



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Saji Karunakaran

**Respondent:** RGB Hifi and Video Limited

**Heard at:** East London Hearing Centre (by Cloud Video Platform)

**On:** 18<sup>th</sup> October 2022

**Before:** Employment Judge Travers (sitting alone)

**Representation:**

Claimant: In person  
Respondent: Jennifer Platt, solicitor (SAS Daniels LLP)

**JUDGMENT** having been sent to the parties on 24 November 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

## REASONS

- 1 At the conclusion of the hearing oral reasons were given for the judgment. The judgment was sent to the claimant on 24 November 2022.
- 2 On 27 November 2022 the claimant wrote to the tribunal stating that he wished to appeal the decision. The tribunal treated this as a request for written reasons made within 14 days of the decision being sent to the parties.
- 3 An appeal against the judgment of the Employment Tribunal must be made to the Employment Appeal Tribunal.

### Issues

- 4 By a claim form dated 19 May 2022 the claimant raises three complaints:
  - (a) Unfair dismissal;
  - (b) Redundancy payment;
  - (c) Arrears of pay.

5 At various points the claimant referred to constructive dismissal. The tribunal has therefore considered whether the claimant was constructively dismissed.

6 The respondent states that it dismissed the claimant for a potentially fair reason, namely capability, and that the decision to dismiss was fair. The respondent submits that no redundancy payment is due because the claimant was not made redundant. The respondent also resists the claim in respect of arrears of pay on the basis that it says that the claimant has received all the pay that he is due.

7 The issues for the tribunal to consider are therefore:

- Was the claimant dismissed by the respondent or did he terminate the employment contract in response to a fundamental breach of contract by the respondent;
- If the claimant was dismissed by the respondent was the reason for dismissal the claimant's capability;
- Was the dismissal fair or unfair;
- Is the claimant entitled to a redundancy payment;
- Is the claimant entitled to £15,000 (less sick pay received) which the claimant says is arrears of pay due to him in respect of one year's pay for a period when he was on sick leave?

## **Facts**

8 The following facts have been found by the tribunal on the basis of the oral and written evidence and information presented to it. Any findings have been reached applying the balance of probabilities as the standard of proof.

9 Two witnesses gave evidence at the hearing – the claimant and Dennis Digwa who is the director responsible for HR matters at the respondent company.

10 In addition, the tribunal has had the benefit of reading an email from Ms Nina Singh which has been filed on behalf of the claimant. Ms Singh worked with the claimant at the respondent company from 2011 until 2014 when her employment with the respondent ceased. She does not give evidence in respect of any facts which are in dispute in the case but Ms Singh's email speaks well of the claimant as a colleague and in respect of his technical skills during the period that she worked with him in what she describes as the 'Internet department'.

## *Employment*

11 The respondent is a family run electrical retailer which supplies and services electrical products across the UK.

12 The parties agree that the claimant commenced employment with the respondent on 01 April 2011 and that his employment terminated on 25 February 2022.

13 After some years of employment, the claimant acquired the job title of Technical Services Manager. It was a customer services role. The claimant's duties included answering customer calls, dealing with customer complaints, arranging for damaged products to be collected and sending damaged items back to manufacturers and obtaining a credit note. The Claimant's role involved him lifting up stock from the warehouse to reserve for customers who were due a replacement.

*Decision to move claimant from customer services to warehouse*

14 Over time the respondent developed concerns about the claimant's performance in the role. Concerns included missing items from replacement packages sent to customers and also the existence of a backlog consisting of around £100,000 worth of returned stock which should have been sent back to the manufacturers.

15 By September 2020, the respondent had decided to move the claimant from the customer services team to work full-time in the warehouse. On 20 September 2020 the claimant's line manager spoke to the claimant to inform him of the decision and to give him one month's notice of the move. In evidence the claimant acknowledged that a conversation took place where his line manager informed him that he was to be moved to the warehouse. The claimant however said that he didn't take the conversation seriously.

16 The tribunal has been shown emails in the bundle addressed to the claimant which confirm that he was informed of the decision that he should work in the warehouse. Both emails are addressed to the claimant at his work email address. The claimant says that he had not seen either email at the time and the only information which he had about the change was the conversation with his line manager and a text sent two days before the proposed date of the move.

17 The tribunal is satisfied that the emails were at the very least sent to the claimant. There is no evidence or challenge raised before the tribunal which could support a finding that these emails were a later fabrication.

