



EMPLOYMENT TRIBUNALS

Claimant: Mr L Phillips

Respondent: One Housing Group Limited

Heard at: London Central

On: 2 August 2022 and 3 August 2022

Before: Tribunal Judge J E Plowright acting as an Employment Judge

Appearances

For the Claimant: In person

For the Respondent: Miss L Kaye (Counsel)

RESERVED JUDGMENT

1. The claimant's claim for unfair dismissal is dismissed.

REASONS

Claims and Issues

1. The claimant worked for the respondent, One Housing Group Limited, between 03 August 2015 and 12 November 2021, most recently as a Defects Manager. The claimant has brought a claim for unfair dismissal.
2. At the start of the hearing the parties agreed that the issues in the case were as follows:
 - 2.1 Has the respondent proven on the balance of probabilities that the reason for the claimant's dismissal was capability, which is a potentially fair reason for dismissal?

- 2.2 Did the respondent act reasonably having regard to its size and administrative resources in treating capability as a sufficient reason for dismissal?
- 2.3 Did the decision fall within a band of reasonable responses open to a reasonable employer in all the circumstances?
- 2.4 Did the respondent follow a fair procedure?
- 2.5 If not, if the respondent had followed a fair procedure, would the claimant have been dismissed in any event and should compensation be reduced accordingly?

Procedure, documents and evidence heard

3. In terms of documentation, I had before me a bundle of 348 pages. I was also provided with witness statements of the claimant, Anan Varsani, Tessa Barraclough and Mark Jones, an email from Michael Owen, an email from Jim Edwards and text messages between the claimant and Tony Wates.
4. On behalf of the respondent, I heard evidence from Tessa Barraclough (the dismissing officer) and Mark Jones (the appeal chairperson). On behalf of the claimant, I heard evidence from Anan Varsani, Jim Edwards and the claimant. At the end of the evidence, I heard submissions from the claimant and then from Miss Kaye on behalf of the respondent.

Fact-findings

5. On 03 August 2015, the claimant began working for the respondent, One Housing Group Limited, which is a business that manages over 16,000 homes in 26 London boroughs and the surrounding counties.
6. On 01 April 2017, the claimant was appointed to the position of Defects Manager.
7. In 2017, the claimant went on a Development Away Day at a go-karting track, organised by the respondent. There he had an accident and suffered four broken ribs.
8. The claimant subsequently began to suffer from acid reflux. In 2018, the claimant attended hospital and it became clear from a camera survey that he had a hiatus hernia.
9. On 15 January 2020, a clinical report was prepared by Dartford and Gravesham NHS Trust. The claimant had a painful stiff neck and lower back.
10. On 20 January 2021, the claimant was assessed by his doctor as unfit to work from 20 January 2021 until 03 February 2021 because of 'low mood/stress'. No other comments were recorded on the fit note. On the same date, the claimant went on sick leave.

11. On 03 February 2021, the claimant was assessed by his doctor as unfit to work from 03 February 2021 until 01 March 2021 because of 'bilateral herniae – awaiting surgery'. No other comments were recorded on the fit note.
12. On 01 March 2021, the claimant was assessed by his doctor as unfit to work from 01 March 2021 until 05 April 2021 because of 'bilateral hernia – awaiting surgery'. No other comments were recorded on the fit note.
13. On 06 April 2021, the claimant was assessed by his doctor as unfit to work for one month because of 'bilateral hernia, awaiting surgery'. No other comments were recorded on the fit note.
14. On 07 May 2021, the claimant was assessed by his doctor as unfit to work from 06 May 2021 until 05 June 2021 because of 'hiatus hernia'. In the comments section on the fit note, the following was stated:

“Severe dyspepsia, awaiting investigations, awaiting surgery”

15. During this period, the claimant's line manager at that time, Aanan Varsani, kept in regular contact with the claimant to monitor his well-being and to obtain regular updates so that he could inform his line manager at that time, Robert Marcantoni, and the HR department of the claimant's progress.
16. The respondent has a Sickness Absence Policy which states this at section 6:

6.1 Long term sickness is deemed to be one a continuous period of 20 working days or more. The position will be reviewed when considered appropriate and ultimately it may become necessary from a business perspective to consider termination of employment.

6.2 One Housing will review the absence record to assess whether it is sufficient to justify dismissal on the grounds of ill health incapability. It is essential that:

- *up to date medical advice is considered;*
 - *the employee is made aware that termination of employment is a possibility;*
- Consideration is given to whether there are any other jobs that the employee could undertake. Formal meetings will be arranged in line with the Absence Management Procedure (see below). For long term sickness, this may be one formal meeting if a return to work is not considered an option within certain parameters.*

17. The Sickness Absence Policy states this at sections 15 – 17:

15.1 Absence Review Meetings

At either informal or formal absence review meetings managers will:

- *Discuss the sickness absence and investigate the reasons for absence, and any work, welfare or domestic problems that may be an issue;*
- *Raise any management concerns and explain the effect of the absence on work and on colleagues;*
- *Explore different ways in which One Housing may support the individual to return to work or improve attendance, after discussion with the HR Team (e.g.*

adaptations to the work or workplace, specifically addressing disability-related absence and considering reasonable adjustments, where this is relevant);

- *Make the employee aware of the Employee Assistance Programme and support it can provide;*
- *Set standards and targets and arrange to monitor attendance;*
- *Establish whether a referral to Occupational Health is relevant and consider any updates provided by medical practitioner or OH;*
- *If necessary, explain the next stage of the Procedure and specify a review period;*

...

