



EMPLOYMENT TRIBUNALS

Claimant:
Mr C Stone

v

Respondent:
Oxfordshire GM Limited

Heard at: Reading

On: 12 and 13 January 2023

Before: Employment Judge Hawksworth

Appearances

For the Claimant: In person, supported by Mrs Stone

For the Respondent: Mr J Middleton (solicitor)

JUDGMENT having been sent to the parties on 17 February 2023 and reasons having been requested by the claimant in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is a complaint of unfair dismissal by Mr Stone. The claim was presented on 15 September 2021 after Acas early conciliation from 2 August 2021 to 1 September 2021. The response was presented on 22 November 2021. The respondent defend the claim.
2. Mr Stone also brought allegations of bullying and harassment during the period from 2019 to September 2020. Those allegations were considered by Employment Judge Gumbiti-Zimuto at a preliminary hearing on 11 August 2022. The judge described the conduct which Mr Stone complained about as very serious instances of harassment which were offensive and upsetting for Mr Stone, and to which he should not have been subjected. However, the judge concluded that they were not complaints that the employment tribunal could consider, as they were not related to a protected characteristic. He also concluded that they had been brought out of time and it was not just and equitable to extend time. Those complaints were struck out. I have therefore, over these two days, only been considering the complaint of unfair dismissal.
3. The hearing took place in Reading tribunal in person. The respondent had prepared a bundle with 157 pages. Mr Stone prepared a separate bundle with 40 pages, these additional documents were allowed by consent.

4. At the start of the hearing, the respondent made an application for the claim to be struck out because of non-compliance with tribunal orders. For reasons explained at the hearing, I refused the application.
5. I heard evidence from Mrs Rodney on behalf of the respondent, and then from Mr Stone. Mr Middleton made closing comments on behalf of the respondent, and Mrs Stone made closing comments on behalf of Mr Stone.
6. I gave my judgment and reasons at the hearing. Mr Stone requested written reasons. I apologise for the delay in providing these written reasons; the typing up of my recorded reasons, which is done by the tribunal administration, took almost 4 weeks because of the current high volume of cases.
7. Tensions can be high in employment disputes and there was an additional factor here as the parties are family members. When I gave my reasons, I recorded my thanks to the parties, their supporters and representatives who, despite these tensions, all conducted themselves with absolute politeness and dignity throughout.

Findings of facts

8. There were relatively few disputes between the parties about the facts but I have found it helpful to set out the chronology in outline. Where there is a dispute about the facts, I have to decide what I think is most likely to have happened, by reference to the evidence I have heard and read.
9. The respondent is a company providing ground maintenance services. Mrs Rodney is the Regional Manager and her brother, Mr Stone, is the claimant. At the time in question the respondent had 18 employees.
10. Mr Stone started working for the respondent in October 2018; his job title was Contract Manager but the work he carried out for the respondent was an outdoors, physical role, largely cutting grass and hedges, and other ground maintenance for the respondent's customers. While he worked for the respondent Mr Stone completed courses in cross felling, use of chain saws, pesticides and first aid. He was booked to go on a tree felling course but that could not go ahead because of the pandemic.
11. During the pandemic Mr Stone had use of one of the respondent's vehicles which we have called the wood truck to get around to sites where he was working. On 5 January 2021 Mrs Rodney told Mr Stone he could not use the wood truck any more because it was needed for the arborists. The arborists specialise in maintenance of trees; they work in pairs partly for safety reasons.
12. Mr Stone was not qualified to do arborist work. Mrs Rodney told Mr Stone that the only work available for him was work for which he would have to use the panel van instead of the wood truck. Mrs Rodney said that later in the season there would be other jobs that Mr Stone could work on, such as hedge cutting jobs but they were not available at that time (she had also mentioned the possibility of these jobs to Mr Stone in December 2020).

13. Mr Stone is tall and he found driving the panel van caused pain in his left knee. He has arthritis in both knees and in 2017, prior to working for the respondent, he had had to have surgery on his left knee. He had been off work for about a year with that knee problem, before being able to return to work after surgery.
14. On 22 January 2021, that is 17 days after he started driving the panel van, Mr Stone was signed off sick. He did not return to work between that date and his dismissal on 3 June 2021. His first sickness certificate was for two months. The reason given was severe knee pain and arthritis. The doctor advised that Mr Stone was not fit for work at all; the doctor did not suggest that there were any alterations to duties or hours that could be put in place to allow Mr Stone to be fit to work.
15. On 23 March 2021 Mrs Rodney wrote to Mr Stone to ask for consent to obtain a report from his GP to enable the respondent to have more information about what they could do to facilitate a return to work.
16. After that request was made but before the report was provided, Mr Stone was signed off sick again until 5 April 2021. At that time, he had post-covid symptoms as well as his knee pain.
17. The GP report was sent to the respondent in a letter of 20 April 2021. The doctor said that Mr Stone had severe knee pain which seemed to have been triggered by the change in work vehicle. He said it was hard to be clear on prognosis. No return date was given. Mr Stone was to be referred to an orthopedic specialist and the GP was hopeful that they could fix Mr Stone's knee for him again. The doctor referred in his letter to Mr Stone's work-related stress arising from incidents of bullying at work. He said that if there was a significant change to the bullying behaviours, Mr Stone's prognosis, as far as return to work for stress reasons was concerned, was good.
18. In April 2021 there was a further sickness certificate for severe knee pain until 1 June 2021. In May the GP provided another certificate which said that Mr Stone would be unfit until the end of July 2021.
19. Mrs Rodney wrote to Mr Stone on 27 May 2021 just before that certificate, to invite him to a medical capability meeting. This invitation was sent under the capability procedure in the employee handbook.
20. The meeting was to take place by video on 2 June 2021. The letter said that Mr Stone could be accompanied. Mr Stone asked if his wife could accompany him; the respondent said he could only be accompanied by a trade union representative or a work colleague.
21. After the invitation but before the meeting took place, the last relevant sickness certificate was issued by the GP. That certificate said that Mr Stone would be unfit for work, again without any suggestions for altered hours or duties, until 28 July 2021.
22. Mrs Rodney chaired the meeting on 2 June 2021. A note taker attended and took a handwritten note. Mr Stone recorded the meeting. At the

hearing before me he produced a copy of the handwritten note to which he had added wording from the recording. This fuller note was agreed by the respondent. I read the note with the claimant's additions in full.

23. At the medical capability meeting Mr Stone reported that his knee was still swollen and painful, that he could do minor duties around the house, but washing up and going up and down the stairs were painful, and he could only stand for 10 to 20 minutes before his knee became painful. Mrs Rodney asked the claimant if he thought there was anything he could do at work and he said that he did not know. As far as medical treatment was concerned Mr Stone said that he was waiting for a date for physio and an MRI scan but neither date had come through. He said he wanted to return to work but was currently unfit to do so.
24. Mrs Rodney made the decision after the meeting that the claimant ought to be dismissed. She wrote to him on 3 June 2021 concluding that no adjustments could be made to assist him to return to work. She had decided that he did not have the capability to continue in his role. He was dismissed with effect from 3 June 2021 and paid in lieu of notice and accrued holiday.
25. Mr Stone was told that he had the right to appeal but he chose not to.

The law

26. I did not read these legal provisions out when I was explaining my reasons at the hearing. Instead, I gave a summary of them as I was explaining my conclusions. I include the legal provisions in full here for completeness.
27. Section 98 of the Employment Rights Act 1996 sets out the tests for determining whether a dismissal is fair or unfair. Subsection 1 provides:

*“(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.”*

28. Capability is a reason falling within subsection (2).
29. If the reason for dismissal is a potentially fair reason within sub-sections (1) and (2), then the tribunal must go on to consider whether the dismissal is fair in all the circumstances of the case, and, under sub-section (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.”*

Conclusions

30. The legal principles are set out in section 98 of the Employment Rights Act. There are broadly two parts to the test.
31. The first is that the reason for dismissal has to be one of the reasons that is listed in section 98(2), also known as potentially fair reasons. They are the only reasons for which someone can be fairly dismissed once they have the right to not to be unfairly dismissed.
32. Mr Stone had that right, because he had worked for the respondent for more than two years.
33. In this case the respondent relied on capability as the reason for dismissal. Capability, which includes long-term absence, is one of the potentially fair reasons on the list in section 98(2). In this case I accept that this first part of the test is satisfied. The reason for Mrs Rodney's dismissal of the claimant was his long-term absence. That is a capability reason, and that is a potentially fair reason.
34. So, I go on to the second part of the unfair dismissal test. In summary, the second part of the test says that the dismissal must be fair in all the circumstances. That is set out in section 98(4). I have to consider whether the respondent acted reasonably in these circumstances in treating the long-term absence as a sufficient reason to dismiss.
35. As I explained earlier in the hearing, my role is not to make my own decision. I do not decide whether I would have dismissed the claimant in these circumstances, or even whether the respondent's decision was the right decision. Instead, my role is much more limited. The reason for this more limited role is that the law recognises that different employers might take different approaches in the same circumstances.
36. So, the rules I am applying accept that there might be more than one reasonable approach. I have to assess whether this decision by the respondent is one of the possible reasonable decisions or not one of the possible reasonable decisions. Another way of putting it is that I ask whether it is a decision that no reasonable employer could make.
37. In Mr Stone's case, I have looked at a number of factors to help me make an assessment of whether dismissing him was one of the possible reasonable decisions, or whether it was not one of the possible reasonable decisions.
38. The first thing I looked at was whether the respondent genuinely believed that Mr Stone was no longer capable of performing his work. I accept that Mrs Rodney did genuinely believe that Mr Stone was not capable of doing his role at the time of the dismissal. There was a reasonable basis for her to think that, namely what it said in the fit notes from 22 January 2021 up until the dismissal, and what the GP said in the report to the respondent. In short, Mr Stone did a wholly outdoors, physical job and the GP said that he was in severe knee pain. It was reasonable for Mrs Rodney to think that he

could not do his job at that time.

39. The second factor for me to consider is the consultation between the respondent and Mr Stone and whether that was adequate. Consultation is an important part of the fairness and reasonableness of the decision. Here, Mrs Rodney did consult Mr Stone. He was invited to a hearing on 2 June 2021. The invitation letter said that if there was no prospect of a return to work, termination of employment was a possibility.
40. At the hearing Mrs Rodney gave Mr Stone the opportunity to explain his symptoms, to say what the medical treatment plan was, to say what the timeframe was and to say what he thought could be done. Mr Stone gave a full and frank update on his symptoms. He said he was currently unfit for work. He said there were no firm dates for the treatment plan, probably because of the pandemic; he did not have dates for a hospital appointment, MRI or physio. As far as suggestions for what could be done, he was not sure. He said he did not know what could be done. The respondent did give Mr Stone the opportunity to say what he wanted to say about his capability to work.
41. Thirdly, I considered whether the respondent carried out all the investigations that it should have done, including finding out about the up-to-date medical position. I have decided that it did. As I have said, Mrs Rodney obtained a report from the GP and spoke to Mr Stone for a current update on how things were by 2 June.
42. The fourth point I have looked at is whether there was another role Mr Stone could have done instead of his own role. When I have considered this I have taken into account that the fit notes did not identify any alteration to duties which could have enabled Mr Stone to return to an amended role. Throughout the whole period of sick leave, he was certified unfit for work without any indication that there was scope for changes which could make him fit for work. Also, when asked about this in the meeting, Mr Stone did not identify any alternative roles he could do.
43. At the hearing before me Mr Stone mentioned the possibility of a contract manager role involving visiting sites, looking a work and getting work in as an alternative. However, that was not something that was raised with the respondent at the time. I have concluded that it was reasonable for the respondent to consider at the time of dismissal that there was no other role that Mr Stone could do while he was unfit for his normal work.
44. The last question for me is whether the respondent could reasonably have been expected to wait longer before dismissing Mr Stone. This is really the heart of Mr Stone's case as I understand it. I have considered this question together with the overarching question of whether dismissal was one of the possible decisions that a reasonable employer could have made in these circumstances.
45. I have considered a number of sub-points when looking at this last question:
 - 20.1 First of all, Mr Stone felt he ought to have been given longer to recover, especially as he was not being paid any sick pay during his

sickness absence. He suggests that there would not have been any disadvantage for the respondent to have kept him on unpaid sick leave while waiting for him to recover. On behalf of the respondent, Mr Middleton said that there was some cost to the respondent even though Mr Stone was not in receipt of contractual sick pay. For example, there are management costs and administration costs for an employee who is on sick leave, and also employees on sick leave have a right to accrue paid holiday while on sick leave.

- 20.2 A related point was made by Mrs Stone on behalf of Mr Stone: she said that the dismissal process was rushed and should have been approached in stages rather than there being only one hearing. The respondent's capability procedure certainly anticipates two warnings before a dismissal. However, that procedure is very much focused on poor performance rather than absence cases. It includes a requirement to issue targets for improvement and for regular reviews of performance for example. This approach would not have been relevant or appropriate in Mr Stone's case, as his injury meant he was not able to be at work at all. And, as the invitation letter made clear, this was a case of medical capability rather than poor performance. I have concluded that in that context, it was reasonable for the respondent to adopt a shorter process.
- 20.3 If there had been a date coming up for medical treatment or a date on which a further medical update was expected, it might have been that a reasonable employer should have waited for that to see what happened and then had another hearing. However, I have decided that, in circumstances where there was no such date coming up, and considering that it had taken a year for Mr Stone to recover from his previous knee injury, it was reasonable to deal with all of the issues in one hearing without waiting an indefinite period to see if there were any further developments.
- 20.4 Another point raised by Mr Stone about the conduct of the capability meeting was that the issues regarding bullying and work-related stress should have been dealt with separately, at another hearing. The notes of the capability meeting record that Mrs Rodney said she raised this with Mr Stone because it was mentioned in the GP letter. In light of what the GP said, it was reasonable for her to think that there was a possible overlap between the capability issues and the bullying issues. Mrs Rodney said in the meeting that she wanted to give Mr Stone a chance to talk about the bullying issues as well. That was a reasonable approach to take.
- 20.5 I have also considered the size of the respondent. Mrs Stone is right to highlight that the respondent is not the smallest of employers, not what you might call a micro employer. Nevertheless, an employer with 18 staff is still of a size where the impact of one person being absent can be very significant in terms of workload and costs. The respondent was incurring costs in excess of the level of the claimant's salary to engage agency staff to cover the claimant's work during his absence.

- 20.6 Finally, the length of the period of sickness absence is an important factor when considering whether it would have been reasonable to wait longer. At the point where Mrs Rodney was considering dismissal, Mr Stone had been off for four months and was signed off sick for a further two months. By the end of the fit note which was current at the time of dismissal, Mr Stone would have been unfit for any work for six months.
- 21 Having considered all these features, I have concluded that overall the respondent's decision to dismiss can be categorised as a decision which a reasonable employer could have made.
- 22 I am not saying this is the decision I would have made, that is not the test I have to apply. There may have been other employers who would have waited longer (and equally, there may have been other employers who would have looked at dismissal earlier). But I have decided that the decision to dismiss in these circumstances, where the claimant was going to be unable to work for six months, where up to date medical evidence could not shed any light on the likely return date, and where Mr Stone could not suggest any alternative role, is a decision which cannot be said to be one that no reasonable employer would have taken. In other words, it was one of the possible reasonable decisions which were open to a reasonable employer in these circumstances. For those reasons, I have concluded that the claimant was not unfairly dismissed.
- 23 Finally, I express my hope that the conclusion of this claim will enable the parties to put these matters behind them and rebuild their relationships.

Employment Judge Hawksworth

Date: 29 March 2023

Judgment sent to the parties on

30 March 2023

For the Tribunal office