18 On 22 September 2020 at 14.50 hours, the claimant's line manager emailed the claimant under the subject heading, 'Change of Department':

*'Hi Saji, Please take this as a months' notice that from the 22<sup>nd</sup> of October 2020 you will be required to start working in the warehouse. If you have any questions, please come and speak to me. Many thanks...'*

19 On 15 October 2020 at 11.46, the claimant's line manager emailed the claimant under the subject heading 'Change of Department':

*'Hi Saji, Reminder for change of department. Please see email below. If you have any questions, please come and speak to me. Thanks...'*

The 22 September 2020 email was forwarded with this email.

*First day in warehouse 22 October 2020*

20 On 22 October 2020 the claimant attended work but refused to work in the warehouse. Consequently, the claimant's new line manager called Dennis Digwa who is

the respondent's director responsible for HR matters. When Mr Digwa arrived, the claimant said that he was waiting for Mr Digwa to confirm the change in his job role. Mr Digwa confirmed the change and the claimant proceeded to the warehouse to work.

21 It was at this point that the claimant's new line manager pointed out that the claimant was wearing loafer shoes which the line manager said were inappropriate for working in the warehouse. The claimant was sent home to get more appropriate footwear. He was expected to return to work that day.

22 The claimant left the warehouse to go home to get alternative footwear. He wasn't to return to work again prior to termination of his employment on 25 February 2022.

*Absence from work following 22 October 2022*

23 The claimant didn't return to work on 22 October and neither did he attend on the working days immediately following. No contact was made by the claimant and no explanation was offered by him for his absence from work. Telephone messages left for the claimant by the respondent went unanswered.

24 Finally, on 26 October a letter was hand delivered by the respondent to the claimant's home highlighting the unauthorised absence:

*'...You have not contacted the company to notify us of your absence, which you are required to do in line with company absence reporting procedures, which I have included here for your information. We are concerned about your welfare and hope that nothing seriously is wrong...your current absence is classed as unauthorised and as such would not be subject to any pay...As your current absence is in breach of procedures you could be liable for disciplinary action. A period of continuing unauthorised absence could be classed as a gross misconduct offence. I must ask that you contact me by 6pm on 28/10/2020 to explain your absence...'*

25 The 'Absence-reporting procedures' document enclosed with the letter dated 26 October 2020 contained information under the following headings: sickness absence reporting; medical certification; procedure to return to work; return to work meeting.

26 The claimant finally made contact via an email dated 28 October 2020. The email was addressed to Mr Digwa and it alleged that the claimant had fallen ill on 22 October after what was said to have been Mr Digwa's aggressive communication and swearing and verbal abuse in front of other members of staff. The claimant said that he had been advised by his GP to take rest and that he had been prescribed medication to help him do so. The claimant said that the, '*...GP has advised me that he will be assessing my progress and he will give me a full report by Thursday 29<sup>th</sup> October or the latest Friday 30<sup>th</sup> October*'.

27 The claimant went on to state:

*"Please note I am writing this email because I have been called a numerous amount of times by a number of different members of staff. Whilst I am resting and when I failed to answer my calls, someone from RGB had turned up at my house to deliver a written letter stating what I should do and what I did wrong at work which*

*has made matters worse and made me feel much worse. Please note I find the actions from the company I work for highly unprofessional."*

28 Mr Digwa replied on 28 October 2020 by email. He wrote that,

*'...We are sorry to hear that your [sic] ill and had no idea...'*

He asked the claimant to contact him by 30 October 2020 at 5p.m. to provide an update on how the claimant was feeling and what the claimant's doctor said.

29 Mr Digwa wrote further:

*'We take your bullying complaint very seriously. If you would like to raise a Grievance you can do either formally or informally in writing 543–549 High Road, Ilford Essex IG10 3JB. I have attached a copy of the Grievance Procedure for you.'*

30 No grievance was raised by the claimant either about the alleged bullying or about his move from customer services to the warehouse.

31 Mr Digwa denies that on 22 October he behaved in the manner alleged by the claimant.

#### *Long-term sickness*

32 On 30 October 2020 the claimant provided the respondent with what was to be the first of a series of fit notes covering the entire period from then until the termination of his employment on 25 February 2022. The description of the claimant's condition on the fit note was, 'Anxiety, Low mood, Stress at Work'. The same or a similar form of wording was followed in almost all subsequent fit notes.

