



EMPLOYMENT TRIBUNALS

Claimant: Mr S Barnes

Respondent: Abellio London Ltd

Heard at: London South

On: 26th & 27th July 2022

Before: Employment Judge Reed

Representation

Claimant: In person

Respondent: Ms R Jones, Counsel

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal is not well-founded. The Respondent fairly dismissed the Claimant.
2. The Claimant's complaint of an unauthorised deduction from his wages is not well-founded. This is because it was presented after the statutory time-limit for bringing such a claim.

REASONS

Introduction

1. The Claimant, Mr Barnes, worked for the Respondent, Abellio London Ltd, from 24th February 2014 until he was dismissed on 12th November. When he was dismissed Mr Barnes had been on sick leave since 31st May 2018.
2. He brings two claims: unfair dismissal and unauthorised deduction of wages. The wages relate to 25th, 26th and 27th April 2018. In brief Mr Barnes says that he was available to work on these days and did work on the 27th, but was not paid.

Documents, evidence and procedure

3. I have considered a joint bundle of documents numbers 1 to 204, with some lettered editions. It has been prepared by Abellio. At the beginning of the hearing Mr Barnes explained that he had not anticipated that this was intended to be a joint bundle and he had brought his own documents. We established, however, that the joint bundle included all the documents he wished to refer to
4. Mr Barnes gave evidence in support of his case as did three witnesses from the Respondent. These were Mr McGuinness, who was involved with the grievance lodged by the claimant in relation to his wages, Ms Patel who was the dismissing officer and Ms Murphy who heard the appeal.

Issues for the Tribunal to Decide

5. The relevant issues in this case had been laid out in the Tribunal's case management order, sent to the parties on 27th April 2022. The issues relating to liability were set out as follows:

1. Time limits

1.1. Given the date the claim form was presented and the dates of early conciliation, the complaint about any deduction from wages that happened before 3rd October 2018 may not have been brought in time.

1.2. The Tribunal will decide:

1.2.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made?

1.2.2. If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.2.3. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.2.4. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Unfair dismissal

2.1. What was the reason or principal reason for dismissal? The Respondent says the reason was capability (long term absence) which is a potentially fair reason.

2.2. 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:

2.2.1. The Respondent genuinely believed the Claimant was no longer capable of performing their duties;

2.2.2. The Respondent adequately consulted the Claimant;

- 2.2.3. The Respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;
- 2.2.4. Whether the Respondent could reasonably be expected to wait longer before dismissing the claimant;
- 2.2.5. Dismissal was with the range of reasonable responses

3. Unauthorised deductions

- 3.1. Were the wages paid to the Claimant for the wage period covering 23rd to 27th April 2018 less than the wages he should have been paid?
- 3.2. Was any deduction required or authorised by statute?
- 3.3. Was any deduction required or authorised by a written term of the contract?
- 3.4. Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?
- 3.5. Did the Claimant agree in writing to the deduction before it was made?
- 3.6. How much is the Claimant owed?

Findings of fact

- 6. On the basis of the above evidence I reach the following findings of fact. These findings are reached on the balance of probabilities, that is that they are more likely to have occurred than not.
- 7. Mr Barnes was employed as a driver from 24th February 2014 until 12th of November 2018. He was employed by Abellio London Ltd, a company that operates public transport services.

Mr Barnes's work in April

- 8. Mr Barnes's wages claim is about his work on the 25th, 26th and 27th April 2018.
- 9. On 23rd April 2018 Mr Barnes's contacted Abellio with an issue with the shift he had been assigned for the 24th. He had seen on Dasweb (the computer system used to manage Abellio's rota) that he been assigned an early shift. This was incorrect since he was assigned to the late rota.
- 10. Mr Barnes spoke to one of the Respondent's managers who offered him a replacement shift. Unfortunately, this was for a route that he had not been trained on and so he did not accept it. He was then taken off rota for that day. At the time he was marked absent and not paid. This issue, however, was resolved internally and Abellio agreed that Mr Barnes should have been paid for this day.
- 11. Mr Barnes' shift for the 25th was then cancelled on the Dasweb system on at morning, about four hours before it was due to start. His shifts for the 26th and 27th were cancelled shortly after that.

