



EMPLOYMENT TRIBUNALS

Claimant: Mr Ali Dadd

Respondent: London Underground Ltd

Heard at: Watford

On: 31 July 2023
1 August 2023
18 September 2023

Before: Employment Judge Bansal (Sitting alone)

Representation

Claimant: Mr A Rhodes (Counsel)

Respondent: Mr M Slater (Counsel)

JUDGMENT having been given orally at the conclusion of the hearing, these reasons are provided following a request made by the respondent for written reasons in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013.

REASONS

Background

1. This is a complaint of unfair dismissal.
2. By a Claim Form presented on 6th January 2022, following a period of early conciliation from 6th December 2021 to 7th December 2021, the claimant brought complaints of unfair dismissal, age and disability discrimination, wrongful dismissal, and other payments.
3. By letter dated 31st May 2022, the claimant withdrew all complaints, except the unfair dismissal complaint. Accordingly a Judgment on withdrawal was issued to this effect on 13th June 2022.
4. The respondent defends the claim asserting that the claimant was fairly dismissed on grounds of capability due to ill health.

The Legal Issues

5. At a Preliminary Hearing held on 13th June 2022, Employment Judge King agreed with the parties representatives the legal issues to be determined. At this hearing both Counsel confirmed their agreement to the List of Issues, which are set out below. (p28-29)

Unfair dismissal

- (i) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (“ERA”) ? *The respondent asserts that it was capability (s98(2)(a) ERA 1996); and in the alternative some other substantial reason of a kind such to justify the dismissal of the claimant holding the position which he held (s98(1)(b) ERA1996).*
- (ii) If so, did the respondent follow a fair procedure? *The claimant asserts the respondent failed to follow a fair procedure as it failed to carry out the recommended risk assessment*
- (iii) If so, in all the circumstances did the respondent act fairly in accordance with s98(4) ERA 1996, and in particular, did the dismissal fall within the range of reasonable responses? *The claimant asserts the dismissal is outside the range of reasonable responses as it failed to follow the advice of Dr Phoolchund by not conducting the recommended risk assessment and not seeking clarification on the claimant’s medical condition at the date of dismissal.*
- (iv) If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct?
- (v) Does the respondent prove that if it adopted a fair procedure the claimant would have been fairly dismissed in any event? and/or to what extent and when?

Remedy for unfair dismissal

- (vi) If the claimant was unfairly dismissed should the Tribunal make an order for reinstatement (s113, 114 and 116 ERA 1996)?
- (vii) If not, should the Tribunal make an order for re-engagement (s113,115 and 116 ERA 1996)?
- (viii) What basic award should be made (s119 ERA 1996)?
- (ix) What compensatory award should be made (s123-124 ERA 1996)?
- (x) Has the claimant taken reasonable steps to mitigate his losses (s123(4) ERA 1996)?
- (xi) If the Tribunal finds that the dismissal was unfair, to what extent does the Tribunal consider:

- a. that it would be just and equitable to reduce the basic award (s122(2) ERA 1996) and/or
 - b. that the dismissal was caused or contributed to by the claimant's actions and that it would be just and equitable to reduce the compensatory award (s123(6) ERA 1996)
- (xii) If the Tribunal finds that there was some procedural unfairness in the claimant's dismissal to what extent does the Tribunal consider that he would have been dismissed in any event. (s123(1) ERA 1996 and *Polkey v Dayton Services Ltd* (1987) ICR 142?)

Hearing

6. The Tribunal was provided with an agreed bundle of documents of 778 pages, which appeared excessive in relation to the issues to be determined. The parties were informed that only documents referred to in the witness statements and those referred to in evidence will be read.
7. The Tribunal heard oral evidence from the claimant and for the respondent from Mr Raymond Quasi Adabra, who was the Appeal Manager. The Respondent did not call or provide a witness statement for Ms Vanda Bruce (Dismissing Manager). The Tribunal was informed she left the respondent on or around November 2021.
8. At the conclusion of the parties evidence, both representatives made oral submissions. Mr Slater also provided written submissions.