33 From December 2020 until August 2021 the respondent in a series of emails sought without success to arrange a welfare meeting with the claimant.

- (a) The claimant was requested to attend a welfare meeting in December 2020. Two dates were offered in the course of correspondence. The claimant refused to attend on either date.

On 02 December 2020 Mr Digwa emailed the claimant:

*'...I would now like to arrange to meet with you to discuss your absence from work...The aim of this meeting is to gain an understanding of your current medical condition in order for us to consider any appropriate support that we may offer to assist and enable your return to work...'*

On 03 December 2020 the claimant responded:

*'...I am not sure that a meeting would be helpful at the moment. I have been feeling very low...doctor suggested last Friday that I start a course of anti-depressants...The doctor advised that I was not to think about work which has been the source of my stress so at this stage I think a meeting would just make it worse...'*

Mr Digwa replied on 04 December 2020:

*'We acknowledge how you are feeling however the purpose of arranging this welfare meeting is to try to resolve the issues you have at work so that you don't feel this way moving forward...'*

The claimant responded on 08 December:

*'...I spoke to my GP to ask for his advice and he asked how I felt. I said that I just didn't feel up to or ready for a meeting yet. He advised me to wait until my headaches from my new tablets had settled down and them also to take effect, in his words he said that I would be much more receptive to a meeting if it was delayed. He also suggested waiting until the new year if I felt I needed more time. I was relieved to hear that, because that was exactly what I was thinking, I would prefer not to be pushed into it too quickly when I'm feeling like this. I have been signed off sick until the end of December, I agree that I should contact you after then...'*

(b) The claimant made contact with the respondent following the end of December on 05 January 2021 to send a further fit note referencing, 'Anxiety, Low Moods and Stress at Work', which was valid until the end of January 2020.

(c) On 02 February 2021 the claimant sent a further fit note covering the month of February. He wrote,

*'Due to the ongoing stress from work and the events relating to me being on sick leave. I have taken the GP's instructions in order to get better.'*

On 05 February 2021 Mr Digwa replied:

*'We empathise and will take onboard your comments about following your Gp's advice. We will allow some further time for yo [sic] to help with your situation to improve. However I think it best we will perhaps contact you at the end of your fit note and that it will be appropriate to try to start discussions with your [sic] again at this time'*

(d) On 24 February 2021 the claimant emailed Mr Digwa with a query about the payment of holiday pay. Mr Digwa responded to this on 11 March 2021, nonetheless he received a chasing email from the claimant on 23 March 2021 when the claimant sent a fit note covering the period from the beginning of March until the end of April 2021.

In response to the fit note Mr Digwa emailed the claimant on 24 March 2021:

*'Sorry to hear your [sic] still unwell after 5 months as 22<sup>nd</sup> October was when you went sick and we hope you make a recovery soon...'*

On 06 April 2021 the claimant emailed Mr Digwa to pursue further the issue of holiday pay. In this email the claimant now alleged that Mr Digwa had been bullying him and treating him unfairly for the last 10 years. He wrote that,

*'...If that was not enough; you went as low as swearing at me in front of other members of staff and took the job and title I worked so hard working years for. I will be having a meeting to try resolve [sic] this matter when I am fit to do so, as I have a number of questions that I want answered...'*

Mr Digwa replied to the claimant's email the same day:

*'I am glad to hear your starting to feel better and will try to resolve this as soon as your [sic] fit...I am sad to hear that you have been bullied in the last 10 years however I never received a complaint from you during this time. I would like to state I have never swear [sic] at you...We await your response when your [sic] ready to work...'*

- (e) The claimant subsequently sent a further fit note covering the period from 01 May until 30 June 2021.
- (f) On 02 July 2021 the claimant sent a fit note covering the period until 27 July 2021. This was the only fit note where the doctor's comments differed materially from the other fit notes. The condition was stated to be, 'stress, anxiety' and a comment was recorded on the note. It said,

*'Been off work since Oct 2020. On Citalopram 10mg. Has had talking therapy and feels a lot better. Aims to return to work in near future.'*

On 05 July Mr Digwa emailed the claimant to follow up the fit note:

*'We hope your [sic] feeling better and see that the sick notes mention you aim to return to work. Can we arrange a welfare meeting at this stage to discuss when your [sic] considering returning and how can this be supported by the workplace.'*

- (g) On 06 August 2021 the claimant sent a fit note covering the period to the end of August 2021.