15.3 Formal Action

If the manager continues to have concerns about the employee's attendance, they will need to assess if there are grounds for taking formal action under this procedure. This will normally comprise of three stages:

- *Stage 1: First Absence Review Caution*
- *Stage 2: Final Absence Review Caution*
- *Stage 3: Dismissal or Redeployment*

When a formal meeting is needed, the employee will be informed of the time, date and venue in writing by the Manager and given a minimum of five working days' notice. The invitation letter will confirm that the meeting is being held in line with the Absence Management Procedure and will identify the specific issues and possible consequences. It will also advise the employee of their right to be represented.

15.4 Outcome

The outcome of all formal meetings will be confirmed to the employee in writing within five days of the meeting, and any caution issued will remain on their personal file for a period of six months. The letter will also advise the employee of their right of appeal against the decision. All letters will also detail an appropriate attendance target and clarify that failure to meet that target may lead to further action under the procedure.

15.5 A Stage 3 meeting should be held when the manager has considered the following factors as appropriate:

- *Has the employee failed to achieve an acceptable level of attendance despite formal target setting at a previous stage 1 or 2 Absence Review Meeting?*
- *Have temporary arrangements, such as reasonable adjustments under the Equality Act (e.g. a phased return to work, workstation adjustments, consideration of temporary workload reduction in certain circumstance) failed to facilitate a return to the full requirements of the role within anticipated timeframes?*
- *If redeployment is an option, medical advice must support this and indicate that such a return would lead to a reduction in absence levels.*
- *Is the employee able to be redeployed to a suitable role within a specific timescale?*

- *Is there a prospect of the employee returning to work in the reasonably foreseeable future?*
- *Is the service area unable to keep the employee's role available if the prognosis is that the employee will be unwell for a lengthy amount of time?*

Having reviewed this information, where appropriate a Senior Manager will meet the employee at a Stage 3 meeting to discuss all the options available, before deciding how to proceed. In some circumstances it may be appropriate to implement the procedure at stage 3. In this case the reasons will be fully explained to the employee.

...

17.0 Appeals Process

Appeals should be made in writing within five working days of receipt of the formal meeting outcome and should indicate the specific basis of the appeal. If the employee intends to produce new evidence, then it must be submitted for consideration before the hearing. The grievance procedure should not be used to replace this appeal process. All appeals will be held in line with One Housing's Appeals Procedure, and the decision at this stage will be final. If the employee is appealing against dismissal, the date on which dismissal takes effect will not be delayed pending the outcome of the appeal. However, if the appeal is successful the employee will be reinstated with no loss of continuity of service or pay.

18. After a few months off sick, Robert Marcantoni queried with Anan Varsani, via a telephone conversation, whether the claimant was actually sick and whether there were any changes that could be made. Anan Varsani told Robert Marcantoni that the claimant had provided doctor's notes at regular intervals. The claimant was told about this conversation by Anan Varsani.
19. On 10 May 2021, Anan Varsani emailed Robert Marcantoni stating that the claimant had been signed off sick until 05 June 2021. He noted that the extended period of sick would soon affect the claimant's salary and enquired whether there was anything they could do to support him to minimize the impact of the reduced salary.
20. On 11 May 2021, Asmeret Haile (HR Advisor at that time) wrote to the claimant to invite him to a stage 1 absence review meeting. The claimant was sent a copy of the respondent's Sickness Absence Management Policy & Procedure. By this time, the claimant had been absent from work for a period of 100 days.
21. On 12 May 2021, Robert Marcantoni, emailed Asmeret Haile and stated this:
"...I don't doubt he is awaiting a hospital appointment, but not completely convinced he is unable to do any work from home etc., though happy to be corrected."
22. On 20 May 2021, a stage 1 absence review meeting took place. Present at that meeting were the claimant, Anan Varsani, who chaired the meeting, and Asmeret Haile. During that meeting, the claimant explained that he was acting on the medical advice of his GP and therefore there was no recommendation or

adjustment that could currently be put in place. He said that under his GP's recommendation he is to be signed off until he gets a date for his surgery. He said that, as a result of other colleagues being furloughed, he had taken on more workload than usual which caused him stress and one of the triggers for stress is acid reflux. He also said that he should have been placed on furlough as he was over 50 years old and asthmatic. He asked what the criteria for furlough were.