12. Mr Barnes says that, having seen that his shifts were cancelled, he did not attend work on the 25th. Instead he called his manager Mr Darren Stedman. Mr Barnes says that Mr Stedman told him to attend on the 27th April for route learning. He says that he did so; staying at home on the 25th and 26th as instructed and working on the 27th.
13. Abellio agrees that Mr Barnes did not attend work on the 25th and 26th. They also, however, say that he also did not work on the 27th. Abellio's position is that after his shifts were cancelled on the 24th Mr Barnes did not attend work or make contact with them until he lodged a grievance about his lack of shifts on 27th April 2018.
14. Both parties agree that Mr Barnes was not paid for the 25th, 26th or 27th April.
15. I have not heard evidence from anyone from Abellio with direct knowledge of these events. I have heard from Mr McGuinness, one of Abellio's managers, who dealt with Mr Barnes' grievance appeal in relation to this issue. Abellio's position on these points arise from the conclusions reached during that process. These were primarily based on the Dasweb records, since, by the time the grievance appeal occurred, those who had dealt with the situation at the time had limited recollection of what had happened.
16. On balance I accept Mr Barnes' account of his work from 25th to the 27th April. In particular, I accept that he spoke with Mr Stedman on 25th April and was instructed to come in on the 27th April. He took from this that he should not attend on the 25th and 26th.
17. In reaching this conclusion I rely on the following factors. Mr Barnes was the person most directly concerned with these events from whom I have heard evidence. Further, I note that his grievance refers to attending route learning, which corresponds with his suggestion that this occurred on the 27th April. It seems to me that Mr Barnes would have been unlikely to make such a reference on the same day that he was suggesting that he had been on route training if that was not true. It would have been a direct lie on an issue that, at the time, could have been checked easily and immediately. This convinces me that the Dasweb records were not reliable regarding Mr Barnes's work during this period.
18. Looking at the situation overall I also consider Mr Barnes' account a plausible one. There is no obvious reason why he would fail to attend work or to make enquiries about his missing shifts if he had received no explanation. He was clearly willing and able to raise such issues, as he had done on the 23rd April. I consider that it is more likely that he did not attend because of what he had seen on the Dasweb system and because he had a conversation with Mr Stedman in which he was told to attend on the 27th.

Grievance

19. As noted above, Mr Barnes raised a grievance about his shifts on the 27th of April 2018 (p77).

20. Mr Barnes was invited to a grievance meeting on the 10th of May 2018. Mr Barnes did not attend this meeting and it was rescheduled to 1st of June. Mr Barnes did not attend the rescheduled meeting and a decision was made in his absence.
21. This decision was communicated to Mr Barnes by a letter dated 1st June 2018 (p84). His grievance was rejected because, although the respondent accepted it that there had been confusion over Mr Barnes's shifts, it said that he was at fault in absenting himself from work from 24th of April. It said that he should have attended work to resolve the situation and that, as he had not, he had been marked as absent.

Beginning of sick leave

22. Mr Barnes was placed on sick leave from 31st May 2018. At that stage he was signed off with stress by his doctor (p82A)
23. Mr Barnes sick note was accompanied by a covering letter from his GP. In his evidence and submissions Mr Barnes placed considerable emphasis on this letter. In particular, he points to the closing lines where his doctor writes "please let me know if you need further information". Mr Barnes says this was a clear invitation to enter into dialogue with his GP and to begin a collaborative process of assisting him back to work.
24. Mr Barnes' provided fitness for work statements in relation to all of his sick leave. There is no suggestion that, at any stage, there was any reason for his absence other than genuine ill health or injury.

