EMPLOYMENT TRIBUNALS

Claimant: Mr W Winczewski

Respondent: MAM Transport Services Limited

Heard at: Cambridge Employment Tribunal **On:** 17-19 October 2022

Before: Employment Judge Dobbie, sitting with members Mrs C Smith and Mr J Vaghela

Representation
Claimant: Ms M Wisniewska (HR Consultant)
Respondent: Mr Abdullah (Director)

JUDGMENT having been sent to the parties on 25 November 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION

1. By a claim form presented to the tribunal on 14 June 2021, following ACAS Early Conciliation from 20 May to 7 June 2021, the Claimant brought claims for:
   (a) Unfair dismissal;
   (b) Direct race discrimination (dismissal only);
   (c) Notice pay;
   (d) Holiday pay; and
   (e) Unpaid wages.

2. At the final hearing, the Claimant's representative withdrew the claim for holiday pay and it was dismissed in an associated judgment.

3. The issues were recorded by Employment Judge Anderson in an order sent to the parties on 18 February 2022, following a case management hearing on 8 February 2022. The parties confirmed these were correct at the outset of the final hearing.

4. The final hearing was listed as an in-person hearing, but due to the ill-health of the Respondent's director and witness, Mr Abdullah, the hearing

proceeded (by consent) as a hybrid hearing, with Mr Abdullah and his witnesses participating by video, and all other attendees appearing in Cambridge Employment Tribunal in person.

5. References in square brackets below are to page numbers of the hearing bundle.

FINDINGS OF FACT

6. The Respondent is a distribution company that operates in the UK and Europe. It employs HGV drivers to drive its fleet of vehicles. It is a relatively small company with approximately 10 office-based workers and 45-50 employees in total.

7. On 14 November 2008, the Claimant commenced working for the Respondent as a class 1 HGV driver.

8. In March 2020, the Claimant had 12 weeks off work on statutory sick pay (not furlough) due to the fact that he suffers various conditions that made him more vulnerable to Covid-19 than others not suffering his conditions. However, he did not receive a shielding letter from the NHS and this is why the Respondent says it did not place him on furlough.

9. In or around July 2020, the Claimant returned to work as normal, as lockdown restrictions lifted.

10. Between 20 July 2020 and 10 August 2020, the Claimant had a three-week period of annual leave that had been authorised in January 2020. It is noteworthy that he had originally requested four consecutive weeks' leave but only three weeks had been granted.

11. On 3 August 2020, whilst on leave in Poland, the Claimant suffered a fall and seriously injured his back

12. On 4 August 2020, the Claimant's son, Lukasz Winczewski, informed the Respondent of the Claimant's condition. Lukasz Winczewski sensed distrust from Mumtaz Abdullah (Company Secretary and Key Account Manager) who requested proof of his admission to hospital. We find that at this stage, the Respondent did not trust that the Claimant was being honest about his injury and that the Respondent suspected the Claimant was feigning an injury to ensure he had the full four weeks in Poland that he had originally requested, but which had been partly refused.

13. At some point, the exact date of which is unknown, Lukasz Winczewski provided the Respondent with a copy of the Claimant's hospital admission certificate, in Polish and with a certified translation in English, which stated that the Claimant had been admitted to hospital (Department of Neurosurgery and Neoplasms of the Nervous System) in Lodz, Poland on 4 August 2020.

14. From 20 August 2020 to 18 May 2021, the Claimant provided a series of consecutive fit notes from his UK GP stating he was unfit for work due to a "vertebral fracture". The Claimant was placed on statutory sick pay, from 4

August 2020 until 6 October 2020 (when his entitlement to SSP is said to have expired).

15. On 30 November 2020, Lukasz Winczewski informed the Respondent that the Claimant had suffered a deterioration in his condition and would not be returning to work before early January 2021. On 8 December 2020, Lukasz Winczewski sent the Respondent a fit note covering the Claimant's absence for late Nov 2020 to 9 January 2021.

16. In December 2020, the Claimant underwent further surgery in Poland.

17. On 5 January 2021, Mumtaz Abdullah wrote to Lukasz Winczewski noting that the Claimant was nearing the end of the period he had been signed off sick for in the most recent fit note and requesting a back to work assessment [27]. Lukasz Winczewski replied the same day stating that his father was still unwell in Poland and was due to see a doctor that Friday and he would update her then. Lukasz Winczewski sent her a copy of the hospital discharge note on 5 January 2021. Mumtaz Abdullah replied stating she already had that document and requesting: *“a current report when he visits the doctor on Friday as to his situation going forward. Basically full report on the progress of his operation and recovery.”* No specific questions were provided by her for the Claimant to ask the doctor, nor did she specify a requirement to inform the doctor of anything specific about the Claimant's role or duties [26 and 21b].

18. On 8 January 2021, the Claimant's doctor advised him that he was not fit to return to work because he could not sit for 20 hours to be able to return to the UK (by car).

19. Between 8 and 25 January 2021, Lukasz Winczewski spoke to Mumtaz Abdullah on various occasions. In an email of 25 January 2021, she noted a conversation they had had and continued: *“Once I have either the report from the consultant or your father returns back to the UK then we will arrange our independent doctor to assess him and verify whether he is able to continue with his job.”* [28]

20. Also on 25 January 2021, Lukasz Winczewski replied that he was chasing the report and hoped to have it to her by Thursday that week and that the Claimant will be ready to see Mumtaz Abdullah on 15 February 2021 (on the basis that his most recent fit note expired on 14 February) [29].

21. On 26 January 2021, Lukasz Winczewski forwarded to Mumtaz Abdullah what the Polish doctor had sent to him. The document was in fact a 20-page assessment document, with multiple choice questions, in Polish, not a report [31-50]. That afternoon, Mumtaz Abdullah passed the document by email to Justyna Sodel to translate. In her email she already expressed doubts over the document stating *“Would you be so kind as to translate this attached document and maybe verify its authenticity due to it being a Word document. It's supposed to be a medical report from a consultant.”* [52]. Justyna replied to Mumtaz Abdullah that *“this is a medical test to me, not a report”* and translated part of it [51].

22. On 27 January 2021, Mumtaz Abdullah wrote to Lukasz Winczewski stating the document was not a medical report but a test and that due to this *"I will proceed with further action as to why you have tried to produce false report"* [53]. To this email, she attached excerpts from the Respondent's disciplinary policy highlighting parts of the definition of gross misconduct as including *"Deliberate falsification of records"* and other acts of misconduct [53-54].

23. Lukasz Winczewski replied by email that same day asking Mumtaz Abdulllah to call him. Later that afternoon, Lukasz Winczewski sent to Mumtaz Abdullah a letter, dated 20 January 2021, in Word format said to be from Maciej Kolasa MD from FMC Centrum Medyczne in Lodz. It was unsigned and not on headed paper. It did not have any form of certification or stamp. It provided a brief overview of the Claimant having had surgery on 8 August 2020 and again in December 2020. It concluded by stating *"He does not take painkillers and does not suffer pain anymore. The neurological treatment is finished."* [56].

24. Mumtaz Abdullah replied to Lukasz Winczewski's email that evening challenging the authenticity of the letter and stating *"before you sent me a false report and now you're sending through a non bona fides letter".* In respect of the Claimant's intended return to the UK on or around 15 February 2021, she stated: *"we will assess his condition and notify DVLA as well as our insurance. Sorry but I cannot call you, I am very busy. Just please correspond by email only."* [55].

25. It was clear to the panel that the Respondent lacked trust and confidence in the Claimant by this time. This was evident from the correspondence and also from Mr Abdullah's live evidence to the tribunal. When he was asked: *"the Respondent had the opportunity to ask the Claimant for written consent to contact his doctor?"* he replied: *"We during this process we had many times asked for various bits and pieces from Mr Winczewski but it did not come in the right time and once we received the false file, my confidence was zero in him"*

26. The tribunal noted that it was on this date, 27 January 2021, that the Respondent first mentioned the DVLA and stated *they* would do what was required in respect of the Claimant's licence. In fact, it was the Claimant that had to refer details of his condition to the DVLA and this correspondence from the Respondent could well have misled the Claimant to think that it was being handled by the Respondent and there was nothing for him to do with respect to the DVLA.

27. The Respondent did not at any time specify what questions it would need a doctor to address, nor did the Respondent's managers send a list of questions or required information to the Claimant, his son or any of the medical professional she interacted with for example. The Respondent simply made vague statements such as the report needed to cover *"full report of your father's condition and supporting documents to establish he is fit to drive HGV vehicle"* [55]. The Respondent could easily have specified questions or provided information to pass to the Claimant's doctor about his role. (Indeed the Respondent had a document detailing the requirements of role to hand, which was later sent to the Claimant with

the subsequent dismissal letter when the Respondent expressed doubt as to what had been conveyed to the medical professionals by the Claimant [78-79], about which see below).

28. At 20:09 on 27 January 2021, Lukasz Winczewski sent a signed and stamped (certified) version of the same medical letter (dated 20 January 2021) to the Respondent and gave Mumtaz Abdullah the doctor's contact details stating that the Claimant had given permission to the doctor to speak to the Respondent and noting that he had already supplied her with the doctor's business card. He concluded that the Claimant would be ready to see the Respondent on 15 February 2021 when his most recent fit note expired [55] and [58].

29. On 28 January 2021, Mumtaz Abdullah wrote to Lukasz Winczewski stating: *"We need to assess him before starting any duty of driving as mentioned before. We have to take measures with insurance and DVLA"* [55a]

30. On 3 February 2021, the Claimant returned to the UK. The Respondent and Lukasz Winczewski had agreed for the Claimant to have a test and release, so he did not have to self-isolate for the period that was required by law at this time. They agreed to meet on 4 February at 3pm.

31. The Claimant and Lukasz Winczewski did meet with Mr Abdullah on 4 February 2021 as planned. The Claimant reports that it was a positive meeting in which Mr Abdullah stated he could do shorter domestic routes only, Mr Abdullah said he wanted him back to work and patted him on the back.

32. The Respondent put into evidence a handwritten note that Mr Abdullah says was written after the meeting on the same day. It records:

    "Gross misconduct for providing false documents, he could not provide any explanation, none. Failure to comply with requests regarding what information had been submitted to DVLA in order to comply with insurance and VOSA. In the meeting Wiktor disclosed he didn't have his licence back from DVLA and therefore could not return to work." [61].

33. These notes were never provided to the Claimant or Lukasz Winczewski at the time. In his live evidence to the tribunal, the Claimant said there was no mention of misconduct to him, not at this meeting nor at any time. He maintained it was a favourable and friendly meeting. Lukasz Winczewski also gave evidence to the tribunal that the meeting was pleasant in tone and that these notes did not reflect what was discussed.

34. The tribunal accepted the evidence of the Claimant and Lukasz Winczewski on this matter. We found them to be credible and straightforward witnesses whose answers tended to be consistent with one another, with underlying documents, and internally consistent in that they did not contradict their own evidence. In contrast, we found that Mr Abdullah had no witness to corroborate his account of the meeting of 4 February 2021 (he attended alone). Further, his evidence to the tribunal was at times inconsistent with documentary evidence and he often

contradicted his own answers when giving oral evidence, changing his account. We noted that the hand-written notes were not shown to the Claimant before disclosure and there was no signature on them to verify their accuracy at the time.

35. However, the comment in the note about gross misconduct and falsification of documents further demonstrates that the Respondent did not believe the veracity of the Claimant's account or the reports he had provided and considered he had falsified documents. This demonstrates the lack of trust they had in him at this time. Notwithstanding this, the Respondent did not invite the Claimant to an investigatory meeting or commence any form of disciplinary process. The Respondent did however refer the Claimant to be assessed for fitness by a doctor.

36. On 10 February 2021, Lukasz Winczewski emailed Mumtaz Abdullah chasing the report from the Respondent's doctor and the DVLA. On 11 February 2021, Dr Zohaib Abdula sent an email to Mumtaz Abdullah with subject line "OH advice" and which reported:

> I advise that Mr Winczewski should inform his GP, either by sending a translated discharge letter from his surgeon in Poland or another option is for his GP to refer him to a trauma and orthopedic surgeon to review his progress and a formal letter to his GP to advise if he is fit to work as a haulage driver again. A quicker option would be a private referral via his GP to an orthopaedic surgeon or calling three shires hospital… In my professional opinion as a doctor, I would advise against returning to work until all the above criteria are met." [63]

37. On 12 February 2021, Mumtaz Abdullah wrote to Lukasz Winczewski referring to Dr Abdula's email stating that the Claimant needs to be seen by an orthopaedic surgeon and that the *"GP is not correct to advise as this should come from the orthopaedic consultant"* [64]. In this email to Lukasz Winczewski, Mumtaz Abdullah also stated that the Claimant had to notify the expert that he is an HGV driver, but she did not specify that he had to tell the expert specific details of his duties.

38. On 15 February 2021, the Respondent informed the Claimant that he had to inform the DVLA of his health condition and attached a link to a form for the Claimant to complete [65].

39. On 16 February 2021, the Claimant's GP wrote a letter to the Respondent stating:

> "The letter from neurosurgeon in Poland states healing of vertebrae can be seen and he does not suffer from pain or take painkillers anymore. Mr Winczewski states he is doing well. He is fit to return to work. Please do not hesitate to contact us if required." [66]

40. The Respondent wrote to the GP on 16 February 2021 (erroneously dated 16 January) stating that they need a report from a trauma and orthopaedic surgeon to give an opinion on the Claimant's ability to return to work and gave some details of the role, stating how demanding it was [67]. It would appear from what followed (and from the fact that both parties deny ever having made a referral to Professor Shad) that the GP must have made

this referral after receiving this letter. Indeed, we note that the letter from Prof Shad is addressed to the GP [75].

41. On 13 April 2021, Lukasz Winczewski informed the Respondent that the Claimant had been assessed by telephone but the surgeon wanted to see him face to face [71].

42. On 17 April 2021, the Claimant received a letter from the DVLA which stated that his licence was valid and *"you satisfy the medical standards for safe driving"* [72]. The Claimant provided this to the Respondent on 21 April 2021 [73a].

43. On 27 April 2021, Lukasz Winczewski informed the Respondent by email that after the assessment with the specialist, the Claimant had been cleared to return to work a report would follow [73a]. The Respondent replied stating the report would need to cover *"all I asked for when you send the one from Poland"* and querying what had been said to the expert, stressing how physically demanding the role was. Mumtaz Abdullah also stated they would need to see what the DVLA had been sent by the Claimant (i.e. what information he had provided about his role and his condition) and the reply from the DVLA [73]. Lukasz Winczewski replied stating that the GP had completed the form to send to the DVLA and hence neither he nor the Claimant had a copy, but that they had already provided the reply from the DVLA on 21 April 2021 [73a]. The tribunal noted that neither the Claimant nor Lukasz Winczewski had previously been asked by the Respondent to provide a copy or make a copy of what had been sent to the DVLA.

44. On 28 April 2021, Lukasz Winczewski informed Mumtaz Abdullah that the Claimant was ready to work, and that the Respondent had:
    (1) the DVLA letter (which certified his licence as valid and that he satisfied the medical standards *for safe driving*;
    (2) a letter from his UK GP (which stared he was fit to return to work); and
    (3) Prof Shad had also confirmed his fitness and a report would be received shortly.

45. On about 30 April 2021, the Respondent received a copy of the report from Professor Shad (professor in neuro and spinal surgery) dated 27 April 2021, which stated that the Claimant has sustained an injury in August 2020 and that:

    "I reviewed Wiktor in clinic today, he walked into clinic unaided, on examination he did have normal power in all muscle groups, he was quick to get in and out of the chair. His wound has healed nicely, he did not have any pain…I have explained that he does need to be careful with his posture, and considering his age, I have also explained that removing the metalwork is not the preferred option. He did ask me with regards to returning to work, he works as HGV driver and I am of the opinion that he can return to work, while driving he must be aware of his posture and observing his posture also." [75]

46. On 17 May 2021, without any further meetings or correspondence, the Respondent sent a letter of termination to the Claimant on the basis that

they were not "entirely happy" with the report from Prof Shad. The Respondent stated:

> "After reviewing the letter with our legal advisors, we have grave concerns for you to return to your old job of driving HGV 44 tonne vehicle. This is due to the fact that Prof Shad mentions "while driving he must be aware of his posture and observing his posture also", whereby we are not entirely happy as we have a duty of care for you and have concerns that you would aggravate your injury further. … We have a duty of care, your posture would strain and become compromised from driving time of 9 hours a day with 2 days at 10 hours and the total working time of 12 hours a day with 15 hours twice a week… With experience in HGV 44-tonne vehicle being part of the logistic industry for over 30 years, we requested the specialist medical opinions due to the severity of your injury and we have grave concerns not only for your health but he public at large, if you were involved in a road traffic accident or if your injury was suddenly aggravated whilst driving due to posture movement if you had to suddenly brake, this certainly would intensify your injury further and long term. Regrettably, for reasons given with duty of care in mind, we cannot let you return to your old job. Unfortunately, we have neither any other vacancy to offer in place of driving and sadly we have no alternative but to terminate your employment as of today 17 May 2021. You have right to appeal [77].

47. The letter was signed and sent from Mr Abdullah.

48. The Claimant did appeal, but he subsequently withdrew this. In his evidence to the tribunal he stated he withdrew his appeal because he had no trust and confidence he would get a fair appeal.

49. In his live evidence, Mr Abdullah accepted that he would have heard the appeal because Chris Williamson had passed away and there was no one else to chair it. Mr Abdullah noted he had made the decision to dismiss. He had also been involved in the process of discussing a return to work, including chairing the meeting on 4 February 2021. He also stated that his decision on appeal would possibly have been the same but did not expand on how it might have differed or why.

50. The Respondent did not have an HR department or seek advice from an HR consultant at the material time of the events giving rise to these claims. However, we note from the dismissal letter than the Respondent did obtain legal advice before dismissing the Claimant.

RELEVANT LAW

51. Section 98 of the Employment Rights Act 1996 ("ERA"), states:

98.— General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

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

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do, ...

(3) In subsection (2)(a)—
(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, ...

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

52. In cases of ordinary unfair dismissal, where the employee has at least two years' service, the respondent carries burden of proof in showing the sole or principal reason for dismissal. Then there is a neutral burden on whether the dismissal for that reason was fair or unfair in all the circumstances (Boys and Girls Welfare Society v McDonald [1996] IRLR 129).

53. Following Sainsbury's Supermarket Ltd v Hitt [2003] IRLR 23 and Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, the tribunal is not asked to consider what it might regard as fair, but what a reasonable employer might consider in same circumstances. This is known as the "range of reasonable responses" test.

54. In present case, the Respondent advances capability as the reason. Under s. 98(2)(a) ERA this is a potentially fair reason. Capability here means an employee's capability assessed by reference to skill, aptitude, health or any other physical or mental quality (per section 98(3)(a) ERA).

55. Where the facts of a case fall squarely within one of the section 98(2) ERA reasons, there cannot simultaneously be an SOSR reason, because by definition, SOSR is some *other* substantial reason. In some cases, the reason may appear to fall within one of the section 98(2) ERA reasons, but in fact does not. In Wilson v Post Office [2000] IRLR 834, an employee with a poor absence record (due to genuine ill-health) was dismissed for failure to satisfy the employer's attendance policy. A tribunal found that the reason for dismissal was capability, but the Court of Appeal held that the reason was the employee's failure to meet the requirements of the policy, which was SOSR.

56. In Ridge v HM Land Registry [2014] UKEAT/0485/12, the tribunal found that the dismissal had been for "some other substantial reason", not "capability" as had been asserted by the respondent. The EAT held that

the re-labelling of the reason for dismissal had caused no procedural unfairness or practical difficulty for the parties. The EAT developed the point made in ***Wilson*,** and emphasised that the correct characterisation of the reason for dismissal will depend on what was at the forefront of the employer's mind. If it was the employee's "skill, aptitude, health or any other physical or mental quality", then the reason for dismissal will be capability under section 98(2)(a) ERA. But where the recurring absences themselves are the reason for dismissal (which is not unusual) and an attendance policy has been triggered, the better characterisation may be SOSR.

57. Even where an employer establishes that capability in the form of ill-health is the reason for an employee's dismissal under section 98(1) of ERA 1996 the tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason. This requires consideration of: whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating ill-health as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case. (Section 98(4), ERA 1996.)

58. Case law states that fairness requires the employer to follow a fair procedure. The principles governing procedural fairness in cases of dismissal for genuine ill-health are those established by case law.

59. The leading case on fairness in ill-health dismissals is Lindsey District Council v Daubney [1977] ICR 566 at 571-572). In Daubney, the EAT stated that:

> "Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill-health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done."

60. The following factors are likely to be relevant when considering the reasonableness of the decision to dismiss for capability:
    (a) The nature of the employee's illness.
    (b) The prospects of the employee returning to work and the likelihood of the recurrence of the illness.
    (c) The need for the employer to have someone doing the work.
    (d) The effect of the absences on the rest of the workforce.
    (e) The extent to which the employee was made aware of the position.
    (f) The employee's length of service.
    (g) Whether there are alternative roles available which the employee could do so as to avoid dismissal.

61. Many of these factors were referred to in Lyncock v Cereal Packaging Ltd [1988] ICR 670 which tends to be regarded as the seminal authority on cases involving persistent short-term absences (but which provides helpful guidance for all ill-health dismissals).

62. In cases of misconduct, the test deriving from British Home Stores Ltd v Burchell [1978] IRLR 379 applies, namely:
    (a) Did the employer believe the employee to be guilty of the misconduct?
    (b) Did the employer have reasonable grounds for believing that the employee was guilty of that misconduct?
    (c) At the time it held that belief, had it carried out as much investigation as was reasonable?

63. In DB Schenker Rail (UK) Ltd v Doolan UKEATS/0053/09/BI, the EAT held that the Burchell test for conduct dismissals is applicable to ill-health capability dismissals.

    "Although this was a capability dismissal rather than a conduct dismissal, the Burchell analysis is, nonetheless, relevant because there was an issue as to the sufficiency of the reason for dismissal – a potentially fair reason relating to capability — in this case. Accordingly the Tribunal is required to address three questions, namely whether the Respondent genuinely believed in their stated reason, whether it was a reason reached after a reasonable investigation and whether they had reasonable grounds on which to conclude as they did."

64. The EAT in DB Schenker Rail (UK) Ltd v Doolan [2010] UKEAT/0053/09 noted how easy it can be for tribunals to fall into the substitution mindset in cases of ill-health. Tribunals must guard against being carried along by sympathy for a long-standing employee when their employer has concluded that they are not fit to return to their job. tribunals must, in such circumstances, resist the temptation to test matters according to what they would have decided if they had been in the employer's shoes.

65. The onus is on the employer to take reasonable steps to ascertain the medical position, rather than the onus being on the employee to volunteer medical information (beyond the duty to submit sick notes). In Mitchell v Arkwood Plastics (Engineering) Ltd [1993] ICR 471, an employment tribunal erred when it found a dismissal fair on the basis that the employee had failed to volunteer a medical prognosis.

66. When investigating the medical position, an employer should be judged by the standards of the reasonable employer, not by the standards of whether it left no stone unturned.

67. However strongly the medical evidence may point towards dismissal, the employer should always consult with the employee rather than relying solely on the expert's opinion (Daubney). An employee may wish to challenge the medical opinion in some way or obtain a counter-report.

68. An employer is entitled to take a medical opinion at face value, unless a reasonable employer would not have relied on a report of that nature. In Liverpool Area Health Authority (Teaching) v Edwards, the EAT stated:

"We do not think that an employer, faced with a medical opinion, unless it is plainly erroneous as to the facts in some way, or plainly contains an indication that no proper examination of any sort has taken place, is required to evaluate it as a layman in terms of medical expertise".

69. Where the employer obtains more than one medical opinion and the two opinions conflict, a reasonable employer would usually take steps to resolve this conflict, by obtaining a third report or by seeking further clarification. However, there may be cases where an employer is entitled to prefer the opinion of one expert over another, although it should be able to show that it acted reasonably in doing so.

70. Consultation with the employee is central to the fairness of any dismissal for ill-health, as established in Daubney. In that case, the fact that the employee had not been consulted rendered the dismissal unfair. It was pointed out (at paragraph 572) that:
    (a) Discussion and consultation with the employee will often bring to light facts and circumstances of which the employer was unaware, which will throw new light on the problem.
    (b) The employee may wish to obtain their own medical evidence, which may result in the employer's medical advisers changing their opinion.
    (c) An injustice may be done if an employee is not consulted and given an opportunity to state their case.

71. As with mitigating factors in misconduct cases, length of service should ordinarily be weighed in the balance when the employer is deciding to whether to dismiss for capability.

72. the ACAS Code of Practice on Disciplinary and Grievance Procedures sets out steps that an employer should take in cases of dismissal for misconduct and poor performance. Although the ACAS Code states specifically that it applies to misconduct and poor performance situations, it does not mention other issues affecting capability, such as ill-health.

Direct discrimination

73. Section 13 Equality Act 2010 ("EqA") states:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

74. Section 9 EqA states:

(1)Race includes—
    (a) colour;
    (b) nationality;
    (c) ethnic or national origins.

75. Section 23 EqA states:

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

76. Section 136(2) EqA is the reverse burden of proof which states:

> If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

77. Accordingly, under s.13 EqA, a claimant must show that they have been treated less favourably than a real or hypothetical comparator. However, the fact that a claimant has been treated less favourably than an actual or hypothetical comparator will not be sufficient to establish that direct discrimination has occurred., nor even to shift the burden of proof under s.136 EqA. There must be “something more” from which the tribunal can conclude that the difference in treatment was because of the protected characteristic (Madarassy v Nomura International plc [2007] IRLR 246 (CA)).

78. If there are facts from which the tribunal could conclude that discrimination occurred, the burden of proof shifts to the respondent to provide an adequate non-discriminatory explanation for its actions.

79. Under s.13 EqA, to amount to discrimination, the less favourable treatment must be “because of” a protected characteristic. The phrase “because of” replaced the words “on grounds of” used in antecedent legislation. However, it has been noted that this was not intended to change its meaning.

80. In Nagarajan v London Regional Transport [1999] IRLR 572 the House of Lords noted that in most cases the respondent’s subjective thought processes are in fact a central issue.

81. It is established law that the discriminatory reason need not be the sole or even principal reason for the respondent’s actions, it only needs to have had “a significant influence on the outcome” (Nagarajan).

APPLICATION OF LAW TO FACTS

82. In respect of the reason for dismissal, the Respondent relied on capability. We reminded ourselves of the definition under s.98(3) ERA that capability here means an employee's capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

83. This was not one of the cases in which the claimant had been on long-term sickness absence and the respondent was dismissing as a result of that absence. Rather, this was said to be the Respondent’s belief that the Claimant was physically incapable of doing the role for which he was employed due to his health or physical condition.

84. We find that the Respondent has not discharged the burden of proving, on balance of probabilities, that it genuinely believed that the Claimant was incapable of his role at the date of termination on 17 May 2021. We found this to be an untenable position because by that date:
    (a) The Claimant had been discharged by a clinician in Poland who had reported in January 2021 that the Claimant’s treatment is finished, he has healed and that he does not take painkillers or suffer from pain anymore [56];

(b) The Claimant's UK-based GP had reported that he was fit to return to work and that he had no pain and needed no painkillers [66];
(c) The Respondent's own occupational health doctor had advised the Respondent as to what was needed and it had been received;
(d) The DVLA had reported that the Claimant was licensed to drive and medically cleared to do so, notwithstanding having been informed by the Claimant's GP of his condition; and
(e) A professor in neuro and spinal surgery (Professor Shad) had examined the Claimant and confirmed that he was fit to return to work as an HGV driver.

85. In light of all of this evidence, we find that the Respondent cannot genuinely have believed that the Claimant was unfit or incapable within the meaning of the legal definition of incapability. We find that such a conclusion would be wholly irrational by that time and we consider it is not in fact what operated on Mr Abdullah's mind at the time.

86. We have therefore had to consider what the real reason for electing to dismiss the Claimant was. We note from the dismissal letter that Mr Abdullah stated he was not "entirely happy" with returning the Claimant to his role that due to his duty of care to the Claimant, other road users and the public, he could not let him return to his role.

87. In his witness statement to the tribunal, Mr Abdullah stated:

> I gave Mr Winczewski every opportunity to comply with requests for what information had been disclosed to the DVLA in terms of his accident, and for an Orthopaedic Surgeon's recommendation letter, neither of which were received despite repeated requests. False documents provided could have resulted in dismissal for Gross Misconduct."

88. We find that the real principal reason for dismissal is that Mr Abdullah was suspicious as to whether the Claimant had accurately informed the DVLA of his injury and treatment and distrusted that he had accurately informed his GP and Professor Shad of the requirements of being an HGV driver. He also doubted whether Professor Shad was qualified to give an opinion, or whether it had to be an orthopaedic surgeon.

89. We base this finding on the comments made to the tribunal, Mr Abdullah's witness statement and the evidence (noted above) which demonstrated that the Respondent distrusted the Claimant from 4 August 2020 onwards: firstly with respect to whether he had in fact sustained an injury (doubting his veracity); then as to the validity or falsification of documents; then as to what had been conveyed to the DVLA or Professor Shad. Hence, we find that on balance of probabilities that the Respondent believed that the Claimant was not being full and frank in his disclosure as to his medical condition and the Respondent lost all trust and confidence in him some time in late January 2021.

90. We noted that it was in late January 2021, that Mumtaz Abdullah stated to Lukasz Winczewski that the Claimant had produced a false report and she would have to take it further, attaching extracts of the definition of gross misconduct for falsifying reports [53-54].

91. The Respondent never regained that trust and continued to believe that the Claimant had been less than frank and honest in the various interactions with his GP, the DVLA and Professor Shad thereafter. Indeed, even in his witness statement for the hearing, Mr Abdullah commented *"False documents provided could have resulted in dismissal for Gross Misconduct"* and in his oral evidence, as noted above, he stated "*once we received the false file, my confidence was zero in him"*

92. Accordingly, we find that the real principal reason for dismissal is a belief he had misled the Respondent or others about his condition, which is a conduct reason, within the definition of s.98(2) ERA. This in turn led to the Respondent distrusting the Claimant. Ancillary reasons flowing from that distrust included the Respondent's concern that if the medical evidence was falsified and they allowed him to return to work, it could have legal implications for the business or present health and safety risks. These were part of the reason for dismissal, but not the principal reason, which as stated was a belief that the Claimant had falsified documents and been dishonest about his condition.

93. As such, there is a potentially fair reason under s.98(2) ERA, namely a conduct reason and the Respondent did genuinely believe it. We then went on to consider whether it was reasonable in all the circumstances to hold that belief and whether a reasonable investigation and process was followed in accordance with the Burchell test and the case law as to what is required for a fair disciplinary process for conduct, in accordance with the ACAS Code.

94. We conclude that the Respondent's belief that the Claimant had provided false information or withheld information from certain persons (his GP, the DVLA or Professor Shad) was outside the range of reasonable responses in all the circumstances of the case including that:
    (a) The Claimant had produced certified translated copies of hospital discharge notes with detailed information which would be difficult to falsify [23-25c];
    (b) Whilst Lukasz Winczewski had originally sent an incorrect document to the Respondent from the Polish doctor, this was quickly corrected on 27 January 2021 with the provision of a stamped certified copy and the Respondent was given permission to speak to the clinician about the Claimant's condition and provided with contact details and a business card;
    (c) The Claimant had provided fit notes and letters from his UK GP which were consistent with other medical information provided to the Respondent;
    (d) Lukasz Winczewski had reported on the Claimant's condition to Mumtaz Abdullah by email and telephone on various occasions and it was consistent with the other sources of information provided at the time and later;
    (e) Lukasz Winczewski had explained to Mumtaz Abdullah that the Claimant's own GP had completed the papers for the DVLA, so the Respondent had no reasonable basis to doubt whether adequate disclosure had been made of the Claimant's medical condition or that the DVLA approval was somehow unsound / unreliable; and

(f) The Respondent had no basis for forming the view that the Claimant had not informed Prof Shad of what HGV driving entailed or that Prof Shad's view was in some way unreliable.

95. Accordingly, if the Respondent had a genuine belief that the Claimant was guilty of falsifying records or withholding information from the DVLA, his GP or Prof Shad, there was no reasonable basis for that belief.

96. Further and in any event, there was no investigation, and no disciplinary process whatsoever to allow the Claimant to address the Respondent's concerns or give his account. Therefore, having not done any investigation into the suspicions of misconduct, any conclusion drawn by the Respondent cannot be said to have been reached on a reasonable basis. It was reached on pure suspicion.

97. It was outside the range of reasonable responses for the Respondent not to have investigated any uncertainties it had about the medical evidence, or to have failed to seek clarity from Prof Shad about what he had been told about the role of an HGV driver. The Respondent did not consult with the Claimant about its concerns. If the Respondent had genuine concerns as to what information had been passed to prof Shad, they could have ascertained the true position before dismissing the Claimant. No reasonable employer would have dismissed before taking such steps in the circumstances.

98. Even if capability had been the real reason for dismissal, the dismissal would have been unfair procedurally and substantively in light of the medical evidence above which was credible, recent, reliable and from suitably-qualified experts who had examined the Claimant and verified him fit to work. The overwhelming message from the medical information was that the Claimant was fit for work just weeks before the Respondent took the decision to dismiss him on the basis that it deemed him to be unfit.

99. It was outside the range of reasonable responses for the Respondent to disregard the expert medical evidence and instead draw its own conclusions about the Claimant's ability to safely work, when neither Mr Abdullah nor Mrs Abdullah were medically qualified, less still a professor in neuro and spinal surgery (like Prof Shad). The Respondent's interpretation and reliance on the comments about posture by Prof Shad was outside the range of reasonable responses. If the Respondent had genuine concerns about the implications of the caveats on posture that Prof Shad had made in his report, the Respondent should have sought clarity as to what was meant, not drawn the conclusions that it did in the dismissal letter, which were outside the range of reasonable responses.

100. The Respondent's concern that Professor Shad was not a suitable expert is outside the range of reasonable responses because Prof Shad himself would have indicated if someone of a different expertise was required to review the Claimant's fitness. Further, since admission to hospital in Lodz, the Claimant had been under the care of experts in Neurosurgery (which plainly includes spinal injuries). The Respondent's fixation on needing an orthopaedic specialist (which it took from its occupational health advisor's recommendation) was not reasonable. Even

if were a reasonably held belief, the Respondent should have checked with its occupational health advisor upon receipt of Prof Shad's report to verify if its own occupational health doctor considered the report to be from someone suitably qualified. Instead, the Respondent decided that it knew better and decided it was not a suitably qualified expert. This was outside the range of reasonable responses.

101. There was also no evidence to suggest that the Respondent had seriously considered alternative roles for the Claimant or adjusted duties. The dismissal letter comments on the Respondent's belief that the Claimant would be unfit to drive the routes and hours he ordinarily did, but the Respondent did not explore alternatives with him at any time before it dismissed him. Nor did the Respondent present any evidence (other than the one comment in the dismissal letter above) to suggest it had considered this or any explanation as to why there were no suitable alternative roles or adjusted duties. It also appears that the Respondent paid no regard to the Claimant's length of service or his clean disciplinary record. Mr Abdullah's witness statement made no mention of having considered such matters. This reinforces the conclusion that the real reason was a belief in misconduct, because if the belief was as to capability, the Respondent would not doubt have led some evidence of attempts to keep the Claimant employed in some capacity. Further, this failure would render any dismissal for capability outside the range of reasonable responses.

102. We have taken into account the size of the Respondent, in that it has approx. 45-50 staff, including 10 office staff, two yard workers and the rest drivers. We have also borne in mind that the Respondent had no HR department or support, but note it did have legal advice before the decision to dismiss, as stated in the dismissal letter [77]. Notwithstanding its modest size and limited resources, the above failures are so significant that its decision is plainly outside the range of reasonable responses.

Notice Pay

103. As to notice pay, we find that there is no basis on which the Respondent can argue that this is not due. Even if the Claimant had been dismissed for genuine capability which had been well-founded, he would be entitled to notice pay. Whilst we have found that the Respondent believed the Claimant had committed misconduct, we do not find that he in fact had committed any act of misconduct, less still gross misconduct.

104. Accordingly, there was no repudiatory breach of contract by the Claimant and no right to dismiss him summarily. Therefore, we find that the Claimant is entitled to recover his statutory notice pay. We have not been provided with a copy of his contract but can consider this at the remedy stage if necessary (if greater notice is sought than the statutory period).

Wages

105. The Claimant claims wages from February 2021 (when his GP declared him fit to return to work) to the date of termination. We find that he is entitled to be paid his normal pay from the date on which the Claimant could lawfully have resumed his duties, namely once the

Respondent had confirmation both from a medical practitioner and from the DVLA that the Claimant was cleared to drive.

106. The Respondent received the letter from the Claimant's GP on 15 February 2021 stating the Claimant was fit to return to work. The Respondent received the DVLA letter on 21 April 2021. Hence we find that from 22 April 2021, the Claimant was fit, willing, able and lawfully allowed to resume his duties and it was the Respondent that failed to allow him to do so. Hence wages are properly payable from that date.

Race

107. On the issue of race discrimination, we have considered whether there are facts from which we could conclude, in the absence of an adequate explanation, that race was a substantial and effective cause of the decision to dismiss. We reminded ourselves that it need not be the sole or even the main reason.

108. The Claimant is of Polish nationality and this was the element of race on which he relied.

109. The Claimant put his case on the basis of a real comparator: a British driver called Mr Umney. He stated that Mr Umney had been off sick for three months with a heart condition and had been allowed to return to driving afterwards. The Claimant stated in oral evidence he had been told this by "Alan the guard" and he himself had not seen Mr Umney during a period of months when they would normally have crossed paths on their routes, which led him to believe that what Alan had said was true and that Mr Umney was absent for this reason.

110. We heard directly evidence from Mr Umney. Whilst we found elements of his evidence to lack credibility, we accepted his evidence that he has never suffered a heart condition and has never taken three months (or any similar period) off work. Therefore, on the basis of the argument advanced by the Claimant, we found that there was a material difference between the circumstances of the comparator and those of the Claimant.

111. We then had to consider whether the Claimant was treated less favourably than a non-Polish driver in the same material circumstances would have been treated, specifically, whether such a driver would not have been dismissed. Given that there was no real comparator or evidential comparator, we decided to approach the matter by considering the "reason why" the Claimant was dismissed, as is permissible under the guidance given in Shamoon**.**

112. Therefore we went on to consider if there were facts from which we could infer that race was an effective cause of dismissal.

113. We heard evidence that in 2019, the Claimant raised an issue of pay parity with respect to a subsistence allowance ("PIE allowance") on the basis that British drivers appeared to be paid more than Polish drivers. Mr Abdullah agreed this had been raised. He did not deny there had in fact been a disparity in pay and did not dispute the assertion that Polish workers were on a lower rate of PIE allowance than British. He instead

sought to defend the matter stating that it had been resolved once it was drawn to his attention and was thus historic. He stated the disparity had been due to different duties, but when tested, he was unable to explain any coherent basis for the difference. We found his evidence unimpressive on this point. However, we considered the most likely explanation was that Mr Abdullah was a man that would save costs where he could and if one group of drivers (quite irrespective of race) insisted on a higher rate than another, he was content to pay them differently to save money where he could, rather than treat his workforce fairly.

114. The Claimant also stated that Mr Umney had refused an unfavourable route and had been heard referring to Polish drivers as "Polish Dogs" telling management to allocate the route to the Polish drivers. Mr Umney ultimately denied this allegation, but his first response to the allegation in live evidence was to deny that he had ever refused a route, not to say he never made such a comment or would never do so. We found his evidence unimpressive on this point. However, we note that Mr Umney had no involvement in the decision to dismiss the Claimant.

115. The Claimant also said that over the years there had been numerous times he and others had complained of discriminatory treatment and management never did anything about it. We find that there were complaints raised orally and management neither investigated them nor invited any drivers to use the grievance procedure. There was no evidence of anything having been done in respect to any such complaints. However, none of the complaints we were informed about implicated Mr or Mrs Abullah. Rather, they failed to address them, but they were not the alleged perpetrators.

116. We also heard evidence from Mr Abdullah that he had travelled to Poland in 2004 to recruit a number of Polish drivers and he employed a Polish translator to facilitate such recruitment. Mr Abdullah stated he had employed many Polish drivers over the years and the Claimant did not dispute this. The Claimant asserted that there had been various Polish drivers who had been dismissed, but on further enquiry, it became clear that they had chosen to leave their roles as employees only to be re-engaged by the Respondent as contractors (drivers) because it suited them to operate that way. Whilst this does not mean that the Respondent cannot have discriminated against the Claimant when it dismissed him, it provided some support against any suggestion that Mr Abdullah was overtly biased against Polish drivers, as suggested.

117. Taking all this into account, we find that whilst the Claimant has proven facts from which we might be entitled to conclude that certain matters or "detriments" had occurred due to race, there were no facts which linked the issue of race to the Claimant's dismissal. Nor did we find any evidence linking Mr Abdullah directly to the acts from which inferences of race discrimination might be drawn, and he was the person who took the decision to dismiss.

118. We are satisfied, as stated above, that the factors operating on Mr Abdullah's mind when he decided to dismiss the Claimant was an unreasonable suspicion that the Claimant had falsified medical records

and withheld relevant information from the DVLA, his GP and Prof Shad and an unreasonable loss of trust as a result. We find that this is the complete answer to the Respondent's decision and that race played no part in it.

119. We also find that had a British driver been in the same material circumstances as the Claimant, starting with him having 12 weeks' statutory sick pay for absence in the first lockdown, then returning for a short period before having three weeks on holiday, which he then had to convert to sick leave (noting he had requested more holiday originally which had been denied) and then provided the documents which he did (and which the Respondent doubted) such a driver would have been subject to the same degree of distrust and suspicion as the Claimant was and hence would have been treated the same, namely, would also have been dismissed by Mr Abdullah, even if he had the same medical and DVLA clearance by April 2021.

120. Accordingly, we do not uphold the race discrimination claim.

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Employment Judge Dobbie

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Date 19 January 2023

REASONS SENT TO THE PARTIES ON

30 January 2023

FOR THE TRIBUNAL OFFICE