23. On 26 May 2021, Asmeret Haile emailed the claimant setting out the categories for the furlough scheme. Attached to the email was an outcome letter prepared by Aanan Varsani who stated that the claimant would be issued with a first absence review caution. He set the claimant an attendance target of no further periods of absence within the three month period following the claimant's return to work, which was anticipated to be 05 June 2021, although that date was to be reviewed on the receipt of medical advice. That letter also explained to the claimant that he had a right to appeal that decision. He did not exercise his right of appeal.
24. On 26 May 2021, the claimant emailed Asmeret Haile stating that he put part of his condition down to the enormous stress that he encountered throughout lockdown in carrying out others' works whilst suffering from health conditions. He goes on to state that he was instructed by the respondent not to inform any residents of the failings at Thomas Road whereas he was led to believe at times that the building was unsafe which gave him many sleepless nights. He says that the respondent sold many of these apartments with the structural damage and that the respondent was aware of the structural damage 10 months before sharing with him.
25. On 04 June 2021, Asmeret Haile emailed the claimant asking him if he would like to take that forward as a complaint. The claimant replied saying that this was for her information only.
26. On 05 June 2021, the claimant did not return to work.
27. On 07 June 2021, the claimant was assessed by his doctor as unfit to work from 05 June 2021 until 05 July 2021 because of 'hiatus hernia; awaiting specialist review; work-related stress'. No other comments were recorded on the fit note.
28. On 08 June 2021, Asmeret Haile emailed the claimant to say that the respondent would like to make an occupational health referral. The claimant replied to that email stating that he had supplied the respondent with his own doctor's report and a surgeon's report (although I note that a written report had not been provided, the claimant had relayed his understanding of the position at the meeting on 20 May 2021). The claimant also wanted to know amongst other things why he had been refused furlough and whether the respondent was aware of the structural issues at Thomas Road prior to completion.
29. On 11 June 2021, Asmeret Haile replied to the claimant's email answering some of his questions but pointing out that in respect of others, which related to operational issues, he would need to speak to his manager.
30. By this time, Aanan Varsani had left the company and the claimant's new line manager became Tessa Barraclough.

31. On 17 June 2021, the claimant emailed Asmeret Hailie stating that that he did not understand why he was refused furlough when he was suffering from ill-health and being within a government high risk category. He said that his legal adviser was requesting this from him. He also asked Asmeret Haile to advise on the process for constructive dismissal.
32. On 18 June 2021, Asmeret Haile replied to the claimant's email setting out the respondent's position in relation to furlough, noting that the claimant had been able to work remotely since the beginning of the pandemic up until the start of his sick leave. Asmeret Haile explained that the respondent wanted to help the claimant back to work but that he had not been able to provide any suggestions other than furlough. It was explained that the purpose of the occupational health report was so that the respondent could better understand the claimant's current condition and prognosis. The report would also include an assessment of the likelihood of continued absence from work and explore any further adjustments that had not already been suggested.
33. On 24 June 2021, Asmeret Haile sent the claimant an email suggesting that they meet with Tessa Barraclough to deal with the operational questions that he had raised in his email dated 08 June 2021. On the same date, the claimant declined to take up that offer.
34. On 05 July 2021, the claimant emailed Asmeret Haile, stating that he had still not received answers to the questions he had asked. Asmeret Haile replied stating that it would be best to organise a meeting with Tessa Barraclough. The claimant replied saying that he was signed off with stress related issues due to the respondent's policy and working practices which had impacted his mental state and general health and that he was surprised HR wanted him to engage with management directly.
35. On the same date, 05 July 2021, the claimant was assessed by his doctor as unfit to work from 05 July 2021 until 03 August 2021, because of 'hiatus hernia'. In the comments section, the following is stated:

"awaiting specialist review of hernia, work-related stress"
36. On 16 July 2021, Asmeret Haile emailed the claimant to say that they had been informed by occupational health that he did not want to go ahead with the consultation. The respondent replied disputing this, requesting that false claims not be made and that the email would be saved and sent to his advisor. There was further email correspondence about this. The claimant maintained that he was not being obstructive and asked if it would help if his solicitor wrote a letter. Ultimately, an appointment was made for the claimant to see occupational health on 03 August 2021.
37. On 02 August 2021, the respondent stopped paying the claimant Statutory Sick Pay due to the length of his absence from work.
38. On 03 August 2021, the claimant was assessed by his doctor as unfit to work from 03 August 2021 until 03 September 2021, because of 'hiatus hernia, stress'. No other comments were recorded on the fit note.

39. On 03 August 2021, An occupational health report was prepared in respect of the claimant. In that report, Dr Rehman recorded that the claimant was suffering from reactive depression and situational anxiety related to difficulties that he had experienced at work, primarily related to the volume of work he had and his relationship with hierarchical superiors. Dr Rehman advised that there was no specific adjustment required for his hiatus hernia but suggested the following adjustments due to his symptoms of anxiety and depression:

- Initial meeting in a neutral environment
- Specific line managers that he has issues with not to be present
- To be provided with a written list of the questions that are going to be explored prior to any meeting, to give him time to think of his answers
- The chance of an initial exchange of written representations prior to any meeting
- An agreement to keep meetings to a limited period of time, e.g. 60 to 90 minutes
- To allow Mr Phillips to be accompanied at a meeting by somebody (who will not take part in any discussions).

Dr Rehman also suggested that the claimant be invited to take part in a problem resolving meeting to determine how to deal with his workplace issues.

40. The occupational health report also contained an addendum in the form of an email from the claimant dated 03 August 2021 which stated :

'Also, can it please be noted in the report that my role is NOT office based and I'm not prepared to have my role changed to suit my condition or to suit OHG.'

41. On 03 August 2021, Asmeret Haile wrote to the claimant to invite him to a stage 2 absence review meeting. By this time, the claimant had been absent from work for a period of 162 days. The claimant replied stating that he would inform his advisor. He sent a follow up email on 04 August 2021 stating that he was happy to attend the meeting but did not want for his medical issues to be shared. He went on to say that his doctor was still of the opinion that he was not fit to return to work and any pressure from the respondent to get him to return to work would result in the meeting being terminated.

