Case Number: 3301900/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Robert Watson	**v**	Tesco Stores Limited

Heard at: Cambridge Employment Tribunal **On:** 9 and 10 March 2023

Before: Employment Judge Freshwater

Appearances
For the Claimant: in person
For the Respondent: Mr Dhorajiwala (counsel)

RESERVED JUDGMENT

1. The claimant's claim for unfair dismissal is not well founded and the claim does not succeed.

2. The claimant's claim for unlawful deduction from wages is well founded and the claim succeeds.

3. The claimant's claim for unpaid holiday pay is not well founded and is dismissed.

4. The respondent is ordered to pay the claimant the sum of £1398.60 (gross) which is his notice pay.

RESERVED REASONS

Introduction

1. The claimant is Mr Robert Watson. The respondent is Tesco Stores Limited.

2. This is Mr Watson's claim for unfair dismissal and unlawful deduction from wages.

3. Mr Watson was employed by the respondent from 14 July 2001 until 7 October 2019. During that time, he worked in many of the departments in the Bletchley Tesco Extra store. For the last 10 years of his employment, he was delivery driver. He was dismissed from his employment following a period of sickness absence which resulted in disciplinary proceedings.

4. The respondent's case is that Mr Watson had failed to keep in touch during his sickness absence as required under the applicable sickness absence policy.

5. Mr Watson's case is that he was on certified sick leave for stress, anxiety and depression when he was dismissed and that he had kept in touch to the best of his ability by providing the required 'fit notes' as requested, which he believed was reasonable. His sickness absence followed a dispute with his manager over his shift hours.

Procedure and hearing

6. The hearing took place over two days and was in person.

7. I was referred to a bundle of 332 pages and a bundle of three witness statements. The respondent submitted a skeleton argument, chronology and bundle of legal authorities. These were also provided to Mr Watson.

8. I heard oral evidence from Mr Watson, Mr Bannerman and Miss Balch.

9. I heard oral submissions from Mr Watson (this was his preference) and received written submissions on behalf of the respondent.

Preliminary issues

10. Mr Watson applied to adjourn the hearing. The reason for his application was that on an earlier date Mr Watson had been permitted to amend his claim form to include a claim of disability discrimination. The respondent had successfully applied to strike out that part of the claim at a hearing on 24 June 2022 when an oral judgment was given. Mr Watson requested (within the required time limit) written reasons for the decision which had not been provided by the start of this hearing. He said to me that he would be at a disadvantage if he had to proceed without the written reasons. He noted that this was the first time he had applied for an adjournment, that he was litigating in person and that the case had been adjourned for lack of judicial resource in the past. He thought that an adjournment would enable the case to be resolved between the parties and was open to the idea of judicial mediation.

11. The application was opposed by the respondent. It was accepted that Mr Watson had not received the reasons and the respondent said that it had also tried to obtain them. The respondent submitted that an adjournment would cause undue delay in a case that was already old. Relevant members of staff had left and redundancies were likely in the future. This would make it difficult for the respondent to defend the claim. Any future listing of the hearing was

likely to be another year away. It was suggested that one option would be to hear the evidence in this claim, and adjourn on a part heard basis to enable the issues about the disability claim to be resolved. It was said that this would save costs and ensure important evidence was heard.

12. My decision was to refuse the application to adjourn the case. I considered the overriding objective which is to deal with cases fairly and justly. This includes, so far as practicable: ensuring that the parties are on an equal footing; dealing with cases in ways which are proportionate to the complexity and importance of the issues; avoiding unnecessary formality and seeking flexibility in the proceedings; avoiding delay so far as compatible with proper consideration of the issues and saving expense.

13. Mr Watson had done all he could to obtain the reasons. It is possible that, when he has the written reasons he may decide to ask for a reconsideration of the earlier decision or seek permission to appeal. However, in my view the impact of the delay in granting the adjournment outweighed the potential for any disadvantage to Mr Watson. This is because even if he had the reasons, that would not mean the disability part of his claim would automatically be reinstated. I do not find that the absence of the full reasons places Mr Watson at a disadvantage in respect of the claim that is before me. He can present his case and present evidence to deal with the circumstances around his dismissal. An adjournment would increase the costs of the case and would not be proportionate.

The law

14. Section 13 of the Employment Rights Act 1996 [ERA 1996] deals with unlawful deduction from wages and states:

> "13.— Right not to suffer unauthorised deductions. (1) An employer shall not make a deduction from wages of a worker employed by him unless— (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or (b) the worker has previously signified in writing his agreement or consent to the making of the deduction."

15. Under section 94(1) of the ERA 1996, an employee has the right not be unfairly dismissed by their employer. It is for the employer to show the reason for the dismissal and that it is a one of a number of listed reasons. In this case, the respondent says that the reason relates to the conduct of the employee (section 98(1)(2)(b) of the ERA 1996).

