dismissal in accordance with equity and the substantial merits of the case.

24. In an unfair dismissal case it is not for the Tribunal to decide whether or not the Claimant is capable of doing his job. Even if another employer, or indeed the tribunal, may not have dismissed the claimant, the dismissal will be fair as long as a fair procedure is followed and dismissal falls within the range of reasonable responses.

25. The test for the range of reasonable responses is not one of perversity but is to be assessed by the objective standards of the reasonable employer rather than by reference to the Tribunal's own subjective views, **Post Office –v- Foley, HSBC Bank Plc –v- Madden** [2000] IRLR 827, CA. There is often a range of options available to a reasonable employer. As long as dismissal falls within this range, the Tribunal must not substitute its own views for that of the employer**, London Ambulance Service NHS Trust v Small** [2009] IRLR 563.

26. The need to apply the objective standards of a reasonable employer, applies as much to the adequacy of an investigation as it does to other procedural and substantive aspects of the decision to dismiss, see **Sainsbury's Supermarkets Limited v Hitt** [2002] IRLR 23, CA.

27. In deciding whether the dismissal was fair or unfair, the tribunal must consider the whole of the process. If it finds that an early stage of the process was defective, the tribunal should consider the appeal and whether the overall procedure adopted was fair, see **Taylor –v- OCS Group Limited** [2006] IRLR 613, CA per Smith LJ at paragraph 47.

28. The authorities on dismissal for ill health capability give some guidance as to how the tribunal should approach these cases under s 98(4). The basic question to be determined, according to the EAT in **Spencer v Paragon Wallpapers** [1977] ICR 301 is whether, in all the circumstances, the employer can be expected to wait any longer and if so how much longer. The relevant circumstances, according to the EAT, include the nature of the illness, the likely length of the continuing absence and the need of the employer to have done the work which the employee was engaged to do.

29. When considering whether an employer has acted as a reasonable employer might have acted, the tribunal will take into account the steps that the employer has taken to inform itself of the true medical position by consulting with the employee and carrying out a reasonable investigation, including finding out about the up-to-date medical position (**East Lindsey District Council v Daubney** [1977] ICR 566). This is primarily the employer's rather than the employee's duty (**Mitchell v Arkwood Plastics (Engineering) Ltd** [1993] ICR 471). The employer will normally not act reasonably unless he investigates fully and fairly and hears whatever the employee wishes to say.

30. The tribunal will also take account of whether the respondent took reasonable steps made to consider suitable alternative employment.

31. In looking at all these factors, the tribunal must not substitute its own view and must bear in mind that the question is whether the tribunal adopted an approach that might have been adopted by a reasonable employer, and that not all reasonable employers will adopt the same approach.

32. If a dismissal is unfair but the appropriate steps, if taken, would not have affected the outcome, this may be reflected in the compensatory award, **Polkey v A E Dayton Services Ltd** [1987] IRLR 503, HL. This may be done either by limiting the period for which a compensatory award is made or by applying a percentage reduction to reflect the possibility of a fair dismissal in any event. The question for the Tribunal is whether this particular employer

(as opposed to a hypothetical reasonable employer) would have dismissed the Claimant in any event had the unfairness not occurred.

Conclusions

33. I find that the reason for dismissal was capability and that the respondent genuinely believed the claimant was no longer capable of performing their duties.

34. It is an employer's responsibility to ensure that they take reasonable steps to find out the true medical position. The steps to be taken to inform themselves are assessed against the standards of reasonableness i.e. whether a reasonable employer could have adopted that approach.

35. The employer in this case decided to rely on the occupational health report and, I find, did not even put their mind to the question of whether or not they should obtain medical evidence from the claimant's consultant.

36. The respondent was aware because the claimant had told them, that he was due to have an appointment with his consultant in October, and that until he had had that appointment the claimant had made clear that neither the GP, the physiotherapist nor the consultant would be able to provide any sort of prognosis.

37. The question for me is whether it was within the band of reasonable responses for the employer to decide to dismiss the claimant in July on the basis of the occupational health evidence or whether any reasonable employer would have considered getting or wating for a prognosis from the surgeon.

38. Although the claimant did not challenge the occupational health report he does make clear in a number of the meetings that he cannot give a prognosis and his progress will not be known until he has been seen by the surgeon.

39. It is clear from the evidence that neither Mr Battye nor Mr. Roberts considered the possibility of waiting until the claimant had been seen by the surgeon in October, when the prognosis might have been clearer. Nor did they consider asking the claimant to try and obtain an earlier appointment, nor did they consider asking the claimant to give consent for the respondent to contact the consultant directly.

40. In the light of a clear indication from the claimant that he could not provide a prognosis without seeing his surgeon I find that it was not within the band of reasonable responses not to even consider whether or not to wait until the claimant had seen his surgeon in October or to explore the possibility of getting an opinion from the treating consultant at an earlier date, and instead to simply rely on the occupational health report of someone who had not seen the claimant in person.

41. The respondents simply did not address their mind to this. I find that this was not an investigation which a reasonable employer could have adopted. Accordingly I find that it was outside the band of reasonable responses for the respondent not to wait until it had at least explored this possibility before dismissing the claimant. This renders the dismissal unfair.