Welfare meetings

25. While he was off sick, Mr Barnes had a number of welfare meetings with Darren Stedman, his manager. The first of these was on the 28th of June 2018 then there was a following meeting on the 3rd of July 2018 (p85-86 & 88-89).
26. Mr Barnes has suggested that Mr Stedman was not taking notes during these meetings and that therefore the notes provided in the bundle must be fabricated. I do not accept this. This is not a situation in which Mr Stedman or anyone at Abellio would have had any motivation for fabricating notes. Further, although he did not accept that they were accurate there was not substantial challenge to the account of the meeting given in the notes.
27. Discussions focused on Mr Barnes's stress and the difficulties he was having with his interactions with Ibus (which refers to the depot staff who communicated by drivers by radio). Mr Stedman inquired about the sources of stress and asked whether Mr Barnes had sought assistance from counselling. He also gave Mr Barnes the number for a phone counselling service.

Grievance appeal

28. On 5th July 2018 Mr Barnes sent an email regarding his grievance submitted an appeal from his grievance outcome (p90-91). He said that he had been denied a grievance hearing and also challenged the outcome of the grievance. He reiterated his position that he had been available for work or had worked on all relevant days and was therefore entitled to be paid.
29. This appeal was not dealt with in a timely fashion. Mr McGuinness has told me that this was because of an oversight in HR. I accept his evidence on this point. It is a plausible account. The respondent had nothing to gain by ignoring the appeal and it was dealt with promptly when Mr Barnes chased it up later.

Referral to Occupational Health

30. On 12th of July 2018 Mr Stedman referred Mr Barnes to Occupational Health (p92). Mr Barnes was seen by occupational health on the 17th of July 2018 and an occupational health report was produced (p 94).
31. This report focused on Mr Barnes's stress. Broadly, it is optimistic. The doctor noted that Mr Barnes had contacted the telephone counselling service and that this had been helpful. Mr Barnes is reported as describing himself as feeling 'a lot calmer'. The doctor concluded that Mr Barnes did not have an underlying mental health issue and was fully fit for work from a mental health point of view.
32. The report also mentions that Mr Barnes had tightness / pain in his left wrist and this had been troubling him for to the last year. The doctor reported that Mr Barnes said that this was gradually getting worse, but that it was not yet serious enough to prevent him working.
33. The doctor reports a somewhat inconclusive physical examination of Mr Barnes's wrist. When the doctor first examined his hand it shook and trembled. The doctor the reported that this would not be an expected symptom of any underlying wrist problem. When Mr Barnes's grip strength was tested he demonstrated almost no strength in the affected hand. But, when he was asked to make a fist and resist the opening of his fingers, his grip was strong. The report concluded that this inconsistency implied a non-physical reason for the initial inability to grip.
34. At the end of the report the doctors concluded that Mr Barnes was fit to return to work immediately.

Attempt to return to work

35. On the 26th of July 2018 at Mr Barnes had a meeting with his depot manager and one of the health and safety officers for the depot. This was with a view to him returning to work, initially part-time. It was agreed that Mr Barnes would return to work beginning on the 27th of July.
36. Mr Barnes says that on the same day he encountered Mr Stedman in the depot and asked him about his previous grievance hearing. Prompted by this, Mr Stedman went to his office to get the grievance outcome letter for Mr Barnes, which he handed to him.

37. Mr Barnes attended work on the 27th of July 2018. He tells me that prior to beginning his route he observed a notification which indicated that drivers must always have both hands on steering wheel. Mr Barnes was concerned about this because the difficulties with his wrist would mean that he was not always able to keep both hands on the wheel. He says he sought clarification of this from a number of people and received conflicting advice. Ultimately, however, the driving standards manager told him that he was not able to drive and should return home. He was placed back on sick leave.

August welfare appointment

38. There was a further welfare meeting with Mr Stedman on 14th August 2018.

August Occupational Health meeting

39. Mr Barnes attended a further occupational health appointment on 29th August 2018. A report was produced dated 30th of August 2018 (p117-118).