16. Section 98(4) of the ERA 1996 states that the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employee):

> (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.

17. In determining if the dismissal is fair, the tribunal must consider whether the dismissal fell within a band of reasonable responses. This is a test set out in the case of *Iceland Frozen Foods Ltd v Jones [1983] ICR 17 (EAT)* as follows:

> *"[T]he authorities establish that in law the correct approach for the… tribunal to adopt in answering the question posed by [S.98(4)] is as follows:*
>
> *(1) the starting point should always be the words of [S.98(4)] themselves;*
> *(2) in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the… tribunal) consider the dismissal to be fair;*
> *(3) in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*
> *(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*
> *(5) the function of the… tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.'"*

18. In the case of *British Home Stores Ltd v Burchell [1980] ICR 303 (EAT)* it was said that a dismissal on the grounds of conduct will be fair where, at the time of the dismissal:

> (a) the employer must have a genuine belief in the misconduct;
> (b) there are reasonable grounds for that belief; and
> (c) the employer carried out as much investigation as was reasonable in the circumstances.

19. In the case of *Polkey v A E Dayton Services Ltd [1988] AC 344 (HL)* it was said, in respect of a conduct dismissal, that the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation.

20. In the case of *Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588* it was said that the range of reasonable responses test applies to whether a reasonable dismissal procedure has been adopted.

Findings of fact

21. Mr Watson was signed off sick from work on 15 March 2019 with stress, depression and anxiety. He remained signed off until his dismissal on 7 October 2019.

22. Miss Balch was Mr Watson's line manager. I believe her evidence that she was unaware of Mr Watson's health issues until he took sickness absence. I found Miss Balch to be an honest witness. I did note that she showed her frustration at times, and that she is a very direct person. This did not diminish her credibility, but I could understand that she may be perceived as abrupt by her colleagues.

23. A disagreement formed between Miss Balch and Mr Watson about Mr Watson's shift hours. Mr Watson had different hours from most of the other drivers, and these had been his working hours for many years. This was an historical arrangement. Mr Watson's hours were from 6 am to 3 pm on a Sunday. The other drivers work from 10 am until 3 pm. There was no driving work to do before 6 am, and this is why Miss Balch wanted to change Mr Watson's working hours. Mr Watson disagreed, and initially Miss Balch agreed with him that he would do other work in the morning (loading the vans) and start driving at 10 am. Miss Balch remained unhappy with this agreement as she felt it did not suit the needs of the business. I think this was a bigger issue to her than the change in driving regulations that she set out in evidence. This is because it was unclear what exactly the impact of those regulations was on the hours worked by Mr Watson.

24. On 10 March 2019, a customer complaint was received about Mr Watson. The nature of the complaint is not important. However, the usual practice of the respondent is to investigate complaints from customers by having a discussion with the employee in question. This would normally happen during the contractual hours of employment. Miss Balch posted a letter to Mr Watson on 11 March 2019, inviting him to an investigation meeting on Sunday 17 March 2019. Mr Watson telephoned in sick on that day. He did not return to work again. Mr Watson's evidence was that the complaint had been made by a family member of Miss Balch. I accept the evidence of Miss Balch that this was not the case. As I have said, I found her to be a credible witness and there was nothing to justify this assertion by Mr Watson.

25. On 26 March 2019, Miss Balch wrote a letter (sent by recorded delivery) to Mr Watson, inviting him to an investigation meeting on 31 March 2019. This was to deal with the customer complaint.

26. On 8 April 2019, Miss Balch wrote to Mr Watson requesting that he provide a 'fit note' from his doctor due to the length of his absence from work. Mr Watson provided two statements of fitness for work for the period 15 March 2019 until 29 April 2019.

27. On 13 May 2019, Miss Balch requested a new fit note. One was provided by Mr Watson on 16 May 2019, which expired on 28 May 2019.

28. Under the respondent's Sickness Absence Policy, once an absence reached four weeks it becomes long term. In the bundle, I was provided with a copy of the Sickness Absence policy dated October 2021. This clearly postdates the relevant dates in this case. I accept the evidence of Mr Bannerman that the policy in place in 2019 was not materially different. Mr Watson had a copy of the 2019 policy and did not raise any concerns about the content of the 2021 policy. Under the policy, a wellness meeting was arranged. Miss Balch sent an invitation to Mr Watson for a wellness meeting on 20 May 2019. She also requested Mr Watson's consent to refer him to Occupational Health. This is a normal part of the procedure and enables the respondent to obtain more information about an employee's condition and any potential adjustments that could assist. Mr Watson did not respond to the meeting invitation or attend the meeting. He did not provide consent for the Occupational Health referral.

29. Miss Balch wrote to Mr Watson on 4 June 2019 to remind him of the Sickness Absence Policy. She asked him to contact her within 48 hours to discuss the absence. The letter also explained that if he did not respond within the time frame, then he may be invited to an investigation meeting to discuss the lack of contact. Mr Watson sent a fit note covering the period until 30 June 2019, but did not telephone Miss Balch.

30. The Sickness Absence Policy says that it is a condition of employment that employees keep in touch and that if they do not then a disciplinary investigation may follow. They must keep in touch even if providing fit notes.

31. In June 2019, the process followed became focussed on conduct rather than sickness absence. On 18 June 2019, Miss Balch invited Mr Watson to an investigation meeting on 23 June 2019. Mr Watson did not respond or attend the meeting. Similarly, he did not attend a meeting fixed for 30 June 2019.

32. The disciplinary meeting was rescheduled for a third time – 7 July 2019. In the letter containing the invitation for that meeting, Miss Balch explained that as Mr Watson's fit note had expired his pay had been stopped. On 4 July 2019, Mr Watson responded. He provided a fit note for the period 1 July 2019 until 31 July 2019. He explained in a letter that he had been signed off with anxiety and depression and so was unable to attend work, including wellness meetings and hearings. He said that he had thought providing fit notes was sufficient and this "led to an error" in not responding to correspondence. He did not attend the meeting on 7 July

33. It was decided by Miss Balch and Mr Bannerman (a senior manager) that as Mr Watson had communicated with them, that they would not continue with the disciplinary process. Instead, Mr Bannerman decided to arrange a long-term sickness meeting with Mr Watson. He also requested consent to refer Mr Watson to Occupational Health. This was set out in a letter dated 8 July 2021. The meeting was fixed for 21 July 2019. Mr Watson responded saying he intended to return to work in the near future and that he could not attend the meeting in person, but would speak by telephone with Mr Bannerman on a

different date. On 23 July 2019, Mr Bannerman wrote to Mr Watson requesting a suitable date and time for the meeting.

34. On 30 July 2019, Mr Watson wrote to Mr Bannerman proposing a meeting on 11 August 2019 at 11.30.

35. On 6 August 2019, Mr Bannerman wrote again to Mr Watson. He explained that a wellness meeting had been fixed for 11.30 am on 11 August 2019 and that Miss Balch would call because Mr Bannerman would be away on holiday. Mr Watson replied on 9 August 2021 to reschedule the meeting and stating that he would prefer to speak to Mr Bannerman.

36. Mr Bannerman said that he was not aware that Mr Watson had any issues with Miss Balch at this stage, and I accept his evidence. There was nothing in the correspondence to date that would have indicated otherwise.

37. Attempts were made by Miss Balch and another colleague (Mr Aloysius, the store manager at the time, who no longer works for the respondent and did not give evidence during the hearing) to contact Mr Watson by telephone while Mr Bannerman was away on holiday. These were unsuccessful because Mr Watson did not answer.

38. On 19 August 2019, Miss Balch again wrote to Mr Watson inviting him to an investigation meeting on 25 August 2019. This would be a conduct meeting due to lack on engagement whilst on sickness absence. Mr Watson replied to say that he would not attend the meeting and that he preferred to liaise with Mr Bannerman.

39. On 4 September 2019, Mr Aloysius wrote to Mr Watson to invite him to a disciplinary meeting on 8 September 2019. This was because Mr Bannerman was on holiday. Mr Watson wrote back on 6 September 2019 to say that he would not be attending as he was not fit to do so. He requested a telephone call with Mr Bannerman.

40. Mr Bannerman wrote to Mr Watson on 12 September 2019 inviting him to a wellness meeting. Mr Bannerman hoped that this would mean the conduct/disciplinary process could – potentially – be averted. Mr Bannerman telephoned Mr Watson on the appointed date and time, but Mr Watson did not answer.

41. Mr Bannerman wrote to Mr Watson on 18 September 2019 to invite him to a conduct investigation meeting on 22 September 2019. Mr Watson did not attend. Mr Watson was invited to a further meeting on 20 September 2019. He was told the outcome might be dismissal. Mr Watson said that he had not received this invitation letter. However, the evidence is that delivery of the letter was refused at the doorstep. There was proof of this from Royal Mail. Mr Watson denied that he had refused the correspondence.

42. Mr Bannerman wrote again on 1 October 2019, inviting Mr Watson to a conduct meeting on 6 October 2019. The letter explained that the meeting

would proceed in Mr Watson's absence. It was sent by recorded delivery. Mr Watson denied receiving the letter. I do not find it credible that Mr Watson did not receive it. I find it more likely that Mr Watson was stressed and worried about what was happening. He may not have wanted to deal with the situation or may have felt unable to deal with it. Mr Watson had provided fit notes for the duration of his sickness absence and was, at least, able to obtain and submit these to his employer. Mr Watson said in his evidence that had done the best he could in the circumstances.

43. The outcome of the meeting on 6 October 2019 was that Mr Watson was dismissed. He was informed of this by a letter sent by recorded delivery on 7 October 2019. The outcome letter incorrectly stated that Mr Watson was not entitled to notice pay. The respondent accepts this is correct. It has not yet been paid to Mr Watson because Mr Watson has not provided his bank account details. The amount due is £1398.60 (gross).

44. Mr Watson was paid his holiday pay entitlement. This is found in a payslip in evidence.

45. Mr Watson sent in a fit note for the period 1 October 2019 until 31 October 2019. This included a covering letter which stated he had not received any letters since 4 September 2019. He requested a rescheduled meeting. Again, I do not find this to be credible. All correspondence was sent by recorded delivery as evidenced in the bundle. It seems to me that Mr Watson responded when he realised that there would be a tangible detriment to himself, for example when he was told that he would lose pay (in early July 2019 and in this instance, when he was told he had been dismissed). In any event, the note and letter had not been seen by Miss Balch or Mr Bannerman before the tribunal proceedings were commenced. I understand that if they had been, then an appeal hearing would have been heard. I accept the evidence as credible because all procedures had been followed previously by Mr Bannerman and Miss Balch.

46. The respondent paid Mr Watson's unpaid holiday pay as set out in the payslip at page 250 in the bundle.

Conclusions

47. The respondent followed its sickness absence and disciplinary procedures. Mr Watson was given many opportunities to attend meetings and engage with his employer. This included speaking to Mr Bannerman instead of Miss Balch, and by telephone instead of in person at the store in question.

48. I do not find it credible that Mr Watson did not receive the number of letters that he set out in his evidence. The respondent produced evidence that these were sent by recorded delivery. I could well imagine that due to his illness he may have disregarded or simply not dealt with the correspondence because it added to his stress and anxiety. This was not his evidence, and indeed there is nothing to on which I can make a finding that this is did happen. Ultimately, it is not material. The fact is that the letters were sent to his address. There

is no more that the respondent could reasonably have done, as attempts had also been made to speak to Mr Watson by telephone on the number that he had provided. Mr Watson did not inform Miss Balch or Mr Bannerman that he felt unable to engage with Miss Balch or that he was doing his best to comply with the requests for meetings. Therefore, the respondent cannot be expected to have known this information.

49. I am satisfied that the respondent has shown the reason for Mr Watson's dismissal was due to conduct. This was on the basis that he had not followed the long-term absence process in the Sickness Absence Policy, even after he was told that he needed to do so. In particular, Mr Watson failed to attend meetings in person and by telephone. Miss Balch and Mr Bannerman made numerous attempts to engage with Mr Watson, including enabling Mr Watson to choose the format and date of meetings. None of the 'fit notes' said that he was unable to attend meetings (which is distinct from being unable to go to work).

50. I am satisfied that the dismissal was fair because it was within the range of reasonable responses. The respondent is a large company with significant resources and had appropriate policies in place. Mr Bannerman and Miss Balch applied those policies fairly. They gave Mr Watson ample opportunity to keep in touch and were flexible in their approach. This was demonstrated by the fact that they reverted from a disciplinary investigation to set up a wellness meeting when there was, initially, some contact from Mr Watson beyond sending in fit notes. They provided the opportunity for Mr Watson to speak by telephone rather than attend the store in person. A fair procedure was therefore followed.

51. The respondent had a genuine belief in the misconduct and the belief was reasonable. The relevant policies were followed, and flexibility shown in Mr Watson's favour. As much investigation was carried out as was reasonable in the circumstances. There was a genuine attempt to invite Mr Watson to meetings, both in person and by telephone, on many occasions. This would have enabled Mr Watson to explain his side of things. Therefore, the conduct of the respondent was reasonable.

52. Dismissal was the last resort because of all the attempts made by the respondent to engage with Mr Watson. Even though Mr Watson had not told the respondent why he did not want Miss Balch to conduct the investigation and wellness meetings, Mr Bannerman made efforts to accommodate Mr Watson's request. Mr Watson did not accept the opportunity to engage with Occupational Health.

53. The respondent has paid Mr Watson's holiday entitlement but has not paid him notice pay. As this is the only remedy that falls to be dealt with, I have dealt with it in this judgment rather than list the case for a remedy hearing as that would be disproportionate.

_____

Employment Judge Freshwater

Date: 8 June 2023

Sent to the parties on: 8 June 2023

For the Tribunal Office