42. In terms of suitable alternative employment I accept that reasonable attempts were made to find suitable alternative employment at the Leeds Depot. I find that it was outside the band of reasonable acts to fail to at least explore and

raise with the claimant the possibility of finding alternative work, perhaps on a temporary basis at the Manchester Depot. It is clear from the letters sent out after the meetings that this is something that the respondent would normally explore because they refer to employment in a different location and it is unclear why the respondent made an assumption that the claimant would not be interested in this without raising it with the claimant. This also renders the dismissal unfair.

43. I do not accept that either of these points needed to be specifically pleaded. They are part of the well-known principles applied by employment tribunals in dismissals for capability. The respondent had the right witnesses present and they were able to deal with these issues. I disagree that it is incompatible with the claimant's assertion that the respondent failed to adopt the suggestion of returning to work on alternative duties in the occupational health report to suggest that the respondent should have at least considered informing themselves of the updated medical position by either waiting until after the appointment in October or seeking evidence from the consultant once he had had seen the claimant in person.

44. Neither of these defects were cured on appeal because Mr Roberts took the same approach as Mr Battye on these points.

45. In relation to the other points made by the claimant I find that they did not render the dismissal unfair. Whilst there was a technical breach of the policy, in that no discussion of dismissal took place before the final meeting, I find that the claimant was given the opportunity to put forward any possible alternatives, and that it had been made absolutely clear in the letter that dismissal was a potential outcome of the final meeting. This breach of the policy looked at in terms of the procedure as a whole was not in my view sufficient to render the whole process unfair. I accept that the appeal officer's witness statement can be interpreted to suggest that Mr. Roberts had had a certain opinion before the appeal hearing but I find on the basis of the oral evidence he gave in the tribunal that he had not prejudged the appeal.

46. The claimant and the respondent made a number of other subsidiary or alternative points about fairness, which I have considered, but rejected. In the light of my findings above it is not necessary for me to set out my reasoning on these other issues.

Polkey

47. Although it is for the respondent to adduce evidence in support of a **Polkey** deduction, I must have regard to all the evidence before me when making my assessment. This is not, I find, a case where the evidence is so unreliable that I take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. The mere fact that a degree of speculation is involved is not a reason for refusing to have regard to the evidence.

48. I find in this case that I can reach a determination on the balance of probabilities as to what would have happened if this employer had approached the matter fairly. In terms of suitable alternative employment, I have found that they should have considered the Manchester depot, but

having heard the evidence of Mr. Battye on the jobs that were available, I am not persuaded that any of those jobs would have been suitable for the claimant. Further, having heard evidence from the claimant I am not persuaded that, in reality, the claimant would have gone to work at Manchester. Finally I find that it would not have taken the respondent any longer to consider those Manchester positions during the consultation period. Accordingly I conclude on the balance of probabilities that even if this aspect had been carried out fairly, dismissal would have occurred when it did in any event.

49. In terms of the medical position in this case what the respondent has done wrong is to fail to address the possibility of attempting to get a prognosis from the respondents surgeon. I must consider what would have happened if they had addressed that possibility.

50. Given the difficulty that the claimant had in getting an appointment, and taking account of the global pandemic, if the respondent had explored this issue with the claimant and his surgeon, I cannot see that the claimant would have been able to be seen before October.

51. The respondent had already waited six months. I find that had they properly considered the question of whether or not to wait until October they would have concluded that they could not wait another 3 months: importantly it was not a question of waiting three months for a return to work but waiting three months for the possibility of a prognosis from the surgeon. This came with the possibility of extra surgery. All this would be taking place a total of nine months post-injury.

52. Even taking into account the fact that this is not a small employer and that the claimant had exhausted his entitlement to company sick pay, this is a long period of time to wait for a prognosis. Taking account of the respondent's witness evidence: (a) I find on the balance of probabilities that they would have decided not to wait and (b) I find that it would have been within the band of reasonable responses to decide not to wait. I therefore conclude that it is inevitable the claimant would have been dismissed fairly in any event after a short period of time.

53. I find that it would have taken a little time to consider this. Dismissal was first considered as an option at the meeting at end of July, which is when the respondent was told that the consultant appointment had been moved to October. If find that it would have been reasonable to hold another meeting at the end of August after exploring possibilities with the claimant and his surgeon of getting an earlier appointment, but I find that, given the covid background, and as set out above, there was no chance that the surgeon would have been able to see him earlier than October. In the absence of even getting a prognosis until nine months after the injury, with the possibility of further surgery, I find that it was inevitable that the respondent would have reached the decision to dismiss at the end of August.

54. On this basis the claimant is entitled to a basic award but any compensatory award is limited to a period of one month.

Compensation

55. The parties agreed that the basic award was £5930.50 and I made an award in that amount.

56. In relation to the compensatory award it was agreed that the claimant was on sick pay at the date of termination, and that he had earned in excess of that amount in the first month in new employment starting immediately after his dismissal.

57. The claimant submitted that I should make an award for loss of earnings in any event on the basis that it was just and equitable to do so. I have to make an award that is just and equitable, having regard to the loss sustained by the claimant in consequence of the dismissal. This includes giving credit for any sums earned by way of mitigation, During the relevant period of one month, the claimant sustained no financial loss as a result of the dismissal and I find that it would be just and equitable to make no award for loss of earnings.

58. The parties agreed, and I concur, that it would be appropriate to make an award for loss of statutory rights of £350.

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Employment Judge Buckley

Date 24 March 2021