Findings of Fact

9. Having considered all of the evidence, on the balance of probabilities the Tribunal made the following findings of fact. Any reference to a page number is to the relevant page number in the bundle.
10. The claimant was employed full time by the respondent from 30th May 2008 in the role of Customer Service Assistant (CSA1), until his dismissal on grounds of capability due to ill-health, effective on 15th September 2021. At the date of his dismissal, the claimant was based in the Willesden Green Area and was managed by Ms Vanda Bruce (Area Manager)
11. The role of CSA 1 entitled safety critical duties; dealing with customers at stations; dealing with their queries; undertaking platform duties; handling money in ticket offices, emptying ticket machines and undertaking banking. It was a mobile role which required a lot of walking and standing. There was another role, that of CSA2 this was not a safety critical role.
12. The claimant was provided with a statement of main terms and conditions of employment, which he signed on 27th May 2008. (p44) This statement contained a clause, which read, under the heading Medical Examination, (p43) *"London Underground can require you to have a medical examination with London Underground Doctor/Consultant and or a Consultant selected by*

London Underground at any time during your employment for the purpose of obtaining advice regarding your continued fitness to carry out your current post or where applicable, another post.”

13. The respondent operates the Attendance at Work Policy, which is designed to specifically deal with unauthorised and non-attendance to work. Clause 5.2 of this policy, sets out the procedure to follow in dealing with employees with absence issues.(p65) In summary, it provides the Manager will maintain contact with the employee; contact Occupational Health for appropriate advice and guidance, including the possibility of medical interventions to facilitate a return to work; arrange a case conference as soon as possible, and consider actively making reasonable adjustments (if required); actively pursue alternative employment; and as a last resort, having fully considered these two options, consider termination of employment on medical grounds. (p63-67)
14. The claimant had a history of absence due to ill health. Mr Adabra in his witness statement at Paras 8-9 summarised the claimant's absence history. The dates of absences was not challenged in cross examination, although the reasons for the absence were disputed by the parties. The Tribunal finds there is no dispute in relation to his absence record.
15. In summary, the claimant's absence records confirm as follows;
16. On or about July 2009, the claimant had walking difficulties due to foot and leg problems. He was placed on temporary alternative duties working in the office.
17. In December 2010, the claimant's employment was terminated on medical grounds after a lengthy absence in 2009/2010. On appeal he was re-instated.
18. Between 22nd October 2016 to 2nd April 2017, the claimant was absent from work for a total of 163 days with stress.
19. From 10th October 2017 to 19th February 2018, the claimant was assessed to be unfit for work due to foot/knee pain. He was placed on re-deployment for a period of 12 weeks. This re-deployment process enabled the claimant to search for suitable alternative roles, and to identify developmental opportunities. During this period the claimant received his full pay.
20. In 2018, the claimant was also off sick due to a various conditions as noted in the Occupational Health reports. These were noted to be Chronic Fatigue syndrome; Irritable Bowel Syndrome, obesity and a chronic foot condition.
21. Due to these conditions, the report advised the claimant required adjustments/restrictions to assist him to carry out his role. His limitations required regular breaks; limit his walking to 10 minutes and standing up to 30 minutes.

22. In the Occupational Health Report dated 13th June 2019, the claimant confirmed he was able to perform full duties without the required adjustments. He then moved to the Willesden Green area on full time duties, and was managed by Ms Vanda Bruce.

Process resulting in termination

23. On 19th January 2020, some six months after returning to full time duties, the claimant commenced a further period of absence. He had a surgical procedure involving the insertion of an intragastric balloon for obesity. Due to the covid pandemic, the removal of the balloon was delayed to October 2021.
24. On 1st September 2020, the claimant presented a Fit Note for the period from 1st August 2020 to 1st November 2020 citing diagnosis of anxiety, depression and post-traumatic stress disorder. (p108)
25. On 11 November 2020, the claimant presented another Fit Note for the period 2nd November to 1st February 2021. (p109) By email sent on 18th November 2020, Ms Bruce acknowledged the Fit Note, and advised the claimant that he would be referred to Occupational Health ("OH").
26. On 18th November 2020, Ms Bruce made a referral to OH. (p112-114) On 21st December 2020, the claimant attended with OH. He was seen by Dr Harry Phoolchund ("Dr HP") (Consultant OH Physician). In his report, Dr HP confirmed the claimant was suffering from anxiety/depression and PTSD. The report confirmed that at present the claimant was temporarily unfit for work in any capacity and that he was unable to predict when he was likely to be able to return to work, as it is dependent on his progress with his treatment. The recommendation was that the claimant *"is referred back to the OH, after his treatment, when a return to work can be considered."* (p115-116)
27. Following this report, Ms Bruce, in accordance with the respondent's Attendance at Work Policy/Procedure, by letter dated 28th December 2020, invited the claimant to a Long Term Sickness case conference arranged for 8th January 2021. (p117-118) In the said letter, it stated that, *"I understand that you have been away from work since 19th January 2020 due to anxiety/depression. I think it would be beneficial for us to meet to discuss your current situation and any way I can support you with your recovery."* As was pointed out in evidence (by the claimant's Counsel), the reference to his being absent from work since 19th January 2020 due to anxiety/depression was incorrect. The claimant first reported a diagnosis for anxiety/depression and PTSD was in the sick note of 1st August 2020. Before then the claimant's absence was for his gastro surgery.