Mr Digwa responded the same day and asked the claimant to attend a meeting on 12 August 2021, stating:

*'The aim of this meeting is to gain an understanding of your medical condition in order for us to further consider any reasonable adjustments and/or measures that would facilitate your return to work and any other ways that I can support you.'*

In the absence of a reply from the claimant, Mr Digwa sent a chasing email on 10 August 2021. This elicited the following reply from the claimant on 11 August 2021:

*'...Please understand that I am in no fit state for a meeting as per my sick note from my GP, please also note how serious my sickness is. I will be in touch to discuss a meeting in September.'*

Mr Digwa responded to this email on 16 August 2021 in the following terms:

*'As you are aware, I have tried to contact you and meet with you on several occasions but sadly I have not been able to communicate with you during your absence. You were struggling and have advised you are in no fit state to discuss things further at each attempt. I do*

*understand this is a difficult time for you and it is not my intention to cause you any further distress. However, **the business has sustained your absence from October 2020 until now, but we cannot continue to do this indefinitely. At the moment we do not have any information to suggest that you will be fit to return to work in the near future nor do we have an indication of any adjustments or help that we could provide to support a return to work because we have not been able to talk to you. Therefore, I now feel it is reasonable to ask once more that you complete and return the attached questions. I must make you aware that if there is no possible return to work in the near future, the next step the company may have to consider is termination of employment on the grant of capability based on the available information. With this in mind, I would ask that you either contact me for an informal discussion or return the attached form completed by 20 August 2021 with an update on your situation.***

The form referred to in the email was a two page document which was headed, 'Health Questions instead of a face to face meeting'.

The claimant did not complete this health questionnaire prior to the termination of his employment.

On 19 August 2021 the claimant replied, stating:

*'...I am sick and in no frame of mind now to talk about return to work or to fill in any form...I am looking to have a meeting regarding coming back to work in September...I will be talking about the reasons why I am ill in the first place and not to discard it was due to the company and the management actions I am ill which has now resulted in myself being very ill and all sorts of problems which I blame the company and management for.'*

Following a further email exchange, a welfare meeting was set up by telephone for 17 September 2022. Prior to that meeting Mr Digwa emailed the claimant to say that,

*'...the meeting is a welfare meeting which is only intended as a chance for us to discuss your health and how you are generally...'*

- (h) During the meeting on 17 September the claimant expressed concerns about working in the warehouse. He rejected Mr Digwa's suggestion that he could be given training. When asked by Mr Digwa what he was proposing the claimant stated, '*Number one, I need to get better, that's the main concern. Which I am, I think I'm much stronger than I was in October*'. The claimant said that on doctor's advice he was due to have blood tests. He complained about pain in his neck and arm. When asked when he would be fit to return to work the claimant said, '*I can't give you a timeframe, I can't say to you until I get reports from the doctor or the bloods. I can't give a timescale. It might be a couple of weeks, one month, I don't know, I really don't know. I can't tell you that.*' Mr Digwa asked the claimant to provide an update on his health in two weeks time. The claimant said that he would. In fact, he did not send to Mr Digwa an update on his health two weeks after the welfare meeting.



- (i) On 24 October 2021 Mr Digwa chased by email the health update which the claimant had promised him at the 17 September meeting.

On 29<sup>th</sup> October the claimant responded by email and complained about the way in which the respondent had conducted itself, including the decision to move him to the warehouse. He also complained again about how the respondent had treated the issue of paid holiday.

As to his health and when he may be able to return to work, the claimant said that his '*...health has got much worse...*' since the welfare meeting.

He said that his,

*'...GP has also advised not to have any communication with anyone at work until I am better and this is the reason I have not been in touch at the time I was off on the 22 October till now.'*

### *Grievance meeting*

34 Following receipt of the claimant's email, Mr Digwa thought it appropriate to arrange a grievance meeting to discuss matters which had been raised by the claimant. The claimant was informed by email on 17 November 2021 that the meeting was scheduled for 23 November 2021. The claimant was told that if those arrangements were not suitable that he should contact Mr Digwa so that alternative arrangements could be considered. The claimant was advised by Mr Digwa of his right to be accompanied at the meeting by either a work colleague or a trade union official.

35 The claimant did not respond to the offer of a grievance meeting and nor did he attend. Consequently, Mr Digwa emailed the claimant on 24 November to rearrange the meeting.