42. On 10 August 2021, a stage 2 absence review meeting took place. The claimant was in attendance along with Tessa Barraclough (the claimant's line manager) and Asmeret Haile. During this meeting the claimant refused to share the occupational health report with Tessa Barraclough, although he stated that the recommendation part of the report could be read. He said that he was going along with what the respondent proposed but that he was exploring the option of constructive dismissal where he dismisses himself and goes to an industrial tribunal. He said that he had been asked to cover things up which he thought was not right. Tessa Barraclough asked him if there were any recommendations by his GP and occupational health to support lower stress. He was also asked what support the respondent could provide him to improve his attendance and whether there were any reasonable adjustments that could be made to support his return to work. He said that returning to work would increase his stress levels, that he had asked to be furloughed and said he was given more work on top of his usual work. Tessa Barraclough asked him if he would consider a

phased return or reducing his hours to support him back into work. He said that he did not know. He said that he did not want his role to change to accommodate the condition that he has, that he is a defects manager and nothing else. He said that if the respondent was going to dismiss him he would dismiss himself and claim constructive dismissal

43. On 19 August 2021, Tessa Barraclough wrote to the claimant. In her letter, she summarised what had been discussed at the stage 2 absence review meeting. She confirmed that it was her decision that the claimant be issued with a final absence review caution. She explained that this was because the claimant continued to be absent on a significant period of long-term sickness absence and that there was no indication of the claimant's likely return to work or an indication that he would be able to sustain an acceptable level of attendance on any return to work. She explained that she was setting the claimant an attendance target of no further periods of absence in excess of 10 working days within the 3-month period following the claimant's return to work. She explained that the claimant had the right to appeal her decision and that a failure to meet the target set could result on progression to the next stage of the respondent's formal absence review process. She explained that she had noted that the claimant had raised concerns during their meeting about building defects. She explained that if the claimant had genuine concerns related to suspected wrongdoing or danger affecting any of the respondent's activities, he should report it under the whistleblowing policy which she attached and also asked him to share the images of building defects that he had mentioned during their meeting.
44. On 19 August 2021, the claimant wrote to Asmeret Haile stating that it may now be necessary for him to consider constructive dismissal. He said that this would enable him to bring his case to the industrial tribunal and allow him to provide evidence of his concerns in the best interests of the public. He asked for advice on the full process and also for advice on any payments owed to him such as holiday pay.
45. On 20 August 2021, the claimant wrote to Asmeret Haile asking how much holiday pay he was owed and the process for constructive dismissal. He said that he had taken legal advice. He said that the respondent would not be obtaining information he has on issues already discussed and asked that he stop being referred to the whistleblower's process. He said that his legal advisor had pointed out that his request should be answered before he decided on action via an industrial tribunal.
46. On 23 August 2021, Asmeret Haile replied to the claimant outlining his holiday pay and stated that if he planned to resign, he should provide Tessa Barraclough with his resignation letter. The claimant replied on the same date stating that his solicitor needed to know the point of contact for the industrial tribunal action. He also asked whether his holiday pay would be paid in full if he terminated his contract on constructive dismissal grounds.
47. The claimant did not appeal the final absence review caution.
48. On 03 September 2021, the claimant was assessed by his doctor as unfit to work for one month because of 'hiatus hernia'. No other comments were recorded on the fit note.

49. On 17 September 2021, Warwick Clarke (Head of HR), emailed the claimant to advise that Asmeret Haile was no longer working for the respondent. He proposed a meeting with the claimant, himself and Tessa Barraclough to discuss the workplace situation as highlighted in the occupational health report.
50. On 18 September 2021, the claimant replied to that email, stating that pressure had been put on him via the maintenance department to cover up a lack of maintenance which would invalidate latent defects. He asked about his holiday payment if he decided to resign and go public.
51. On 22 September 2021, Warwick Clarke wrote to the claimant, stating that their priority was to support the claimant to return to work. The claimant replied asking whether his holiday pay would be paid in full if he were to resign in January 2022.
52. On 24 September 2021, Warwick Clarke wrote to the claimant, explaining the situation relating to his holiday pay. He advised the claimant that continued sickness absence could ultimately lead to a decision being made over his continuing employment, but that they would explore all options with dismissal being a last resort.
53. On 04 October 2021, the claimant was assessed by his doctor as unfit to work from 03 October 2021 until 03 November 2021 because of 'hiatus hernia'. No other comments were recorded on the fit note.
54. On 08 October 2021, Alina Siddiqi (HR Officer) wrote to the claimant to invite him to an informal meeting to discuss the concerns that he had sent to Warwick Clarke by email on 18 September 2021.
55. On 15 October 2021, an informal meeting took place. Present at that meeting were the claimant, Tessa Barraclough, Warwick Clarke and Alina Siddiqi. The claimant stated that he had been advised only to discuss his health issues and would not be commenting on any issues relating to the respondent. He said that he was not able to elaborate because an investigation outside of the respondent was taking place. Tessa Barraclough asked him to detail the requests by the maintenance division to cover up lack of maintenance. He replied 'no comment'. However, he then did go on to detail various complaints against the maintenance department and suggested that there had been dishonesty on the part of the respondent. However, he refused to name anyone. He stated that his relationship with the respondent was exhausted and broken beyond repair. He said that his health had deteriorated over the last six years and that he did not want to come back, as he also took a 50% pay cut from his previous role to join the respondent company. The claimant stated that his health was suffering, he had asked to be furloughed but that this request had been refused. The claimant said that he was currently speaking with ACAS and that he did not wish for bad publicity should these issues go to tribunal. He stated that he would not be returning to his role on the ground that his role was detrimental to his health. He was asked if he could provide any details in terms of a resolution and he replied that if the respondent let him go and paid him off, the problem would not be dealt with. Warwick Clarke told him that the focus was on supporting him back to work.