1st Case conference meeting – 8/01/2021

28. On 8th January 2021, the claimant attended a case conference meeting. At this meeting, (and the subsequent meetings the claimant was accompanied by his Trade Union representative. Mr Felix Matthew Brown). At this meeting, the claimant advised he was taking medication for depression since September 2020, and that the dosage had been increased and that he was

awaiting counselling.

29. In their discussion, Ms Bruce mentioned that they might need to look at moving the claimant to work in another area, and she needed to know how to support him to return to work. The claimant enquired if he could work from home; do any alternative work including admin, and even doing minimum hours. Ms Bruce replied that working from home was not possible as he did not fall into the category to work from home; she could not accommodate any alternative admin duties due to others doing admin. Ms Bruce mentioned looking at redeployment, and explained the purpose of this. To make the claimant aware, Ms Bruce explained the available options to be considered, namely; a return to full duties; or be referred to re-deployment if fit to do so, or medical termination. (p123-127)

2nd Case conference meeting – 15/01/2021

30. At a second this meeting held on 15th January 2021, Ms Bruce confirmed that based on the Occupational Health report the only option was termination on medical grounds. The claimant was asked to complete relating to estimates for his pension and ill health retirement.

3rd Case Conference meeting – 29/01/21 (p138-142)

31. A third case conference meeting took place on 29th January 2021. The claimant confirmed his health was improving and felt well enough to commence re-deployment. There was some discussion about the claimant being able to do a CSA2 role which was station based. The claimant indicated he could do so for around up to 4 hours a day, whilst looking for another role. In discussion, the claimant confirmed his preference was to undertake a non-operational role in redeployment. Ms Bruce referred the claimant to OH to ascertain if he was fit to do a CSA2 role, and if any adjustments were necessary.

Claimant's Fit Note

32. The claimant's Fit Note was due to expire on 1st February 2021. He was told by Ms Bruce to return to work but to stay in the office, pending the OH report.
33. On 5th February 2021, Ms Bruce held another case conference with the claimant at which they discussed the redeployment process . (p143-144)

Occupational Health Report.

34. For an unexplained reason there are 2 identical OH reports but with different dates. (i.e 12th February 2021 or 12th March 2021)The report advised that the claimant was not fit to undertake duties of a CSA 1 or 2, and was likely to remain unfit for the unforeseeable future (six months). The report also confirmed if the claimant did start the CSA role, it was likely there would be further absence. (p147-149) The report confirmed he may be fit for "sedentary office based duties" and was willing to participate in redeployment discussions".

35. As a consequence, on 20th April 2021, the claimant engaged in the redeployment process for a period of 12 weeks which was subsequently extended until a further review was carried out. The claimant attended at Willesden Green 5 days a week from 9am-5pm.
36. On 23rd August 2021, Ms Bruce met with the claimant to discuss the redeployment process which was to end on 27th August 2021. (p199-200) The claimant did not find a suitable alternative role. In the meeting the claimant enquired if he could return as a CSA. Ms Bruce enquired if he would consider a CSA part-time role, as she had a weekend vacancy at Stanmore or a Monday to Friday 4 hour duty at WGN. He expressed his preference to return to his CSA1 role full time at Willesden Green. Ms Bruce then commissioned a further referral to OH.
37. On 26th August 2021, the claimant had a telephone appointment with Dr PH. The report confirms the claimant confirmed he was able to perform full CSA1 duties, with prolonged standing as may be required. Dr PH recommended that a risk assessment was carried out to establish if the claimant could perform safety critical aspects of the role, and if so, he could return to work to resume his duties. Dr PH's opinion was that the claimant was fit for the role with temporary adjustments/restrictions. In the referral, Ms Bruce asked the question, whether the claimant was likely to have any further absences. Dr PH replied, "*past absence history is the best indicator of future attendance*". (page 199-200)

4th Case Conference

38. On 15th September 2021, the claimant attended a further case conference with Ms Bruce. (p208-210) The letter of invite confirmed the purpose of the conference was to review the outcome of his redeployment and the latest OH report. It also stated the possible outcome could be the termination on medical grounds.
39. At this meeting the claimant requested a phased return. Ms Bruce explained that she cannot accommodate a phased return, as she could not go against the OH report. The claimant explained he was fit to resume full duties and requested another appointment with the OH. Ms Bruce, declined his request and said to the claimant, "*The OH Report says you are not fit, and you will be medically terminated.*" The claimant repeated that he was fit to return. He was informed of his right to appeal this decision. (p209-210) The notes record, the claimant saying that he was astonished by the outcome. There was no discussion about alternative roles.
40. The claimant's termination was confirmed in an undated letter, which essentially summarised the reason for the termination as he could not fulfil the CSA1 role without adjustment or restrictions. (p211-213)