36 On 26 November 2021 the claimant responded to Mr Digwa by email. He complained that Mr Digwa was bullying him,

*'...via email by pushing for meetings and information which it is confirmed I am sick via my doctors and that I need to rest, you choose to ignore my illness and have no care.'*

In the email the claimant also reiterated his concerns about holiday pay and asserted that he was entitled to his, '*...wage from October 2020 to date*'. He said that credit would be given for the 6 months statutory sick pay which he had received.

The claimant stated that;

*'Before any more meetings are set up to resolve this matter we would need to resolve the back pay issue, only after that when I'm fit to do so we can think about my future within the company and set up meetings face to face.'*

37 In the 26 November email the claimant also stated:

*'My solicitor has advised to take over this matter and he confirms I have a valid case and we will investigate why you as a company director are acting in this manner, if this matter is not resolved between us. My solicitor also confirms this is a method used called constructive dismissal which I already know, which is used to push people out of the company.'*

38 Mr Digwa replied on 29 November and addressed the issues raised by the claimant in respect of sick pay and holidays. Mr Digwa noted that the claimant said that he was not well enough to attend a formal grievance meeting at present. He told the claimant that he hoped that the email had answered the immediate questions and that the claimant would be, '*...given the opportunity to raise a formal grievance once he felt well enough to do so*'.

39 The claimant responded on 07 December 2021 and asked Mr Digwa to note that, '*...if this matter of all the back pay is not resolved by the 15<sup>th</sup> December I will have no choice but to take this matter much further and legal fees will also be added as advised by my solicitor.*' He went on to allege that, '*...you have made me sick and I **have no idea if I will be able to work or be fit to come into work as I'm working on my health.** Please note this is not just me saying I'm unwell, it is also my doctors as advised on my sick notes and reports emailed to you. **Please try resolve this matter in writing as I'm far too sick to come into work to resolve matters and I don't want my health to get any worse than it already is.***' [emphasis added]

40 On 08 December 2021 Mr Digwa replied to the claimant, '*We are saddened to hear that you feel you have not been supported by the company, however we are keen to resolve these issues. As per your request, we will arrange a meeting with the intention to resolve these matters when you are well enough to participate*'.

41 On 14 December 2021 Mr Digwa emailed the claimant to propose a meeting, '*...to gain an understanding of your medical condition in order for us to further consider any reasonable adjustments and/or measures that would facilitate your return to work and any other ways I can support you*'.

A health questionnaire was again attached to this email. No response was received to the email.

#### *Termination of employment*

42 On 02 February 2022 Mr Digwa wrote to the claimant to invite him to a meeting on 07 February to discuss his ongoing absence from work. He wrote,

*'...as you have been absent from work since 20/10/2020 and as yet have given no indication of being able to return to work, we will be discussing your ongoing employment...You will have a final chance to give us an update on your situation at this meeting. You will also be able to put forward any further suggestions for the company or further representations you may wish to make prior to any final decision on your ongoing employment being made. An outcome of this meeting could be the termination of your employment due to your long-term absence.'*

43 The claimant did not attend the meeting on 07 February 2022 and nor did he contact Mr Digwa in advance to let him know that he would not be attending. When Mr Digwa emailed the claimant to reschedule the meeting for 09 February 2022, the claimant responded to say that he had received the email inviting him to the meeting on 07 February but that he, '*...could not reply to you as I have been busy in and out of appointments...*'. The claimant indicated a willingness to engage in a meeting set up using Microsoft teams.

44 Mr Digwa emailed the claimant to inform him that the meeting would take place on 18 February. He also attached a Health Questionnaire,

*'...which we require filled in prior to our meeting'. In replying to confirm his attendance the claimant wrote that, '...I cannot fill in forms or concentrate on to [sic] many things as it makes my condition worse...Please note during the meeting my condition will get worse if you don't take note the level of seriousness of this matter and if you don't stop mocking me in the way of lies or thinking I'm a joke and thinking the matter will just go away.'*

45 During the meeting on 18 February 2022:-

- The claimant told Mr Digwa that he wouldn't fill in the health questionnaire.
- The claimant indicated that emailing makes stress worse, as any interaction with the respondent company brings everything back.
- Mr Digwa explained that he did not have a medical report and that the information on the claimant's fit notes did not give him a detailed understanding of the claimant's illness currently.
- The claimant couldn't give a date for his return to work, he was only willing to return when he was 100% fit and when he felt it was 100% safe as he was not sure what job he would be doing on his return.
- The claimant complained that Mr Digwa was emailing him about returning to work and setting up meetings whilst the claimant was ill and meant to be resting. He said that he would only consider returning to work when he's 100%.
- The claimant said that he felt this was a constructive dismissal which he explained as the company trying to drive him out.
- Mr Digwa asked if there were any changes he could make in the company (e.g. move him to a different department) to facilitate his return to work sooner. The claimant said that he couldn't even think about this. His main focus was getting 100% well and getting the finances sorted out. The claimant stated that he was 80% and wouldn't be returning until he was 100%.