40. The OH doctor reported that Mr Barnes denied that he continued to be absent because of stress.

41. The report records that Mr Barnes has said that the difficulty at that point was his problems with his left wrist and right shoulder, specifically pain and restricted movement. He said that these problems had existed for about two years. He indicated that his wrist was the primary obstacle to him returning to work. He also reported that this had gradually worsened over the last two years, although it had improved in the three weeks before the OH meeting

42. The doctor further explained that the nature of these problems was not clear. The doctor also wrote that Mr Barnes should not return to work until he was able to demonstrate a good range of movement in the wrist which was not impeded by pain. He said that he thought the wrist was likely to prevent Mr Barnes working for 'many months to come' and that there was no prospect of him returning to work in the foreseeable future.

October capability hearing

43. Mr Barnes was invited to a capability hearing scheduled for 2nd October 2018. This was chaired by Urvi Patel, the operations manager of the Walworth depot. Mr Barnes attended with a union representative.

44. Notes of that hearing have been produced (p120-122). I accept these as a broadly accurate account of the meeting.

45. At the meeting Mr Barnes explained that he was due to have further scans on 16th October on base his shoulder and wrist. He also told Ms Patel that he was doing physio for his wrist. He said that it was the problem with his wrist that was preventing him from being able to work.

46. The capability hearing was adjourned so that the situation could be considered when Mr Barnes's upcoming scan results were available.

October Occupational Health appointment

47. Mr Barnes attended a further occupational health appointment on 31st October 2018. A report was produced following that appointment (p 141-142). The doctor reported that Mr Barnes had said that he was off work for two reasons: pain in his wrist and pain in his shoulder. It reported the results of Mr Barnes's recent scans. These were that he had tendonitis in his wrist. He also had inflammation around the shoulder joint, together with age-related degenerative change in the shoulder joint.

48. The report goes on to say that Mr Barnes' GP was potentially referring him for cortisone injections into both the wrist and shoulder. It also reports Mr Barnes as saying that he was worried about the injections and that he would have to consider seriously whether to have them.

49. The report set out two different prognoses depending on whether Mr Barnes had the injections. If he did, the doctor suggested that he might well see an improvement over a small number of weeks which could possibly be sufficient for him to return to work. The doctor noted however that it was possible that Mr Barnes would need to wait weeks for the injections and then further weeks to see if they were effective. The doctor could not however guarantee that the treatment would allow Mr Barnes to return to work, if he did not the doctor suggested symptoms were likely to continue for a very long time.

October grievance appeal meeting

50. There was a grievance appeal meeting on 4th of October between Mr Barnes and Mr McGuinness. Mr Barnes attended with a union representative.

51. Overall the meeting dealt with two matters. First, with Mr Barnes's arguments that he had not been informed of the earlier grievance meeting. Second, with the substance of Mr Barnes's contention that he had been available for work or had worked on the relevant days in April and that he therefore should have been paid.

52. Mr McGuinness told me that he did not reach a conclusion at that meeting because he wished to carry out further investigations. These included speaking to the HR team and speaking to the CDM on duty on 23rd April.

53. Mr McGuinness' decision was sent to Mr Barnes in a letter dated 31st October 2018 (p 139-140). In relation to the 23rd of April pay he concluded that Mr Barnes should have been paid because he had been available for work and the problems with his shift were not of his making. But he rejected the remaining elements of the grievance. He concluded that Mr Barnes had been notified of the meeting but failed to attend. And, in relation to the remaining unpaid days, he concluded that Mr Barnes was at fault for failing to attend work and therefore should not be paid.

54. As I have set out above, I have concluded that Mr McGuinness was wrong in these conclusions. He did not, however, act maliciously or unreasonably. He reached a reasonable conclusion on the basis of the information he had, primarily the Dasweb records.

November capability hearing

55. Mr Barnes's capability hearing was reconvened on 12th of November 2018. The notes of the hearing continue from the previously convened hearing (p122-123). The meeting continued to be chaired by Ms Patel. Mr Barnes attended with his union representative.