56. On 27 October 2021, Tessa Barraclough wrote to the claimant. In that letter she said that she was keen to build an atmosphere of trust which included responding to any pressures put on the claimant. She said that they would be looking at service improvements based on what the claimant had said. She said that, whilst she could not speak for the past, she would not be putting any pressure on the claimant. She also said that she wanted to improve the latent defect process. She proposed a phased return to work, gradually increasing the claimant's hours and days per week. She suggested that the claimant could use his non-working days as annual leave to help with his financial situation. She suggested that, although the team were working 40% in the office, that could be adjusted for the claimant at first to support his return to work. She also explained that a stage 3 absence review would be arranged for the claimant when they could discuss these proposed adjustments.
57. On 28 October 2021, the claimant emailed Tessa Barraclough, stating that her email ignored all the concerns he had raised such as mental stress and unethical practices. He said that he would no longer be participating in the respondent's process for dismissal and that his continuing interaction with the respondent was making him anxious and causing him great stress. He asked to be advised who his legal advisors should contact, along with the press office details, if he were dismissed.
58. On 01 November 2021, Alina Siddiqi emailed the claimant to say that it was not their intention to cause him stress. Alina Siddiqi encouraged him to attend the meeting which was scheduled for 03 November 2021 or alternatively if he chose not to attend, to submit a summary of when he could return to work and gave him the option of asking a colleague or a trade union representative to attend on his behalf.
59. On 02 November 2021, Alina Siddiqi emailed the claimant, again noting that he had indicated that he would not attend the stage 3 absence meeting but went on to ask whether he would like the meeting to be rescheduled because he had said that he had a hospital consultation on 03 November 2021. The claimant replied to this email stating that in his opinion the respondent's actions were unacceptable, that they should do as they pleased in his absence and that he would deal with 'this appalling fiasco' once they had come to a decision.
60. On 03 November 2021, the stage 3 absence meeting went ahead in the absence of the claimant. Present at the meeting were Tessa Barraclough, Warwick Clarke and Alina Siddiqi. A full note of the meeting was prepared by Alina Siddiqi. After the meeting took place, Alina Siddiqi emailed the claimant to explain that the meeting had gone ahead in his absence and asked if the claimant would like to provide the respondent with a current update regarding his condition before an outcome was reached. The claimant replied to this email stating that his GP had advised him he was not fit for the role, that the respondent had placed him under undue pressure which caused him great stress and that cause of his illness was the injury he had whilst working for the respondent. He also suggested that 'perhaps' the only fair outcome would have to be decided by an industrial tribunal.
61. On 12 November 2021, Tessa Barraclough wrote to the claimant. She explained that she was satisfied that the claimant had been given the opportunity to attend

the meeting or alternatively to provide written submissions for consideration at the meeting and that he was aware that the meeting would go ahead in his absence if he did not attend. She summarised the sickness absence process carried out to date. She said that she had previously suggested implementing adjustments to facilitate the claimant returning to work. She said that she had discussed the recommendations set out in the occupational health report with the claimant but that he did not wish to engage in any further process or return to work. She explained that the claimant's absence from work had continued to increase without signs of improvement. She said that she did not think that redeployment to another suitable role was a viable option because the claimant had confirmed that he did not wish to engage in the process any further. She stated that it was reasonable to conclude that the claimant would not return to work in the foreseeable future or undertake his duties on an ongoing and sustainable basis. She said that his employment would be terminated as of 12 November 2021. She said that the claimant had the right to appeal that decision.

62. On 19 November 2021, the claimant emailed Warwick Clarke explaining that he believe the decision was incorrect for the following reasons. He was waiting for an operation; he had suffered a work-related accident which he did not believe had been investigated; the respondent had not taken into account NHS delays; the respondent had ignored medical advice; he had raised a number of concerns about building safety and he had seen no evidence that these issues had been investigated.
63. On 19 November 2021, the claimant sent further emails to Warwick Clarke with attached photographs of the respondent's schemes and other documents. The claimant explained that he felt the things he was asked to do had contributed to his illness and he wished to know whether this evidence had been taken into account by the respondent before his dismissal.
64. On 19 November 2021, Warwick Clarke emailed the claimant to state that the claimant's email would be treated as his grounds of appeal.
65. The respondent's Appeals Procedure Policy states the following at section 1.3:

1.3 An appeal hearing will take place as soon as is reasonably practicable, but usually within 10 working days of receipt of the request, subject to the availability of an appropriate manager. The manager hearing the appeal will normally be more senior than the one who made the original decision and will have no previous involvement in the case. The employee will be invited to attend in writing and will be advised of their right to be accompanied, by a work colleague or a union representative.

1.6 The appeal hearing will generally follow the format outlined below: The Chair will ensure that the employee is aware of their right to be accompanied and confirm whether they have chosen to exercise this right.

The employee, or their representative, will present their appeal including any relevant evidence. The Chair may ask questions of the employee.