46 In oral evidence the claimant told the tribunal that he,

***'...wasn't comfortable in giving Mr Digwa and the company any information. I wasn't unfair to Mr Digwa in not giving him information because Mr Digwa started it'. The claimant went on to say, 'I refused to complete the health questionnaire because I thought Mr Digwa was going to build a defence around it.'***

47 On 25 February 2022 Mr Digwa wrote to the claimant to inform him that his employment was terminated with effect from that day. He was paid in respect of 10 weeks' notice.

48 Mr Digwa's email was headed, 'Termination of employment due to capability'. It highlighted that the claimant had been absent from work due to sickness since October 2020 and that on 18 February 2022 the claimant had been unable to provide a potential date when he may be fit enough to return to work. The email also referenced the claimant's refusal to engage in welfare meetings. The claimant was informed of his right to appeal within 7 days. He did not do so.

49 The claimant wrote to Mr Digwa on 11 March 2022 that, '**You have now terminated my employment** with RGB after 10 years of me working within the company...**your actions are unlawful and unfair.**' [emphasis added]

#### *Absence management*

50 Paragraph 16 of the claimant's contract of employment required him to notify the respondent of his sickness absence personally by telephone no later than 8.30am on the first day of absence. The claimant did not do this on 23 October 2020.

51 The Employee Handbook provides that:

*'During a period of long-term absence, you are required to attend any scheduled welfare meetings with the Company. The purpose of these meetings is to discuss your current state of health, how long you expect to be absent from work and what steps, if any, the Company can take to facilitate your return to work.'*

52 The Handbook also provides that,

*'...where there is a failure, without good reason, to co-operate with the Company in relation to attending meetings, communicating effectively, attending occupational health assessments and providing necessary information, this may be treated as misconduct and the Company may take disciplinary action.'*

53 The Handbook sets out that,

*'...a prolonged period of absence cannot be sustained indefinitely, and the Company may need to review your employment periodically. Before any decision is made in relation to termination of your employment on the grounds of capability, the Company will consult fully with you and may obtain up-to-date medical advice.'*

#### *Sick pay and outstanding holiday entitlement*

54 The claimant was paid the full 26 weeks of statutory sick pay to which he was entitled. Any accrued and unused holiday entitlement was also paid to the claimant on termination.

### **Law**

55 Under s94(1) of the Employment Rights Act 1996 ['ERA'] an employee has the right not to be unfairly dismissed by his employer.

56 ERA s95(2) provides that a dismissal takes place where an employer gives notice to an employee to terminate his contract of employment.

57 ERA s95(1)(c) effectively defines constructive dismissal as where the **employee terminates** the contract of employment in circumstances where he is entitled to terminate without notice by reason of the employer's conduct.

58 Lord Denning MR explained constructive dismissal in **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221, CA** as follows:

*“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.”*

59 ERA s98 provides that in determining whether a dismissal is fair or unfair:

- It is for the employer to show the reason, or the principal reason for the dismissal – s98(1)(a)
- It is a reason falling within s98(2)
- One of the s98(2) reasons relates to the capability of the employee to perform work of the kind which he is employed to do by the employer.

60 Under ERA s98(4):

‘...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.’

61 Where the reason for dismissal is capability related to long-term sickness absence the Court of Session in **BS v Dundee City Council [2014] IRLR 131** helpfully distilled the principles which emerge from the decided cases including **Spencer v Paragon Wallpapers Limited [1976] IRLR 373** and **East Lindsey District Council v Daubney [1977] IRLR 181**.

62 At paragraph 27 of **BS v Dundee City Council**, Lord Drummond Young observed:

*Three important themes emerge from the decisions in Spencer and Daubney.*

*First, in a case where an employee has been absent from work for some time owing to sickness, it is essential to consider the question of whether the employer can be expected to wait longer.*

*Secondly, there is a need to consult the employee and take his views into account. We would emphasise, however, that this is a factor that can operate both for and against dismissal. If the employee states that he is anxious to return to work as soon as he can and hopes that he will be able to do so in the near future, that operates in his favour; **if, on the other hand he states that he is no better and does not know when he can return to work, that is a significant factor operating against him** [emphasis added].*

*Thirdly, there is a need to take steps to discover the employee's medical condition and his likely prognosis, but this merely requires the obtaining of proper medical advice; it does not require the employer to pursue detailed medical examination; all that the employer requires to do is to ensure that the correct question is asked and answered.*

## **Conclusions**

### *Dismissal by the respondent or constructive dismissal*

63 The tribunal is satisfied that the claimant was dismissed by the respondent. He was not constructively dismissed.

64 A key aspect of constructive dismissal is that the claimant should himself have terminated the contract of employment. He did not. His employment was terminated by the respondent via the email dated 25 February 2022.

65 It is clear from the claimant's response to that email that until he received the 25 February email from the respondent, he regarded himself as still an employee. The claimant wrote to Mr Digwa on 11 March 2022 that, '**You have now terminated my employment with RGB after 10 years of me working within the company...your actions are unlawful and unfair**'.

### *Was capability the reason for dismissal?*

66 Capability is the reason for dismissal which is relied on by the respondent. The tribunal is satisfied that capability is the genuine reason for dismissal. This is consistent with the content of the respondent's correspondence with the claimant.

67 This consistent theme of the respondent's communications with the claimant was to explore when the claimant's health would permit him to return to work.

### *Was the dismissal fair or unfair?*

68 By the date that the claimant was dismissed, he had been absent from work for 16 months. There continued to be a complete lack of clarity as to when the claimant would return to work. The claimant had largely failed to honour the obligations set out the Employee Handbook that he should co-operate with the respondent in attending welfare meetings and communicating effectively.

69 The claimant's attitude to these obligations is exemplified by his evidence that he:  
***'...wasn't comfortable in giving Mr Digwa and the company any information. I wasn't unfair to Mr Digwa in not giving him information because Mr Digwa started it...I refused to complete the health questionnaire because I thought Mr Digwa was going to build a defence around it.'***

70 Mr Digwa's entirely legitimate enquiries by email as to the claimant's health and possible timetable for returning to work were mischaracterised by the claimant as somehow improper: *'...pushing for meetings and information which it is confirmed I am sick via my doctors and that I need to rest, you choose to ignore my illness and have no care.'*

71 In all the circumstances, after 16 months the respondent could not be expected to wait any longer.

72 The respondent manifestly endeavoured to consult with the claimant. During the meeting on 18 February 2022 when Mr Digwa sought to explore the circumstances in which the claimant would return to work, the claimant insisted that the claimant's main focus was getting 100% well and getting the finances sorted out. The claimant stated that he was 80% and wouldn't be returning to work until he was 100%. The claimant was unable to offer any firm timescale as to when that might be.

73 As it was put by Lord Drummond Young in ***BS v Dundee City Council***, where an employee,

***'...states that he is no better and does not know when he can return to work, that is a significant factor operating against him'***.

74 The tribunal is satisfied that the respondent did take steps to ascertain the claimant's condition and prognosis. These steps were largely frustrated by the claimant himself. He refused to co-operate in providing more detailed medical information than appears on the fit notes. These fit notes are repetitive and provide no detail as to the underlying condition and prognosis.

75 The claimant refused to respond to a health questionnaire. In all the circumstances any deficiencies in ascertaining the claimant's medical condition and prognosis are largely due to the rigid approach adopted by the claimant.

76 The tribunal is entirely satisfied that the decision to dismiss the claimant on the grounds of capability was one which the respondent was entitled to make. It fell well within the band of reasonable responses which was open to the respondent.

#### *Redundancy payment*

77 This case concerns a dismissal on the grounds of capability. It is not a redundancy case. No redundancy payment is due,

78 In all the circumstances the dismissal was fair.

*Arrears of pay*

79 The claimant asserts that he is entitled to £15,000 (less sick pay received) as arrears of pay due to him in respect of a period when he was on sick leave.

80 The claimant has been paid all the statutory sick pay which he is due. He had no contractual entitlement to any greater sum of pay during the period when he was absent due to ill health. Consequently, this aspect of the claimant's complaint fails.

**Employment Judge Travers  
Date: 19 January 2023**