56. Mr Barnes was asked for an update on his current position. He confirmed that the way forward appeared to be that he would need cortisone injections. He repeated his statement that he did not like injections, but that appeared to be what he needed.

57. There is a section in the notes where it appears that what is being recorded is Mr Barnes saying 'I don't like injection but I need to disappear now and not to come back'. In her witness statement Ms Patel refers to this. It is possible to read her witness statement as implying that she believed that Mr Barnes would not, or at least might not, have the injections. At one point her evidence, Ms Patel said that she was not sure that Mr Barnes was saying in the capability hearing that he would take the injections.

58. Elsewhere in the notes, however, Mr Barnes is recorded as saying that he intended to take the injections. The notes indicate that he said 'it looks to be way forward to help me' and that, after seeing his doctor, he would have 'some ideas on injection I have to take'.

59. In the letter of dismissal, Ms Patel also records that Mr Barnes had said that he did not want to have injections, but would do so if necessary.

60. In my view, this is important because it might well have been unfair to dismiss Mr Barnes on the basis of a belief that he was refusing or likely to refuse treatment if that belief was not reasonable – or if his intentions had not been properly investigated.

61. I do not think that Mr Barnes said anything about refusing treatment at the capability meeting. He did say that he did not like needles. But there is a clear note, on two separate occasions in the meeting, that he intended to have injections if his doctor recommended them.

62. Conversely the note about disappearing makes little sense in context – there was no suggestion that Mr Barnes would need to disappear in order to avoid treatment. It also seems to me to be an unlikely thing for an employee to say during a capability meeting. It would inevitably raise doubts about how quickly they could return to work in a situation where that was plainly to their disadvantage. Further, if an employee did appear to say something to this effect, I would expect a manager to follow up with more questions. Both because it would be a surprising thing for an employee in that situation to say and since, if it was true, it would be significant to their decision. There is no

such follow up from Ms Patel, which, in my view, makes it less likely that Ms Barnes did suggest he might refuse the injections.

63. On balance, therefore, Mr Barnes did not indicate that he might not have the injections. It might be that he was referring to the need to make his pain disappear, so that he could return to work. In any event, whatever was said was noted down incorrectly or incompletely. Such mistakes do, inevitably, sometimes happen when notes are taken during a meeting.
64. I turn then to consider what Ms Patel understood at the relevant time. Her oral evidence to me would suggest that she did think that Mr Barnes might refuse treatment. Considering all the evidence, however, I have concluded that at the time she did not think this. She correctly understood that Mr Barnes intended to have the injections and made her decision on that basis.
65. In part this is because I have concluded that Mr Barnes did not say that he might refuse treatment and made a number of statements to the contrary. In addition, if Ms Patel had believed that Mr Barnes was refusing or likely to refuse treatment, this would most likely have appeared prominently in the letter of dismissal – since it would have been likely to form an important part of her thinking. Its absence is therefore significant. So is Ms Patel's written account in the letter setting out that Mr Barnes, while reluctant, intended to have the injections. In my view, this contemporaneous evidence is more likely to reflect Ms Patel's thought process at the time, than Ms Patel's recollection at a hearing after significant time has passed.
66. Ms Patel asked whether Mr Barnes could say when he would be able to resume driving duties. He said start he was expecting to see his doctor shortly and would have some idea then. Mr Barnes accepted that, at that time, he was not able to drive normally. He did, however, suggest that he would be able to drive safely if he was permitted to use a steering knob, attached to the wheel, which would allow him to steer one handed.
67. This arose out of a suggestion by Mr Barnes' union representative that such a device might be a reasonable adjustment that would allow Mr Barnes to drive safely. He had made enquires with the Driver & Vehicle Standards Agency about their view of such devices (p126). The DVSA had replied saying that they did not condone them, because of the risk of damage to the steering wheel (p125). Ms Patel said that this would not be permitted.
68. Finally, there was also discussion of whether Mr Barnes was able to return to do light duties, with Mr Barnes saying that he would be fit and willing to do such duties.
69. The hearing was then adjourned at approximately 3:30 PM. During this adjournment Ms Patel contacted managers asking whether they had light duties available for a driver who had been on long term sick. The responses were negative, with managers indicating that no light work was available.
70. To put this in context, it is useful to set out briefly what Mr Barnes and Abellio meant by light duties. Within Abellio 'light duties' was used to refer to temporary duties than might be done by someone unable to drive, such as stuffing envelopes, carrying out licence checks or other administrative duties. The