The original hearing manager will then explain why they came to their decision, using relevant evidence. The Chair may ask questions of the manager, following

which the employee or their representative may ask questions. Both parties will have the opportunity to sum up their case

66. On 10 December 2021 an appeal hearing took place. Present at the meeting were the claimant, Mark Jones (Appeal Chairman), Tessa Barraclough, Hilary Judge (Head of HR) and Alina Siddiqi.
67. On 17 December 2021, Mark Jones wrote to the claimant. He said that consideration had been given to the fact that the claimant was waiting for an operation and that the respondent was obliged to consider and propose reasonable adjustments to support the claimant back to work but the claimant had made it clear that there were no reasonable adjustments that he would be prepared to consider. The claimant had been absent due to sickness since 20 January 2021 which he acknowledged was very unfortunate in light of the pandemic and the impact on the NHS but the claimant had not been able to perform his duties from this date notwithstanding that adjustments had been proposed by the respondent. He was not in a position to assess whether there was a link between the go karting incident in 2017 and the claimant's current absence and noted that the occupational health report did not comment on this. He said that the claimant had been absent from work since 20 January 2021 and this was the focus of the current absence process. The claimant had refused to agree to desk-based work, explore reasonable adjustments and confirmed that his operation date was unknown. The claimant had confirmed during the appeal hearing that there were no reasonable adjustments which could support his condition, and that medical advice he had received would supersede any other advice that could be offered to him regarding returning to work. Mark Jones's view was that the respondent could not continue to employ the claimant indefinitely, especially considering he had said, on more than one occasion, the situation was untenable and that he had no inclination or desire to return to his current role. During the course of the sickness absence process, ways in which to support the claimant returning to work were discussed, such as implementing a phased return and potential desk-based duty, which would require less physical strain. The claimant had also been assured that his stressors would be addressed and would not occur again. The occupational health report suggested a problem solving meeting with the claimant's line manager to discuss ways to resolve his concerns about his workload but the claimant did not wish to engage in this discussion and refused to consider any alternatives or ways in which the respondent could support him. He said that the respondent had addressed the stress issues raised in the claimant's fit notes. The claimant's concerns about being asked to act dishonestly were not part of the decision to terminate his contract of employment. Tessa Barraclough had assured the claimant that under her line management he would not have been asked to carry out any duties outside of the formal and approved processes. The claimant had been advised and encouraged to raise any concerns he had formally and had been provided with a copy of the respondent's 'Whistleblowing and Raising Concerns at Work Policy' and signposted to the respondent's governance and compliance team to raise any concerns. He said that he was satisfied the issues raised by the claimant did not contribute to Tessa Barraclough's decision to terminate his employment. The decision to terminate the claimant's employment was upheld. There was no further right of appeal.

68. Following a period of early conciliation, the claimant lodged his claim form on 22 February 2022.

The Law

69. What was the principal reason for the claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996? There is no dispute that the principal reason for the claimant's dismissal was capability and that this is a potentially fair reason for dismissal.
70. Was the dismissal fair or unfair within section 98(4), and, in particular, did the respondent in all respects act within the band of reasonable responses?
71. The determination of the question whether the dismissal was fair or unfair (having regard to the reasons shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating as sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.
72. In DB Schenker Rail (UK) Limited v Doolan (2010) UKEAT-0053-09, the EAT observed that in respect of ill health capability dismissals the respondent must show that it had a genuine belief that ill health capability was the reason for dismissal; it had reasonable grounds for its belief; it carried out a reasonable investigation.
73. Where an employee has been absent long term, the tribunal must also consider whether the employer can be expected to wait longer for the employee to return (Spencer v Paragon Wallpapers Limited (1977) ICR 301).
74. In the case of McAdie v Royal Bank of Scotland [2008] ICR 1087 CA, it was decided that an employer could fairly dismiss an employee for ill-health capability despite the fact that the employee's stress-related illness was attributed to the conduct of the employer. Although the cause of the employee's incapability is a relevant factor for the tribunal to consider when determining whether or not a dismissal is fair, the key issue is whether the employer acted reasonably in all the circumstances, which include the fact that the employer was responsible for the ill-health. In that case, the employee made it clear that she would not consider returning to work (and medical evidence supported this). In reality, there was no alternative to dismissal. However, the Court of Appeal agreed with the EAT that where the employer is responsible for the employee's ill-health, it should normally make more effort to find alternative employment for the employee or put up with a longer period of sickness absence than would otherwise be reasonable.
75. In the case of BS v Dundee City Council (2014) IRLR 131 CS, as applied in Monmouthshire County Council v Harris (2015) UKEAT/0010/15/DA, the following was stated at paragraph 27:

"27. ... 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 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."

