EMPLOYMENT TRIBUNALS

Claimant: Mr M Peters

Respondent: London General Transport Services Limited t/a Go-Ahead London

HELD AT: Croydon **ON:** 6 and 7 February 2023

BEFORE: Employment Judge Barker
Mrs S Dengate
Mr W Dixon

REPRESENTATION:

Claimant: Mr Foy, counsel
Respondent: Mr Bailey, counsel

JUDGMENT having been sent to the parties on 17 March 2023 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

Preliminary Matters and Issues for the Tribunal to decide

1. The Tribunal had the benefit of a bundle of documents which ran to 395 pages, and witness statements from the claimant and the respondent's witnesses Mr Pitt, the claimant's line manager, Mr Margrave, the dismissing officer, Mr McKeown, the appeals officer and Ms Lambshead, the respondent's HR manager.

2. The parties had agreed to exchange witness statements on 19 January 2023. No further directions as to witness statements were agreed by the parties. The respondent provided two further witness statements after this date from Mr Margrave and Ms Lambshead, which the claimant objected to being admitted on the basis that the respondent had neither sought consent from the claimant nor permission from the Tribunal and the contents of the further statements were expanded beyond merely clarifying earlier statements.

3. Having considered the representations from the parties and having read all of the witness statements, the Tribunal allowed the two supplemental witness statements

on the basis that they were short, dealt with a limited number of discrete points, some of which were merely repetitive of evidence already given in the main witness statements and the rest of which could have been dealt with in short order by examination in chief. The claimant was not disadvantaged by the supplemental statements, having been served with them the week before the hearing on 27 January 2023.

4. The respondent's counsel raised an issue with the composition of the Tribunal, indicating that as the jurisdictions before the Tribunal were only those referred to in s111 of the Employment Rights Act 1996 they were properly to be heard by a judge sitting alone and that it would be a potential error of law were the parties not to consent to a variation from this, being prescribed in s4 of the Employment Tribunals Act 1996. The parties therefore provided their consent. The Tribunal noted that it is a common listing practice to provide full Tribunal panels on cases where allegations of public interest disclosure are made, due to the need for a full Tribunal to hear cases involving whistleblowing detriment. The Tribunal did not consider there to be an error of law if a discretion had been exercised by the Tribunal to provide a full panel, nor consider that the hearing would risk being a nullity. Nevertheless, the submissions of the respondent's counsel and the consent of the claimant's counsel is noted, and it was not deemed to be proportionate to take up any more hearing time in considering the matter further, in the circumstances.

5. The issues for the Tribunal to decide were agreed between the parties in a list dated 2 February 2023. In essence, with some additions by the Tribunal as to the nature of the Tribunal's considerations in relation to the fairness of the decision to dismiss for capability and the components of protected disclosures, they are:

    a. the reason for the claimant's dismissal, whether capability as alleged by the respondent or because of protected disclosures as alleged by the claimant.

    b. If the latter, the dismissal would be automatically unfair.

    c. If the former, was the dismissal fair within the meaning set down in s98 Employment Rights Act 1996. In cases of capability due to long term sickness absence, this will usually involve the Tribunal considering whether:

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

        ii. The respondent adequately consulted the claimant.

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

        iv. Whether the respondent could reasonably be expected to wait longer before dismissing the claimant; and

        v. Dismissal was within the range of reasonable responses.

    d. It is the respondent's case that if the Tribunal finds the dismissal to be procedurally unfair that a *Polkey* deduction should be applied to reduce the

claimant's compensation because the claimant would, had any procedural deficiencies been corrected, have been dismissed in any event.

e. The Tribunal also needs to consider whether the claimant has made protected disclosures. Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

    i. What did the claimant say or write? When? To whom? The claimant says he made disclosures on these occasions:

        1. To Mr Pitt on 22 Sept 2021

        2. To Mr Margrave on 29 Sept 2021

    ii. Did he disclose information? The claimant says he communicated that there was a slippery or uneven surface in the workplace which caused him to fall.

    iii. Did he believe the disclosure of information was made in the public interest?

    iv. Was that belief reasonable?

    v. Did he believe it tended to show that the health or safety of any individual had been, was being or was likely to be endangered;

    vi. Was that belief reasonable?

    vii. If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

f. Was the reason or principal reason for dismissal that the claimant made a protected disclosure as per s103A Employment Rights Act 1996?

Findings of Fact

6. The claimant was, at the time to which these proceedings relate, employed by the respondent as a senior vehicle engineer at the Stockwell Garage and had been employed by the respondent since July 2005.

7. The claimant had an accident in the workplace on 22 September 2021 and fell and sustained an injury. There was some confusion as to where accident took place and the claimant initially reported to Mr Pitt, his manager, that it was on a walkway inside the garage and that he had slipped on a wet surface, whether due to the presence of water or oil, with the claimant unsure as to which it may have been.

8. Sometime later, following the consultation of CCTV footage, it became clear that the accident happened at the vehicle entrance to the garage and that the claimant fell over on uneven paving when entering from the street. Mr Pitt ensured the area was cleaned immediately afterwards, and subsequently the respondent, having conducted an investigation, repaired the floor at the entrance to the garage.

9. We accept that the claimant reported an accident to the respondent and we further accept that the uneven surface could have endangered other members of staff or even members of the public, although very few. We accept the claimant's evidence that members of the public could, although not authorised, have entered into the garage via the vehicle entrance and that they did so, as did employees, on occasion. Although a relatively minor risk, we accept that it could have endangered health and safety and that the claimant reported his concerns to the respondent on this basis.

10. The claimant was absent from work due to sickness from 23 September 2021. He never returned to work prior to his dismissal on 22 December 2021. He submitted a number of fit notes from his GP which all indicated that he was unfit for work in any capacity. The last fit note expired on 10 January 2022.

11. The respondent's engineering manager Mr Margrave was instructed to manage the claimant's sickness absence. The respondent has an absence management policy. We note that the claimant's absence was managed under the long-term sickness section of the policy and not under any provisions relating to persistent absenteeism. We find the following facts in relation to the events following the claimant's absence from work on 23 September 2021.

12. On 29 September 2021, the claimant attended the office to complete a "Non-Vehicle Investigation" form. The claimant contended this was a sickness absence meeting. The respondent told the Tribunal it was not and that the claimant attended in order to complete the Non-Vehicle Investigation form relating to the reporting of his accident at work. We accept the respondent's evidence in this regard.

13. On 30 September 2021, the claimant was signed off work as not fit for work in any capacity by his GP.

14. On 07 October 2021, the respondent's Report of Injury relating to the claimant's accident was submitted to the Health and Safety Executive.

15. On 03 November 2021, the respondent held a long-term sickness absence meeting with the claimant. This was the first meeting under the respondent's policy, which envisages three meetings in total.

16. On 12 November 2021, the claimant had an initial consultation with his chiropractor, but did not begin treatment on this date.

17. On 19 November 2021 the claimant was signed off work as not fit for work in any capacity by his GP until 13th December 2021.

18. On 24 November 2021 the claimant attended a second sickness absence meeting with Mr Margrave. The claimant contends that Mr Margrave told him that an appointment would be arranged for him to see a "company doctor" who would assess his condition. Mr Margrave contends that the claimant was told that an assessment of his condition would be arranged and it was not specified he would see a company doctor. We do not accept the respondent's evidence on this issue as even the form allegedly completed at the meeting refers to an "appointment to be arranged" and notes that the claimant is "awaiting visit" from the company doctor. Therefore, we find that the claimant had a reasonable expectation that he

would see a doctor from the respondent's occupational health provider. The claimant signed medical questionnaire and provided the respondent with a consent form at this meeting.

19. The claimant's treatment with his chiropractor commenced on 27 November 2021. It ran until 18 January 2022 over six sessions. The claimant's chiropractor provided a letter to the respondent dated 27 November 2021 which stated:

    "Malachi presented…. with right ankle pain and left knee pain which started after a fall at work at the end of September 2021. He has had x-rays on the left knee and right ankle which show no abnormalities. He also reported a 10-year history of low back pain, without any radicular leg symptoms.

    On examination Malachi had a positive stress test on his right deltoid ligament and a positive stress test on his left posterior cruciate ligament. Furthermore, the musculature around both of these ligaments were tight and painful. His low back pain appears to be mechanical in nature as a result of some tight muscle and joints. I have started a course of treatment for these problems and he is responding well so far."

20. On 7 December 2021, Mr Margrave referred the claimant to the respondent's occupational health. The Tribunal has not seen the letter of referral from him but we have seen a copy of the claimant's consent form. It is unclear what questions were asked by the respondent, but we find on the balance of probabilities there were very few questions asked, if any. The claimant was however never assessed by occupational health. Instead, Dr Hughes from occupational health relied on the letter set out above from the claimant's chiropractor.

21. Dr Hughes' 'report' of 7 December 2021 reviewed the chiropractor's evidence set out above dated 27 November 2021 and provided an expected date for resolution of the issue of 6-8 weeks from start of treatment. Dr Hughes also noted

    "If a return to work were not possible within six to eight weeks of these treatments being started it is difficult to predict when he would be able to return."

22. On 15 December 2021 the claimant was signed off work as not fit for work in any capacity by his GP until 10 January 2022.

23. On 22 December 2021, the claimant attended a sickness absence meeting with Mr Margrave, at which he was dismissed on the basis that he had started treatment on 12 November 2021 and 6 weeks had almost expired by then. The respondent now accepts that this was incorrect and that treatment with the chiropractor had not started until 27 November 2021, but the respondent does not accept that the claimant told Mr Margrave this. The claimant accepts that he may have said "I went to the chiropractor on 12 November" to Mr Margrave, and that this may have led to the confusion. However, we find that this indicates that the respondent did not make sufficient effort to establish the correct medical position before dismissing the claimant.

24. The claimant's evidence is that he begged Mr Margrave for his job back at this meeting, on being told that he had been dismissed. We do not accept his evidence in this regard on the balance of probabilities, based on the lack of detail of this in

the claimant's pleaded case (in his claim form or witness statement) and also due to the claimant's lack of any desire to return to work, including during his discussions in the appeal hearing.

25. On 02 January 2022, the claimant appealed against his dismissal to the respondent. His letter of appeal contained no grounds for appeal and in it, he did not ask for his job back.

26. The appeal hearing took place on 31 January 2022 and the claimant was accompanied by his union representative. His appeal was not upheld. He was not able to give the respondent any indication of when he could return to work at the meeting on 31 January 2022, and said he was not prepared to return to work at all until "fully recovered" or else he could risk "making it worse". We note that the claimant's course of treatment with his chiropractor finished on 18 January 2022 and that by the date of the appeal hearing, over 9 weeks had passed since the start of his course of treatment.

The Law

27. There are five potentially fair reasons for dismissal set out in S.98(1)(b) and (2) of the Employment Rights Act 1996 (ERA). The reason pleaded by the respondent in these proceedings is ill-health, that is, a reason related to the capability of the employee for performing work of the kind which he was employed to do. It is for the employer to show on the balance of probabilities that the principal reason was a potentially fair reason.

28. If the employer establishes a fair reason, the determination of the question of whether the dismissal is fair or unfair (as per s98(4) ERA):

    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.

29. The test of whether or not the employer acted reasonably involves a Tribunal determining 'the way in which a reasonable employer in those circumstances, in that line of business, would have behaved' (NC Watling and Co Ltd v Richardson 1978 ICR 1049, EAT). It is a well-established principle that it is the employer's conduct which the Tribunal must assess, not the unfairness or injustice to the employee. Tribunals are to ask: did the employer's action fall within the band (or range) of reasonable responses open to an employer (Iceland Frozen Foods Ltd v Jones 1983 ICR 17, EAT)?

30. In ill-health capability dismissals, if the employer was in any way responsible for the employee's illness that led to the dismissal this may be a factor that is taken into account by a Tribunal when deciding on the fairness of the dismissal. (Royal Bank of Scotland v McAdie 2008 ICR 1087, CA).

31. A factor for the Tribunal to consider is whether the employer could reasonably have been expected to keep the employee's job open any longer (Spencer v Paragon Wallpapers Ltd 1977 ICR 301, EAT; Monmouthshire County Council v Harris EAT 0332/14). This is a question of fact and will turn on the circumstances of each case, including the nature of the employee's job and the nature of their illness or injury. Another factor to be considered is the continued payment of contractual sick pay or otherwise in deciding whether an employer could be expected to wait longer before dismissing.

32. In O'Brien v Bolton St Catherine's Academy 2017 ICR 737, CA, Underhill LJ noted "a time comes when an employer is entitled to some finality. That is all the more so where the employee had not been as co-operative as the employer had been entitled to expect about providing an up-to-date prognosis' and 'In principle, the severity of the impact on the employer of the continuing absence of an employee who is on long-term sickness absence must be a significant element in the balance that determines the point at which their dismissal becomes justified".

33. Disclosures qualify to be considered protected disclosures if they fall within the definition set out in section 43B of ERA 1996. That is, they must, in the reasonable belief of the worker making the disclosure, be made in the public interest and tend to show one or more of the matters in section 43B(1) Employment Rights Act 1996 ("ERA"). In the claimant's case, he alleges that his disclosures tend to show that the health or safety of any individual has been, is being, or is likely to be endangered (section 43B(1)(d)).

34. Protected disclosures must also be made in accordance with one of the six methods of disclosure set out in ERA. The claimant here relies on section 43C, disclosure to the employer or other responsible person.

35. A worker or employee must show that they have a reasonable belief that the information disclosed tended to show the relevant failure. There must be some objective basis for the worker's belief (Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4 EAT).

36. Tribunals are advised that their task, in relation to matters of public interest, is not to determine what is in the public interest, but instead to determine whether the individual employee had a belief that what he disclosed was in the public interest and whether that belief was reasonable (Chesterton Global (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979).

37. ERA 1996 s103A provides that 'an employee who is dismissed shall be regarded … as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure'.

Application of the law to the facts found

38. We do not accept that the claimant's whistleblowing was the sole or principal reason for his dismissal and so his dismissal was not automatically unfair. We find that the reason for the claimant's dismissal was capability relating to his sickness absence. However, we find that the claimant's dismissal was unfair, as there are a number of procedural flaws in the respondent's handling of the claimant's dismissal.

39. Contrary to the respondent's procedures, the claimant did not receive any of the letters in the bundle inviting him to the attendance meetings and was not given the requisite 5 days' notice in each case. The respondent has not produced any of the emails said to have sent the letters to the claimant. On the balance of probabilities we find that the letters were not sent by email. We also find that these were not received by the claimant having been sent by post. The claimant's address is not on the letters and they are addressed to him at the depot where he worked, but was not present due to his sickness absence. Mr Margrave admitted that he was inexperienced in such matters, in that this was his first time going through this process as a manager. We find that he was given notice of meetings by telephone only.

40. Mr Margrave also incorrectly identified the third meeting as being the second meeting in the process ("contractual review") and therefore he did not warn the claimant in advance of the third meeting that a potential outcome would be dismissal as required by the respondent's policy. The claimant therefore was not prepared for this to be a possible outcome and we find he was taken by surprise during the meeting.

41. Contrary to the respondent's policy, Mr Margrave also did not ever tell the claimant the date by which he would have to return to work or face the possibility of dismissal.

42. We also find that the respondent did say to the claimant not to worry and that he would not be dismissed during an earlier meeting on 24 November 2021. The claimant has consistently said this in his evidence and we accept his evidence as being credible, clear and consistent on this issue. The claimant was expected to return to work at this stage, which was also why Mr Margrave didn't discuss alternative roles with the claimant at that stage either. This further added to the claimant's lack of preparedness for his dismissal on 22 December 2021.

43. We do not accept that Mr Margrave made contemporaneous notes during his meetings with the claimant. We accept the claimant's evidence that Mr Margrave was not typing onto a computer during these meetings. We note that the documents which purport to be contemporaneous notes are very short, given their importance.

44. Overall therefore, we find that there was a lack of adequate consultation with the claimant by the respondent, and a lack of transparency from the respondent as to when decisions would be made about the claimant's future.

45. We do not accept that the respondent carried out a reasonable investigation into the claimant's position. We find that there was inadequate medical evidence before the respondent on which to base their decision to dismiss. We would have expected Mr Margrave to pose a number of questions to the occupational health doctor about adjustments, or alternative work for example and there is no evidence that he did so. We accept that the respondent cannot go against the fit note from the claimant's GP that said he was unfit for any work, but there was a failure by the respondent to explore and obtain evidence of possible future alternative courses of action from occupational health.

46. We find that no reasonable respondent would have dismissed the claimant before the expiry of the 6-8 week period identified by their own occupational health doctor from the start of the claimant's chiropractor's treatment. By his dismissal on 22 December 2021, the claimant had not even received the minimum identified by Dr Hughes of 6 weeks' treatment. This is particularly relevant given the claimant's length of service and the fact that the claimant's injury was sustained at work.

47. We find that a reasonable employer would have scheduled a further meeting at a minimum after 8 weeks since the start of treatment, or after treatment had concluded, before considering the termination of the employment contract.

48. We find that there was a failure to discuss alternative roles with the claimant and note that he has provided evidence of a comparator with whom alternative roles were discussed much more fully and in good time. We accept he was only handed information about alternative jobs at the end of the process and after dismissal, based on the respondent's assumption that it was adequate compensation for the claimant to be able to reapply for employment afresh after his dismissal, once he was fit to return to work. We do not accept that this is an acceptable alternative to delaying dismissal in order to discuss alternative roles or possible adjustments to allow a return to work.

49. Did the appeal stage and appeal hearing repair the defects in the respondent's process that went before it? The fact that the respondent dismissed the claimant too quickly was partially rectified by the appeal hearing, in that by this date the claimant had completed his course of treatment and the eight weeks from the start of his treatment had passed, as recommended by the respondent's occupational health doctor as an appropriate point of assessment.

50. Furthermore, the claimant was represented by his union representative at the appeal hearing and had been given a pack of documents and adequate time to prepare for the meeting. Unlike prior to his dismissal hearing, the claimant also knew what the purpose and possible outcome of the appeal hearing would be.

51. We still consider that the transparency of the appeal meeting could have been better, in that the claimant was given little or no time after the adjournment to respond to Mr McKeown's report of what was said to him by Mr Margrave.

52. However we note that the claimant did not say at any point during the appeal hearing that he was fit to return to work or would be at any date in the future. He did not ask for a referral to occupational health, or seek to discuss the possibility of alternative work. The claimant now says that he did not want to return to work because of how the respondent had treated him. However, his case before this Tribunal is not put on the basis of a breach of trust and confidence and we find that this was not how it was put at the appeal hearing.

53. In relation to whether the claimant made qualifying disclosures, we accept that he communicated to Mr Pitt on 22 September and to Mr Margrave on 29 September 2021 that a slippery or uneven surface in workplace caused him to fall. We accept that this was a disclosure of information that he reasonably believed was made in the public interest and that he reasonably believed tended to show the health or safety of any individual had been, was being or was likely to be endangered. We

accept that the claimant had fallen in the workplace and reasonably believed that other employees or members of the public may also be at risk.

54. In relation to the claimant's allegation that his whistleblowing disclosures were partly or wholly the cause of his dismissal, we find that there was no evidence whatsoever before us that it was an issue in the parties' minds at the time of the claimant's dismissal or appeal. We note that it was not mentioned at the appeal hearing by the claimant or by his union representative. There is no evidence that the respondent was unhappy that the claimant raised the issue of his accident at work, or that they sought to cover up the matter. Indeed, there was evidence before us in the bundle that the respondent dealt with the issue properly and thoroughly, including by repairing the area where the claimant fell and by reporting it to the proper external body. There is no evidence whatsoever of a causal link between the claimant's dismissal and his protected disclosures. The claimant's dismissal is therefore not automatically unfair contrary to s103A ERA.

55. In terms of whether the claimant's dismissal was also unfair contrary to s98 ERA, we find that dismissal was not within the range of reasonable responses. No reasonable employer would have dismissed the claimant on 22 December 2021 in the circumstances. The claimant was therefore unfairly dismissed by the respondent.

Remedy

56. The claimant is entitled to a basic award, the sum of which has been agreed between the parties and which we accept is correct, of £8,704.

57. Should the claimant receive a compensatory award and how much should it be?

58. We find that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, but 7 weeks after 22 December 2021 to allow for that fair procedure to be properly carried out.

59. A fair procedure would, we find, have involved the respondent waiting until after 18 January 2022 for the claimant's course of treatment to finish with the chiropractor and for the 8 weeks as initially identified by Dr Hughes to have passed. The claimant should then have been sent to its occupational health doctor for assessment to consider whether there was any possibility of a return to work. Had the respondent have arranged for a consultation with occupational health by phone or video and posed proper questions about adjustments or alternative work, questions would have been posed the week after his course of treatment finished and his MRI results had been received.

60. We find that an occupational health consultation would have taken place on the balance of probabilities in the last week of January 2022. The outcome of this and a third stage review meeting would have taken place in the week commencing 7 February 2022 at which the claimant would have been fairly dismissed, as we find at this point the claimant would have said there was no prospect of a return to work whatsoever at that time.

61. We have taken account of evidence given by the claimant of his prospects of a return to work at the appeal meeting on 31 January 2022 where neither he nor his

union representative gave any indication of the possibility of a return to work even though his treatment had finished by then and there was no indication of serious damage or injury from his x-rays or MRI scan. The claimant did not consider alternative employment or modified duties at the meeting on 31 January and said he would not come back until he was "fully recovered". We find that by 7 February 2022 it would have been obvious that the injury was "open-ended" and that there would be no likely return to work date.

62. A dismissal on 7 February 2022 would therefore have been fair. The claimant's losses therefore end on 7 February 2022 and his compensation should run from the date of dismissal for loss of sick pay and pension contributions for 7 weeks from 22 December 2021 to 7 February 2022, which was agreed by the parties to be the sum of £3,769.64.

63. Has the claimant taken reasonable steps to replace his lost earnings, for example by looking for another job? In that 7-week period we accept that the claimant was not fit for work according to his account and the medical evidence before the Tribunal.

64. We have not made an award for loss of statutory rights, as no award should be made where there is a finding that the claimant would have been fairly dismissed in any event (Puglia v C James and Sons [1996] IRLR 70).

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Employment Judge Barker

Date 27 February 2023

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