Appeal

41. The claimant appealed the dismissal by email dated 29 Sept 2021. (p214-215)

42. The grounds of appeal were; (i) that he is fit to return to work; (ii) he did not accept that past history of sick leave is a reliable indicator of his current ability to fulfil his role, and (iii) the respondent should have considered part time work as a reasonable adjustment;
43. The appeal was heard by Mr Raymond Adabra. (Head of Customer Service – Jubilee Line) In evidence, he said his hearing was not a re-hearing but a review of the dismissal decision and he was looking for any new evidence or information from the claimant.
44. The appeal hearing was held on 6th December 2021. The claimant was accompanied by his Union representative. The representative made the point that the OH report made it clear that the claimant was fit to resume CSA1 duties subject to a risk assessment being undertaken, which did not happen. (p216-223)
45. In evidence, Mr Adabra, explained his interpretation of the OH Report was that the claimant was not fit to return to his duties because this was subject to a risk assessment.
46. In his statement, Mr Adabra (Para 30) states he undertook a number of additional investigations, and carefully reviewed all of the information he was provided with including case conference notes, medical records and OH reports. In evidence he was not able to recall which documents were provided to him, He said he had telephone conversations with Ms Bruce and Mr McVeigh, which were informal discussions and that he did not keep any notes of these discussions. He said he also spoke with OH by telephone but did not keep any note of these discussions.

Decision to dismiss

47. Mr Adabra decided to uphold the decision to dismiss. As stated in his statement, whilst he acknowledged a risk assessment had not been carried out, which he said in hindsight would have been advisable to carry out, the key issue which determined his decision was that the OH said “past absence history was the best indicator of future attendance” He concluded *“it was reasonable for Ms Bruce to follow OH’s advice that past absence levels are a future indicator of levels of absence”* He considered that one or the other of the claimant’s conditions was highly likely to cause him to have higher absence levels than normal, and to prevent him from undertaking full CSA1 duties. The respondent could not sustain this.

The Applicable Law

48. Pursuant to Section 98(2) of the Employment Rights Act 1996 (‘ERA’), an employer needs to have a potentially fair reason for dismissal. The burden is on the employer to establish the reason. Capability is one of the reasons and is relied upon by the respondent in this case.
49. Pursuant to Section 98(4) ERA, the Tribunal needs to be satisfied, having regard to the reason shown, that the employer acted reasonably in treating that reason as a sufficient reason for dismissal. This is a neutral burden.

50. A Tribunal must assess objectively whether dismissal fell within the range of reasonable responses available to the employer. Whether or not the Tribunal would have dismissed the employee if it had been in the employer's shoes is irrelevant: the Tribunal must not "substitute its view" for that of the employer. **(Iceland Frozen Foods Ltd v Jones (1982) IRLR 439)**. The range of reasonable responses test applies not only to the question of whether the sanction of dismissal was permissible, but also to that of whether the employer's procedures leading to dismissal were adequate. **(Sainsbury's Supermarkets Ltd v Hitt (2003) IRLR 23)**.
51. The case law relevant to capability dismissals which was referred to are as set out below.
52. In **Spencer v Paragon Wallpapers (1977) ICR 301** it states, "Every case depends on its own circumstances. The basic question which has to be determined in every case is whether in all of the circumstances the employer can be expected to wait any longer and if so how much longer. Every case will be different depending upon the circumstances."
53. The case of **BS v Dundee City Council (2013) CSIH 91** confirmed that the following factors may be relevant in how long an employer may be expected to wait; the likely length of absence; the fact the employee has exhausted sick pay; the cost of continuing to employ the employee; the size of the employee and the size of the employing organisation.
54. **Alidair Ltd v Taylor (1978) ICR 44** confirmed it is sufficient that the employer genuinely believed on reasonable grounds that the employee was incapable of work. The employer does not have to prove that the employee was in fact incapable of work.
55. The Tribunal must be satisfied that the procedure followed in relation to the claimant's dismissal fell within the band of reasonable responses. **Whitbread Plc v Hall (2001) EWCA Civ 268**.

Conclusions

a. Reason for dismissal

56. The respondent admitted dismissing the claimant the reason being capability due to ill-health, which is a potentially fair reason in accordance with s98(1)&(2) ERA 1996. In the alternative the respondent relies on "some other substantial reason" of the kind to justify the dismissal. The claimant has not asserted any other reason for his dismissal.
57. On the facts and evidence heard, the Tribunal is satisfied that capability was the reason for dismissal and this was in the respondent's mind at the time the decision to dismiss was taken, effective on 15 September 2021. This is clearly evidenced by the dismissal meeting and confirmed by letter. Accordingly, the Tribunal is satisfied that the claimant's dismissal was for a potentially fair reason within section 98(1)&(2) ERA, namely the claimant's capability.

58. In considering the question of fairness in context of the reason found for the dismissal the Tribunal considered the following questions below;

Did the respondent genuinely believe the claimant was no longer capable of performing his role.

59. The Tribunal is satisfied that from the conference meeting notes with Ms Bruce and Mr Adabra's review at the appeal stage, their belief was genuine that the claimant was not capable of returning to work in his role. They both reached the conclusion taking into account the claimant's length of absence, and based on the OH's view that his return was dependant on a risk assessment to ascertain if he could actually undertake the role. The OH report did not say he was fully fit to return to work without any conditions or adjustments. There was uncertainty whether the claimant would be able to undertake his role, even if any adjustments were possible, and even then for how long.

Did the respondent adequately consult the claimant

60. There were 4 case conference meetings with the claimant and a series of OH consultations. Also, as Mr Salter pointed out in his submissions, the claimant was (i) cautioned over his absences; (ii) was considered for and assisted with the redeployment process (iii) was made aware as to the risk of medical termination. The Tribunal is satisfied the consultation process with the claimant was informed and adequate.

Did the R carry out a reasonable investigation, including finding out about the up to date medical position

61. It is noted the claimant was seen by the OH for consultations on the following dates; 22 June 2018; 31 October 2018; 13 June 2019; 12 March 2021 and 18 August 2021. In addition, between the period December 2020 to the date of dismissal, Ms Bruce held a series of discussions with the claimant about his condition. The purpose of these was to explore and discuss the claimant's medical condition and ability to return to work. The respondent carried out reasonable investigations in the circumstances.

In all of the circumstances, did the respondent act reasonably or unreasonably in treating it as sufficient reason to dismiss the claimant.

62. In considering this, the Tribunal has been mindful not to substitute its own view to that of the respondent

63. On the facts and circumstances in this case and the decision taken, the Tribunal is satisfied that the decision to dismiss the claimant was within the band of reasonable responses. The respondent acted reasonably for the following reasons;

(i) Account was taken of the claimant's past sickness record and his length of absence. His latest absent from work was for approx 18 months because

he was incapable of performing his role and would remain so for the foreseeable future. It was only in the OH meeting of 26th August 2021 that the claimant himself represented he was ready & fit to return, which was not entirely supported by the OH report.

- (ii) The respondent considered the likelihood of the claimant returning to work and then going absent again, as he had done previously. Given the claimant's history of absence, it was not unreasonable for the respondent to form the view, that this would happen again, particularly as indicated by OH that past absence is an indicator of future absences. This was a consideration for the requirements of the business and the impact and disruption it would have on others and operationally given the nature of the business. The respondent was entitled to take this into account.
- (iii) The prospects of finding the claimant suitable alternative work. The redeployment process which was extended to support the claimant did not prove successful. Nether was the respondent able to accommodate the claimant's requests of working from home at night in administration roles which was not feasible. There was no other roles available for the claimant.
- (iv) Although a risk assessment was not carried out to ascertain if he could perform his role, as recommended by OH in the latest report, this does not render the dismissal unfair. Up until the meeting with OH on 26th August 2021, the claimant had continuously confirmed he was not fit to return to his role. The Tribunal did take into consideration that waiting for the outcome of a risk assessment might have been more reasonable. A reasonable employer might have waited for a further assessment and waited longer before deciding to dismiss. The fact that an assessment was not done, does not mean that the decision to dismiss lay outside the band of reasonable responses of a reasonable employer. In this case the respondent decided not to wait any longer on the information available, the medical reports, and the considerations set out above.

64. The Tribunal is satisfied that taking into account all of the above circumstances dismissal was a response falling within the range of reasonable responses open to a reasonable employer, and that the respondent did act reasonably and the dismissal was fair procedurally and substantively.

65. Finally, the Tribunal has sympathy for the claimant and his predicament due to his ill health.

Employment Judge Bansal

Date 19 December 2023

JUDGMENT SENT TO THE PARTIES ON

19 December 2023

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.