76. If a dismissal is unfair due to procedural failings 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

77. It is not disputed between the parties that the reason for the claimant's dismissal relates to his capability, assessed by reference to his health. This is a potentially fair reason for dismissal.
78. In determining whether his dismissal was unfair I must go on to consider whether the respondent acted within the range of reasonable responses. Relevant to this is whether the respondent could be expected to have waited longer before dismissing the claimant and whether there was a fair and reasonable investigation.
79. The claimant went on sick leave on 20 January 2021. At that time, the fit note the claimant provided to the respondent stated that he was unfit for work owing to low mood/stress. Over the following months, the fit notes provided by the claimant to the respondent indicated that the claimant was not fit for work owing to a combination of his stress, anxiety and his hernia. The claimant was awaiting surgery in respect of his hernia but, owing to issues with the NHS, that surgery was delayed. By the time of his dismissal and to date, that surgery has not taken place.
80. There were a number of work-related issues that contributed to the claimant's stress. Firstly, the claimant maintains that his hernia was caused at go-karting event, organised by the respondent, when he suffered an accident. Secondly, the claimant felt that he ought to have been furloughed by the respondent. Thirdly, the claimant was given additional responsibilities because others were on furlough. Fourthly, the claimant believed that he was being put under pressure to state that properties had latent defects by the maintenance department, when in fact this was not the case.
81. Although the respondent's own sickness absence policy suggests that long term sickness is deemed to be a continuous period of 20 working days or more, no

formal action was taken in respect of the claimant until 11 May 2021 when the claimant was invited to attend a first absence review meeting. That was just under four months after the claimant had gone on sick leave on 20 January 2021.

82. Between 20 January 2020 and 11 May 2021, the claimant's line manager at that time, Aanan Varsani, had kept in regular contact with the claimant to monitor his well-being and to obtain regular updates so that he could inform his line manager at that time, Robert Marcantoni, and the HR department of the claimant's progress.
83. However, during that period of time a telephone conversation took place between Aanan Varsani and Robert Marcantoni, during which Robert Marcantoni queried with Aanan Varsani whether the claimant was actually sick and whether there were any changes that could be made. Aanan Varsani told Robert Marcantoni that the claimant had provided doctor's notes at regular intervals.
84. The claimant was told about this conversation by Aanan Varsani and he felt aggrieved that the genuineness of his illness was being questioned.
85. However, on 12 May 2021, Robert Marcantoni, emailed Asmeret Haile and stated this:

"...I don't doubt he is awaiting a hospital appointment, but not completely convinced he is unable to do any work from home etc., though happy to be corrected."
86. It is clear from the above email that, although Robert Marcantoni was questioning whether the claimant was unable to do any work at home he had not formed a final view on this and was happy to be corrected about this.
87. A stage one absence review meeting then took place on 20 May 2021. During that meeting, the claimant explained that he was acting on the medical advice of his GP and therefore there was no recommendation or adjustment that could currently be put in place. He said that under his GP's recommendation he is to be signed off until he gets a date for his surgery. He said that, as a result of other colleagues being furloughed, he had taken on more workload than usual which caused him stress and one of the triggers for stress is acid reflux. He also said that he should have been placed on furlough as he was over 50 years old and asthmatic. He asked what the criteria for furlough were.
88. In light of what the claimant said at that meeting, the claimant felt that he was unable to return to work and that there were no recommendations or adjustments that could support his return to work. The claimant was also aggrieved that he was not placed on furlough and this sense of grievance became an ongoing issue for the claimant over the following months as evidenced by his repeated reference to explanations for why he was not furloughed, both in email correspondence and at subsequent meetings.
89. After this meeting, on 26 May 2021, the claimant emailed Asmeret Haile stating that he put part of his condition down to the enormous stress that he encountered throughout lockdown in carrying out others' works whilst suffering from health conditions. He then for the first time went on to raise issues of latent defects, which then became an issue that he repeatedly raised in emails and at meetings,

going so far as to suggest, further down the line, that this was a matter of public interest and intimating that the press would become involved. However, although he was repeatedly referred to the respondent's whistleblowing policy, he refused to take this forward as a formal complaint.

90. I find that the claimant did have genuine concerns about the process relating to the identification of latent defects but the respondent company was transparent in the way that they addressed these concerns, wanted to meet with the claimant and repeatedly referred the claimant to their whistleblowing policy.
91. On 17 June 2021, the claimant emailed Asmeret Hailie stating that that he did not understand why he was refused furlough when he was suffering from ill-health and being within a government high risk category. He also said that his legal adviser was requesting this from him. He also asked Asmeret Haile to advise on the process for constructive dismissal. This was the first time that the claimant mentioned having a legal advisor and the first time he asked about constructive dismissal. However, following on from this email, the claimant repeatedly made reference in emails and meetings to his legal advisor and also to the possibility of claiming constructive dismissal.
92. On 02 August 2021, the respondent stopped paying the claimant Statutory Sick Pay due to the length of his absence from work.
93. An occupational health report was prepared in respect of the claimant on 03 August 2021. In that report, Dr Rehman recorded that the claimant was suffering from reactive depression and situational anxiety related to difficulties that he had experienced at work, primarily related to the volume of work he had and his relationship with hierarchical superiors. Dr Rehman advised that there was no specific adjustment required for his hiatus hernia but suggested the following adjustments due to his symptoms of anxiety and depression:
 - Initial meeting in a neutral environment
 - Specific line managers that he has issues with not to be present
 - To be provided with a written list of the questions that are going to be explored prior to any meeting, to give him time to think of his answers
 - The chance of an initial exchange of written representations prior to any meeting
 - An agreement to keep meetings to a limited period of time, e.g. 60 to 90 minutes
 - To allow Mr Phillips to be accompanied at a meeting by somebody (who will not take part in any discussions).

Dr Rehman also suggested that the claimant be invited to take part in a problem resolving meeting to determine how to deal with his workplace issues. However, in an addendum to that report, the claimant stated that his role was not office based and he was not prepared to change his role to suit his condition or to suit the respondent.