availability of such work has to be understood in the context of Abellio's business and staffing structure. Abellio employed approximately 2,500 people. Approximately 2,200 were drivers. Of the remainder 100 were engineers, 100 worked in Head Office and 100 held other operation roles. The vast majority of potential roles, therefore, were for drivers. Mr Barnes accepted in his evidence that he did not have the necessary qualifications or experience to take on an engineering job.

71. All of this arises from the nature of Abellio's business. The vast majority of its work was concerned directly with the driving or maintenance of its fleet, with limited other activity. It was not an organisation which was carrying out substantial other work, where Mr Barnes might have been likely to find a useful role while his wrist recovered. Such work did arise, but was uncommon and short term. This was, inevitably, part of Ms Patel's thinking as she considered how to proceed.
72. In his evidence, Mr Barnes accepted that he had no reason to doubt Ms Patel's evidence that there was no light work available when she made investigations. He explained that he thought that it was unfair that enquires had not been made earlier.
73. In response to questions on this point during her evidence Ms Patel said that it was not until the sick note dated 26th October 2018 that any mention of light duties had been made (p132). The sick note comments 'Advised light duties. Not to drive. More paper based and administrative work for the next eight weeks'.
74. At approximately 5:30 PM the meeting reconvened and Mr Barnes was dismissed. A letter of dismissal was sent on 13th of November 2018 by Ms Patel (p152-153).

Appeal meeting

75. On 12th November 2018 Mr Barnes' union representative sent an e-mail appealing the decision (p151). In particular this referred to the decision by Ms Patel to reject the suggestion of using a steering knob.
76. An appeal hearing took place on 10th December 2018. It was chaired by Lorna Murphy, Operations Director at the Walworth depot. Mr Barnes attended with his union representative. Notes of the appeal meeting have been provided in the bundle (p120-123).
77. During the appeal Mr Barnes presented two main arguments. First, he said that Dave responded should have spoken to his GP and referred to the letter that had been sent in May 2018. Second, he said that he should be allowed to use a steering knob. Both of these arguments were rejected by Ms Murphy who upheld the decision to dismiss.

The law

Unfair Dismissal

78. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996 (ERA 1996). Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a potentially fair reason falling within subsection (2). There is no dispute in this case that the reason for dismissal was capability, which is a potentially fair reason.
79. If dismissal is for a potentially fair reason, then the Tribunal must consider whether in all 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 (s 98(4)(a)). The question of fairness is to be determined in accordance with equity and the substantial merits of the case (s 98(4)(b)). At this stage, neither party bears the burden of proof, it is neutral: *Boys and Girls Welfare Society v McDonald* [1997] ICR 693.
80. The Tribunal must not substitute its own view for that of the employer, but must consider whether the employer's actions were (in all respects, including as to procedure and the decision to dismiss) within the range of reasonable responses open to the employer: *BHS Ltd v Burchell* [1980] ICR 303 and *Sainsbury's Supermarkets Ltd v Hitt* [2003] ICR 111. This means that I must not ask myself whether I would have dismissed the Claimant, but instead whether what the Respondent has acted in a way that a reasonable employer might have acted.
81. In a capability dismissal this question should be considered in light of all the relevant circumstances, including the nature of the illness and the job, the needs and resources of the employer, the likely duration of the illness, length of service and the possibility of alternative employment.
82. I remind myself, however, that there is no requirement that an employer create an alternative post for an employee if one is not available: *Taylorplan Catering (Scotland) Ltd v McInally* [1980] IRLR 53.

Unauthorised deductions from wages

83. The right not to suffer unauthorised deductions from wages is contained in s13 ERA 1996.
84. The time limit for bringing a claim for unauthorised deduction of wages is found at s23 ERA 1996. It requires that a complaint be presented to the Tribunal within three months of the deduction from wages. There are provisions relating to series of deductions, but these are not relevant to this case.
85. If a claim is brought after the statutory time limit in s23 it can only be considered by the Tribunal if time to bring the claim is extended under s23(4). This sets out that time can only be extended if a) it was not reasonably practicable to bring the claim within the three month time-limit and b) that it is presented within a reasonable period of time thereafter.

86. The definition of and approach to the concept of 'reasonably practicability' and extensions of time has been the subject of extensive appellate comment. I have considered in particular the guidance laid down in *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119, which concluded that the concept of 'not reasonably practicable' fell between the extremes of what is physically possible to achieve on the one hand and a simple question of what was reasonable on the other. Rather, I must consider broadly whether it was reasonably feasible to present the claim to the Tribunal within the time limit.
87. Where an employee has worked in accordance with their contract they will be entitled to be paid in accordance with that contract. Where an employee has not worked, but was 'ready, willing and able to work', they will generally also be entitled to be paid, see *North West Anglia NHS Foundation Trust v Gregg* [2019] IRLR 570.

Conclusions

Wages: Time limit

88. The deduction of wages claim relates to wages earned in late April 2018. I have not heard detailed evidence on exactly when wages for that period would have been paid, but it can have been no later than the end of May 2018. Given that the deadline for bringing a claim is three months, to be in time, a claim would have been made on or around the end of August 2018. Since the claim was not brought until 13th March 2019, over six months after that, it is significantly out of time.
89. I must therefore consider whether time should be extended. I begin by considering whether it was reasonably practicable for Mr Barnes to present his wages claim in time. I have concluded that it was.
90. Mr Barnes's explanation for not presenting his claim earlier was that he felt that the claim was in the hands of the Respondent's HR department and that he was waiting for them to sort it out. He said that he was not, at that stage, thinking of bringing a claim. In my view, this is not enough to mean that it was not reasonably practicable to present a claim within time. Mr Barnes does not suggest that he was unaware of the possibility of bringing a claim of some sort. Nor did he suggest that there was any reason he could not make enquiries, either through his trade union or elsewhere about how he might enforce his rights. He was obviously capable of pursuing the matter internally, since he raised a grievance with Abellio at the time the dispute arose and pursued an appeal within the deadline for presenting a claim.
91. Since it was reasonably practicable to present the claim within the statutory time limit I do not extend time.

Wages

92. If the claim had been within time, I would have concluded that the wages Mr Barnes had been paid for the wage period covering 23rd to 27th April 2018 were less than he was entitled to receive. This is because I have concluded a)

that Mr Barnes was willing and available to work on the 25th and 26th April. He did not do so only because Abellio did not provide him with shifts as detailed above. He then did work on the 27th April. Since he was not paid for the 25th, 26th or 27th there was a shortfall in his wages.

93. Since, however, I have concluded that this part of the claim is out of time and that time should not be extended, I must dismiss the wages claim.

Unfair dismissal

94. Both Mr Barnes and the Respondent agree is that the reason for dismissal was capability, specifically the injuries to Mr Barnes's wrist that meant that he was not able to drive with both of his hands consistently on the wheel.

95. Mr Barnes also accepts that at the time of dismissal he was not able to drive safely, without use of the steering knob that Abellio did not permit.

96. I begin by considering whether Abellio acted reasonably in the way that they sought information about Mr Barnes' circumstances, both in terms of seeking information from medical professionals and from himself.

97. I concluded that they did. There were three occupational health reports over the course of approximately three months. These were properly considered both at the capability hearing and the appeal hearing by Ms Patel and Ms Murphy. Overall I find that there was a fair process used to consider Mr Barnes's position. He was provided with both a capability hearing – which was correctly adjourned so that further diagnostic scans could be considered by Occupational Health – and an appeal hearing. Mr Barnes had the opportunity to set out details of his condition and circumstances, both to the OH physicians and to Abellio's managers.

98. Both in the hearing and elsewhere, Mr Barnes has laid considerable emphasis on the respondents failure to speak directly to his GP despite them indicating willingness to be contacted as early as May 2018.

99. I accept that Mr Barnes strongly feels that in failing to take up what he sees as an invitation to work with his GP Abellio has behaved unreasonably. In my view, however, the GP did not suggest that sort of involvement. In writing 'please let me know if you need further information' they intended to do no more than say that they would be willing to respond to a query from Abellio if one was made. It contained no greater suggestion of further involvement than that.

100. In the circumstances of this case, it is also difficult to see what further contact between Mr Barnes's GP and the occupational health physicians could have achieved. The occupational health reports indicate a clear understanding of the circumstances and prognosis at the relevant time. Mr Barnes's has not suggested that his GP's view of his condition would have differed to any significant extent to that of the OH doctors.

101. In relation to the possible adjustment of allowing Mr Barnes to use a steering knob, I have concluded that the respondents decision against this was with a range of reasonable responses. The information available at the relevant

time was that the DVSA did not condone the use of such knobs, because of the risk of damage. That information was provided to them by Mr Barnes and his union representative. I find that it was reasonable for Abellio to accept that the guidance Mr Barnes was putting forward was an accurate account of the DVSA's position and for Abellio to comply with that guidance by refusing to allow Mr Barnes to use a steering knob.

102. In relation to the possibility of light duties it is common ground the first consideration of this was not until 12th November 2018. Mr Barnes accepts that, at that stage, there was no light work to assign him. He argues, however, that such work should have been considered at a much earlier stage.

103. Although I agree that it could have been considered earlier I have concluded that the respondents treatment of light work did not take the dismissal outside the range of reasonable responses. This is for two reasons. First the search for alternative work must be considered in the context of an employer's operations and the likelihood that such work would be available. Although Abellio had 2,500 employees, the vast majority of those were drivers or engineers. Since Mr Barnes's injuries meant that he could not drive and that he did not have the necessary training to take on an engineer role, this left a very small pool of potential work. Second, I have accepted that Mr Barnes did not raise the possibility of light work until shortly before the final capability hearing.

104. Taking these factors together I do not think that it was unreasonable for Abellio not to consider seeking other duties for Mr Barnes at an earlier stage. When told made her decision on the 12th of November 2018 Ms Patel correctly took steps to ascertain whether light duties were available. These were not extensive, but they were a genuine attempt to look for alternative duties and the effort was proportionate to the likelihood that such work was available.

105. Looking to the decision to dismiss on the 12th November 2018, I return to the essential question of whether it was within the range of reasonable responses to dismiss Mr Barnes at that point.

106. At that stage, he had been off sick since the 31st May, nearly six months. For some of that time he had been absent due to stress, rather than his wrist issues. He had, however, been absent with those wrist issues since 26th July, approximately three and a half months at the point of dismissal. At that point, the prognosis was that the earliest he could return to work would be something in the region of four to six weeks (in order to arrange injections and for those injections to take effect). This, however, was not a certainty – treatment might have taken longer to arrange, longer to take effect or not have allowed Mr Barnes to return to work

107. I do consider that, in this context, the decision to dismiss was a relatively severe one. Nothing in the evidence I have heard suggests that there was an urgent business need to replace Mr Barnes that required his dismissal. Another employer might have given him more time to have treatment and to observe its effect. The relevant test is not, however, whether another employer might have acted differently, but whether a reasonable employer might have acted as Abellio did. While I do consider it was on the harsher end of possible outcomes, I consider it was one open to a reasonable employer.

108. I therefore conclude that the dismissal was fair and dismiss the Claimant's claim for unfair dismissal.

Employment Judge Reed

Date: 7th November 2022