94. On 10 August 2021, a stage 2 absence review meeting took place. He was asked if there were any recommendations by his GP and occupational health to support lower stress. He was also asked what support the respondent could provide him to improve his attendance and whether there were any reasonable

adjustments that could be made to support his return to work. The claimant said that returning to work would increase his stress levels, that he had asked to be furloughed and said he was given more work on top of his usual work. He was asked if he would consider a phased return or reducing his hours to support him back into work. He said that he did not know. He said that he did not want his role to change to accommodate the condition that he has, that he is a defects manager and nothing else. It was clear at this stage that the claimant was not going to return to work in the immediate future.

95. On 15 October 2021, an informal meeting took place, as recommended in the occupational health report, to discuss the claimant's workplace issues. During that meeting he stated that his relationship with the respondent was exhausted and broken beyond repair. When he was asked if he could provide any details in terms of a resolution he replied that if the respondent let him go and paid him off, the problem would not be dealt with. However, Warwick Clarke told him that the focus was on supporting him back to work. Even though the claimant was making it clear that his relationship with the respondent was broken beyond repair, the respondent still attempted to find a resolution to the workplace issues that the claimant had experienced. This is evidenced by the email that Tessa Barraclough sent the claimant on 27 October 2021.
96. In that email she explained that she was keen to build an atmosphere of trust which included responding to any pressures put on the claimant. She explained that they would be looking at service improvements based on what the claimant had said. She also explained that, whilst she could not speak for the past, she would not be putting any pressure on the claimant. She also said that she wanted to improve the latent defect process. She proposed a phased return to work, gradually increasing the claimant's hours and days per week. She suggested that the claimant could use his non-working days as annual leave to help with his financial situation. She suggested that, although the team were working 40% in the office, that could be adjusted for the claimant at first to support his return to work. She also explained that a stage 3 absence review would be arranged for the claimant when they could discuss these proposed adjustments.
97. However, on 28 October 2021, the claimant emailed Tessa Barraclough, stating that her email ignored all the concerns he had raised such as mental stress and unethical practices and said that he would no longer be participating in the respondent's process for dismissal.
98. On 03 November 2021, a stage 3 absence meeting went ahead in the absence of the claimant, because he refused to participate. However, a final decision was not made then. After the meeting took place, Alina Siddiqi emailed the claimant to explain that the meeting had gone ahead in his absence and asked if the claimant would like to provide the respondent with a current update regarding his condition before an outcome was reached. The claimant replied to this email stating that his GP had advised him he was not fit for the role, that the respondent had placed him under undue pressure which caused him great stress and that cause of his illness was the injury he had whilst working for the respondent. He also suggested that 'perhaps' the only fair outcome would have to be decided by an industrial tribunal.

99. On 12 November 2021 (almost ten months after the claimant had gone on sick leave on 20 January 2021) Tessa Barraclough wrote to the claimant stating that it was reasonable to conclude that the claimant would not return to work in the foreseeable future or undertake his duties on an ongoing and sustainable basis and explained that his employment would be terminated as of 12 November 2021. She also explained that the claimant had the right to appeal that decision.
100. On 19 November 2021, the claimant emailed Warwick Clarke explaining that he believe the decision was incorrect. That email was treated as his grounds of appeal. On 10 December 2021 an appeal hearing took place and the claimant was present at that meeting. However, on 17 December 2021, Mark Jones wrote to the claimant, addressing all the issues that the claimant had raised and upheld the decision of the respondent to dismiss him.
101. Throughout the whole process, I find that the respondent has at all times acted fairly and reasonably in addressing the claimant's concerns. The respondent sought ways to support the claimant back to work but the difficulty was that, although the claimant's ill-health, owing to his hernia and stress, made it difficult for him to return to work, he refused to consider any suggestions that the respondent suggested to help him to return to work and maintained that he would not work to return because it was detrimental to his health. It is not clear on the medical evidence whether the go karting incident caused his hernia or contributed to his stress. The respondent did everything in its power to look at options to support the claimant back to work. However, the claimant had become bitter by the process, by what he perceived to be the respondent's ill-treatment of him and refused to meaningfully engage with the respondent, in terms of looking for ways that he could return to work.
102. I find that the respondent did take into account both the claimant's physical health and his mental health before finally dismissing the claimant. The respondent did everything in its power to address the workplace stresses that were impacting upon the claimant's mental health causing him depression and anxiety. The respondent did attempt to address the claimant's concerns relating to the procedure regarding latent defects and did suggest ways of reducing the claimant's workload and also suggested a phased return to work. The respondent did take account of the medical evidence and behaved sympathetically to the claimant, even though he made it clear at times that he did not want to engage with the respondent.
103. Ultimately, by 12 November 2021, when the claimant was dismissed, he was not prepared to meaningfully engage with the respondent. There was no prospect whatsoever of him returning to work in the near future and therefore I find that the respondent acted fairly and reasonably by not waiting any longer to dismiss the claimant. At all times the respondent followed their own policies and procedures and acted fairly in the process, through which the claimant eventually came to be dismissed.
104. For these reasons, I find that the claimant was not unfairly dismissed.

Date: 11/08/22

Tribunal Judge J E Plowright acting as an Employment Judge

Sent to the parties on:

12/08/2022

For the Tribunal: